

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRIT.**S. KAPOOR, ACCOUNTANT MEMBER**
AND
SHRI **N. K. CHOUDHRY, JUDICIAL MEMBER**

ITA No. 1219/Del/2021
(Assessment Year: 2018-19)

Murti Supply Chain
Solutions Private
Limited Pole No. 26,
Village Mundka West
Delhi-110041

Vs. DCIT, CPC Bangalore

PAN: AAJCM7010N

(Appellant)

(Respondent)

Assessee by:

Sh. Gaurav Gupta Adv.,
Sh. Mayank Gupta CA

Revenue by :

Ms. ShwetaYadav Sr. DR

Date of hearing

22/03/2022

Date of pronouncement

22/03/2022

ORDER

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

The Assessee has preferred the instant appeal against the order dated 28.07.2021 impugned herein passed by the Id. Commissioner of Income tax (Appeals), National Faceless Appeal Centre (NFAC), (in short "Ld. Commissioner") u/s 250 of the Income Tax Act, 1961 (in short "the Act").

2. The issue involved in the instant appeal relates to the deposit of employees' contributions qua ESI & PF after the due date as prescribed in the relevant Acts, however, before the due date of filing of return of income u/s.139(1) of the Act, resulting into disallowance of Rs. 42,18,378/-by the Assessing Officer.

3. Against the above disallowance, the Assessee preferred first appeal before the Ld. Commissioner, who vide impugned order, dismissed the appeal of the assessee by affirming the order of the AO.

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 Assessee before the Id. Commissioner claimed as the Assessee has deposited the employee's contributions towards ESI & PF 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 as it appears from the impugned order.

5.2 The Ld. Commissioner though considered the claim of the Assessee, however uphold the disallowance/additions qua employee's contributions towards PF & ESI, mainly on two aspects/ determinations-

(i) Non-applicability of the provisions of Section 43B of the Act to the employee's share qua ESI & PF

And

(ii) Applicability of the amended provisions of Sections 36(1)(va) and 43B of the Act wherein Explanations have been inserted by Finance Act, 2021.

5.3 Admittedly there is plethora of judgments in favour of the Assessee's contention and of the Revenue, however 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.*'

5.4 The 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.

5.5. The jurisdictional High Court as well, in the case of CIT Vs. AIMIL Ltd {(2010) 321 ITR 508 (Del)} affirmed the action of the ITAT in deleting the addition relating to employees' contribution deposited before the due date of filing of return, in respect of Provident Fund and ESI made by the Assessing Officer under Section 36(1)(va) of the Income Tax Act, 1961.

5.6. Again the Jurisdictional High Court in the case of PCIT vs., Pro Interactive Service (India) Pvt. Ltd., vide ITA.No.983/2018 order dated 10.09.2018 while following the decision in the case of CIT Versus AIMIL Ltd., (supra), has held *that legislative intent was/is to ensure that the amount paid is allowed as expenditure only when payment is actually made. It was further held that it was not the legislative intent and objective to treat belated payment of Employees' Provident Fund & Employees' State Insurance Scheme as deemed income of the employer under section 2(24)(x) of the I.T. Act, 1961.*

5.7. From the aforesaid Judgments of the Hon'ble High Courts, it is clear that the Hon'ble High Courts have not drawn any distinction between the employee's and employer's share qua PF & ESI contributions, **hence, first determination of the Ld. CIT(A) qua non-applicability of the provisions of**

Section 43B of the Act to the employee's share qua PF and ESI is un-sustainable.

5.8 Now, coming to the second aspect/determination made by the CIT(A) with regard to the clarification made by the amendment brought in the Finance Act 2021 by inserting the Explanation 2 in Section 36(1)(va) and 5 in section 43B of the Act of the Act, for better clarification and ready reference we are reproducing the Explanations 2 and 5 inserted in sections 36(1)(va) and 43B of the Act respectively, which reads as under :-

Section 36(1)(va)-

“Explanation 2.— For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the “due date” under this clause.”

Section 43B-

“Explanation 5.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the Assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies.”

5.9 We observe that various benches of the ITAT including Hyderabad Bench in the case of Value Momentum Software Services Pvt. Ltd. (ITA No.2197/Hyd/2017 decided on 19.05.2021), have taken into consideration the identical issue qua applicability of the amendment to Sections 36(1)(va) and Section 43B of the Act, by inserting Explanations by the Finance Act, 2021 and clearly held that the amendment shall be applicable from 1st April, 2021 onwards . It is also relevant to note that the CBDT has also issued Memorandum of Explanation qua applicability of the amended provisions of Sections 36(1)(va) & 43B of the Act w.e.f. 1st April, 2021 and Assessment Year 2021-21 onwards, hence there is no doubt qua applicability of the amended provisions referred above, prospectively.

5.10 On the aforesaid discussions and observations, **the second aspect as considered by the Id. CIT(A) qua applicability of the amended provisions of Sections 36(1)(va) and 43B of the Act to the case in hand, is also un-sustainable.**

5.11 In view of the above discussions, the disallowances to the tune of Rs. 42,18,378/- made by the AO and confirmed by the CIT(A) is not sustainable and, hence, the same stands deleted.

6. In the result, the appeal of the Assessee is allowed.

Order pronounced in the open court on 22-03-2022.

-Sd/-
(T.S. KAPOOR)
ACCOUNTANT MEMBER

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

Dated: 22/03/2022

A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi