

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"SMC" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 61/JP/2022
निर्धारण वर्ष / Assessment Year : 2018-19

M/s. Mahalaxmi Saws Pvt. Ltd. H-39, Road No. 2B, Bindayaka, Sirsi Road, RIICO Industrial Area Jaipur 302 016 (Raj)	बनाम Vs.	The DCIT CPC, Bengaluru/ ITO, Ward 4(2) Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAHCM 5794 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal, CA
राजस्व की ओर से / Revenue by: Smt. Runi Pal, Addl. CIT

सुनवाई की तारीख / Date of Hearing : 07/04/2022
उदघोषणा की तारीख / Date of Pronouncement: 11/04/2022

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal by the assessee is directed against the order of the Id. CIT(A) dated 30-12-2021 National Faceless Appeal Centre, New Delhi [hereinafter referred to as (NFAC)] for the assessment year 2018-19.

2. The hearing of the appeal was concluded through video conference by both the parties in view of the prevailing situation of Covid-19 Pandemic.

3.0 The grounds of appeal raised by the assessee are as under:-

“1. On the facts and in circumstances of the case the ld. CIT(A) has grossly erred in upholding the action of CPC in making disallowance of employee’s contribution to PF/ESI, paid before the due date of filing of return of income but after the specified due dates of respective Acts by making adjustment u/s 143(1) (a) Appellant prays such adjustment being outside the scope of provisions of Section 143(1)(a) of the Act, the intimation issued deserves to be quashed.

1.1 On the facts and in circumstances of the case the ld. CIT(A) has grossly erred in confirming the disallowance of Rs.1,29,759/- made u/s 36(1)(va) r.w.s. 2(24)(x) of the Income Tax Act, 1961 of deduction claimed on account of payment of contribution of Employees’ Provident Fund by brushing aside the submission that as per the provisions of Section 43B of the Act, assessee’s claim has to be allowed where the contribution is deposited before the due date of filing of return of income. Thus the addition of Rs.1,29,759/- deserves to be deleted.

1.2 That the ld. AO has further erred in ignoring the fact that the deduction was claimed on the basis of ruling of jurisdictional High Court prevailing at the time of filing of Return of Income. Appellant prays that no liability can be fastened upon the assessee on the basis of subsequent amendment made in statute, therefore, consequent disallowance deserves to be deleted.”

3.1 Thus, the only issue arises in this appeal of the assessee is regarding disallowance of employee’s contribution of PF and ESI deposited belatedly but before due date of filing of return of income U/s 139(1) of the Income Tax Act, 1961 (in short, the Act).

3.2 The assessee filed its return of income on 26.09.2018 which was processed u/s 143(1) of the Act whereby an adjustment was made on account of disallowance of claim of deduction with respect to employees’ contribution towards PF and

ESIC deposited belatedly. The assessee challenged the said adjustment before the Id. CIT(A)/NFAC and contended that as per the binding precedents if the payment is made in the government account before due date of filing of return of income U/s 139(1) of the Act then as per provisions of Section 43B of the Act, no disallowance is made. The Id. CIT(A)/NFAC did not accept this contention of the assessee and confirmed the disallowance by considering the amendment in Section 36(1)(va) of the Act whereby an explanation (2) as well as explanation (5) to Section 43B of the Act was inserted being retrospective in nature.

3.3. The Hon'ble Rajasthan High Court as well as other Hon'ble High Courts are consistently holding that where Assessee had paid employees contribution of PF and ESIC, though beyond due date(s) under respective Acts but prior to due date of filing the Return of income under sec. 139(1) of IT Act, the payments cannot be disallowed u/s. 43B. The assessee contended that avoiding the binding nature of judgments, the CPC, Bangalore was not justified in making addition of Rs.1,29,759/- which was paid before due date of filing of Return of Income and in rejecting application. The matter were carried to CIT(A)/NFAC by the assessee and the appeal of the assessee is dismissed and the decision of the Jurisdictional High court is not considered while passing the order by the NFAC and has relied on the decision of Hon'ble Gujarat High Court in the case of Gujarat State Transport Corporation, Kerala High Court in the case of Merchem Ltd. and

Hon'ble Madras High also where the contrary views there in respect of this issue. The NFAC has also relied upon various decision connected these Hon'ble High Courts and the amendment made in the Finance Act, 2021 and contended that the amendment being curative in nature should apply retrospectively.

