

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "SMC" BENCH: NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

**ITA No.1705/Del/2020
[Assessment Year : 2017-18]**

Talent Resource Consulting Pvt.Ltd., GF, LSC Building No.16, Near Pushpa Bhawan, New Delhi-110062. PAN-AAECT2519G	vs	DCIT, CPC, Bangalore.
APPELLANT		RESPONDENT
Appellant by	Shri Sanjay Jain, CA	
Respondent by	Shri Om Prakash, Sr.DR	
Date of Hearing	23.05.2022	
Date of Pronouncement	23.05.2022	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee for the assessment year 2017-18 is directed against the order of Ld. CIT(A)-9, New Delhi dated 20.08.2020. The assessee has raised following grounds of appeal:-

1. *"That on the facts and circumstances of the case , the Id. A.O. as well as CIT(A) have erred in making a addition of Rs. 14,58,550.00 u/s 40A(7) towards Provision for Gratuity which is not Provided out of Current Profit.*
2. *That the Provision for Gratuity of Rs. 14,58,550.00, not having been Provided out of Current Profits, is not liable to be added to the returned Income and thus the order is bad in Law and facts of the case.*
3. *That as result of typing mistake, mere wrong mentioning of the Provision of Gratuity Rs. 14,58,550.00 in Tax Audit Report cannot lead to addition to the Income as there is no effect to reduce the Income of the Assessee.*

4. *That the due date to deposit EPF is by including the grace period of 5 days and thus the due date would be the 20th of each month upto 20th January 2017 and thus EPF deposited by this dated would be and allowable deduction.*
5. *That the payments towards Employees' Share of EPF and ESIC having been debited to the Assessee's account and remitted to the respective Authority within time, cannot be said to be belated payments and thus qualifies for deduction u/s 36(l)(va) of the IT Act.*
6. *That the addition of Rs. 10,68,945.00 towards belated payments of Employees' Share of EPF is bad as the same have been paid / deposited before the due date of filling of return.*
7. *That the order is bad in laws and facts of the case.*
8. *That the above Grounds of Appeal are without prejudice to one another.*
9. *That your appellant prays that he be allowed to add, amend or withdraw any of the Appeal at the time of hearing."*

FACTS OF THE CASE

2. Facts giving rise to the present appeal are that in this case, the Central Processing Centre ("CPC"), Bangalore processed the income of the assessee u/s 143(1) of the Income Tax Act, 1961 ("the Act"). Thereby, it computed income of the assessee amounting to Rs.30,32,666/- against the declared income of Rs.15,66,820/-. The CPC, Bangalore made adjustment in respect of provision for payment of Gratuity of Rs.14,58,550/- and late deposit of employee's contribution towards EPF & ESIC amounting to Rs.10,68,945/-

3. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who after considering the submissions of the assessee, sustained the addition. In respect of the addition regarding provision of Gratuity u/s 40A(7) of the Act, sustained the addition on the basis that Auditor has not corrected the mistake

by furnishing the corrected Audit Report as mandated by law. In respect of the deposit of employee's contribution towards EPF & ESIC, the Ld.CIT(A) following the decision of the Hon'ble Delhi High Court in the case of *CIT vs Bharat Hotels Ltd. [2019] 103 Taxmann.com 295 (Delhi)* and confirmed the addition made by the AO.

4. Aggrieved against the order of Ld.CIT(A), the assessee preferred appeal before the Tribunal.

5. Ground Nos.1 to 3 raised by the assessee are against the making of addition of Rs.1,45,58,550/- u/s 40A(7) in respect of disallowance of provision of Gratuity.

6. At the outset, Ld. Counsel for the assessee submitted that there was a mistake on the part of the Auditor. The assessee has given an affidavit regarding error in the Audit Report. He submitted that in view of the affidavit of the Auditor who categorically stated that the provisions were not made out of the current years profit but were created out of the Reserves and Surplus of the earlier year by writing off the excess provision that existed and the provisions were made on the basis of the record of the Actuarial valuer dated 27.07.2017.

7. On the contrary, Ld.Sr.DR opposed these submissions and supported the orders of the authorities below.

8. I have heard the contentions of the rival parties and perused the material available on record and gone through the orders of the authorities below. Ld.CIT(A) has decided this issue by observing as under:-

5.1. *"A perusal of above provisions, reveals that no deduction shall be allowed in respect of any provision made by the appellant for payment of*

gratuity 10 his employees on their retirement or on termination of their employment for any reason. Further, the appellant has claimed that the provision has not been debited to the P&L accounts and has given, a certificate of actuarial valuation for the year FY year 15-16 and 16-17 pertaining to the provision for leave encashment and gratuity. The said certificate and other documents have also been perused. These merely show as to the computation for arriving at the figures of provision for gratuity. However, the allowability in itself has to be seen in the context of factual matrix and the legal matrix. Any provision of gratuity is not allowable in terms of provisions of section 40A(7). As far as the issue of it being debited or not to the P & L account is concerned, the report of statutory audit needs to be looked into as this has an important bearing on the factual correctness of accounts. As per this statutory auditory report, the same has been held to be a provision (form no. 3CA column 21E) and is liable to be disallowed.”

