आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No. 205/Ind/2022 (Assessment Year:2018-19)

M/s. Vijay Pulses, 12, Sajan Nagar, Indore	Vs.	DCIT, CPC, Bangalore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAAFV 9714 E		
Assessee by	None	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	30.01.2023	
Date of Pronouncement	13.03.2023	

O R D E R

Per B.M. Biyani, AM:

Feeling aggrieved by appeal-order dated 14.07.2022, passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi **["Ld. CIT(A)"]**, which in turn arises out of rectification-order passed by DCIT, CPC, Bangalore **["Ld. AO"]** u/s 154 of Income-tax Act, 1961 **["the act"]** for assessment-year **["AY"]** 2018-19, the assessee has filed this appeal on following grounds:

> *"1. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi erred in sustaining addition of Rs. 2,46,614/- u/s 43B of the Income Tax Act, 1961 towards Provident Fund by the Hon'ble CIT(A) which was wrong, illegal and unjustified.*
>
> *2. The learned Commissioner of Income Tax (Appeals), NFAC failed to consider the facts of the case in proper perspective.*

3. The learned Commissioner of Income Tax (Appeals), NFAC, Delhi should have allowed the relief.

4. The appellant prays for the relief.

5. Without prejudice to the above, the addition made were excessive.

6. The appellant craves leave to add, alter or amend any grounds of appeal as and when the necessity or occasion arises."

The assessee has also filed following "Statement of Facts" in the sequel of "Grounds of Appeal":

"7. STATEMENT OF FACTS:- The assessee carries on the business of Dall Mill. During the year, the assessee has deposited Employee's contribution to PF in time except for Rs. 36,609/- which was delayed but before the due date of filing of Return of Income u/s 139(1) of the Income-tax Act, 1961. The assessee filed an appeal before the Hon'ble CIT(Appeals) but no relief was allowed to the assessee. It is further stated that out of four instances of delay quoted in the Tax Audit Report, initially was corrected by the Auditor, Chartered Accountants by its own certificate by payment of Rs. 2,10,005/- made in time but still the whole amount of Rs. 2,46,614/- was disallowed. Even the amount of Rs. 36,609/- is concerned, the same were paid before the due date of filing the return."

2. When the case was called upon, none appeared on behalf of assessee. On perusal of record, it is found that the notice sent by registry has been returned back with the remark "left". The Ld. DR representing the revenue submitted that the issue involved can be decided on the basis of material held on record and after hearing him from revenue's side. Therefore, the hearing is proceeded with and the appeal is being disposed of.

3. Briefly stated the facts culled out from the order of first-appellate authority are such that the assessee filed his return of income alongwith auditors-report in Form No. 3CD. The auditors reported 4 instances of the

late payment of employee's contributions to PF / ESI involving a total sum of Rs. 2,46,614/- after due date under the PF/ ESI laws. Based on such reporting by auditors, the Ld. AO made a disallowance of Rs. 2,46,614/- u/s 143(1)(iv) while processing intimation of assessment. The assessee segregated the sum of Rs. 2,46,614/- in two components and accordingly claimed before lower authorities, viz. (i) the auditors had wrongly reported 3 instances involving a sum of Rs. 2,10,005/- as late-payment although the assessee had made payments well in time before the due dates under PF/ESI laws; (ii) even the remaining sum of Rs. 36,609/- does not attract any disallowance as the same was though paid after due date under the PF/ESI laws yet before the due date for filing of return u/s 139(1). Regarding 1st component of Rs. 2,10,005/-, the assessee also filed documentary evidences in the form of a certificate of auditors, M/s Rakesh Kumar & Associates, admitting the wrong-reporting in Form No. 3CD, the copies of challans and bank statements through which the payments were made. Thus, the assessee made plausible efforts before Ld. AO as well as Ld. CIT(A) to emphasize these claims. But the lower-authorities were not impressed by the submissions of assessee; accordingly addition of Rs. 2,46,614/- was made/confirmed. Being aggrieved by action of lower-authorities, the assessee has now come in this appeal before us.

4. With the assistance of Ld. DR representing the revenue, on perusal of Para No. 7 of the order of first-appellate authority, we observe that the Ld. CIT(A) has precisely rejected the claim of assessee on twin-reasonings, viz. (i) The Ld. AO made disallowance u/s 143(1)(a)(iv) which provides "disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return". Therefore, the disallowance of Rs. 2,46,614/- as indicated by auditors in the audit-report was made which is very much correct; and (ii) On merit, the employees contributions paid belatedly after due date under PF/ESI laws attract disallowance in terms of section 2(24)(x) read with section 36(1)(va).