3.4. Since the CIT(A)/NFAC has quoted the amendment made in Finance Act, 2021, it is worthwhile to record the extract of the memorandum explaining the change made in the relevant provisions of the Act.

Rationalisation of various Provisions

Payment by employer of employee contribution to a fund on or before due date

Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees. Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head =Profits and gains of business or profession'. Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, "due date" to mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.

Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions.

Accordingly, in order to provide certainty, it is proposed to –

(i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the "due date" under this clause; and

(ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.

3.5. Thus, it is clear that the provision is not retrospective and prospective.

Before the Tribunal, the Id. AR of the assessee has submitted that this issue is covered by the various decisions of this Tribunal as well as the Hon'ble Jurisdictional High Courts. The Id. AR of the assessee during the course of hearing has relied upon the recent decision dated 29-03-2022 of ITAT Jaipur Bench in the case M/s. Modern Masti (P) Ltd. vs DCIT, Circle-1, Jaipur (ITA No.20/JP/2022).

3.6. On the other hand, the ld. DR has submitted that the amendment to Section 36(1)(va) as well as 43B of the Act vide Finance Bill, 2021 is clarificatory in nature and therefore, applicable with retrospective effect. The ld. DR has submitted that the ld. CIT(A) has relied upon the decision of the Delhi Benches of the Tribunal in the case of Vedvan Consultants Pvt. Ltd. in ITA No. 1312/Del/2020 **order dated 26/08/2021.**

3.7. We have considered the rival submissions as well as the relevant material on record. The Bench noted during the course of hearing that the AO made an addition of Rs.1,29,759/- on account of late deposit of employees PF & ESI by the assessee. However, the assessee deposited the employees PF & ESI contribution before due date of filing of return of income u/s 139 of the Act. It is further observed that the ld. CIT(A) has confirmed the action of the AO holding that the sum of 1,29,759/- being employees contribution to PF/ESI has been paid late under that Act and thus the addition made by the CPC deserves to be upheld. The Bench has taken into consideration its various orders wherein similar issue has been decided in favour of the assessee on the issue in question. Recently, the similar issue of late deposit of employees PF/ESI contribution by the assessee but paid the same before due date of filing of return of income in the case of Modern Masti (P) Ltd. vs DCIT, Circle-1,

Jaipur (ITA No.20/JP/2022) vide order dated 29-03-2022 has been disposed off by observing as under:-

“3.7. We have considered the rival submissions as well as the relevant material on record. There is no dispute that prior to the amendment brought by the Finance Bill, 2021 in Section 36(1)(va) as well as Section 43B of the Act, the issue of allowability of employees contribution towards PF and ESI and depositing the same in the government account before the due date of filing of return of income U/s 139(1) of the Act was settled and decided in favour of the assessee by various binding precedents of Hon’ble High Courts including the Jurisdictional High Court. The limited controversy is whether the amendment brought to Section 36(1)(va) as well as 43B of the Act is applicable retrospective or from assessment year 2021-22 as it is specifically stated in the memorandum of Finance Bill, 2021. At the outset, it is noted that the Coordinate Bench of this Tribunal in the case of M/s Kogta Financial (India) Ltd. Vs CPC (supra) has considered this issue in para 5 to 7 as under:

“5. *We have heard the rival contentions and perused the material available on record. In case of Mohangarh Engineers and Construction Company vs DCIT, CPC (Supra), speaking through one of us, we have extensively dealt with the identical matter relating to employee’s contribution towards ESI/PF and our findings therein read as under:-*

“13. *We have heard the rival contentions and perused the material available on record. On perusal of the details submitted by the assessee as part of its return of income, it is noted that the assessee has deposited the employees’s contribution towards ESI and PF well before the due date of filing of return of income u/s 139(1) and the last of such deposits were made on 16.04.2019 whereas due date of filing the return for the impugned assessment year 2019-20 was 31.10.2019 and the return of income was also filed on the said date. Admittedly and undisputedly, the employees’s contribution to ESI and PF which have been collected by the assessee from its employees have thus been deposited well before the due date of filing of return of income u/s 139(1) of the Act.*

14. *The issue is no more res integra in light of series of decisions rendered by the Hon’ble Rajasthan High Court starting from CIT vs. State Bank of Bikaner & Jaipur (supra) and subsequent decisions.*

15. *In this regard, we may refer to the initial decision of Hon’ble Rajasthan High Court in case of CIT vs. State Bank of Bikaner & Jaipur wherein the Hon’ble High Court after extensively examining the matter and considering the*

various decisions of the Hon'ble Supreme Court and various other High Courts has decided the matter in favour of the assessee. In the said decision, the Hon'ble High Court was pleased to held as under:

“20. On perusal of Sec.36(1)(va) and Sec.43(B)(b) and analyzing the judgments rendered, in our view as well, it is clear that the legislature brought in the statute Section 43(B)(b) to curb the activities of such tax payers who did not discharge their statutory liability of payment of dues, as aforesaid; and rightly so as on the one hand claim was being made under Section 36 for allowing the deduction of GPF, CPF, ESI etc. as per the system followed by the assesseees in claiming the deduction i.e. accrual basis and the same was being allowed, as the liability did exist but the said amount though claimed as a deduction was not being deposited even after lapse of several years. Therefore, to put a check on the said claims/deductions having been made, the said provision was brought in to curb the said activities and which was approved by the Hon'ble Apex Court in the case of Allied Motors (P) Ltd. (supra).

21. A conjoint reading of the proviso to Section 43-B which was inserted by the Finance Act, 1987 made effective from 01/04/1988, the words numbered as clause (a), (c), (d), (e) and (f), are omitted from the above proviso and, furthermore second proviso was removed by Finance Act, 2003 therefore, the deduction towards the employer's contribution, if paid, prior to due date of filing of return can be claimed by the assessee. In our view, the explanation appended to Section 36(1)(va) of the Act further envisage that the amount actually paid by the assessee on or before the due date admissible at the time of submitting return of the income under Section 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income. It is also clear that Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1) (va) and if read in isolation Sec. 43B would become obsolete. Accordingly, contention of counsel for the revenue is not tenable for the reason aforesaid that deductions out of the gross income for payment of tax at the time of submission of return under Section 139 is permissible only if the statutory liability of payment of PF or other contribution referred to in Clause (b) are paid within the due date under the respective enactments by the assesseees and not under the due date of filing of return.

22. We have already observed that till this provision was brought in as the due amounts on one pretext or the other were not being deposited by the assesseees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said amounts were not deposited. It is pertinent to note that the respective Act such as PF etc. also provides that the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire

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amount as also to adduce evidence regarding such deposit on or before the return of income under sub-section (1) of Section 139 of the IT Act.

23. Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income under Section 139(1), cannot be disallowed under Section 43B or under Section 36(1)(va) of the IT Act.”

16. The said decision has subsequently been followed in CIT vs. Jaipur Vidyut Vitran Nigam Ltd. (supra), CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. (supra), and CIT vs Rajasthan State Beverages Corporation Limited (supra). In all these decisions, it has been consistently held that where the PF and ESI dues are paid after the due date under the respective statutes but before filing of the return of income under section 139(1), the same cannot be disallowed under section 43B read with section 36(1)(va) of the Act.

17. We further note that though the ld. CIT(A) has not disputed the various decisions of Hon'ble Rajasthan High Court but has decided to follow the decisions rendered by the Hon'ble Delhi, Madras, Gujarat and Kerala High Courts. Given the divergent views taken by the various High Courts and in the instant case, the fact that the jurisdiction over the Assessing officer lies with the Hon'ble Rajasthan High Court, in our considered view, the ld CIT(A) ought to have considered and followed the decision of the jurisdictional Rajasthan High Court, as evident from series of decisions referred supra, as the same is binding on all the appellate authorities as well as the Assessing officer under its jurisdiction in the State of Rajasthan.

18. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, the addition by way of adjustment while processing the return of income u/s 143(1) amounting to Rs 4,38,530/- so made by the CPC towards the delayed deposit of the employees's contribution towards ESI and PF though paid well before the due date of filing of return of income u/s 139(1) of the Act is hereby directed to be deleted as the same cannot be disallowed under section 43B read with section 36(1)(va) of the Act in view of the binding decisions of the Hon'ble Rajasthan High Court.”

6. In the instant case, admittedly and undisputedly, the employees' contribution to ESI and PF collected by the assessee from its employees have been deposited well before the due date of filing of return of income u/s 139(1) of the Act. Further, the ld D/R has referred to the explanation to section 36(1)(va) and section 43B by the Finance Act, 2021 and has also referred to the rationale of the amendment as explained by the Memorandum in the Finance Bill, 2021, however, I find that there are express wordings in the said memorandum which says “these amendments will take effect from 1st April, 2021 and will accordingly

apply to assessment year 2021-22 and subsequent assessment years". In the instant case, the impugned assessment year is assessment year 2018-19 and therefore, the said amended provisions cannot be applied in the instant case. Similar view has been taken by the Coordinate Bangalore Benches in case of Shri Gopalkrishna Aswini Kumar vs. ACIT (supra) wherein it has held as under:-

"7. The Hon'ble Karnataka High Court in the case of Essae Teraoka Pvt. Ltd., (supra) has taken the view that employee's contribution under section 36(1)(va) of the Act would also be covered under section 43B of the Act and therefore if the share of the employee's share of contribution is made on or before due date for furnishing the return of income under section 139(1) of the Act, then the assessee would be entitled to claim deduction. Therefore, the issue is covered by the decision of the Hon'ble Karnataka High Court. The next aspect to be considered is whether the amendment to the provisions to section 43B and 36(1)(va) of the Act by the Finance Act, 2021, has to be construed as retrospective and applicable for the period prior to 01.04.2021 also. On this aspect, we find that the explanatory memorandum to the Finance Act, 2021 proposing amendment in section 36(1)(va) as well as section 43B is applicable only from 01.04.2021. These provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect unless the legislature specifically says so. In the decisions referred to by us in the earlier paragraph of this order on identical issue the tribunal has taken a view that the aforesaid amendment is applicable only prospectively i.e., from 1.4.2021. We are therefore of the view that the impugned additions made under section 36(1)(va) of the Act in both the Assessment Years deserves to be deleted."

7. In light of the aforesaid discussions and in the entirety of facts and circumstances of the case and following the consistent decisions taken by the various Benches of the Tribunal, the addition by way of adjustment while processing the return of income u/s 143(1) amounting to Rs. 37,62,586/- so made by the CPC towards the deposit of the employees's contribution towards ESI and PF though paid before the due date of filing of return of income u/s 139(1) of the Act is hereby directed to be deleted."

Thus, it is clear from the above cited decision that this Tribunal has considered various decisions on this issue and by following decisions of the Coordinate Benches of the Tribunal, this issue was decided in favour of the assessee by holding that amendment in Section 36(1)(va) as well as Section 43B of the Act by way of inserting the explanation vide Finance Bill, 2021 are applicable only from A.Y. 2021-22 and subsequent assessment years and therefore, the said amendment is not applicable to the assessment year under consideration.

3.8. Similar view has been taken by the Delhi Benches of the Tribunal in the case of Chatru Mal Garg Vs ACIT (supra) in para 7 as under:

“7. I have heard the rival submissions and perused the materials on record. The issue in the present ground is with respect to disallowance under section 36(1)(va) of the Act. It is an undisputed fact that there has been slight delay in the deposit of employees’ contribution of PF and ESI by the assessee and the contribution have been deposited beyond the due date prescribed by the relevant authorities but at the same time it is also a fact that the amounts have been deposited with the appropriate authorities by the assessee before filing the return of income for the relevant assessment year. I find that Hon’ble Delhi High Court in the case of CIT vs. AIMIL Ltd. (supra) has held that no disallowance under section 36(1)(va) of the Act is called for when the amounts are deposited before filing the return of income. Similar view has also been taken by the Hon’ble Punjab & Haryana High Court in the case of CIT vs. Hemla Embroidery Mills (P) Ltd (supra) and Indian Geotechnical Services (supra). As far as the applicability of amendment made by Finance Act 2021 is concerned, I find that the Co-ordinate Bench of Tribunal in the case of Indian Geotechnical Services (supra) has held that amendment made by Finance Bill 2021 shall take effect from 1st April 2021 and will accordingly apply to A.Y. 2021-11 and subsequent years. In the present case assessment year involved is 2018-19 and therefore following the aforesaid decision in the case of Indian Geotechnical Services (supra), I am of the view that the amended provisions would have no application to the case under consideration. Before me, Learned DR has relied on the decision of Co-ordinate Bench of Tribunal in the case of Vedvan Consultants Pvt. Ltd. (supra). It is settled law that when two judgments are available giving different views then the judgment which is in favour of the assessee shall apply as held in case of Vegetable Products Ltd. 82 ITR 192 by the Hon’ble Supreme Court. I therefore following the decision of High Courts cited hereinabove and the decision of the Co-ordinate Bench of Tribunal, I am of the view that no addition u/s 36(1)(va) of the Act is called for in the present case. Therefore I direct the AO to delete the addition. Thus the ground of assessee is allowed.”

Thus, it is clear that the Delhi Benches of the Tribunal has considered the earlier decision of the Tribunal in the case of Vadvan Consultants Pvt. Ltd. (supra) which was relied upon by the Id. CIT(A) as well as the Id. DR and the issue was decided by following the decisions of Hon’ble Delhi High Court and Hon’ble Punjab & Haryana High Court and the decisions of the Division Bench of the Delhi Tribunal in the case of Indian Geotechnical Services in ITA No. 622/Del/2018 order dated 27/08/2021. Accordingly, in view of the above discussions as well as following the decisions of the Coordinate Benches of the Tribunal, this issue is decided in favour of the assessee and consequently, the disallowance made on account of employees

contribution towards PF & ESIC deposited before due date of filing of return of income U/s 139(1) of the Act amounting to Rs. 11,52,115/- is deleted.

4.0. In the result, the appeal of the assessee is allowed’.

4.0 Respectfully following the order of this Bench in the case of Modern Masti (P) Ltd vs DCIT, Circle-1, Jaipur (supra), the disallowance made on account of employees contribution towards PF & ESI deposited before due date of filing of return of income u/s 139(1) of the Act amounting to Rs.1,29,759/- is deleted.

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

Order pronounced in the open court on 11/04/2022

Sd/-

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 11/04/2022

*Mishra

आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. The Appellant- M/s. Mahalaxmi Saws (P) Ltd. Jaipur
2. प्रत्यर्था / The Respondent- The DCIT, CPC, Bengaluru/ ITO, Wd 4(2), Jaipur.
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 61/JP/2022)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar