

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

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 1672/DEL/2021
[Assessment Year: 2018-19]

Balraj, Village: Revali, p.O. Murthal, Distt. Sonapat-131001 PAN- BLVPB0234J	<u>Vs</u>	Income-tax Officer, Ward-1, Sonapat
APPELLANT		RESPONDENT
Appellant by	None	
Respondent by	Sh. Om Prakash, Sr. DR	
Date of hearing	26.05.2022	
Date of pronouncement	09.06.2022	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 01.09.2021, pertaining to the assessment year 2018-19. The assessee has raised following grounds of appeal:

“The Learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the addition of Rs.2181023/- made by the CPC u/s

43(1) of I.T. Act, on account of late deposit of PF/ESI following the amendment in 43B regarding Employees' Contribution of Provident Fund, ESI or any other welfare fund under Finance Act 2021 ignoring the fact that amendment made in section 43B is not with retrospective effects. Addition made u/s 143(1) by CPC is void abinitio therefore it is prayed before your honor the same may kindly be deleted.

2. The Learned Commissioner of Income Tax (Appeals) has erred in law and on facts in confirming the addition made by CPC in disallowing the payment of Employees' contribution of ESI/PPF on the ground that the amount was paid after due date by the assessee, whereas, the appellant deposited the ESI and PF before due date of filling the return of income. It is prayed the addition may kindly be deleted.

2. No one attended at the hearing. Considering the issue involved for adjudication in the appeal, the adjournment application moved on behalf of the assessee is rejected and the appeal of the assessee is taken up for hearing in the absence of the assessee and is decided after hearing the learned DR and on the basis of the material available on record.

3. The only effective ground raised in this appeal relates to the deposit of employees' contributions qua PF & ESI after the due date as prescribed in the relevant Acts, however, before the due date of filing of return of income u/s.139(1) of the Act, resulting into disallowance of Rs. 21,81,023/-, u/s 36(1)(va) by the Assessing Officer. Aggrieved against this, the assessee preferred appeal before the

CIT(A), who after considering submissions, dismissed the appeal of the assessee by affirming the order of the AO on the issue in question. Against this the assessee is in appeal before this Tribunal.

4. The learned CIT(Appeals) while upholding the disallowance/additions qua employee's contributions towards PF & ESI, mainly focused on two aspects/determinations-

(i) Non-applicability of the provisions of Section 43B of the Act to the employee's share qua ESI & PF

And

(ii) Applicability of the amended provisions of Sections 36(1)(va) and 43B of the Act wherein Explanations have been inserted by Finance Act, 2021.

5. Admittedly there is plethora of judgments in favour of the Assessee's contention and of the Revenue. The controversy with regard to divergent views of different High Courts, has been settled by the Hon'ble Apex Court in the case of CIT Vs. M/s. Vegetables Products Ltd. (88 ITR 192) by laying down the dictum '*if two reasonable constructions of a taxing provision are possible that construction which favours the Assessee must be adopted.*'

6. The issue under controversy travelled upto the Hon'ble Apex Court in the cases of Rajasthan State Beverages Ltd (2017) 84 Taxmann.com 185 (SC), CIT Vs. Alom Extrusion Ltd (2010) 1 SCC 489, CIT Vs. Vinay Cement Ltd 213 CTR 268 and the Hon'ble Apex Court clearly held the amount claimed on payment of PF and ESI if deposited on or before due date of filing of returns then the same cannot be disallowed u/s 43B or u/s 36(1)(va) of the Act.

7. The Hon'ble Delhi High Court in case of CIT vs. AIMIL Ltd. (2010) 321 ITR 508 (Delhi), has held as under:

“If the employees' 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 payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. In so far as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement [2009] 313 ITR (St.) 1.”

8. Again the Hon'ble Delhi High Court in the case of Pr.CIT Vs. M/s Pro Interactive Services (India) Pvt. Ltd. in ITA no. 983/2018 vide order dated 10.09.2018 in ITA no. 983/2018 has held as under:

“In view of the judgment of the Division Bench of Delhi High Court in Commissioner of Income Tax Vs. 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 (EPD) and employee's State Insurance Scheme (ESI) as deemed income of employer under section 2(24)(x) of the Act."

9. Even the Hon'ble Punjab and Haryana High Court in the case of CIT Vs. M/s Hemla Embroidery Mills (P) Ltd. (366 ITR 167) (P&H) and in the case of CIT Vs. M/s Mark Auto Industries Ltd. (358 ITR 43) (P&H) has clearly held that the Assessee is entitled to claim deduction of employee's share of ESI & PF u/s.43B of the Act, if the same has been deposited prior to the filing of return of income u/s.139(1) of the Act.

10. From the aforesaid Judgments of the Hon'ble High Courts, it is clear that the Hon'ble Courts have not drawn any distinction between the employee's and employer's share qua PF & ESI contributions, hence, first determination of the Ld. CIT(A) qua non-applicability of the provisions of Section 43B of the Act to the employee's share qua PF& ESI is unsustainable.

11. Now, coming to the amendments brought in by the Finance Act 2021 by inserting Explanation 2 in Section 36(1)(va) and 5 in section 43B of the Act, for better clarification and ready reference the Explanations 2 and 5 inserted in sections 36(1)(va) and 43B of the Act respectively, are reproduced herein below:

Section 36(1)(va)-

"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.”

Section 43B-

“Explanation 5.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the Assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies.”

12. It is observed that various benches of the ITAT including Hyderabad Bench in the case of Value Momentum Software Services Pvt. Ltd. (ITA No.2197/Hyd/2017 decided on 19.05.2021), have taken into consideration the identical issue qua applicability of the amendment to Sections 36(1)(va) and Section 43B of the Act, by inserting Explanations by the Finance Act, 2021 and clearly held that the amendment shall be applicable from 1st April, 2021 onwards . It is also relevant to note that the CBDT has also issued Memorandum of Explanation qua applicability of the amended provisions of Sections 36(1)(va) & 43B of the Act w.e.f. 1st April, 2021 and Assessment Year 2021-22 onwards, hence there is no doubt qua applicability of the amended provisions referred above, prospectively.

13. On the aforesaid discussion, the second aspect as considered by the Id. CIT(A) qua applicability of the amended provisions of Sections 36(1)(va) and 43B of the Act to the cases in hand, is also un-sustainable.

14. In view of the above discussions, the disallowances to the tune of Rs. 21,81,023/- made by the Assessing Officer and confirmed by the learned CIT(Appeals) is not sustainable and, hence, the same stands deleted.

15. In the result, the appeal of the Assessee is allowed.

Order pronounced in open court on 9th June, 2022.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

MP

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI