

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “C” DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.2581/DEL/2018
Assessment Year 2014-15

DCIT, Circle-10(1), New Delhi.	v.	G4S Facility Services (India) Pvt. Ltd., New Delhi.
TAN/PAN: AABCG8346B		
(Appellant)		(Respondent)

Appellant by:	Ms. Ananya Kapoor, Adv.		
Respondent by:	Mr. Ishtiyaque Ahmad, CIT		
Date of hearing:	24	03	2022
Date of pronouncement:	24	03	2022

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-XXXV, New Delhi [‘CIT(A)’ in short], dated 22.01.2018 arising from the assessment order dated 01.12.2016 passed under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2014-15.

2. As per its grounds of appeal, the Revenue has challenged the reversal of disallowance of Rs.3,57,13,697/- made by the Assessing Officer under Section 36(1)(va) r.w. Section 2(24)(x) of the Act on account of delayed deposit of employee’s contribution towards PF and ESIC.

3. The CIT(A) has reversed the action of the Assessing Officer in

its appellate order. The operative paragraph of the order of the CIT(A) is reproduced hereunder:

4.4.3. *The submissions of the appellant the case laws cited and the relevant orders have been considered. With regard to the issue regarding late payment of ESIC and PF, the following points emerge:*

(i) Briefly the facts are that in respect of employees' contribution the PF & ESI, in certain months, the appellant has deposited the amounts beyond the due dates prescribed in the respective Acts. The deposits have been made before the due date of filing of Income Tax Return.

(ii) The appellant has claimed that after deletion of second proviso to section 43B by Finance Act, 2003, w.e.f. 01.04.2004, payments of employees contribution to PF and ESI are allowable as deduction if the same is paid before the due date for filing of Income Tax Return, as per section 43B, even if the amounts were not deposited before the due dates prescribed in the respective Acts (PF & ESI Act).

(iii) On the other hand, the Assessing Officer has not found the expenditure allowable u/s 43B of the I. T. Act. Employees contribution to PF and ESI is deemed as income of the employer u/s 2(24)(x), and the same is allowable as deduction u/s 36(1)(va) of the I.T. Act. Section 36(1)(va) stipulates that such payment by employer is allowed only if such sum is credited to the employee's account in the relevant fund or funds on or before the due date under the relevant Act. The Assessing Officer has concluded that section 36(1)(va) is applicable in respect of employee's contribution to PF and ESI, and if the same is not deposited within the due date prescribed under the respective Acts, the same does not become allowable

by virtue of section 43B, even if it is deposited before the due date of filing of Income Tax Return. Accordingly, the Assessing Officer has disallowed such amounts of employee's contributions where the deposit has been made by the appellant after the due dates under the respective Acts.

(iv) Aggrieved with this, the appellant has filed the appeal claiming that the amount should be allowed u/s 43B as it has been deposited before the due date of filing of return. The arguments taken before the AO have been reiterated in the appeal.

(v) It is pertinent to note that contribution to PF and ESI have two different components. The employee's contribution is deducted from the salary/wages of the employees and the employer also makes contribution. PF and ESI are important legislation for providing social security to employees. Under section 2(24)(x) of the I.T. Act, any sum received by an assessee from its employees as contribution to PF or ESI is deemed to be income of the assessee. The same is allowed as a deduction u/s 36(1)(va), if it is credited in the employee's account in the relevant funds before due date. As per explanation to this clause, the due date means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account under the relevant fund under any Act, rule etc. Section 43B provides for allowability of certain deduction only on actual payment. Prior to 01.04.2004, the second proviso to section 43B specified the conditions for allowability u/s 36(1)(va). To be allowable, cash payments were required to be made on or before the due date prescribed u/s 36(1)(va), and for payments made other than in cash, the sum has to be realized within 15 days from the due date. However, the second proviso to section 43B was omitted by Finance Act, 2003, w.e.f. 01.04.2004. This had led to the

controversy in respect of the allowability of such sums. The appellant's contention is that after deletion of second proviso to section 43B w.e.f. 01.04.2004 such payments are now covered under first proviso to section 43B, which allows deduction for payments of such sums on or before the due date of filling of Income Tax Return.

(vi) There are several judicial pronouncements dealing on this issue. The Honble Gujarat High Court in the case of CIT vs. Gujarat State Road Transport Corporation 366ITR170 (Gujarat)(2014) has dealt with the issue and has analysed the provisions in detail.

(vii) CBDT circular No. 22/2015 dated 17.12.2015 has further clarified about the deletion of second proviso and amendment of first proviso to section 43B are applicable in the case of employer's contribution to PF and ESI and payments made before due date of filing of ROI are allowable u/s 43B. However, this circular states that it does not apply to claim of deduction relating to employee's contribution to welfare funds which are governed by section 36(1)(va).

(viii) However, the Honble Delhi High Court in its judgment in the case of CIT vs AIMIL Ltd. (321 ITR 508) while examining this issue in 2010 had held that no disallowance could be made in view of the provisions of section 43B, as amended by Finance Act, 2003.'

Respectfully following the decision by the jurisdictional High Court, the deposit of employee's contribution of PF and ESI of Rs.3,57,13,697/- by the appellant .beyond the due date u/s 36(1)(va), but before the due date of filing of Income Tax Return, is allowed. This is also in line with maintaining judicial discipline on this issue. Therefore, this ground is allowed.”

4. Both the parties were heard in length on the issue in dispute.
5. On perusal of the records, we observe that the Assessing Officer has made the impugned addition on the ground that the assessee has deposited employee's contribution towards Provident Fund and ESI amounting to Rs.3,57,13,697/- after due date as prescribed under the relevant Act/ Rules in breach of Explanation 5 to Section 43B of the Act. The Assessing Officer accordingly resorted to the additions under Section 36(1)(va) read with Section 2(24)(x) of the Act.
6. It is the case of the assessee before lower authorities that it has deposited the employee's contribution in EPF and ESI before the due date of filing of return of income stipulated under Section 139(1) of the Act.
7. We find that the identical issue has been decided in favour of the assessee by the Hon'ble Delhi High Court in the case of **Pr.CIT vs. Pro Interactive Service (India) Pvt. Ltd. vide order dated 10.09.2018 in ITA No.983/2018**. The extract of the judgment is reproduced 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. ”

8. We also take note of the plea of the assessee that delayed payment of employee's contribution to PF/ESIC is not disallowable as the amendments to Section 36(1)(va) and Section 43B effected by Finance Act, 2021 were applicable prospectively in relation to Assessment Year 2021-22 and subsequent years. Therefore, the claim of deduction of contribution to Employee's State Insurance Scheme (ESI) and Provident Fund u/s.36(1)(va) could not be denied to the assessee in Assessment Year 2018-19 in question on the basis of amendments made by Finance Act, 2021. For this proposition, we find support from the decision of the Co-ordinate Bench of Tribunal in the case of **The Continental Restaurant and Café Company vs. ITO as reported in (2021) 91 ITR (Trib.)(S.N.) 60 (Bang.)** and **Adyar Ananda Bhavan Sweets India P. Ltd. vs. ACIT, ITA No.402 and 403/Chny/2021 order dated 08.12.2021**. Consequently, we see no error in the order of the CIT(A) and therefore decline to interfere.

9. In the result, the appeal of the Revenue is dismissed.

Order was pronounced in the open Court on 24/03/2022.

Sd/-
[KUL BHARAT]
JUDICIAL MEMBER

DATED: 24/03/2022

Prabhat

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER