

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI**

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष
**BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI MANJUNATHA. G, HON'BLE ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.: 63/Chny/2023

निर्धारण वर्ष / Assessment Year: 2018-19

Kumarasamy Raja,
V53Q, V Block Kovaipudur,
Coimbatore – 641 042.

[PAN: AHAPR-9599-J]

(अपीलार्थी/Appellant)

Deputy Commissioner of
Income Tax,
Centralized Processing Centre,
Bengaluru – 560 500.

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri. G. Derrick Sam, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Shri. P. Sajit Kumar, JCIT

सुनवाई की तारीख/Date of Hearing

: 29.03.2023

घोषणा की तारीख/Date of Pronouncement

: 06.04.2023

आदेश / O R D E R

PER MANJUNATHA. G, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order passed by the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 18.10.2022 and pertains to assessment year 2018-19.

2. At the outset, learned AR for the assessee submitted that the appeals filed by the assessee is time barred by 30 days for which necessary petition for condonation of delay along with affidavit explaining the reasons for the delay has been filed. The AR, further submitted that the assessee could not file appeals within the time allowed under the Act, due to the fact that the assessee is sole incharge of filing of appeal and was out of station for business purposes, which caused delay of 30 days. The delay in filing appeal is neither intentional nor willful but for the unavoidable reasons, therefore, delay may be condoned in the interest of advancement of substantial justice.

3. The learned DR, on the other hand, strongly opposing condonation of delay petition filed by the assessee submitted that the reasons given by the assessee do not come within the ambit of reasonable and bonafide reasons, which can be considered for condonation of delay and hence, appeal filed by the assessee may be dismissed as not maintainable.

4. Having heard both sides and considered the petition filed by the assessee for condonation of delay, we are of the considered view that reasons given by the assessee for not

filing the appeal within the time allowed under the Act comes under reasonable cause as provided under the Act for condonation of delay and hence, delay in filing of appeal is condoned and appeal filed by the assessee are admitted for adjudication.

5. The assessee has raised the following grounds of appeal:

"1. The order of the Assessing Officer is erroneous in law and unsustainable on the facts and circumstances of the appellant's case.

2. The Assessing Officer erred in adding a sum of Rs.9,64,796/(Employee's Contribution to PF /ESI) under Section 36(1)(iv) and Rs. 70,01,408 under Section 37 of the Income-tax Act.

3. Even though disallowance of Rs.70,01,408 was set aside by the Commissioner (Appeals), disallowance of late deposit of Employee's Contribution to PF to the tune of Rs.9,64,796 was upheld by the Commissioner (Appeals). The issue before this Hon'ble Tribunal is whether the disallowance of Rs. 9,64,796/- u/s.36(1)(va) and sec. 43B, on account of late deposit of Employee's Contribution towards PF and ESI is sustainable or not. The amended provisions of Section 36 and 43B had created additional liability disallowing late contributions.

4. Employer Contribution to PF /ESI is allowed under Section 43B if it is paid before the due date of filing return under Section 139(1). Whereas Employee Contribution to PF/ESI is considered as income under Section 2(24)(x) and allowed as deduction only it is paid within due date of payment specified under the respective Act (PF /ESI) not before the due date of filing return as referred in Employer Contribution.

5. Corresponding amendments were made in the Finance Bill 2021, by inserting another explanation

and the clause (va) of sub section (1) of section 36 was amended to clarify that the provision of section 43B does not apply and deemed to never have applied for the purposes of determining the "due date" under this clause .

6. Similarly amendments were made in section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applicable to a sum received by the assessee from any of his employees to which provisions of sub-clause(x) of clause (24) of section 2 applies.

7) As per the Memorandum explaining the provisions in the Finance Bill,2021 the amendments of section 36(1) (va) and 43B is applicable only with effect from 01.04.2021 and accordingly, the aforesaid amendments are applicable from the Assessment Year 2021-22 onwards. Therefore, the said amendments cannot be applied retrospectively.

8. Further this amendment would apply only prospectively from 01.04.2021 not retrospectively as per following decisions of the Tribunal

- Sri Chandra Reddy V ACIT, CPC ITA No.31/Bang/2021/A.Y.2019-20/Bangalore ITAT dated 09.11.2011*
- M/s Shakuntala Agarbathi Company V.DCIT in ITA No.385/Bang/2021(Order dated 21.10.2021)*
- Dhabriya Polywood Limited V ACIT(2021) 63 CCH 0030*
- Jaipur Trib, NCC Limited V ACIT(2021) 63 CCH0060 Hyd Tribunal*
- Indian Geotechnical Services V.ACIT in ITA No.622/Del/2018(order dated 27.08.21)*
- M/s Jana Urban Services for Transformation Private Limited v DCIT in ITANo.307/Bang/2021(order dated 11.10.21)*

9. The common decision of all the above is that when an amendment creates new obligation, it is applicable prospectively. In the present case, the amendments are applicable only from the

Assessment year 2021-22, not retrospectively especially for the Assessment year 2018-19.