5. Regarding 1st component of disallowance amounting to Rs. 2,10,005/-, we are not in agreement with the view taken by Ld. CIT(A). We observe that the assessee has submitted auditor's certificate admitting the reporting-mistake. We further observe that the assessee has also submitted the copies of bank challans and bank statements to prove that the payments to that extent were in fact made before due dates under PF/ESI laws. We further note that the evidences submitted by assessee are not at all disputed by revenue. Thus, it is clearly established that the sum of Rs. 2,10,005/- paid before due dates under PF/ESI laws does not attract any disallowance under the provisions of Income-tax Act, 1961; the same had been made merely due to wrong reporting by the auditors. When it is so, the Ld. CIT(A) was not justified in merely reproducing the provision of section 143(1)(a)(iv) in his order and thereby upholding the action of Ld. AO. We believe that the lower authorities, at least the Ld. CIT(A), should have taken a correct and judicious view in the situation and do not resort to making / confirming disallowance which even the provisions of section 2(24)(x) read with 36(1)(va) do not provide. More so, when the assessee has loudly explained that there was no delay, it was just a reporting mistake by auditors. Needless to mention that the Income-tax Act is a welfare legislation and taxable income of assessee has to be computed strictly in accordance with the provisions of Act. Therefore, we delete the disallowance to the extent of Rs. 2,10,005/-.

6. Regarding 2nd component of disallowance amounting to Rs. 36,609/- which is paid after due date under PF/ESI laws, we note that identical issue is recently decided ***against assessee*** by the Co-ordinate Bench of **ITAT, Indore in ITA No. 171/Ind/2021 M/s Prashanti Engineering Works (P) Ltd. Vs. ADIT, CPC, Bangalore, order dated 22.02.2023**, after taking into account the latest decision of Hon'ble Supreme Court in **Checkmate Services (P.) Ltd. [2022] 143 taxmann.com 178 (SC),** the legal provision of section 143(1) of the Act and various judicial rulings. The order of Hon'ble Co-ordinate Bench is extracted below:

"5. The assessee is in appeal before us against the order passed by Ld. CIT(Appeals). Before us, the counsel for the assessee submitted that firstly, in the audit report, the auditor has not made any specific observation regarding inadmissibility of the claim u/s 36(1)(va) of the Act which was required to be made by the auditors in the Tax Audit Report and the Auditors have only mentioned the "actual dates" and "due dates" of remittance. Accordingly, in view of the Mumbai ITAT decisions in the case of PR Packaging in ITA number 2376/Mum/2022 and Kalpesh Synthetics 137 Taxmann.com 475 (Mumbai), this claim of deduction u/s 36(1)(va) of the Act cannot be disallowed u/s 143(1) of the Act (more specifically under sub-clause (d) to 143(1) of the Act). Secondly, the counsel argued that the issue at the time when the disallowance was made, issue was debatable and accordingly could not be the subject matter of disallowance under section 143(1) of the Act. In response, DR relied upon the observations made by the Ld. CIT(Appeals) in the appellate order.

6. We have heard the rival contentions and perused the material on record. Regarding the argument that the auditors did not specifically mention in the audit report regarding inadmissibility of claim with respect to contributions received from the employees for various funds as referred to in section 36(1)(va) of the Act, it would be useful to reproduce section 143(1) of the Act, which reads as under:

Assessment.

143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—
(a) the total income or loss shall be computed after making the following adjustments, namely:—

i) any arithmetical error in the return;

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;

(iv) disallowance of expenditure [or increase in income] ***indicated in the audit report*** *but not taken into account in computing the total income in the return;*

(v) disallowance of deduction claimed under 69[section 10AA or under any of the provisions of Chapter VI-A under the heading "C.—Deductions in respect of certain incomes", if] the return is furnished beyond the due date specified under sub-section (1) of section 139; or

(vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:

*A perusal of section 143(1) of the Act shows that the words used are "(iv) disallowance of expenditure …****indicated in the audit report****"*