9. Now, the contention of the assessee is that there was a mistake in the Audit Report and the Auditor has given an affidavit. For the sake of clarity, the relevant contents of the affidavit are reproduced hereunder:-

“I, Vinay Kumar Malik Proprietor M/s Vinay Malik & Co. Chartered Accountants and son of Late Mr. P. D. Malik, with my office at 232, DDA Commercial Complex, Jhandewalan Extension, New Delhi and carrying on Profession of Chartered Accountants hereby solemnly affirm and declare as under:

1. That I am the Tax Auditor of M/s Talent Resource Consulting Pvt. Ltd. For the Ay 2017-18 (FY 2016-17) and I am assessed to income-tax by the Assessing Officer, Ward 61(1) on file bearing Permanent Account Number AFHPN1251K

2. That the above assessee M/s Talent Resource Consulting Pvt. Ltd. preferred an appeal before the Hon’ble ITAT against order dated 20/08/2020 passed by the Ld Commissioner (Appeals) and against the Assessing Officer’s order u/s 154 dated 28/06/2019 read with assessment order u/s 143(1) dated 27/12/2018 for the assessment year 2017-18.

3. I say that the assessee had created a provision for gratuity payable and provision for leave encashment as on 31/03/2017, as per dated below:

DISCRETION	PROVISION FOR GRATUTY	PROVISION FOR LEAVE ENCASHMENT	TOTAL
<i>Non-Current Liability (Amount Due After 12 Months)</i>	11,49,379.00	1,36,056.00	12,85,435.00
<i>Current Liability (Amount Due Within 12 Months)</i>	3,09,171.00	68,194.00	3,77,365.00
TOTAL	14,58,550.00	2,04,250.00	16,62,800.00

4. I say that the above provisions were not made out of the current years profit. The provisions were created out of the Reserve and Surplus of the earlier year by writing off the excess provision that existed.

The provisions were made on the basis of the report of the Actuarial valuer dated 27/07/2017.

5. I also say that since the provisions were not created out of the Profit of the Company, the same are not to be added back to the returned Income.

6. I further say that while preparing the Tax Audit Report u/s 44AB in Form No. 3CD in Item No. 21(b) (ix)(e) Rs.14,58,850.00 has been inadvertently mentioned as the amount of gratuity not allowable. (Please refer to page 30 of the Paper Book)

7. I say that this mistake has taken place in the tax audit report inadvertently. There is a provision for Gratuity payable Rs. 14,58,550.00 on the basis of the actuarial report but since this has not been made out of the profits of the current year, the same is not disallowable as wrongly mentioned in the tax audit report. The said mistake in the Tax Audit Report was neither deliberate nor willful.”

10. In view of the categorically statement by the Auditor of the assessee and in the interest of justice, I deem it proper to restore this issue to the AO to verify the claim of the assessee that the provisions were not made out of the current profit. The provisions were created out of Reserve and Surplus of the earlier years by writing off the excess provision that existed. The AO would verify from

the accounts of the assessee and in case, it is found that the provisions were not made out of the current profit and were created out of the surplus of the earlier year, the AO would delete the addition. Thus, Ground Nos. 1 to 3 raised by the assessee are allowed for statistical purposes.

11. Now, coming to Ground Nos. 5 to 6 raised by the assessee, relate to disallowance of employee's contribution of Rs.10,68,945/- towards PF & ESI.

12. At the outset, Ld. Counsel for the assessee submitted that the issue is squarely covered by the various decision of the Tribunal and the judgement of the Hon'ble Jurisdictional High Court in the case of *PCIT vs Pro Interactive Service (India) Pvt.Ltd. in ITA No.983/2018 [Del.]* order dated 10.09.2018 held as under:-

"In view of the judgement 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(23)(x) of the Act."

13. On the contrary, Ld.Sr.DR opposed these submissions and supported the orders of the authorities below.

14. I have heard the contentions of the rival parties and perused the material available on record and gone through the orders of the authorities below. Therefore, respectfully following the ratio laid down by the Hon'ble Jurisdictional

High Court in the above-mentioned binding precedents, I hereby direct the Assessing Officer to delete the disallowance. Thus, Ground Nos. 5 & 6 raised by the assessee are allowed.

15. Rest of the grounds are general in nature, need no separate adjudication.

16. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 23rd May, 2022.

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI