

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH

**Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 49/Ahd/2019
Assessment Year 2015-16**

Shri Patel Mahendrabhai Aditbhai (HUF), Ahmedabad PAN: AAEHP0767R (Appellant)	Vs	The ITO, Ward-7(2)(3), Ahmedabad (Respondent)
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**Assessee by: Written Submission
Revenue by: Shri Rajdeep Singh, Sr. D.R.**

Date of hearing : 19-12-2022
Date of pronouncement : 20-12-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-7, Ahmedabad in Appeal no. CIT(A)-7/31/17-18, in proceeding u/s. 143(3) vide order dated 17/09/2018 passed for the assessment year 2015-16.

2. The assessee has raised the following Grounds of Appeal:-

“1. Ground No. 1

1.1 That on the facts and in the circumstances of the case and as per law the learned CIT (A) erred in sustaining the additions/disallowance of Rs. 1,21,08,227/- under section 36 (1) (va) of the Income Tax Act, 1961.

1.2 That learned assessing officer was ought to have considered the submission of the appellant that "due date", as per the explanations to section 36 (1) (va) shall be considered from the month in which actual Salary, from which employee's contribution was deducted, irrespective of the month to which it pertains.

That in the Appellant's Own Case, related to the Assessment Year 2014 - 15, it was held so by the honourable jurisdictional tribunal following its decision in the case of "Suzlon Energy Ltd".

1.3 That, even otherwise, the learned CIT (A) was ought to have considered the submission of the appellant that payment towards the employee's contribution was made to the respective funds account, before due date in terms of provisions of section 43B of the Act and accordingly she should have allowed the appeal of the appellant.

2. Appellant craves to add, amend, alter and/or delete any of the grounds aforesaid as and when it is necessary to do so.”

3. The brief facts of the case are that the Ld. Assessing Officer made addition of ₹ 2,48,66,112/- u/s 36(1)(va) of the Act on account of delayed contribution to PF/ESI. In appeal, Ld. CIT(A) partly allowed the assessee's appeal with the following observations:

*“3.2 I have carefully considered the facts of the case in the light of the submissions made by the appellant and the finding of the Assessing Officer recorded in the assessment order. Recently, in the case of **CIT v. Gujarat State Road Transport Corporation [2014] 41 taxmann.com 100 (Gujarat)**, the Hon'ble Gujarat High Court (HC) held that the employees' contribution to the Employees' Provident Fund (EPF)/ Employees' State Insurance Corporation (ESIC) deposited beyond the due date prescribed under section 36(1)(va) of the Income-tax Act, 1961 (the Act) would not be eligible for deduction under section 43B of the Act, even if deposited before the due date of filing the tax return. The appellant has*

stated that the delay in depositing the employees' contribution was due to financial crunch and lack of funds. However, this explanation of the appellant cannot be accepted since the decision of the Hon'ble High Court of Gujarat is categorical in its ruling.

*It is further seen, that even in the immediately preceding year, i.e. AY 2014-15, an addition of Rs.33,95,734/- had been made to the appellant's total income for the same reason, i.e. non deposit of employees' contribution to EPF account. Thus it is clear that the appellant is a habitual defaulter in this regard, and the **action of the AO is upheld**. However, the other plea of the appellant is that out of the total amount disallowed, employees' contribution actually amounted to only **Rs.1,26,45,918/-**, out of which Rs.5,37,691/- had actually been paid within the due date. This contention needs to be verified by the AO from the challans and record. The AO is therefore directed to do the same and recompute the disallowance, **if the appellant's claim is found correct**. This ground of appeal is partly allowed, **subject to verification by the AO of the exact amount to be disallowed**.*

*4. In the result, the appeal is **partly allowed, but subject to verification.**"*

4. The assessee is in appeal against the aforesaid order passed by Ld. CIT(A) partly confirming the additions. Before us, the assessee filed written submissions stating that though there is delay in deposit of ESI/PF contribution, however, the same was filed before the due date of filing return of income. He further submitted that as per the Finance Act, 2021, Explanations has been introduced to section 36(1)(va) of the Act whereby it has been clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the "due date" under this close. Similar explanations has been introduced to the provisions of section 43B to clarify that said 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. However, it has been clarified that above explanations will be applied prospectively i.e. with effect from 1st April,

2021 onwards. Hence, it can be reasonably inferred that for the year under consideration, i.e. assessment year 2017-18, said explanations were not applicable and accordingly when payment is made before due date of return under section 139(1), assessee is eligible for claiming deduction under section 36(1)(va) of the Act considering the provisions of section 43B(b) of the Act. Hence, disallowance under section 36(1)(va) of the Act is not sustainable for the year under consideration. Ld. Counsel for the assessee further relied upon some judicial precedents in support of the above contention.

4.1 In response, Ld. Departmental Representative submitted that the issue is covered against the assessee by the jurisdictional High Court in the case of **Gujarat State Road Transportation Corporation (2014) 41 taxman.com 100**.

5. We have heard the rival contentions and perused the material on record. We note that the issue is squarely covered against the assessee by the Jurisdictional High Court decision in case of **Gujarat State Road Transportation Corporation (2014) 41 taxman.com 100**, wherein it was held that where assessee did not deposit employees' contribution to employees' account in relevant fund before due date prescribed in Explanation to section 36(1)(va), no deduction would be admissible even though he deposits same before due date under section 43B of the Act. Again, the Gujarat High Court in the case of **Pr. CIT v. Suzlon Energy Ltd. [2020] 115 taxmann.com 340 (Gujarat)** held that where assessee had not deposited employees' contributions towards PF and ESI within

prescribed period in law and Assessing Officer by invoking provisions of section 36(1)(va) read with section 2(24)(x) made addition of aforesaid amount to income of assessee, impugned addition made to income of assessee was justified. Respectfully following the above decisions of Jurisdictional High Gujarat High Court, we hold that there is no infirmity in the order passed by ld. CIT(A).

5.1 In view of the above, in our considered view Ld. CIT(Appeals) has not erred in facts and in law in confirming addition/ disallowance in respect of late payment of ESI/PF amounting to ₹ 2,48,66,112/- u/s 36(1)(va) of the Act in the instant set of facts. In the result, the appeal of the assessee is dismissed.

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

Order pronounced in the open court on 20-12-2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad : Dated 20/12/2022

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

I.T.A No. 49/Ahd/2019 A.Y. 2015-16
Shri Patel Mahendrabhai Aditbhai (HUF)

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By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद