

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

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

**ITA No. 98 & 99/Del/2022
Assessment Year: 2018-19 & 2019-20**

Valiant Resource and Tech Solution Plot No. 85, Block A-3, Mohan Garden, Uttam Nagar, Delhi. PAN : AAECV6926D (Appellant)	vs.	ADIT, CPC, Bengaluru. (Respondent)
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Appellant by : Sh. Rakesh Kumar Garg, CA
Respondent by: Sh. Om Prakash, Sr. DR

Date of hearing: 30.03.2022
Date of order : 30.03.2022

ORDER

These appeals appeals by the assessee are directed against the orders passed by learned CIT(A), National Faceless Appeal Centre, Delhi dated 21.12.2021 and 10.12.2021 for the assessment years 2018-19 and 2019-20 respectively.

2. Assessee has raised common grounds in both these appeals on identical issue. The only difference is in the quantum of addition. Therefore, the grounds raised in appeal for A.Y. 2018-19 are being reproduced hereunder for the sake of brevity and convenience.

"1. Ld. CIT(A) has erred in law and on merits of the case was not justified in confirming the addition of Rs 579430/- made by A.O (CPC) on account of late deposit of employee contribution towards ESI/PF, even it is paid before due date of filing of ITR in view of Section 43B

of the Income Tax Act, 1961 and ignored various judicial pronouncement cited by the assessee like CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC); CIT v. Vinay Cement Ltd. [2007] 213 CTR 268 (SC); Pr. CIT v. Raj. State Bev. Corpn. Ltd. [2017] 84 taxmann.com 185 (SC); CIT v. AIMIL Limited [2010] 321 ITR 508 (Delhi)

In a latest order dated 10.09.2018 the Jurisdictional High Court of Delhi in ITA 983/2018 Pro Interactive Service (India) Pvt. Ltd has held this issue in the favour of assessee and held that: 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."

2. CIT (A) has erred in law in confirming the disallowance of employee contribution to ESI in the light of amendment in sections 36(1)(va) as well as in section 43B by inserting corresponding Explanations through Finance Act, 2021. Although the impugned employee PF / ESI now comes under the provision of section 36(1)(va) only, but the memorandum explaining Finance Bill, 2021 says that these amendments will take effect from 01.04.2021 and will accordingly apply to AY 2021-22 and subsequent Assessment Years. Thus the legislature itself has condoned the impugned default before 01.04.2021.

3. Latest Case Laws relied upon After amendment in Finance Act 2021 (Covered Matter)

Insta Exhibitions Private Limited vs ACIT ITA No 6941/DEL/2017 (and ITA no 4959/DEL/2016) wherein it was held that belated payments of ESI and PF cannot be treated as deemed income u/s 2(24). Further it was held that 'notes on clauses introducing Finance Bill holds that amendment is effective from A.Y 2021-22' and thus deleted the addition on this account.

Shashi Rajawat u/s ITO (ITAT Jaipur) (Pronounced on 12.10.2021)

Employee contribution towards ESI/PF though paid before due date of filing of return of Income Tax u/s 139(1) is hereby directed to be deleted. CIT (A) referred explanation to 36(1)(v)(a) and 43 B by Finance Act 2021 and referred the rationale of amendment as explained in memorandum, However, he has simply failed to

consider the express wording as the ITAT memorandum which say "these amendments will take effect from 01.04.2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years".

Vansh Jain Vs ITO (ITA No 1853/Del/2020) (Pronounced on 13.10.2021)

Since in the instant case the assessee admittedly has deposited the employees' contribution to PF & ESI before the due date of filing of the income tax return, therefore, respectfully following the decisions cited (supra), I hold that the Ld. CIT(A) is not justified in sustaining the adjustment made by the A.O-CPC of Rs.3,26,330/- on account of belated payment of employees' contribution to PF & ESI. I, therefore, set aside the order of the Ld. CIT(A) and direct the A.O. to delete the disallowance. The grounds raised by the assessee are accordingly allowed.

Adama Solution Pvt. Ltd., New Delhi ITA.No.1800/Del./2020 (Order pronounced on 13.10.2021)

The amendment made in section 36(1)(va) is effective from 01.04.2021 and will, accordingly apply in relation to A.Y. 2021-2022 and subsequent assessment year. In view of this we allow the solitary ground of appeal raised by the assessee holding that the addition/disallowance made by the learned assessing officer of late deposit of employees contribution to the provident fund and ESI, as it is deposited before the due date of the filing of the return of an income but beyond the due date prescribed Under the respective provident fund and ESI laws is not sustainable in law. In the result, appeal of the assessee is allowed."

Since in the instant case the assessee admittedly has deposited the employees' contribution to PF & ESI before the due date of filing of the income tax return, therefore, respectfully following the decisions cited (supra), I hold that the Ld. CIT(A) is not justified in sustaining the adjustment made by the A.O-CPC."

- 2.1 As can be culled out from the records and grounds of appeals, the solitary issue involved in these appeals is regarding disallowance of

Rs.5,79,730/- and Rs. 5,77,779/- u/s. 36(1)(va) of the Act on account of delay in depositing the employees' contribution to ESI and PF for the A.Yrs.2018-19 and 2019-20 respectively. The Central Processing Centre ("CPC"), Bengaluru vide intimation/order dated 05.05.2020 and 01.05.2020 u/s 154 and 143(1) of the Income Tax Act, 1961 ("the Act") for Assessment Year 2018-19 and 2019-20 respectively, has made adjustment of taxes after considering the disallowance of expenditure on account of delay in deposit of employees contribution to PF & ESI. The disallowances so made stood confirmed by the Id. CIT(A), National Faceless Appeal Centre, Delhi vide impugned orders 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 these appeals before the Tribunal.

3. Ld. AR of the assessee submits that since the assessee has paid employees' contribution to PF and ESI before the due date of filing of return u/s. 139(1) of the Act, the same cannot be held as disallowable deduction. Reliance is placed on a series of decisions.

4. On the other hand, Id. 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 orders of Id. CIT(A) do not call for any interference.

5. I have considered the rival arguments made by both the parties and perused the record. It is an undisputed fact that the assessee in the instant cases 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.

6. 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 (EPF) and Employee's State Insurance Scheme (ESI) as deemed Income of the employer under section 2(24)(x) of the Act."

7. 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 Id. CIT(A) is not justified in sustaining the disallowance made by the CPC. I, therefore, direct the Assessing Officer to delete the disallowances in the hands of the assessee.

8. In the result, the appeals filed by the assessee are allowed.
Order pronounced in the open court on 30/03/2022.

Sd/-

(R.K. PANDA)
Accountant Member

Dated: 30/03/2022
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