

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI

BEFORE SHRIANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER
(Through Video Conferencing)

ITA No. 1730/Del/2020
(Assessment Year: 2018-19)

Ram Kumar Tomar, C-40, Shakti Nagar Extension, New Delhi d PAN: AADPT6457D (Appellant)	Vs. ITO, Ward-34(1), New Delhi (Respondent)
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Assessee by :	ShriAmitGoel, Ld. CA ShriMohit Jain, Ld. CA
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Revenue by:	ShriVipulKashyap, Ld. Sr. DR
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Date of Hearing	10/03/2022
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Date of pronouncement	21/03/2022
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O R D E R

PER N.K. CHOUDHRY, J. M.:

1. The Assessee has preferred the instant appeal against the order dated 31.07.2020 impugned herein passed by the Ld. Commissioner of Income Tax-12 New Delhi [in short 'Ld. Commissioner] u/s.250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), whereby the Ld. Commissioner sustained the disallowance to the tune of Rs. 5,58,690/- which was made by the Assessing officer for late deposit employees' contribution qua PF and ESI.

2. The issue involved in the instant appeal relates to the deposit of employees' contributions qua PF and ESI after the due date as prescribed in the relevant Act, however, before the due date of filing of return of income u/s.139(1) of the Act, which resulted into addition of Rs. 5,58,690/- made by the AO on account of disallowance on the ground that there has been delay in deposit of aforesaid amounts beyond the due date of deposit prescribed under the PF and ESIC Act.

The details of amount of Rs. 4,55,413/- deposited qua employees' contribution towards PF, are as under:-

Month	Amount (Rs.)	Due Date of Deposit	Actual date of deposit
April 2017	37484	15/05/2017	08/06/2017
May 2017	32052	15/06/2017	12/08/2017
June 2017	39202	15/07/2017	04/09/2017
July 2017	38071	15/08/2017	04/09/2017
August 2017	39900	15/09/2017	17/10/2017
Sept. 2017	39652	15/10/2017	17/10/2017
Oct. 2017	37238	15/11/2017	02/12/2017
Nov. 2017	37508	15/12/2017	23/01/2018
Dec. 2017	38603	15/01/2018	24/01/2018
Jan. 2018	39190	15/02/2018	03/04/2018
Feb. 2018	38962	15/03/2018	03/04/2018
March 2018	37551	15/04/2018	28/05/2018
Total	455413		

The details of amount of Rs. 1,03,277/- deposited qua employee's contribution towards ESI are as under:-

Month	Amount (Rs.)	Due Date of Deposit	Actual date of deposit
April 2017	8600	21/05/2017	08/06/2017
May 2017	7205	21/06/2017	12/08/2017
June 2017	8364	15/07/2017	04/09/2017
July 2017	7543	15/08/2017	04/09/2017
August 2017	8793	15/09/2017	17/10/2017
Sep. 2017	8945	15/10/2017	17/10/2017
Oct. 2017	8122	15/11/2017	02/12/2017
Nov.2017	9156	15/12/2017	23/01/2018
Dec. 2017	9558	15/01/2018	24/01/2018
January 2018	9308	15/02/2018	03/04/2018
February 2018	9268	15/03/2018	03/04/2018
March 2018	8415	15/04/2018	28/05/2018
Total	103277		

3. The said disallowance (455413+103277=5,58,690/-)was challenged by the Assessee before the Ld. Commissioner, who vide impugned order, sustained the same.

4. Being aggrieved, the Assessee is in appeal before us.

5. Having heard the parties and perused the material available on record. The Assessee raised the arguments against the impugned order, whereas the Ld. DR vehemently supported the same.

5.1 The Ld. CIT(A) while upholding the disallowance/addition qua employee's contributions towards PF and ESI, referred the

provisions of section 36(1)(va), 2(24)(x) and 43B of the Act and held that if any of the deposit is outside the due date mandated under the statute then that amount shall never be allowed as deduction under section 36 (1) (va) even though it might have been deposited with a delay of just a one day. There is no provision in the Act under which this amount can be allowed as deduction in any year thereafter. The Ld. Commissioner while sustaining the addition also relied upon the judgment passed by the Hon'ble Delhi High Court in the case of CIT Vs. M/s. Bharat Hotels Ltd., [2019] 410 ITR 417 (Del).

