

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, 'B' 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. 37/JP/2022  
निर्धारण वर्ष/Assessment Year : 2019-20

Rajasthan State Ganganagar Sugar Mills Limited 4 <sup>th</sup> Floor Nehru Sehkar Bhawan, Bhawani Singh Road, Jaipur	बनाम Vs.	ACIT/DCIT Circle-06, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAACR 8906 R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Mudit Jain, CA  
राजस्व की ओर से / Revenue by: Smt. Monisha Choudhary, JCIT

सुनवाई की तारीख / Date of Hearing : 28/06/2022  
उदघोषणा की तारीख / Date of Pronouncement: 30/06/2022

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the assessee is arising out of an order passed by the National Faceless Appeal Centre [ here in after referred to as NFAC ] by dated 29/11/2021 for the assessment year 2019-20 which in turn arise from the order passed under section 143(1) dated 26.06.2020.

2. The appellant has taken following grounds in this appeal;

"1. The learned CIT(A) and AO erred in law and on facts in making/confirming addition of Rs. 1,54,32,185/- u/s 36(1)(va) of Income Tax Act in respect of sum

*received from employees as contribution to Provident Fund/ESI to the extent not deposited in relevant Fund on or before the due date of deposit as mentioned in relevant Act despite the fact the amount was deposited in relevant fund before due date of filing of Income Tax Return under Income Tax Act, 1961.*

2. *The appellant craves leave to add, alter, amend or withdraw any ground or grounds of appeal on or before the date of hearing.”*

3. The related facts as culled out from the assessment records are that the during the processing of return of income, CPC Bangalore made disallowance of Rs.1,54,32,185/- u/s 36(1)(va) being the belated payments made towards ESI and PF subscriptions under the respective act and determined total income accordingly.

4. The assessee filed the appeal before the first appellate authority but without any success. Aggrieved from the order of the first appellate authority the assessee is in appeal before us.

5. The hearing of this appeal conducted after giving notice of hearing to both the parties. During the process of hearing the Id. AR appearing on behalf of the assessee has placed their written submission which are extracted in below;

Ground No.1

1. *The learned CIT-(A) and AO erred in law and on facts in making/ confirming addition of Rs. 1,54,32,185/- u/s 36(1)(va) of Income Tax Act in respect of sum received from employees as contribution to Provident Fund / ESI to the extent not deposited in relevant Fund on or before the due date of deposit as mentioned in relevant Act despite the fact that the amount was deposited in relevant fund before due date of filing of Income Tax Return under Income Tax Act, 1961.*

1.1. *In this connection It is submitted that the addition of Rs. 1,54,32,185/- u/s 36(1)(va) of Income Tax Act consists of following two amounts :-*

<u>Particulars</u> <u>Rs</u>	<u>Amount in</u>
a) <i>Typographically err of Due Date of Payment of PF as reported in Tax Audit Report by Tax Auditor</i>	1,22,41,554/-
b) <i>Other amount not deposited in relevant Fund on or before the due date of deposit as mentioned in relevant Act</i>	<u>31,90,631/-</u>
	<u>1,54,32,185/-</u>

1.2 *In the Tax Audit Report for the year under reference there was a Typographically err of year in Due Date of Payment of PF/ESI. It is submitted that in the following cases the year of Due date of deposit was inadvertently mentioned as 2017 instead of 2018. Similarly, the year 2018 has been inadvertently mentioned instead of 2019.*

<i>Nature of Fund</i>	<i>Amount (in Rs.)</i>	<i>Due date of deposit (As per Tax Audit Report)</i>	<i>Actual Date of Deposit</i>
<i>Provident Fund</i>	<i>14,73,211.00</i>	<i>15-05-2017</i>	<i>15-05-2018</i>
<i>Provident Fund</i>	<i>11,65,724.00</i>	<i>15-06-2017</i>	<i>14-06-2018</i>
<i>Provident Fund</i>	<i>7,87,829.00</i>	<i>15-07-2017</i>	<i>15-07-2018</i>
<i>Provident Fund</i>	<i>11,09,080.00</i>	<i>15-08-2017</i>	<i>03-08-2018</i>
<i>Provident Fund</i>	<i>7,80,350.00</i>	<i>15-09-2017</i>	<i>06-09-2018</i>
<i>Provident Fund</i>	<i>8,13,021.00</i>	<i>15-10-2017</i>	<i>12-10-2018</i>
<i>Provident Fund</i>	<i>11,77,688.00</i>	<i>15-11-2017</i>	<i>05-11-2018</i>
<i>Provident Fund</i>	<i>6,39,299.00</i>	<i>15-12-2017</i>	<i>12-12-2018</i>
<i>Provident Fund</i>	<i>7,84,403.00</i>	<i>15-01-2018</i>	<i>11-01-2019</i>

*Kindly direct the learned AO to allow the amount of Rs. 1,22,41,554/- deposited timely.*

2. *Further The learned AO made addition of Rs. 31,90,631/- u/s 36(1)(va) of the Income Tax Act, 1961 in respect of sum received from employees as contribution to Provident Fund/Employees State Insurance which was deposited beyond the due date stipulated under Provident Fund Act or Employees State Insurance Act.*

We give below the details of late deposit of employee contribution to PF/ESI as reported at S. No. 20b of the Tax Audit Report for the Year under reference:-

A Late Deposit of Employees PF/ESI

<i>Nature of Fund</i>	<i>Amount (in Rs.)</i>	<i>Due date of deposit (As per Tax Audit Report)</i>	<i>Actual Date of Deposit</i>
<i>Provident Fund</i>	<i>5,05,682.00</i>	<i>15-05-2018</i>	<i>16-05-2018</i>
<i>Provident Fund</i>	<i>5,57,585.00</i>	<i>15-07-2018</i>	<i>16-07-2018</i>
<i>Provident Fund</i>	<i>4,42,095.00</i>	<i>15-07-2018</i>	<i>16-07-2018</i>
<i>Provident Fund</i>	<i>4,48,920.00</i>	<i>15-08-2018</i>	<i>16-08-2018</i>
<i>Provident Fund</i>	<i>5,80,811.00</i>	<i>15-06-2018</i>	<i>16-06-2018</i>
<i>Provident Fund</i>	<i>6,05,311.00</i>	<i>15-04-2019</i>	<i>30-04-2019</i>
<i>Provident Fund</i>	<i>45,949.00</i>	<i>15-04-2019</i>	<i>12-05-2019</i>
<i>ESI</i>	<i>29.00</i>	<i>15-04-2019</i>	<i>12-05-2019</i>
<i>ESI</i>	<i>992.00</i>	<i>15-05-2018</i>	<i>16-05-2018</i>
<i>ESI</i>	<i>782.00</i>	<i>15-12-2018</i>	<i>18-12-2018</i>
<i>ESI</i>	<i>2,475.00</i>	<i>15-09-2018</i>	<i>19-09-2018</i>
<i>Total</i>	<i>31,90,631.00</i>		

2.1 In this connection It is submitted that no disallowance of employees contribution towards PF/ESI can be made under section 43B or under section 36(1)(va) of the Income Tax Act if the payments were made before due date of filing of Income Tax Return applicable to the assessee. We place reliance on following judgements:-

*CIT Vs. Aimi Ltd.(321ITR508)(Delhi HC)*

*CIT Vs. P.M. Electronics (313ITR161)(Delhi HC)*

*CIT Vs. ANZ Information Technology Pvt. Ltd. (318ITR123)(Karnataka HC)*

*CIT Vs. SBBJ (2014)) (363ITR 70) (Rajasthan HC)*

*CIT Vs. JVVNL (2014)) (363ITR 70) (Rajasthan HC)*

*CIT Vs. JVVNL (2014)) (363ITR307) (Rajasthan HC)*

2.2 Further in the case of *CIT v. Rajasthan State Beverages Corporation Ltd. (2017) 84 taxmann.com 185 (SC) /(2017)/ 250 Taxman 0016* enclosed at Annexure3 the Hon'ble Supreme Court dismissed SLP filed by Department to appeal against the judgment of Hon'ble Rajasthan High Court in *CIT v.*

*Rajasthan State Beverages Corporation Limited. (ITA No. 150 of 2016, dt. 8-6-2016), whereby the High court held that no part of PF/ESI Contribution, if payment was remitted beyond due date prescribed under the relevant Act but before due date of filing of return, could be disallowed under section 43B or under section 36(1)(va), whether it was employees contribution or employers contribution.. Held: The Supreme Court dismissed SLP.*

2.3 Further the departmental appeal in assessee's own case on this ground has also been rejected by the Hon'ble Income Tax Appellate Tribunal, Jaipur Bench, Jaipur in Assessment Year 2006-07 to 2014-15 and 2016-17. We enclose herewith at Annexure 4 a Copy of the order dated 16-03-2020 of Hon'ble Income Tax Appellate Tribunal for Assessment Year 2016-17 for your ready reference. In this connection Para No.6 on Page No.6 of the Order of Hon'ble ITAT, Jaipur Bench may be perused.

2.4 Further It is submitted that there was an amendment w.e.f Asstt Year 2021-2022 in Section 36(1)(va) of the Income Tax act, 1961. The relevant Assessment Year under appeal is 2019-2020 and this amendment in Section 36(1)(va) of the Income Tax act, 1961 is applicable w.e.f Asstt Year 2021-2022.

2.5 Similar view has been taken by the ITAT Hyderabad 'SMC' Bench in ITA No. 644/Hyd./2020 for the AY 2019-20 in the case of Salzgitter Hydraulics Private Ltd, Hyderabad vs ITO vide order dt 15.6.2021. The relevant findings given in para 2 of the said order read 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.

2.6. Recently the Hon'ble Jaipur Tribunal has decided in the case of Harish Clays similar and identical issue vide Order dated 01-12-2021 passed in ITA No : 154/JP/2021 for the Asstt Year 2018-2019. We enclose herewith at Annexure 5 a copy of order Dated 01-12-2021 of Jaipur Tribunal for your ready reference. In this connection Para No.8 of Page No.9 of the Order may be perused. We reproduce below the Para No.8 of Page No.9 of the said Order Dated 01-12-2021 :-

*“ 8. Since the facts involved in the present case are identical to the facts involved in the case of Mohangarh Engineers and Construction Company Vs. DCIT (supra) and in the case of Bikaner Ceramics Private Limited, Bikaner Vs. ADIT, CPC, Bangaluru (supra). So respectfully following the aforesaid referred to order, the disallowances sustained by the Ld. CIT(A) are deleted. “*

2.7. We, therefore, request your Honour to very kindly direct the learned AO to allow the amount of Rs.31,90,631/- u/s 36(1) (va) of the Income Tax Act,1961 in respect of sum received from employees as contribution to Provident Fund/ESI which was deposited beyond the due date stipulated under Provident Fund Act/ESI Act but before due date of filing of Income tax return applicable to assessee.

2. Ground No. 2

*General ground.”*

6. The Id. AR of the assessee submitted that there is an error in tax audit report while mentioning the date. In this regard the Id. AR of the assessee filed a letter from the tax auditor wherein it was clarified there is inadvertent error while mentioning the date. For this Id. AR of the assessee filed the related challan and ledger account from the records of the assessee. Summarily the Id. AR of the assessee submitted that out of the total disallowance of Rs. 1,54,32,185/-, Rs. 1,22,41,554/- is disallowed by CPC which is in fact at all not disallowable on account of error in mentioning the date and the balance amount of Rs. 31,90,631/- is not disallowable considering the decision of the jurisdictional high court decision in the assessee's own case and the SLP of the department is dismissed by the

supreme court. In addition to the above Id. AR of the assessee submitted that there was an amendment w.e.f assessment year 2021-2022 in Section 36(1)(va) of the Income Tax act,1961. The relevant Assessment Year under appeal is 2019-2020 and this amendment in Section 36(1)(va) of the Income Tax act,1961 is applicable w.e.f Assessment Year 2021-2022. Since, the Id AR and DR both quoted the amendment made in Finance Act, 2021, it is worthwhile to record the extract here in below 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. Subclause (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 subsection 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.*

7. On this issue of disallowance Id. AR of the assessee also relied upon the judgment of this co ordinate bench in the case of Harish Clays in ITA No. 154/JP/2021 dated 01.12.22021 where in the disallowance was deleted not only that the jurisdiction High Court in the case of the assessee the amount is not disallowable.

8. Since, the CPC disallowed the figure based on the Tax Auditor's Report and Id. AR filed clarification that there is an error in the report. Since this contention requires verification, with the date of payment.

9. Per contra Id. DR in all fairness accepted the legal decision in the assessee's own case but requested that the figure of payment needs verification as this has been clarified by the assessee now and therefore, requested to remand back the issue for verification of payment date to the file of the AO.

10. The Id. AR accepted the plea of the DR that for this limited issue of correction in date agreed that let it be verified by the AO but the substantiate question that is decided if the assessee has paid the amount, which is outstanding at the year end, paid before the due date of filling the return of income the disallowance is not required to be made by the AO in this set-a-side proceeding, which the DR has also agreed. With these observations the **Ground no. 1 raised by the assessee is allowed.** Ground no. 2 is general in nature does not require any adjudication.

11. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 30/06/2022.

Sd/-

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

Sd/-

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

जयपुर / Jaipur

दिनांक / Dated:- 30/06/2022

\*Ganesh Kr.

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

1. The Appellant- Rajasthan State Ganganagar Sugar Mills Limited, Jaipur
2. प्रत्यर्थी / The Respondent- ACIT/DCIT Circle-06, 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. 37/JP/2022)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar