

आयकर अपीलीय अधिकरण न्यायपीठ नागपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH : NAGPUR

BEFORE S.S.GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकरअपीलसं. / ITA No.233/NAG/2022
निर्धारणवर्ष / Assessment Year : 2019-20

AMA Extrusion Pvt. Ltd., Maimoon Chambers, Maharashtra – 440 002.	Vs	The Assistant Director of Income Tax, Bengaluru.
PAN: AAECA 5587 F		
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Rajesh Loya – AR
Revenue by	Shri G.J.Ninawe- JCIT
Date of hearing	16/11/2022
Date of pronouncement	07/12/2022

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This is an appeal filed by the Assessee against the order of Id.Commissioner of Income Tax(Appeals)[NFAC], Delhi dated 18.07.2022 emanating from the order under section 154 of the Act, 1961 passed by the Asst. Director Income Tax, CPC, Bangalore. The assessee has raised the following grounds of appeal:

“(1) That the Rectification Order of the learned Asst. Director of Income Tax, CPC, Bangalore passed u/s. 154 is bad in law and wrong on facts and the learned CIT(A) erred in confirming the same.

(2) That the learned AO erred in law and on facts in making addition of Rs.94,066/- on account of employees contribution to PF/ESIC Fund paid after the due date by invoking provisions of section 36(l)(va) r.w.s. 2(24)(x) and the learned CIT(A) erred in confirming the action of the

AO. On the facts and circumstances of the case, the payment has been made before due date of filing return of income u/s 139 and thus allowable. The action of the authorities is therefore highly unjustified and illegal

(3) That the learned CIT(A) erred in law and on facts in confirming the action of learned AO by accepting the disallowance made by CPC merely through electronic processing u/s 143(1). On the facts and circumstances of the case, the disallowance on account of appellant's failure to pay the employee's contribution to Provident Fund/ ESIC within the prescribed due dates as per section 36(l)(va) is outside the purview and scope of adjustments as envisaged u/s 143(l)(a)(iv). The action of the learned authorities is illegal.

(4) That the learned CIT(A) erred in law and on facts in holding that the employee's contribution to Provident Fund and ESIC are governed by the provisions of section 36(1)(va). On the facts and circumstances of the case, following the principal of Judicial Discipline, the decision of Jurisdictional High Court of Bombay is binding on its subordinate authorities and thus the issue is governed by section 43B and the action of the learned CIT(A) is illegal.

(5) That for any other ground with kind permission of your honour at the time of hearing of appeal."

2. The only issue for our consideration is disallowance of Rs.94,066/- on account of Employees Contribution to Provident Fund and ESIC which was paid beyond the due dates mentioned in the relevant statute. The Ground No.1 to 4 are related to the same issue.

3. The ld.Authorised Representative(ld.AR) of the assessee submitted as under:

BEFORE THE HONOURABLE INCOME TAX APPELLATE TRIBUNAL,
NAGPUR BENCH (Virtual), NAGPUR.

Assessee : AMA Extrusion Pvt Ltd
Maimoon Chambers,
Gandhibag
Nagpur.

Asstt. Year : 2019-20

ITA No. : 233/Nag/2022 by Assessee

Hon'ble Sir,

RE : Gist of Submissions

Ground No. 1 : Rectification Order is bad in law and wrong on facts

(1) The AO cannot disallow expenditure u/s. 143(1)(a)(iv) where opinion in tax audit report is contrary to the view of jurisdictional HC. Further, the assessee is not obliged to follow the opinions formed by the Tax Auditor in the Report whereas the assessee has right to form its opinion regarding allowability of any expense based on the provisions of the Act and the judicial decisions of various courts.

We rely on the recent ruling by the ITAT Mumbai Bench in [2022] 137 taxmann.com 475 (Mumbai - Trib.) [27-04-2022] in case of Kalpesh Synthetics (P.) Ltd. v. Deputy Commissioner of Income-tax, CPC Bangaluru.

(2) A tax audit report is prepared by an independent professional who is a third party and his opinions cannot bind the auditee in any manner.

(3) The audit observations are seldom taken an accepted position by the auditee- even when the auditor is appointed by the auditee himself. The audit report requires reporting of a factual position rather than to express an opinion about legal implication of that position.

(4) The position of the auditor is treated so subservient to the assessee that the views expressed by the auditor are treated as a reflection of the stand of the assessee, and, on the other hand, the views of the auditor are treated as so sacrosanct that these views, by themselves, are taken as justification enough for a disallowance under the scheme of the Act.

(5) When the law enacted by the legislature has been construed in a particular manner by the Hon'ble jurisdictional High Court, it cannot be open to anyone in the jurisdiction of that Hon'ble High Court to read it in any other manner than as read by the Hon'ble jurisdictional High Court. The views expressed by the tax auditor, in such a situation, cannot be reason enough to disregard the binding views of the Hon'ble jurisdictional High Court.

(6) What a tax auditor states in his report are his opinion and his opinion cannot bind the auditee at all. It is not even an expression of opinion about the allowability of deduction or otherwise; it is just a factual report about the fact of payments and the fact of the due date as per the Explanation to Section 36(1)(va). This due date, however, has not been found to be decisive in the light of the law laid down by Hon'ble Courts above, and it cannot, therefore, be said that the reporting of payment beyond this due date in the tax audit report constituted "disallowance of expenditure indicated in the audit report but not taking into account in the computation of total income in the return" as is sine qua non for disallowance of Section 143(1)(a)(iv) and is "indicative" of the disallowance of expenditure in question.

(7) While preparing the tax audit report, the auditor is expected to report the information as per the provisions of the Act, and the tax auditor has done that, but that information ceases to be relevant because, in terms of the law laid down by Hon'ble Courts, which binds all of us as much as the enacted legislation does, the said disallowance does not come into play when the payment is made well before the due date of filing the income tax return under section 139(1).

Ground No. 2: Payment is made before due date as per section 43B and 36(1)(va)

(1) The "Due Date" is defined in Explanation 1 to section 36(1)(va), according to which, the due date means 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 thereunder.

(2) In accordance with r. 38 of the Employees Provident Fund Scheme, 1952, which prescribes the mode of payment of contribution, it is the duty of the employer to pay the contributions to the fund within 15 days of the close of every month. The term 'Month' has not been defined in the Act. In our opinion, the term 'month' referred to the month in which the salaries were paid, 15 days from the close of the month, which is the due date prescribed, will occur only in the succeeding month of each preceding month in which the salary is paid.

We have furnished the Paper Book containing ledger account of Wages and Salary Expenditure A/c. The payment of salary of particular month is made in the subsequent month and therefore the due date in such case shall be reckoned from the subsequent month only.

(3) We contend that condition that payment should be made "within 15 days from the close of each month" should be **reckoned from the month in which such contributions are received by the assessee from its employees** and not to the month in respect of which such contributions are received. There is support for this ambiguity from the provisions of section 36(2) of the Employees' Provident Fund Scheme, 1952, which dealt with the duties of the employer

Reading together ss. 36 and 38, it could be said that there is certain amount of ambiguity over the expression "15 days from the close of the month" and **in the case of ambiguity the benefit should be given to the taxpayer**. If this context is considered, the payments have been made within the due date and, therefore, no part of it can be disallowed.

We rely on following decisions

(i) Madras Radiators & Pressings Ltd Vs. DCIT [1996] 59 ITD 515 (Mad.)

(ii) Kanoi Paper & Industries Ltd Vs. ACIT [2002] 75 TTJ 448 (Cal.)

(4) Without prejudice to above contention, **section 10 of the General Clauses Act, 1897** will be applicable in the facts of the case. According to this section, where any act or proceeding is directed or allowed to be done or taken in any court or office on a certain day or within a prescribed period, then, if the court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the court or office is open. We draw your kind attention to the fact that **15th July, 2018 is Sunday and 15th August, 2018** is Independence Day. This aspect is not verified by the learned AO nor by the learned CIT(A) which is required to be examined in the peculiar facts of the case and in the interest of justice

Ground No. 3: Disallowance by CPC merely through electronic processing u/s 143(1)/154

(1) The purpose of section 143(1) is to reduce the revenue loss which arise due to clerical mistake or where there is no two opinion can be formed or where the adjustment can be made due to a mistake which occurred in the return of income in view of declaration made by the assessee in the tax audit

(2) In the case of disallowance u/s. 36(1)(va) which is made while processing the return u/s. 143(1), it cannot be said that there is clerical mistake in the computation of returned income as per income tax return filed electronically. Since the issue is debatable one, action of AO in making addition without giving any reason is against the cannon of the

natural justice, unjustified and illegal. The impugned adjustment in the course of processing of return under section 143(1) is vitiated in law.

(3) Under the electronic processing, the adjustment can only be made for the mistakes apparent or such disallowance which are duly settled and there is no dispute for it. The said adjustment made by CPC does not come under the purview of prima facie adjustment.

(4) Where there are divergent views of different High courts on an issue, no disallowance can even be proposed for the expenditure claimed as it will not fall within the purview of mistake apparent as there can conceivably two opinions. This is so held by the Hon'ble Supreme Court in the case of **Balram Vs. Volkart Brother 82 ITR 50 (SC)**.

(5) It has been held in the following case laws that disallowance of expenses claimed by assessee cannot be done by the AO merely on basis of disclosures in Tax Audit Report by way of adjustments u/s. 143(1)(a) (by an electronic processing in intimation) specially when in the tax audit report, the tax auditor never expresses his opinion for the disallowance of the said payment. But instead the AO must issue a notice u/s. 143(2) and conduct proceedings u/s. 143(3) to provide an adequate opportunity to the assessee to explain why such expenses are allowable :-

- (a) Priyanshu Chemicals Pvt. Ltd. vs. DCIT ITA No. 2350/Kol/2019 dated 19-2-2020.
- (b) Peerless General Finance & Investment Co. Ltd. vs. CIT (2010) 228 CTR 0072 (Calcutta)

We further rely on following case laws:

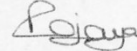
- (i) The **Hon'ble Bombay High Court** in the case of Khatau Junkar Ltd. v. K.S. Pathania, Dy. CIT [1992] 196 ITR 55 (Bom.)
- (ii) **Hon'ble Bombay High Court** in case of Bajaj Auto Finance Limited Vs. CIT [2018] 93 taxmann.com 63 (Bombay)
- (iii) Hon'ble Guahati High Court in the case of George Williamson (A) Ltd vs. CIT [2006] 286 ITR 533 (Gauhati)
- (iv) The Hon'ble Calcutta High Court in the case of Mintri Tea Co. (P) Ltd vs. CIT [2009] 223 CTR 241 (Calcutta)
- (v) The Hon'ble Calcutta High Court in case of Jagatdal Jute & Industries Ltd. v. CIT [2004] 266 ITR 587 (Cal.)

"..... It is apparent that for holding a prima facie finding out what is the due date and therefore, whether the contributions were really paid after the due dates. The documents available before the AO do not apparently disclose what were the due dates of the said contributions. Therefore, it does not appear that without holding further enquiry from the records, it was apparent on the face of it that the said contributions were paid after the due

dates. In such circumstances on the said allegation, the notice under s. 154, could not have been issued and the proceedings following such notice is apparently bad. The law relied on by learned counsel for the appellant in this connection also supports such view.

Further, in respect of payment of such contributions, the due date has to be ascertained and a finding has to be arrived at as to whether such due date is the one referred to under s. 139 of the Act or its due date under the relevant Act which provides for the payment of contributions and provident fund and employees' state insurance contributions. As apparently no opinion could be formed from the records available on the face of it for deciding such due date, the power under s. 154 could not have been exercised for rectification of the order earlier passed."

Signature.



Counsel for assessee

(CA Rajesh Loya)

4. The Id.Departmental Representaitve(ld.DR) for the Revenue relied on the order of the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. Vs. Commissioner of Income-tax-1.
5. We have heard both the parties and perused the records. The only issue for our consideration is disallowance of Rs.94,066/- on account of Employees Contribution to Provident Fund which was paid beyond the due dates mentioned in the relevant statute. All the four grounds are related to the same issue. It is an admitted fact that in the Audit Report it is mentioned that amount of Rs.94,066/- was paid beyond the due date mentioned in the respective statute. This amount is Employees Contribution to Provident Fund and ESIC.
6. However, the issue of delayed payment of Employee's Contribution of Provident Fund has been decided by the Hon'ble

Supreme Court. The issue of delayed payment of employee's contribution of Provident fund has been decided by Hon'ble SC in the case of **Checkmate Services (P.) Ltd. Vs. Commissioner of Income-tax-1** vide order dated October 12, 2022 as under :

Quote, " That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. " Unquote.

6.1 Thus, the Hon'ble Supreme Court has held that the Employee's Contribution towards Provident Fund has to be deposited before the due date mentioned in the respective statute. In this case it is an admitted position by the assessee in the Audit Report that the amount was not deposited before the due date mentioned in The Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Hence, the impugned amount has been rightly disallowed by the AO. Accordingly, the Grounds of appeal raised by the assessee are dismissed.

7. In the result, appeal of the Assessee is Dismissed.

Order pronounced in the open Court on 7th December, 2022.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 7th Dec, 2022/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, नागपुर बेंच,
नागपुर/ DR, ITAT, Bench, Nagpur.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.