IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC' NEW DLEHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No. 1962/Del/2021
Assessment Year: 2019-20

Ram Meher, C-1/65, 3rd Floor, Ashok Vihar, Phase-2, New Delhi	vs.	Income-tax Officer, Ward 3(1), Gurgaon.
PAN : AELPR9150B		
(Appellant)		(Respondent)

Appellant by : None
Respondent by: Sh. Om Prakash, Sr. DR

Date of hearing: 28.03.2022
Date of order : 28.03.2022

ORDER

This appeal by the assessee is directed against the order passed by learned CIT(A), National Faceless Appeal Centre, Delhi dated 25.10.2021 for the assessment year 2019-20.

2. Assessee has raised following grounds of appeal :

"1. That the intimation order passed u/s. 143(1) are illegal, bad in law, without jurisdiction and against the principle of natural justice.

2. That CIT(A) has grossly erred in law and on facts in assessing the total loss at 18,58,424 against the returned income of Rs.10,91,510/- declared by the appellant.

3. That in view of the facts and circumstances of the case, the CIT(A) has grossly erred in law and on facts in making an addition of Rs.7,66,915/-.

4. That the CIT(A) has in view of the facts and circumstances of the case, grossly erred in making an addition when the assessee has deposited ESI/PF before the due date of filing of return of income.

5. Without prejudice to the above, the CIT(A) has in view of the facts and circumstances of the case, grossly erred in law and facts in making an addition on ESI/PF which was deposited within the grace period allowable by the relevant authorities.

6. That the addition/disallowance made are illegal, unjust and bad in law and are based on mere surmises and conjectures and the same cannot be justified by any material on record.

7. That the evidence filed and materials available on record have not been properly construed and judiciously interpreted, hence, the addition/disallowance made is uncalled for."

2.1. As can be culled out from the records and grounds of appeal, the solitary issue involved in this appeal is regarding disallowance of Rs.7,66,915/- u/s. 36(1)(va) of the Act on account of delay in depositing the employees' contribution to ESI and PF. The Central Processing Centre ("CPC"), Bengaluru vide intimation dated 25.12.2019 u/s 143(1) of the Income Tax Act, 1961 ("the Act") for Assessment Year 2019-20, has made adjustment of taxes after considering the disallowance of expenditure on account of delay in deposit of employees contribution to PF & ESI. The disallowance so made stood confirmed by the ld. CIT(A), National Faceless Appeal Centre, Delhi vide impugned order on the premise that since the assessee did not deposit the employees' contribution to PF and ESI before the due date, the assessee is not entitled to claim deduction u/s. 36(1)(va) of the Act. Aggrieved by this order, the assessee is in appeal before the Tribunal.

3. None is present on behalf of the assessee. Ld. Sr. DR contended that once the assessee failed to deposit employees' contribution to PF & ESI before due date as

prescribed in the ESI & PF Act, the decision of ld. CIT(A) does not call for any interference.

4. I have considered the arguments made by ld. Sr. DR and perused the record. It is an undisputed fact that the assessee in the instant case has deposited the employee's contribution to PF & ESI before the due date of filing of return, although the same has been paid after the dates specified in the relevant Act.

5. I find the issue stands decided in favour of the assessee by the following decisions :

Sagun Foundry (P) Ltd., vs. CIT, 145 DTR 265 (All) has held in favour of the assessee and adjudged that;

"By way of First Proviso Section 43-B, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax duty cess or fee is paid before the date of filing of the return under Act 1961, Assessee would then be entitled to deduction. This relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer should not sit on the collected contributions and deprive workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds.

"27. ... In the result when contribution had been paid, prior to filing of return under Section 139(1), Assessee/employer would be entitled for deduction.... "

28. .... we find that irrespective of the fact that deduction in respect of sum payable by employer contribution was involved, but Court did not restrict observations, findings and declaration of law to that context hut looking to the objective and purpose of insertion of Section 43B applied it to both the contributions. It also observed clearly that Section 43B is with a non-obstante clause and therefore override even if, anything otherwise is contained in Section 36 or any provision of Act 1961.

29. Therefore, we are clearly of the view that law laid down by High Courts of Karnataka, Rajasthan, Punjab & Haryana, Delhi, Bombay and Himachal Pradesh

have rightly applied Section 43B in respect to both contributions i.e. employer and employee. ...

30. In view of above all the questions formulated above are answered against Revenue and in favour of Assessee.

31. Appeal is therefore allowed....

• CIT vs. AIMIL LIMITED, (2010) 188 Taxman 265 (Del.)

"If the employee's contribution is not deposited by the due date prescribed under the relevant acts and is deposited late, the employer not only pays interest on delayed payments but can incur penalties also, for which specific provisions are made in the provident fund act. ***Therefore, the act permits the employer to make the deposit with some delay, subject to aforesaid consequences. Insofar as the Income Tax Act is concerned, the assessee can set the benefit if the actual payment is made before due date of ft line the return under section 139(1)".***

PR. C1T vs. PRO INTERACTIVE SERVICE (INDIA) PVT. LTD., 983/2018, DATED 10.09.2018 (DEL)

"In view of the judgement of the Division Bench of Delhi High Court in Commissioner of Income-Tax versus AIMIL Ltd., [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 (EPD) and Employee's State Insurance Scheme (ESI) as deemed Income of the employer under section 2(24)(x) of the Act."

6. I find that the co-ordinate Benches of Tribunal, following the above decisions and various other decisions, are holding that if the assessee has deposited the employees' share of contribution to PF & ESI before the due date of filing of return u/s. 139(1) of the Act, then no disallowance u/s. 36(1)(va) can be made. It has further been held that the amendment to the provisions of section 43B and 36(1)(va) of the Act by the Finance Act, 2021 has to be construed as prospective and applicable for the period after 01.04.2021.

It is held that this provision imposes a liability on the assessee and therefore, cannot be construed as applicable with retrospective effect since the legislature has not specifically said so. Since the assessee in the instant case has admittedly deposited the employee's contribution to PF & ESI before the due date of filing of return of income, therefore, I am of the considered opinion that the ld. CIT(A) is not justified in sustaining the disallowance made by the CPC. I, therefore, direct the Assessing Officer to delete the disallowance in the hands of the assessee.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28/03/2022.

Sd/-

(R.K. PANDA)
Accountant Member

Dated: 28/03/2022
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