

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI**

**BEFORE SHRI AMAR JIT SINGH, JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.1858/M/2021
Assessment Year: 2018-19**

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| M/s. Mec Elec Industrial Services Pvt. Ltd., 602, Pushpa Mangal Complex, Building No.1, Near Babubhai Petrol Pump, L.B.S. Marg, Thane, Maharashtra- 400 601 PAN: AAFCM3973Q | Vs. | ACIT, CPC, Bangalore, Karnataka |
| (Appellant) | | (Respondent) |

Present for:

Assessee by : Shri Ravi K. Mulchandani, A.R.
Revenue by : Ms. Bharti Singh, Sr. A.R. CIT

Date of Hearing : 07.04.2022
Date of Pronouncement : 28.04.2022

ORDER

Per Amar Jit Singh, Judicial Member:

The assessee has filed the present appeal against the order dated 12.08.2021 passed by the National Faceless Appeal Centre (NFAC) relevant to the assessment year 2018-19.

2. The assessee has raised the following grounds:-

"1. The learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the learned Assessing Officer, who while processing the application for rectification filed by the appellant u/sec 154 of the Act, has erred in not deleting the addition of Rs 3,20,699/- (made while processing the return u/s 143(1) of the Act), on account of sum received from employees as contribution to provident fund (PF) and Employee State Insurance Scheme (ESIC) which the appellant company has deposited with the PF and ESI Authorities after the due date prescribed under Provident Fund Act or rules, without considering that there was an nominal delay of

1 to 6 days in depositing the said amount and by not considering the fact that it has been paid into government account before the due date of filing of return of income as specified in Sec. 139(1) of the Act.

2. The learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the learned Assessing Officer, who has erred in not deleting the said addition of Rs 3,20,699/-while processing the application for rectification filed by appellant u/s 154 of the Act, (made while processing the return of Income u/s 143(1) of the Act), by not considering the fact that the addition of Rs 3,20,699/- made to the returned income, while processing the return u/s 143(1), were pertaining to an debatable issue and such type of additions are not permissible to be made while processing the returns u/s 143(1) of the Act.

3. The learned Commissioner of Income Tax (Appeals) has erred in confirming the action of the learned Assessing Officer, who has erred in not deleting the said addition of Rs 3,20,699/-while processing the application for rectification filed by appellant u/s 154 of the Act, (made while processing the return of Income u/s 143(1) of the Act), without appreciating the fact that the same was not an mistake apparent from record and that the payment of employees contribution of provident fund and Employee State Insurance, made before the due date of filing the return of income prescribed u/s 139(1) , have been held as an allowable expenditure by various judicial authorities.”

3. The brief facts of the case are that the assessee filed its return of income on 10.09.2018 declaring total income to the tune of Rs.3,05,88,043/- for the assessment year 2018-19. The assessee was a Pvt. Ltd. Company and was assessed to tax for last many years. During the processing of the return of income, the assessee company received notice from proposed adjustment under section 143(1)(a) of the Act for adjustment on account of sum received from the employees as contribution towards provident fund and superannuation to the extent not credited to the employees' account on or before the due date and to consider the same as income by applying provisions of section 36(1)(va) of the Act. On the receipt of the notice, the assessee submitted the reply. The AO did not find the reply justifiable, therefore, raised the addition of Rs.3,20,699/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the disallowance. Feeling aggrieved, the assessee filed the present appeal before us.

Ground Nos.1, 2 & 3 :

4. We have heard the arguments advanced by the Ld. Representatives of the parties and have perused the record. All these issues are interconnected, therefore are being taken up together for adjudication. In brief the assessee received the contribution towards PF & ESIC from the employees and deposited the same to the government account before due date of filing the return of income except following

(i) PF contribution for December 2017 Rs.1,83,541/-, due date was 15.01.2018 and paid on 16.01.2018

(ii) ESIC contribution for June, 2017 Rs.44,570/- due date was 15.07.2017 and paid on 21.07.2017

(iii) ESIC contribution for December 2017, Rs.45,558/- due date was 15.01.2018 and paid on 16.01.2018

(iv) ESIC contribution for March 2018, Rs.47,030/- due date was Rs.15.04.2018 and paid on 16.04.2018.

5. The contention of the assessee is that the same is liable to be allowable and placed reliance on the judgment of the co-ordinate Bench of the Tribunal in the case of **ITA. Nos. 6425/M/2017 for the A.Y.2011-12, 6426/M/2017 for the A.Y.2012-13 & 1140/M/2017 for the A.Y.2014-15 dated 27.07.2021 titled as DCIT Vs. M/s. Maharashtra Tourism Development Corporation Ltd.**

6. On the other hand, the Ld. D.R. strongly relied on the order passed by the lower authorities.

7. Before going further, we deem it necessary to advert the findings of the judgment of the co-ordinate Bench of the Tribunal relied upon by the Ld. A.R. of the assessee in the case of **DCIT Vs. M/s. Maharashtra Tourism**

Development Corporation Ltd. (supra). The relevant findings are reproduced below:

“13. The next issue in this appeal of Revenue is as regards to the order of CIT(A) deleting the disallowance made by Assessing Officer of employees contribution to provident fund beyond due date of respective statute amounting to ₹11,03,233/-. For this, Revenue has raised the following ground No.4: -

“4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of additions made by the Assessing Officer of ₹11,03,233/- without taking into consideration and the fact that in identical circumstances decided the issue in favour of Revenue.”

14. Brief facts are that the Assessing Officer noticed from Annexure iii to 3CD report, being annual statement of accounts of the assessee in regard to the provident fund i.e. employees contribution for Pune Regional office, Nasik Regional Office and Mumbai Headquarter. The assessee either made no payment or there is difference in payment or the payment is made after due date as prescribed under the Provident Fund Act. The Assessing Officer has pointed out the following:-

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| Disallowance on account of difference | Rs.65,462/- |
| Disallowance on account of non-payment | 1,28,798/- |
| Disallowance on account of payment after due date | 9,08,973/- |
| Total | 11,03,233/- |

15. Hence, the Assessing Officer disallowed the claim of assessee of employees contribution to the provident Fund being paid beyond the due date of prescribed Act amounting to ₹11,03,233/- and added to the returned income of the assessee. Aggrieved assessee preferred the appeal before CIT(A). The CIT(A) allowed the claim of the assessee by observing in Para 5.6 as under: -

“5.6.1 This ground relates to addition of Rs. 11,03,233/- u/s 36(1)(va) on account of late payment of employees contribution to PF. During the appellate proceeding it has been contended that the same are paid before due date of filing of return. Relying on the case in 53 Taxmann.com 141, CIT vs. Ghatge Patil Transport (BOM) and other jurisdictional judgements, the assessing officer is directed to verify and allow the same if paid before due date of filing the return of income. This ground is allowed subject to verification.”

Aggrieved, now Revenue is in appeal before Tribunal.

16. Before us, the learned CIT DR Ms. Mamta Bansal stated that there is no question of allowance of differential payment of ₹65,462/- which has never been paid by the assessee and the amount which are not paid by the assessee amounting to ₹1,28,798/- being claimed on account of employees contribution of provident fund. The balance amount of ₹9,08,873/- was paid after the due date as prescribed under the provident fund Act. She stated that the Assessing Officer clearly brought out the amount due and amount paid. Now, the learned

CIT DR further stated that there is an amendment in the Provisions of Section 36(va), wherein explanation 2 was added by the Finance Act 2021, with effect from 01.04.2021 and the relevant explanation read as under: -

“[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;]

17. The learned CIT DR stated that this is only clarificatory explanation and normal presumption is that these provisions have been in the Act from the very inception, once it is clarificatory for this, she relied on CIT v. Podar Cement (Pvt.) Ltd. [1997] 226 ITR 625 (SC) and CIT vs. Gold Coin Health Food (P.) Ltd [2008] 304 ITR 308 (SC).

18. On the other hand, the learned Counsel for the assessee relied on the decision of Hyderabad Bench of ITAT in the case of Salzgitter Hydraulics (P.) Ltd. Vs. ITO (2021) 128 taxmann.com 192 (Hyderabad – Trib.) dated 15.06.2021, wherein it is held that the provident fund contribution received from employees deposited by assessee before the due date of filing of return under section 139(1) of the Act but after the due date prescribed in the relevant statute of provident Fund Act is to be allowed despite the fact that legislation has not only incorporated necessary amendment in section 36(1)(va) of the Act by inserting explanation 2 as well as explanation 5 to section 43B vide Finance Act, 2021 with effect from 01.04.2021, wherein it is clarified that the provisions of section shall not apply and shall be deemed to have been applied to a sum received by assessee from any of his employees covered by section 2(24)(x) of the Act because this explanations are prospective and not retrospective. The relevant Para 2 of the case reads as under: -

“2. Coming to the sole substantive issue of ESI/PF disallowance of Rs. 1,09,343/- and Rs. 3,52,622/-, the assessee's and revenue's stand is that the same has been paid before the due date of filing sec. 139(1) return and after the due date prescribed in the corresponding statutes; respectively. I notice in this factual backdrop that the legislature has not only incorporated necessary amendments in Sections 36(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 1-4-2021 only. It is further not an issue that the foregoing legislative amendments have proposed employers contributions; disallowances u/s 43B as against employee u/s 36 (va) of the Act; respectively. However, keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1-4-2021, I hold that the impugned disallowance is not sustainable in view of all these latest developments even if the Revenue's case is supported by the following case law.”

19. In view of the above, we are of the view that the legislative amendments incorporated in section 36(1)(va) and 43B of the Act by the Finance Act, 2021 by inserting explanation 2 and explanation 5 to the respective provisions, are prospective in application with effect from 01.04.2021. Hence, we find no

infirmity in the order of Commissioner of Income Tax (Appeals). Hence, the appeal of the Revenue is dismissed.”

8 The factual position is not in dispute. The contribution towards PF and ESIC was deposited on or before the due date of filing the return of income. It is allowable deduction as held in the case **DCIT Vs. M/s. Maharashtra Tourism Development Corporation Ltd. (supra)**. Accordingly, we set aside the finding of the CIT(A) on the issue and allowed the claim of the assessee.

In the result, appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 28.04.2022.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(AMAR JIT SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 28.04.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.