*6.1 Therefore, there is no specific requirement under section 143(1) of the Act that the auditor has to make a specific observation regarding " admissibility/inadmissibility" with regard to any claim of expenditure and all that is required under section 143(1) of the Act is that disallowance of such expenditure should be "**indicated in the audit report**". Now, on going through the specific clauses of the Tax Auditors Report in Form Number 3CD issued under section 44AB of the Act, we observe that serial number 20(b) of Form Number 3CD, which is specific to allowability of claim of deduction u/s 36(1)(va) of the Act, does not require the auditor to make any specific observation regarding admissibility of the amount under section 36(1)(va) of the Act. At the same time, when we observe several other parts of the tax audit report viz. serial number 21(b)-**amounts inadmissible** under section 40(a), serial number 21(c)-**amounts inadmissible** under section 40(b)/40(a)(ia) of the Act (ba), serial number 21(e)- the provision for payment of gratuity **not allowable** under section 40A(7), serial number 21(f)- any sum paid by the assessee as an employer **not allowable** under section 40A(9), serial number 21(h) amount of **deduction inadmissible** in terms of section 14A etc, there is a specific requirement that the auditor has to mention whether the expenditure is admissible/allowable or not. However, so far as section 36(1)(va) of the Act, the audit report does not require the auditor to make a specific observation regarding "admissibility/inadmissibility" of the above expenditure.*

*6.2 Therefore, once the auditor has mentioned the "actual" dates of ESI/PF remittance and the "due" dates of ESI/PF remittance by the assessee u/s 36(1)(va) of the Act at serial number 20(b) of the audit report, then, in our considered view, the requirement of section 143(1) of the Act viz. "disallowance of expenditure ….**indicated** in the tax audit report" stands satisfied and the Department is permitted to make disallowance in terms of section 143(1) of the Act.*

*6.3 With regards to the second argument of the counsel for the assessee that at the time when the disallowance was made, the issue was debatable, we observe that the position on this issue has now been unambiguously clarified by the Hon'ble Supreme Court with respect to all assessment years prior to AY 2021-22 in the case of **Checkmate Services (P.) Ltd. [2022] 143 taxmann.com 178 (SC)** wherein the Supreme Court held that for assessment years prior to AY 2021-22, non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. The Supreme Court observed that there is a marked difference between nature and character of assessee-employer's contribution and amounts retained by assessee from out of employee's income by way of deduction wherein one is liability to be paid by employer and second is deemed income as per section 2(24)(x) which is held in trust by assessee-employer, thus, said marked difference was to be borne while interpreting obligation of assessee-employer under section 43B of the Act. The Hon'ble Supreme held that the non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was not part of assessee-*

employer's income, thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. Again the Supreme Court in the case of ***Harrisons Malayalam Ltd. [2022] 145 taxmann.com 608 (SC)****, dismissed the SLP of the Assessee against order of High Court that where assessee-company failed to pay employees' contribution towards EPF and ESI within due date prescribed in respective Acts, deduction under section 36(1)(va) was not allowable. Recently in the case of* ***Ms. Nalina Dyave Gowda [2023] 146 taxmann.com 420 (Bangalore - Trib.)*** *the assessee during, financial year 2018-19 (assessment year 2019-20) made payment of employees' contribution to ESI and PF beyond due date specified under relevant Act and claimed deduction of same under section 36(1)(va). The Assessing Officer made disallowance of employees' contribution to ESI and PF* ***while electronically processing return of income under section 143(1)(a) of the Act****. The ITAT held that disallowance under section 143(1)(a) was valid in view of Supreme Court's decision in case of Checkmate Services (P.) Ltd. v. CIT [2022] 143 taxmann.com 178 and the assessee will not be entitled to deduction of belated payment of ESI and PF of employees' share of contribution as per provisions of section 36(1)(va) of the Act. Again, recently Pune ITAT in the case of* ***Cemetile Industries v. ITO [2022] 145 taxmann.com 209 (Pune-Trib.)*** *held that where assessee-employer deposited amount of employees contribution towards employees' provident fund and employees' state insurance corporation beyond due date stipulated in respective Acts, disallowance made under section 36(1)(va) was justified. The ITAT further held that adjustment under section 143(1)(a) by means of disallowance made for late deposit of employees' share to relevant funds beyond date prescribed under respective Acts was proper.*

6.4 In view of the above observations respectfully following the decision of the Honourable Supreme Court in the case of Checkmate Services Private Ltd supra and Harrisons Malayalam Ltd supra and in the light of our observations, we hereby dismiss the assessee's appeal.

7. In the result, the appeal of the assessee is dismissed."

Respectfully following the same view, we are also inclined to hold that the 2nd component of Rs. 36,609/- i.e. employees' contributions to PF / ESI paid after due date under PF / ESI laws is not an allowable deduction in computing taxable income of business and the revenue-authorities have rightly disallowed the same.

7. That brings us to conclude that out of the total disallowance of Rs. 2,46,614/-; disallowance of Rs. 2,10,005/- is hereby deleted and disallowance of Rs. 36,609/- is upheld.

8. Resultantly, this appeal of assessee is partly allowed.

Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 13/03/2023.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(B.M. BIYANI)**
Judicial Member	Accountant Member

Indore, 13.03.2023

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