10. Under the circumstances explained above, the appellant prays that on the above grounds and such other grounds as may be adduced at the time of hearing, the addition made by the Assessing Officer may kindly be deleted and justice rendered."

6. The brief facts of the case are that, the assessee is an individual filed her return of income for the assessment year 2018-19 on 31.10.2018. The return was processed u/s. 143(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") on 13.12.2019, after making disallowance of Rs. 9,64,796/- u/s. 36(1)(va) r.w.s. 43B of the Act, towards Employee's Contribution to PF & ESI. The assessee carried the matter in appeal before the first appellate authority. The Id. CIT(A), NFAC, Delhi, vide their order dated 18.10.2022, for the reasons stated therein dismissed appeal filed by the assessee. Aggrieved by the CIT(A) order, the assessee is in appeal before us.

7. The Id. Counsel for the assessee submitted that, the Id. CIT(A) ought not to have dismissed appeal filed by the assessee on the issue of disallowance of PF & ESI u/s. 36(1)(va) r.w.s. 43B of the Act, without appreciating fact that said adjustment cannot be made in the intimation issued u/s.

143(1) of the Act. In this regard, he relied upon the decision of ITAT Cuttack Benches, in the case of M/s. Sunila Sahu in MA No. 23/CTK/2022 dated 13.01.2023.

8. The Ld. DR, on the other hand supporting the order of the CIT(A) submitted that this issue is squarely covered in favour of revenue by the decision of coordinate bench of ITAT, Chennai in the case of Sree Gokulam Chit and Finance Co. P. Ltd vs DCIT in ITA No. 765/Chny/2022, where the Hon'ble Tribunal by following the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd in Civil Appeal No. 2833 of 2016 order dated 12.10.2022 held that, incorrect claim made in the return of income which is apparent from said return can be adjusted while processing return of income u/s. 143(1)(a) of the Act. Further, on merit the issue is squarely covered by the decision of Supreme Court in the case of Checkmate Services Pvt. Ltd (Supra), where it has been held that belated remittances of employees contribution to PF & ESI is not allowable u/s. 36(1)(va) r.w.s. 43B of the Act.

9. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The two questions of law referred by the Id. Counsel

for the assessee has been answered by the coordinate bench of ITAT, Chennai in the case of Sree Gokulam Chit and Finance Co. P. Ltd vs DCIT (Supra), where the Tribunal by following the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd (Supra), categorically held that belated remittance of employees contribution to PF & ESI cannot be allowed as deduction u/s. 36(1)(va) r.w.s. 43B of the Act. The Tribunal had also answered the second question raised by the Ld. Counsel for the assessee, in light of provisions of section 143(1)(a)(iv) and held that said disallowance comes under sub clause (ii) of section 143(1)(a) of the Act, as per which, an incorrect claim, if such incorrect claim is apparent from any information in the return of income is to be disallowed and such adjustment is to be made on the total income or loss of the assessee. Since, belated remittance of PF & ESI is incorrect claim, if it is paid beyond due date specified under respective laws and such claim is apparent from return filed for the relevant assessment year. Therefore, we are of the considered view that the arguments of the assessee that no adjustment can be made towards PF & ESI while processing return of income u/s. 143(1)(a) of the Act is devoid of merits.

10. In this view of the matter and by following the decision of coordinate bench of ITAT, Chennai in the case of Sree Gokulam Chit and Finance Co. P. Ltd vs DCIT (Supra), we are of the considered view that there is no error in the reasons given by the Id. CIT(A) to sustain additions made towards disallowance of employees contribution to PF & ESI u/s. 36(1)(va) r.w.s. 43B of the Act. Thus, we are inclined to uphold the findings of the Ld. CIT(A) and dismiss appeal filed by the assessee.

11. In the result, appeal filed by the assessee is dismissed.

Order pronounced in the court on 06th April, 2023 at Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /Vice President

Sd/-
(मंजुनाथ. जी)
(MANJUNATHA. G)
लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 06th April, 2023

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |