

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 1917/Mum/2021 (A.Y. 2018-19)

Span Intermediates Pvt. Ltd.
6th Floor, Jash Chambers,
Mustafa Building,
Sir Phiroz Shah Mehta Road,
Mumbai-400001.

PAN: AABCS6103Q

..... Appellant

Vs.

ITO, Ward-2(3)(1)
Aayakar Bhavan, M.K. Road,
Mumbai-400020.

..... Respondent

Appellant by : Sh. Sanjiv M. Shah
Respondent by : Sh. Pramod Nikalje
Date of hearing : 16/06/2022
Date of pronouncement : 12/09/2022

ORDER

PER GAGAN GOYAL, A.M:

This appeal by the assessee is directed against the order of National Faceless Appeal Centre, Delhi [hereinafter referred to as ['NFAC'] dated 26.08.2021 passed under section 250 of the Income Tax Act, 1961 (hereinafter referred to as ['the Act'] for the Assessment Year (AY) 2018-19. The assessee has raised the following grounds of appeal:

“The grounds hereunder are independent and without prejudice to one another

1. *Ground No.1: On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) (hereinafter to be referred as "learned CIT(A)") has erred in confirming the disallowance of employer's contribution to provident fund ESIC, etc amounting to Rs. 16.77 419/- made by the learned Assessing Officer ("AO") holding the same to be in excess of the limits prescribed under section 36(1)(iv) of the IT Act read with Rule 87 of the IT Rules. He ought not to have confirmed the disallowance*
2. *Ground No. 2: Without prejudice to Ground No. 1, on the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of Rs 16.77,419/- under section 438 without giving an opportunity to the appellant to explain that no disallowance could be made u/s 43B of the Act. He ought to have given the opportunity to the appellant for providing the explanation.*
 - 2.1 *Ground No. 2.1: On the facts and in the circumstances of the case and in law, the learned CIT(A) has not considered the submissions / explanation provided by the appellant He ought to have considered the submission / explanation made by the appellant to the learned AO.*
3. *Ground No.3: On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not directing the learned AO to allow short credit for TDS to the extent of Rs 39,477 He ought to have directed the learned AO.*
4. *Ground No.4: On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not directing the learned AO to allow interest as per Sec. 244A of the Act. He ought to have directed the learned AO.”*

2. Brief facts of the case are that the assessee-company has filed its return of income u/s 139(1) on 14-03-2019 declaring income at Rs. Nil under the normal provisions of the I.T. Act, 1961. The case was selected for complete scrutiny, assessment under the e-assessment scheme, 2019 on the following issues:

(i) Excess Contribution to Provident Fund, Superannuation Fund or Gratuity Fund. We are reproducing the order of AO in toto to understand the issue under consideration, as the same is relevant to decide the matter:-

“During the year under consideration i.e. AY 2018-19, the assessee derived income from business from manufacturing of chemical products. The assessee filed Return (ITR-6) for AY 2018-19 on 27.06.2019 declaring total income of Rs. Nil which was processed on the same.

The case was selected under scrutiny through CASS for the reason "Excess Contribution to Provident Fund, Superannuation Fund or Gratuity Fund" during the year under consideration. Subsequently, Notice u/s 143(2) of the Income Tax Act, 1961 was issued and duly served upon the assessee on 22.09.2019.

Thereafter, notices u/s 142(1) of the Income Tax Act, 1901 dated 15.12.2020 and 10.03.2021 calling for details required to complete the assessment were issued and duly served upon the assessee. The assessment is completed as under after duly examining the documents and records as furnished by the assessee.

During the course of assessment proceedings, it was noticed from the records/information available that the during the year under consideration, the assessee had claimed Rs. 36,09,756/- as payment for contribution to recognised provident fund against the salaries and wages payments of Rs. 71,58,807/- claimed during the year.

While as per the section 36(1)(iv) of the Income Tax Act, 1961 read with rules 87 of the Income Tax Rules, 1962, any contribution above 27% of the total salary is not allowable as per above said section and rule. The said section and rules are also mentioned here as under:-

"Section-36.

36 (1) the deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 -

(iv) any sum paid by the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognising the provident fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable

under the head "Salaries" or to the contributions or to the number of members of the fund;"

"Rule-87

Ordinary annual contributions.

87. The ordinary annual contribution by the employer to a fund in respect of any particular employee shall not exceed [twenty-seven] per cent of his salary for each year as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year."

In view of the above, it is clear that any contribution above 27% of the total salary paid during the year would not be allowed as business expenditure for the year.

In view of the same, the total contribution to recognised provident fund (above 27%) of total salary of Rs. 71,56,807/- for which expenses claimed to Rs. 36,09,756/- which is almost 50.43% of the total salary for the year. While as per the section 36(1)(iv) r.w.s. 87 the excess contribution above 27% of the total salary could not be allowed.

In view of the same, the excess contribution of Rs. 16,77,419/- (36,09,756/ minus 27% of 71,56,807/-) claimed by the assessee as business expenses is disallowed and added back to the total income for the year u/s 36(1)(iv) of the Income Tax Act, 1961 read with rule 87 of the Income Tax Rules, 1962.

Addition: Rs. 16, 77,419/-

Accordingly assessment is completed as under:-

<i>Total Returned income:-</i>	<i>Rs. Nil</i>
<i>Addition u/s. 36(1)(iv)</i>	<i>Rs. 16,77,419/-</i>
<i>Less-Business Loss:</i>	<i>Rs. 1, 73,769/-</i>
<i>Total Assessed income:</i>	<i>Rs. 15, 03,650/-</i>

3. **Being aggrieved with the above assessment order, assessee preferred an appeal before National Faceless Appeal Centre (NFAC), Delhi. Here it is pertinent to mention that Ld. CIT (A)'s order is absurd in nature, as he has not gone through the orders of AO, submission of the assessee and the issue**

involved in appeal. Issue involved here is with reference to Rule 87 of the I.T. Rules, 1962 about the limit prescribed for maximum contribution which can be done by an assessee towards Provident Fund, Superannuation Fund, etc.

4. Ld. CIT (A) while dealing with this issue simply cut-paste the order relevant to allowability of contribution with reference to section 36(1)(va) and 43B read with section 2(24)(x) of the Act. Consequently, he totally ignored the contents of the assessment order, issue involved, submissions of the assessee and law applicable. Here also because of misconception of Ld. CIT (A), assessee's appeal was rejected and in turn assessee approached ITAT.

5. We have gone through the order of AO, misconceived order of Ld. CIT (A) and submissions of assessee. We have gone through the Paper Book filed by the assessee dated 14.06.2022. To decide the matter, we need to take cognizance of Part-XII, Recognized Provident Funds, Part-XIII, Approved Superannuation Funds and Part-XIV Gratuity Funds.

6. Rule-75 deals with limit for contribution in Recognized Provident Funds, Rule-87 deals with Ordinary Annual Contributions to Approved Superannuation Funds and Rule-103 deals with Ordinary Annual Contributions to Gratuity Funds.

7. Limits for contributions as per Part-XII, Recognized Provident Funds.

"75. (1) where an employee of a company owns shares in the company with a voting power exceeding ten per cent of the whole of such power, the sum of the contributions of the employee and employer to the recognized provident fund maintained by the company shall not exceed Rs. 250 in any month.

(2) For the purpose of clause (a) of sub-rule (4) of rule 5 of Part A of the Fourth Schedule the employer's aggregate contribution in any year, including the normal contribution, to the individual account of any one employee whose salary does not exceed five hundred rupees per mensem shall not exceed double the amount of the contribution of the employee in that year.

(3) The amount of the periodical bonuses and other contributions of a contingent nature which may be credited by an employer in any year under clause (b) of sub-rule (4) of rule 5 of Part A of the Fourth Schedule to the individual account of any one employee shall not exceed the amount of the contributions of the employee in that year:

Provided, however, that the above limit shall not apply to bonus contributions made by an employer under an award by an Industrial Tribunal or under an order of a Court or under an agreement with the employees' union(s) to the individual accounts of employees whose salary does not exceed Rs. 500 per month.

[1997] 93 TAXMAN 476 (AP) Commissioner of Income-tax v. Indocean Engineer (P.) Ltd.

Section 36(1)(iv) of the Income-tax Act, 1961 - Provident fund - Contributions towards recognised provident fund - Assessment year 1982-83 - Whether contributions by assessee-company directly to Provident Fund Scheme under Employees' Provident Fund Act, 1952, maintained by Provident Fund Commissioner could be allowed and rule 75(1) was not applicable to restrict deduction in such a case - Held, yes

FACTS

For the assessment years 1982-83 to 1984-85, the assessee claimed deduction in respect of the company's contribution at the rate of Rs. 3,000 per each of the four directors. The ITO, following rule 75 of the Income-tax Rules, disallowed Rs. 12,000 on the ground that the total contribution both from the employee and the employer should not exceed Rs. 250 per month. On second appeal, the Tribunal held that rule 75 was not attracted as the contributions were not made to the provident fund maintained by the company, but the remittances were made directly to the Provident Fund Scheme under the Employees' Provident Funds Act, 1952, maintained by the PFC.

8. Part-XII, Part-XIII and Part-XIV of the I.T. Rules, 1962 deals with social security contributions made by employer for the benefit of its employees. Each part deals with different type of social security payments and have their own maximum limits prescribed for contribution by employer. Part-XII dealing with Employer Contribution to Provident Fund does not have any limit. Limit of 27% as prescribed in Rule 87 is applicable only in case of contribution to Superannuation Fund (minus contributions made to Provident Fund).

9. We found force in the contentions of the assessee and considering the legal position enumerated above, we are of the view that contributions of the assessee to the Provident Fund may be even exceeding 27% is allowable. Ground No.1 & 2 of the assessee are allowed.

Ordinary annual contributions as per Part-XIII, Approved Superannuation Funds.

87. The ordinary annual contribution by the employer to a fund in respect of any particular employee shall not exceed [twenty-seven] per cent of his salary for each year as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year.

10. The limit prescribed in Rule 87, having reference of the word 'Provident Fund' is just for sake of fulfilment of conditions laid down with reference to maximum limit of contribution to be made under Superannuation Fund. It's nothing to do with Rule 75 applicable to contributions to be made under Provident Fund.

Ordinary annual contributions as per Part-XIV Gratuity Funds.

103. The ordinary annual contribution by the employer to a fund shall be made on a reasonable basis as may be approved by the [Chief Commissioner or Commissioner] having regard to the length of service of each employee concerned so, however, that such contribution shall not exceed $8\frac{1}{3}$ per cent of the salary of each employee during each year."

[1994] 207ITR288 (KER.) Commissioner of Income-tax v. Malayala Manorama Co. Ltd.

"Section 40A (7) of the Income-tax Act, 1961 read with rule 103 of the Income-tax Rules, 1962 - Business disallowance-gratuity - Assessment year 1975-76 - Whether applicability of rule 103 will arise only when deduction has to be allowed in conformity with section 36(1) (v) but after introduction of section 40A (7) deduction has to be worked out solely under section 40A (7) - Held, yes

Even on the merits, the applicability of rule 103 would arise only when deduction had to be allowed in conformity with section 36(1) (v). After the introduction of section 40A (7), rule 103 would have no application. The claim for deduction has to be worked out solely under section 40A (7) which came into effect from 1-4-

1973, by the retrospective effect given to Act 25 of 1975. The department had no case that the assessee had not satisfied the conditions envisaged by sub-clause (ii) of clause (b) of sub-section (7) of section 40A. The only question was what was the 'admissible amount' as defined in Explanation 1 and the Tribunal held that it would be an amount which did not exceed an amount calculated at the rate of 8¹/₃ per cent of the salary of each employee. In this perspective, the Tribunal held that it would be incorrect to reduce the quantum of the 'admissible amount' as defined in Explanation 1 by resorting to rule 103. The said Explanation does not make any reference to the limitation imposed by rule 103. The Tribunal was justified in holding so. So, even on the merits, the plea of the assessee was well founded, as held by the Tribunal."

11. Ground No.3, AO is directed to allow showed credit of TDS to the extent of Rs. 39,477/- after taking certified copies of 26AS and Form-16A by the assessee. In this regard, we considered the view of the ITAT in the case of Kirtida Rameshchandra Chandarana in ITA No. 122/Mum/2022 (A.Y. 2013-14). In the result, Ground No.3 of the assessee is allowed subject to submission of certified documents mentioned above.

12. Ground No.4, no specific adjudication is required as the position of law is very clear and established. This issue is consequential in nature. AO is directed to calculate interest under section 244A of the Act, keeping in view the findings above. In the result, Ground No.4 is allowed.

13. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 12th day of September, 2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 12/09/2022
SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai