

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE MS.MADHUMITA ROY, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.167/Ind/2021
Assessment Year: 2019-20

Shri Sunil Gurjar Dhar	Vs.	ADIT, CPC Bangaluru
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AKSPG 2665 F		
Assessee by	Shri S.N. Agrawal, AR	
Revenue by	Shri Aditya Shukla, Sr. DR	
Date of Hearing	22.06.2022	
Date of Pronouncement	29.06.2022	

O R D E R

PER B.M. BIYANI, A.M.:

THIS APPEAL:

1. This appeal filed by the assessee is directed against the order dated 28.07.2021 of learned Commissioner of Income-Tax (Appeals)-National Faceless Appeal Centre [**Ld. CIT(A)**] in Appeal No. CIT(A), Indore-1/10029/2020-21, which in turn arises out of the intimation of assessment dated 26.02.2020 passed by the learned CPC, Bangalore [**Ld. AO**] u/s 143(1) of the Income-tax Act, 1961 [**the Act**] for the Assessment-Year 2019-20.

BACKGROUND:

2. The return of income filed by the assessee was processed by the Ld. AO u/s 143(1) of the Act after making a disallowance of Rs. 5,19,696/- on account of delayed payment of employees' contributions to Provident Fund/Employees State Insurance ("PF/ESI"). Being aggrieved by the disallowance so made by Ld. AO, the assessee filed appeal to Ld. CIT(A). However, the Ld. CIT(A) confirmed the disallowance and dismissed the appeal of the assessee. Again the order of Ld. CIT(A), the assessee has preferred this appeal and now before us.

GROUNDS:

3. The assessee has raised following Grounds:

"1. That on the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in maintaining the addition of Rs.5,19,696/- made by the Ld. ADIT, CPC, Bengaluru in the intimation order passed under section 143(1) of the Act on account of delay in depositing Employees Contribution towards PF and ESIC under section 36(1)(va) of the Act even when the said issue is highly debatable and is therefore outside the purview of the provisions of section 143(1) of the Act.

2. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in maintain the addition of Rs.5,19,696/- made by the Ld. ADIT, CPC, Bengaluru in the intimation order passed under section 143(1) of the Act on account of delay in depositing Employees' Contribution towards PF and ESIC under section 2(24)(x) r.w.s. 36(1)(va) of the Act without properly appreciating facts of the case and submission made before him.

3. That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in maintaining the addition of Rs.5,19,696/- made by the Ld. ADIT, CPC, Bengaluru in the intimation order passed under section 143(1) of the Act on account of delay in depositing Employees Contribution towards PF and ESIC even when the said amount was deposited before due date of filing of Income Tax return under section 139(1) of the Act and henceforth, no disallowance is called for as per section 43B r.w.s. 36(1)(va) of the Act.

4. That on the facts and in the circumstances of the case and in law, the Ld. ADIT, CPC Bengaluru grossly erred in charging interest under section 234 A of the Act of Rs.1,247/- even when no interest was chargeable under this section since the assessee duly filed his income

tax return within the extended due date for filing the income tax return as per section 139(1) of the Act.

5. That on the facts and in the circumstances of the case and in law, the Ld. ADIT, CPC Bengaluru erred in charging interest under section 234B and section 234C of the Act of Rs.13,717/- and Rs.6,298/- respectively even when such amount of interest as charged was arbitrary, excessive and not chargeable as per the provisions of the Act.

6. The appellant reserves the right to add, alter and modify the grounds of appeal as taken by him.”

GROUND No. 1 to 3:

4. The controversy involved in these Grounds is related to the disallowance of Rs. 5,19,696/- u/s 36(1)(va) of the Act in respect of delayed payment of employee's contributions to PF / ESI.

5. The Ld. AR submitted that the Ld. AO has made the disallowance without appreciating that though the assessee had not deposited the employees' contributions to PF / ESI upto the due dates prescribed under the PF / ESI laws, yet the assessee had deposited the same to the respective funds within the time permitted u/s 43B of the Act i.e. upto the due date u/s 139(1) for filing the return of income and hence no disallowance is attracted in view of numerous decisions of Hon'ble High Courts favouring the assessee. Some of the decisions relied upon by Ld. AR are mentioned below:

- (a) Hon'ble Delhi High Court in AIMIL Limited (2010) 321 ITR 508.
- (b) Hon'ble Allahabad High Court in Sagun Foundary Pvt. Ltd. Vs. CIT 145 DTR 265
- (c) Hon'ble Rajasthan High Court in CIT Vs. Rajasthan State Beverages Corporation Ltd. / Rajasthan State Ganganagar Sugar Mill (2017) 250 Taxman 32

Ld. AR further submitted that the issue is also squarely covered in favour of the assessee by several decisions of this very Bench of ITAT.

Ld. AR also submitted that even otherwise the impugned disallowance is debatable in nature and outside the scope of section 143(1)(iv) of the Act invoked by the Ld. AO and therefore also not sustainable, as held by **ITAT, Visakhapatnam Bench in M/s. S.V. Engineering Constructions India (P) Limited vs. DCIT (ITA No.130/Viz/2021) order dated 23.09.2021.**

With these submissions, the Ld. AR prayed that the disallowance made by Ld. AO is illegal and deserves to be deleted.

6. Per contra, the Ld. DR relied upon the orders of lower authorities. He further submitted that in following decisions it has been held that once the employees' contributions are paid after the due dates under PF / ESI laws, disallowance is attracted even if the assessee has made payments within the time allowed u/s 43B i.e. upto the due date u/s 139(1) for filing of return:

- (a) Hon'ble Gujarat High Court in CIT vs. Gujarat State Road Transport Corporation, (2014) 41 taxmann.com 100
- (b) Hon'ble Gujarat High Court in Pr. CIT vs. M/s Suzlon Energy Ltd. (2020) 115 taxmann.com 340
- (c) Hon'ble Kerala High Court in CIT Vs. Merchem Ltd. (2015) 378 ITR 443

Ld. DR further submitted that the Finance Act, 2021 has also inserted Explanation 2 to Section 36(1)(va) and Explanation 5 to Section 43B as under:

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.”

Ld. DR submitted that with the introduction of these amendments, it is very much clear that the due dates specified in section 43B shall not apply. According to the Ld. DR, the impact would be such that if the employees' contributions are paid after the due dates under the PF / ESI laws, disallowance would happen. The Ld. DR further submitted that the words “... ***shall be deemed never to have been applied*** ...” appearing in these newly inserted Explanations clearly demonstrate that the amendments, though inserted from 01.04.2021, are clarificatory in nature and hence they would apply retrospectively. Therefore, according to the Ld. DR the amendments are applicable to the assessment-year involved in the present appeal too and hence the disallowance made by Ld. AO is very much in accordance with the law.

With these submissions, the Ld. DR argued that the Ld. AO has rightly disallowed the employees contributions to PF / ESI not paid by the assessee upto due dates under the PF / ESI laws and therefore the disallowance must be upheld.

7. We have considered the rival contentions and submission of both sides and also perused the relevant materials available on record. Before proceeding further we would like to mention that the assessee has deposited the impugned contributions of Rs. 5,19,696/- to the PF / ESI, though after due date under PF / ESI law but within the time allowed u/s 43B i.e. upto the due date u/s 139(1) for filing return of income and there is no dispute on this point by revenue.

8. Regarding the decisions relied upon by both sides, we observe that there are divergent views of Hon'ble High Courts on the allowability of employees' contributions to PF / ESI paid after due dates under the PF /

ESI laws but within the time allowed u/s 43B. While the Ld. AR has relied upon various decisions favouring to the assessee, the Ld. DR has quoted the decisions against the assessee. We are also informed by both sides that there is no decision of Hon'ble jurisdictional High Court of Madhya Pradesh on this issue. In this situation, we are mindful of the decision in **Vegetable Products Ltd. 88 ITR 192** wherein the Hon'ble Supreme Court has held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. In view of this, the decisions favouring the assessee shall get preference over the decisions against the assessee. Being so we hold that the employees contributions paid after due date under PF / ESI law but within the time allowed u/s 43B, are allowable as deduction.

9. Regarding the amendments made through Finance Act, 2021, it is specifically mentioned by the legislature that the amendments are effective from 01.04.2021. Further the **Memorandum explaining the Provisions in the Finance Bill, 2021** clearly prescribes thus:

“These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.”

Thus, the legislature itself has categorically stated that the amendments shall apply to *the assessment year 2021-22 and subsequent assessment years*. Therefore these amendments are not applicable to the assessment-years preceding the assessment-year 2021-22 i.e. not applicable upto assessment-year 2020-21. This has also been held so in several decisions of ITAT Benches including following:

- (a) ITAT Kolkata in Harendra Nath Biswas Vs. DCIT, ITA No. 186/Kol/2021 for A.Y. 2019-20, order dated 16.07.2021
- (b) ITAT Hyderabad in Salzgitter Hydraulics Private Limited Vs. ITO, ITA No. 644/Hyd/2020 for A.Y. 2019-20, order dated 15.06.2021

(c) ITAT Jodhpur in Akbar Mohammad Vs. ACIT, CPC, Bangalore ITA No. 108 &109 / Jodh / 2021 for A.Y. 2018-19 and 2019-20, order dated 31.01.2022

10. It is also noteworthy that this Bench has recently decided several appeals, a few mentioned hereunder, wherein the similar disallowance made by Ld. AO has been deleted:

(a) ITA No. 175 / Ind / 2021 Shri Virendra Kumar Tiwari Vs. CIT(A), NFAC, order dated 30.03.2022

(b) ITA No. 184 / Ind / 2021 M/s Prestige Fabricators Pvt. Ltd. Vs. ACIT-4(1), Indore order dated 30.03.2022

(c) ITA No. 223 / Ind / 2021 Kamal Kumar Jain Vs. DCIT, CPC, Bangalore, order dated 30.03.2022

11. In view of foregoing discussion, we observe that employees' contributions to PF / ESI paid after due date under PF / ESI laws but within the time allowed u/s 43B i.e. upto the due date u/s 139(1) for filing of return is allowable as deduction in computing taxable income of business and the assessee had rightly claimed the same. Therefore the Ld. AO as well as Ld. CIT(A) were not justified in disallowing the claim of the assessee. We therefore delete the disallowance made by Ld. AO and confirmed by Ld. CIT(A). Accordingly, Ground No. 1 to 3 of assessee are allowed.

GROUND No. 4 and 5:

12. Ground No. 4 and 5 relate to the levy of interest. During hearing, both sides have not made any submission on these Grounds. Further the levy of interest is consequential. Hence these Grounds do not require any adjudication by us.

GROUND No. 6:

13. Ground No. 6 is general in nature and does not require any specific adjudication.

DISPOSITION:

14. In the result, the appeal of assessee is allowed.

Order pronounced as per Rule 34 of I.T.A.T. Rules 1963 on 29.06. 2022.

Sd/-
(MADHUMITA ROY)
Judicial Member

Sd/-
(B.M. BIYANI)
Accountant Member

Indore, _29.06. 2022

Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore