

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"C" BENCH, AHMEDABAD**

**BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER**  
**AND**  
**T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

**ITA No.444/Ahd/2020**  
**Assessment Year : 2018-19**

The Anup Engineering Ltd. (Merged with Anveshah Heavy Engineering Ltd.) Nr.66 KV Power Station Odhav Road, Odhav, Ahmedabad. PAN : AAQCA 0309 R	Vs	DCIT, CPC, Bangalore.
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(Applicant)	(Responent)
Assessee by :	Shri Biren Shah, AR
Revenue by :	Shri V.K. Singh, Sr.DR

सुनवाई की तारीख/Date of Hearing : 14/06/2022  
घोषणा की तारीख /Date of Pronouncement: 24/06/2022

**आदेश/O R D E R**

**PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

This appeal is filed by the assessee against order dated 28.7.2020 passed by the Commissioner of Income-tax (Appeals)-8, Ahmedabad relating to the Asst.Year 2018-19.

2. The grounds of appeal raised by the assessee are as follows:

1. *On the facts and in the circumstances of the case the learned CIT(A) erred in confirming disallowance of Rs.16,85,937/- being Employees' contribution to Provident Fund, ESI Fund and any other welfare fund made by the Assessing Officer on the ground that the aforesaid payment was made after the due date prescribed under relevant Act, even though the payment was*

*made within the time prescribed under section 139(1) of the IT. Act, 1961 for filing the return of income.*

*2. In law and in the facts and circumstances of the case, the learned CIT(A) erred in confirming disallowance made by the Assessing Officer as such adjustment is beyond the scope of section 143(1) of the IT. Act, 1961.*

Thus, the sole ground raised by the assessee is against disallowance of Rs.16,85,937/- on account of late payment of PF and ESI Fund within the time mentioned in section 36(1)(va) of the Income Tax Act, 1961 (hereinafter referred as “the Act”) but paid within the due date of filing of the return under section 139(1) of the Act, and that the impugned disallowance cannot be made under the provision of section 143(1) of the Act.

3. Brief facts of the case is that the assessee is a limited company. It filed its return of income for the Asst.Year 2018-19 on 21.9.2019 declaring total income under normal provision at Rs.26,91,74,050/-. The return was processed by the Centralised Processing Centre (“CPC”), Bangalore and intimation under section 143(1) of the Act was made by the DCIT by making disallowance of Rs.16,85,937/- being late payment of PF/ESI by the assessee-company. The AO also disallowed a sum of Rs.6,92,937/- under section 43B of the Act. Thus, total income was determined by the AO at Rs.27,15,52,930/-. Aggrieved against intimation order dated 21.9.2019, the assessee filed appeal before the Id.CIT(A). The Id.CIT(A) by a very detailed order, confirmed disallowance made by the CPC by relying on the judgment of Hon’ble Gujarat High Court in the case of CIT Vs. Gujarat State Road Transport Corporation Ltd., 366 ITR 170 and dismissed the appeal filed by the assessee. Relevant portion of the impugned order is reproduced as follows:



*under the Provident Fund Act and ESI Act. Section 43B is with respect to certain deductions only on actual payment. It provides that notwithstanding anything contained in any other provisions of the Act, a deduction otherwise liable under the Act in respect of (B) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him. It appears that prior to the amendment of section 43B of the Act vide Finance Act, 2003, an assessee was entitled to deductions with respect to the sum paid by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees (employer's contribution) provided such sum - employer's contribution is actually paid by the assessee on or before the due date applicable in his case for furnishing return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with such return. It also further provided that no deduction shall, in respect of any sum referred to in clause (B) i.e. with respect to the employer's contribution, be allowed unless such sum is actually been paid in cash or by issue of cheque or draft or by any other mode on or before the due date as defined in explanation below clause (va) of sub-section (1) of section 36 and where such sum has been made otherwise than in cash, the sum has been realised within 15 days from the due date. By the Finance Act 2003, Second Proviso of section 43B of the Act has been deleted and First Proviso to section 43B has also been amended which is reproduced hereinabove. Therefore, with respect to employer's contribution as mentioned in clause (b) of section 43(B), 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 applicable in his case for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B on actual payment and such deduction would be admissible for the accounting year. However, it is required to be noted that as such there is no corresponding amendment in section 36(1) (va). Deletion of Second Proviso to section 43B vide Finance Act 2003 would be with respect to section 43B and with respect to any sum mentioned in section 43(B) (a to f) and in the present case, employer's contribution as mentioned in section 43B(b). Therefore, deletion of Second Proviso to section 43B and amendment in first proviso to section 43B by Finance Act, 2003 is required to be confined to section 43B alone and deletion of second proviso to section 43B vide amendment pursuant to the Finance Act, 2003 cannot be made applicable with respect to section 36(1)(va) of the Act. Therefore, any sum with respect to the employees' contribution as mentioned in section 36(1)(va), assessee shall be entitled to the deduction of such sum towards the employee's contribution if the same is deposited in the accounts of the concerned*