5.2 The Assessee claimed, because the employee's contribution qua PF and ESI was deposited before the due date of filing of the return of income u/s 139 of the Act, hence no disallowance is warranted. In support of its contention the Assessee also relied upon various judgments rendered by Hon'ble Apex Court, which includes Rajasthan State Beverages Ltd (2017) 84 Taxmann.com 185 (SC), CIT Vs. Alom Extrusion Ltd (2010) 1 SCC 489, CIT Vs. Vinay Cement Ltd 213 CTR 268 and by Hon'ble Delhi High Court in the case of CIT Vs. AIMIL Ltd 321 ITR 508.

5.3 On the contrary Ld. DR refuted the claim of the Assessee and relied upon various judgments of the Hon'ble High Courts against the contention and claim of the Assessee, such as in the case of CIT Vs M/s. Bharat Hotels Ltd., [2019] 410 ITR 417 (Delhi) , Gujarat State Road Transport Corporation Ltd. {Tax Appeal no. 637 of 2013 reported in [2014] 41 taxmann.com 100(Gujarat), CIT Vs Merchem Ltd. (2015) 378 ITR 443(Kerala) and Unifac Management Services(India) P. Ltd. (2018) 100 taxmann.com 2414(Madras).

5.4 Admittedly there is plethora of judgments in favour of the Assessee's contention and of the Revenue. The controversy with

regard to divergent views of different High Courts, has been settled by the Hon'ble Apex Court in the case of CIT Vs. M/s. Vegetables Products Ltd. (88 ITR 192) by laying down the dictum *'if two reasonable constructions of a taxing provision are possible that construction which favours the Assessee must be adopted.*

5.5 Admittedly the issue under controversy travelled upto the Hon'ble Apex Court in the cases of Rajasthan State Beverages Ltd (supra), CIT Vs. Alom Extrusion Ltd (supra) and CIT Vs. Vinay Cement Ltd (supra) and the Hon'ble Apex Court clearly held the amount claimed on payment of PF and ESI if deposited on or before due date of filing of return, then the same cannot be disallowed u/s 43B or u/s 36(1)(va) of the Act.

5.6 Even Hon'ble Punjab and Haryana High Court in the case of CIT Vs. M/s Hemla Embroidery Mills (P) Ltd. (366 ITR 167) (P&H HC) and in the case of CIT Vs. M/s Mark Auto Industries Ltd. (358 ITR 43) (P&H HC) has clearly held that the Assessee is entitled to claim deduction of employee's share of ESI & PF u/s.43B of the Act, if the same has been deposited prior to the filing of return of income u/s.139(1) of the Act.

5.7 Jurisdictional High Court as well, in the case of CIT Vs. AIMIL Ltd (supra) affirmed the action of the ITAT, in deleting the addition made by the Assessing Officer under Section 36(1)(va) of the Act, on account of employees' contributions qua Provident Fund and ESI, deposited before the due date of filing of return.

5.8 The Ld. Commissioner while sustaining the addition also relied upon the judgment delivered by the jurisdictional High Court in the case of CIT Vs M/s. Bharat Hotels Ltd., [2019] 410 ITR 417 (Delhi) which infact was delivered later on and without considering

the precedent on identical issue in the case of CIT Vs. AIMIL Ltd (supra) and it is also a fact that the judgment delivered by the jurisdictional High Court in the case of PCIT vs., Pro Interactive Service (India) Pvt. Ltd., (ITA.No.983/2018 order dated 10.09.2018) is a latest one , wherein the decision of the Hon'ble High Court in the case of CIT Versus AIMIL Ltd., (supra), has been followed by holding as under :-

“In view of the judgment of the Division Bench of Delhi High Court in Commissioner of Income-Tax versus Aimil Limited, (2010) 321 ITR 508 (Del) the issue is covered against the Revenue and, therefore, no substantial question of law arises for consideration in this appeal.

The legislative intent was/is to ensure that the amount paid is allowed as an expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPF) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act.

Appeal is dismissed.”

5.9 From the aforesaid Judgments of the Hon'ble High Courts, it is clear that the Hon'ble Courts have not drawn any distinction between the employee's and employer's share qua PF & ESI contributions, hence, the determination of the Ld. CIT(A) to the effect *“if any of the deposit is outside the due date mandated under the statute then that amount shall never be allowed as deduction under section 36 (1) (va) even though it might have been deposited with a delay of just a one day”*, is un-sustainable.

5.10 In view of the above discussions, the disallowance to the tune of Rs. 5,58,690/- made by the AO for the assessment year under consideration and confirmed by the CIT(A) is not sustainable, hence, the same stands deleted.

6. In the result appeal filed by the Assesses is allowed.
Order pronounced in the open court on 21/03/2022.

-Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

-Sd/-
(N.K. CHOUDHRY)
JUDICIAL MEMBER

Dated: 21/03/2022
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	