*employees and in the concerned fund such as Provident Fund, ESI Contribution Fund, etc. provided the said sum is credited by the assessee to the employees' accounts in the relevant fund or funds on or before the 'due date' under the Provident Fund Act, ESI Act, Rule, Order or Notification issued thereunder or under any Standing Order, Award, Contract or Service or otherwise. It is required to be noted that as such there is no amendment in section 36(1) (va) and even explanation to section 36(1)(va) is not deleted and is still on the statute and is required to be complied with. Merely because with respect to employer's contribution Second Proviso to section 43B which provided that even with respect to employers' contribution [(section 43(B)b], assessee was required to credit amount in the relevant fund under the PF Act or any other fund for the welfare of the employees on or before the due date under the relevant Act, is deleted, it cannot be said that section 36(1)(va) is also amended and/or explanation to section 36(1)(va) has been deleted and/or amended.*

*It is also required to be noted at this stage that as per the definition of "income" as per section 2(24)(x), 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 the such employees is to be treated as income and on fulfilling the condition as mentioned under section 36(1) (va), the assessee shall be entitled to deduction with respect to such employees' contribution. Section 2(24)(x) refers to any sum received by the assessee from his employees as contribution and does not refer to employer's contribution. Under the circumstances and so long as and with respect to any sum received by the assessee from any of his employees to which provisions of sub-clause (x) of sub-section 24 of section 2 applies, assessee shall not be entitled to deduction of such sum in computing the income referred to in section 28 unless and until such sum is credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as mentioned in explanation to section 36(1)(va). Therefore, with respect to the employees contribution received by the assessee if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in explanation to section 36(1) (va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in section 28 of the Act.*

*5.2.2 Keeping in view the provisions of section 2(24)(x) r.w.s. 36(1)(va) and respectfully following the judgment of Hon'ble jurisdictional High Court as above, the sum of Rs.16,85,937/-being Employees Contribution to PF & ESIC admittedly deposited in the respective accounts beyond the prescribed due dates under the relevant Act is rightly treated as income of the appellant by the AO. Thus, this ground of appeal is decided against the appellant and appeal on this ground 3 is dismissed.”*

4. Aggrieved against this appellate order, the assessee is in appeal before the Tribunal by raising the grounds stated (supra).

5. During the course of hearing, the ld.counsel for the assessee relied upon the decision of the Co-ordinate Bench of the Tribunal in ITA No.83/Ahd/2021 order dated 11.5.2022 in the case of Rajratna Metal Industries Ltd. Vs. JCIT(OSD) wherein similar disallowance made under section 36(1)(va) of the Act on account of late deposit of employees' contribution in PF/ESI was confirmed and dismissed the appeal. However given liberty to the assessee to revive appeal based on the outcome within three months from the date of order of the Hon'ble Supreme Court as follows:

*“8.1 In our considered view, the issue is covered against the assessee at this stage and deserve to be dismissed. However in the event if the Hon'ble Supreme court reversed the finding of the Hon'ble Gujarat High Court then it would be open for the assessee to revive this appeal within three month from the date of order of the Hon'ble Supreme Court by filing an application to this effect. In holding so, we draw support and guidance from the judgment of Hon'ble Gujarat High Court in the case of PECO MICA LIMITED vs DOT in R/Tax appeal No. 302 of 2021 order dated 7-1-2022 wherein it was held as under:*

*We dismiss this appeal at this stage. However, in the event, if the Supreme Court reverses the judgement in the G.S.R. T. C (Supra), it would be open for the appellant herein to revive this appeal by filing an application for such purpose within three months from the date of the judgment. The appeal stands disposed of accordingly.*

*8.2 In view of the above and after considering the facts in totality, the ground of appeal of the assessee is hereby dismissed in accordance with above discussion.”*

6. Per contra, the ld.DR appearing for the Revenue strongly contested that late payment of ESIC/PF is a settled issue by the Hon'ble Gujarat High Court in the case of Gujarat State Road Transport Corporation (supra). SLP filed by the assessee is pending and no stay has been granted by the Hon'ble Apex Court. Therefore,

it is open to the Department to follow jurisdiction High Court's judgment in all pending proceedings. Thus, the CPC was right in disallowing the claim made by the assessee. This disallowance has been upheld by the Id.CIT(A) by a detailed order which does not require any interference and therefore the disallowance made by the Revenue is well within the purview of section 143(1) of the Act. He also relied upon the decision dated 17.5.2022 in ITA No.55/Ahd/2022 of the Co-ordinate Bench in the case of Diversified Services Vs. ITO, and therefore pleaded to dismiss the appeal filed by the assessee.

7. We have given our thoughtful consideration and material available on record. We are unable to accept the arguments of the assessee for the simple reason that the section 254(2) of the Act provides the time limit of six months only to rectify or amend its order as follows:

*"254. (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.*

*(1A) [\*\*\*]*

*(2) The Appellate Tribunal may, at any time within six months from the end of the month in which the order was passed, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the Assessing Officer :*

*Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard :*



*under section 154. In the absence of any specific provision in the Act, which disallows a deduction because a specific document specified in that section is not annexed to the return, the ITO cannot, under clause (iii) of the proviso to section 143(1)(a), disallow a claim or a deduction because, in his view, Diversified Services vs. ITO adequate evidence in support of such a claim or deduction is not before him. He can disallow a claim for deduction only if he is satisfied, on the basis of the material which is before him, that the assessee is not entitled to such a deduction"*

*Thus, from the above decision, it evident that CBDT Circular No. 581 dated 28-9-1990 makes it clear that the Board has viewed the scope of the powers to make prima facie adjustments under section 143(1)(a) as co-terminus with the power to rectify a mistake apparent from the record under section 154.*

*6. In view of the above discussion, we are of the considered view that in the instance of the facts the Ld. CIT(A) has not erred in facts and law in confirming the disallowance of late deposit of employees Provident fund contribution under section 36(1)(va) of the Act. The Supreme Court in the case of ACIT v. Saurashtra Kutch Stock Exchange Ltd[2008] 173 Taxman 322 (SC) has held that not following decision of the Supreme Court or the jurisdictional High Court would constitute a mistake apparent from record. Since, admittedly the jurisdictional High Court in case of Gujarat State Road Transport Corporation supra has directly ruled on this issue against the assessee and has held that employees' contribution to specified fund will not be allowed as deduction u/s.36(1)(va) if there is delay in deposit as per the due dates mentioned in the respective legislation, in our view, the Department is bound to follow the decision of the jurisdictional High Court. Perhaps, it would have been a different factual situation in case the jurisdictional High Court had decided the issue on late deposit of employee's Provident fund in favour of the assessee or there would have Diversified Services vs. ITO been no jurisdictional High Court decision on this issue, in which case, in our view, the issue could have been debatable. However so far as the present facts are concerned, in our considered view, Ld. CIT(A) has not erred in facts and law in coming to the conclusion that disallowance made by the CPC u/s 143(1) of the I.T. Act on account of appellant's failure to pay the employee's contribution of PF/ESI of Rs.8,85,284/- within the prescribed due dates as per section 36(1)(va) is strictly in accordance with law."*

10. Respectfully following the same, we hereby reject the grounds and dismiss the appeal filed by the assessee.

11. In the result, appeal of the assessee is dismissed.

**Order pronounced in the Court on 24<sup>th</sup> June, 2022 at Ahmedabad.**

**Sd/-  
(ANNAPURNA GUPTA)  
ACCOUNTANT MEMBER**

**Sd/-  
(T.R. SENTHIL KUMAR)  
JUDICIAL MEMBER**

Ahmedabad, dated 24/06/2022