

आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri K. Narasimha Chary, Judicial Member

ITA Nos.130 & 60/Hyd/2023		
Assessment Years: 2014-15 & 2018-19		
Icomm Tele Ltd Hyderabad PAN:AAECA1326Q (Appellant)	Vs.	Dy. C. I. T Circle 2(1) Hyderabad (Respondent)
Assessee by:	Shri S. Rama Rao, Advocate	
Revenue by:	Shri Kumar Aditya, DR	
Date of hearing:	19/04/2023	
Date of pronouncement:	28/04/2023	

ORDER

Per R.K. Panda, A.M

ITA 130/Hyd/2023 filed by the assessee is directed against the order dated 03/01/2023 of the CIT (A) NFAC Delhi relating to A.Y 2014-15. ITA 60/Hyd/2023 filed by the assessee is directed against the order dated 24.11.2022 of the CIT (A)-NFAC Delhi relating to A.Y 2018-19. For the sake of convenience, both these appeals were heard together and are being disposed of by this common order.

ITA 130/Hyd/2023 (A.Y 2014-15)

2. Although a number of grounds have been raised by the assessee, however, these all relate to the order of the learned CIT (A) NFAC in confirming the addition of Rs.1,13,11,663/- made by

the Assessing Officer u/s 36(1)(va) of the Act on account of delayed payment of employees' contribution to PF & ESI.

3. Facts of the case, in brief, are that the assessee is a company engaged in the business of manufacturing and sale of Telecom/Electrical Towers. It filed its return of income for the impugned A.Y on 30.11.2014 admitting current year loss of Rs.23,64,70,514/- under the normal provisions and admitted book loss of Rs.84,58,26,995/- under MAT provisions. The case was selected for scrutiny through CASS and statutory notices u/s 143(2) & 142(1) of the Act were issued to the assessee in response to which the AR of the assessee appeared before the Assessing Officer from time to time and filed the relevant details. The Assessing Officer completed the assessment u/s 143(3) on 29.12.2016 wherein he apart from other additions made addition of Rs.1,13,11,663/- on a/c of delayed payment of Employees' contribution to PF & ESI by observing as under:

“4.1. From the above, it is clear that the employee's contribution of PF are covered u/s.36(1) (va) of the Act but not by section 43B of the Act. In view of the above the belated payment/ not paid payment of employee contribution to PF and ESI account of Rs.1,68,27,755/- is disallowed u/s. 36(1)(va) of the IT Act, 196. However, assessee vide his computation of income has added back the PF & ESI disallowance in respect of employee contribution of Rs. 55.16.092/-. Therefore the balance of Rs. 1,13,11,663/- is disallowed and added to the income of the assessee. Addition : Rs. 1,13,11,663/-“.

4. In appeal, the learned CIT (A) NFAC sustained the addition of Rs.1,13,11,663/- made by the Assessing Officer by observing as under:

“7.2. I have perused the facts of the case with reference to the Tax audit report. the return of income, the assessment order and the submissions of the appellant. As per Column 20(b) of the Tax audit report (Form No.3CD), the appellant has collected monthly contribution from the salaries of employees towards PF/ ESI aggregating to Rs.1.68.27.755/- but has not deposited the same into the respective PF/ ESI accounts within the due dates prescribed under the PF/ ESI Acts

read with section 36(1)(va) of the Act. Out of Rs.1,68,27,755/-, a sum of Rs.43,55,038/- was deposited before 31.03.2014 (within the financial year 2013-14) but after expiry of due dates under the PF/ ESI Acts read with section 36(1) (va), a sum of Rs.69,56,625/- was paid after 31.03.2014 and before the due date of furnishing the return and the balance Rs.55,16,092/- was not even paid till the due date of furnishing the return of income. Thus, evidently, no portion of the employees' monthly aggregating contribution to PF/ ESI to prescribed under Rs.1,68,27,755/- the PF/ ESI Acts was paid before the expiry of the due dates as read with section 36(1)(va).

7.3 Through its written submissions, the employees' contribution to PF/ ESI appellant has urged that the amount of paid on or before the due date to the extent paid within financial year 2013-14 or of furnishing the return of allowed for deduction u/s income u/s 139(1) should be 43B even though there has been delay in deposit in terms of provisions of section 36(1)(va) of the Act. The contention of the appellant cannot be accepted for the reasons that the allowability of deduction of employees' contribution to PF/ ESI is governed by section 36(1)(va) and not by section 43B. The issue is no longer *res integra* and all recent landmark controversies thereto have been finally laid to rest by the recent landmark judgment of the Hon'ble Supreme Court in the case of *Checkmate (2022) 143 Services (P.) Ltd. vs. CIT (2022) 143 Taxmann.com 178 (S.C)* wherein the Hon'ble Supreme Court has held that section 43B(b) does not cover employees' contributions to PF, ESI, etc. deducted from salaries of employees and the disallowance of the same has to be considered u/s 36(1)(va) read with section 2(24)(x) only. The observations of the Hon'ble Supreme Court may be briefly enumerated as under:

- Section 43B(b) does not cover employees' contributions to PF,ESI etc deducted by employer from salaries of employees.
- The words "any sum payable by the assessee as an employer by way contribution to any provident fund, or gratuity fund or any other fund for the welfare of the employees" in section 43B (b) cover only employers' contributions to these funds to be borne and paid by employer out of his income, and not employees' contributions to these funds deducted by employer out of employees' The former are sums which are liabilities of the employer out of employees' income/salary. The latter are sums deducted from others' income and held in trust by him and deemed to be his income under before section 2(24)(x) unless deposited with concerned authorities on or before the due date as defined in Explanation (now Explanation 1) before section 36(1)(va) i.e. due dates under the relevant employee legislation like PF Act, ESI Act etc.
- The non-obstante clause in section 43B cannot be overriding interpreted as section 36(1)(va) and cannot be interpreted to mean that employer will get deduction in respect of deducted from their employees' contributions salaries and deposited by employer after

the due date u/s 36(1)(va) but on or before the due date u/s 43B i.e. due date of filing ITR.

- *The non-obstante clause in section 43B does not override section 36(1)(va) as both provisions operate in different fields. Section 43B(b) applies to employer's contributions while section 36(1)(va) applies to employees' contributions.*

7.4 In view of the aforesaid, it is amply clear that even prior to insertion of Explanation 2 in section 36(1)(va) and Explanation 5 in Section 43B by the Finance Act.2021 w.e.f. 01.04.2021, section 43B will not apply to employees' contributions to PF,ESI etc. as claimed by the appellant. In case contributions collected from the salaries of the employees are not deposited within the due date prescribed under the respective EPF/ ESI Acts, then the addition of the said amount as income of the employer u/s 2(24)(x) read with section 36(1)(va) of the Act is automatic and mandatory. Therefore, the A.O. has rightly acted in accordance with law while making the addition/ disallowance of Rs.1,68,27,755/in the return of income, the Assessing Officer has rightly allowed the credit for that and kept the further disallowance at Rs. 1,13,11,663/- u/s 36(1)(va). For the reasons elucidated above, there is no scope left for the appellant to avail the deduction of the said amount u/s 43B of the Act. In this view of the matter, I find no infirmity in the action of the A.O. and therefore, the action of the A.O. is hereby confirmed. Consequently, the Ground No. 6 is dismissed..

8. In the result, the appeal of the appellant is Partly Allowed”.

5. Aggrieved with such order of the learned CIT (A) the assessee is in appeal before the Tribunal.

6. We have heard the rival arguments made by both the sides and perused the record. A perusal of the record shows that out of the total delayed payment of Rs.1,68,27,755/- which is disallowable u/s 36(1)(va) of the I.T. Act, 1961, the Assessing Officer has already given credit of Rs.55,16,092/- which the assessee had suo moto disallowed in the computation of income. The Assessing Officer has only disallowed Rs.1,13,11,663/- which has been sustained by the CIT (A) NFAC, the reasons of which have already been reproduced in the preceding paragraph. A perusal of the details filed before the Assessing Officer and the

CIT (A) NFAC clearly shows that the assessee has not made deposit of Employees' contribution to PF & ESI amounting to Rs.1,13,11,663/- before the statutory due date under the said Act. We find the issue stands decided against the assessee by the decision of the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd vs. CIT (2022) 448 ITR 518 wherein the Hon'ble Supreme Court has categorically held that the employees' contribution to PF and ESI to the extent it is not paid within due date prescribed under the PF Act, is not allowable u/s.36(1)(va) of the Act. The Hon'ble Supreme Court has also admittedly held that the provisions of section 43B would not apply to the provisions of section 36(1)(va) of the Act in respect of employees' contribution to PF & ESI. Respectfully following the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd(supra), we are of the view that the delayed payment in respect of employees contribution to PF and ESI is not allowable. Since the issue stands decided against the assessee by the decision of the Hon'ble Supreme Court, therefore, the grounds raised by the assessee are dismissed.

ITA No.60/Hyd/2023 -(A.Y 2018-19)

7. The first issue raised by the assessee in the grounds of appeal relates to the disallowance of Rs.52,44,996/- by the Assessing Officer on account of delayed payment of Employees' contribution to PF & ESI which has been confirmed by the learned CIT (A) NFAC.

7.1 After hearing both the sides, we find the issue is identical to the issue raised by the assessee in the grounds of appeal in ITA 113/Hyd/2023 for the A.Y 2014-15. We have

already decided the issue in the preceding paragraphs and the appeal filed by the assessee has been dismissed. Following similar reasonings, the grounds raised by the assessee on this issue are dismissed.

8. The second issue raised by the assessee in the grounds of appeal relates to the order of the learned CIT (A) NFAC in sustaining the adhoc disallowance of Rs.70,51,870/- out of the total addition of Rs.1,12,51,266/- made by the Assessing Officer.

8.1 Facts of the case, in brief, are that the Assessing Officer during the course of assessment proceedings observed that the assessee has debited an amount of Rs.11,25,12,665/- under different heads the details of which are as under:

1	Printing & stationery	13,96,771
2	Other expenses	6,29,15,604
3	Repairs to plant, machinery or furniture	2,39,56,484
4	Telephone expenses	20,57,616
5	Travelling expenses other than on foreign travelling	88,59,192
6	Foreign travelling expenses	14,88,582
7	Workwomen and staff welfare expenses	54,00,770
8	Conveyance expenses	10,16,641
9	Entertainment	23,01,611
10	Hotel, boarding and lodging	31,19,394
	T O T A L	11,25,12,665

9. He issued a detailed questionnaire asking the assessee to furnish all the bills/vouchers for his verification in respect of the above expenditure alongwith ledger a/c copies. In spite of giving several opportunities, the assessee failed to furnish the bills/vouchers or ledger a/c copies to establish that these expenses are incurred wholly and exclusively for the purposes of business. The Assessing Officer, therefore, considering the nature of the business and in the interest of revenue disallowed an

amount of Rs.1,12,51,266/- on estimate basis being 10% of such expenditure.

10. In appeal, the learned CIT (A) NFAC granted part relief to the assessee by excluding the excise duty of Rs.4,17,70,010/- and sales tax paid of Rs.2,23,957/- from other expenses of Rs.6,29,15,604/- and accordingly directed the Assessing Officer to recompute the deduction by observing as under:

“10.1 have given a thoughtful consideration on the impugned disallowance. observed that the other expenses of Rs.6,29,15,604/- [item no.(x) above] includes excise duty paid of Rs.4,17,70,010/- and sales tax paid of Rs.2,23,957/-. These two payments are clearly not disallowable unless they were incurred in the prior year(s) and deduction was also claimed thereof in the prior year(s). The AO is, therefore, directed to verify the claim from the tax audit report [Form No.3CD] as to the period of incurrence and payment of the said two expenditure and allow the appellant's claim to the extent admissible u/s 43B and/ or u/s 37(1) of the Act.

10.2 For the remaining items of expenditure mentioned in item nos. (i) to (ix) above and also balance expenditure from item no.(x) after excluding excise duty/ sales tax, it is observed that the quantum of expenses under each item is pretty big and these expenses have substantial impact in the incurring of overall loss computed by the appellant for the tax purposes. The AO had issued statutory notices calling for the details like bills, vouchers, ledger accounts, etc. for verification of the appellant's claim with regard to the quantum of such expenses as well as the genuineness of such claim. It has been fairly admitted by the appellant that the requisitioned details were not furnished before the AO. At the appellate stage, the appellant has now filed these details as fresh evidences without giving any appropriate reasons for its inability to furnish the details before the AO even after they were requisitioned by the AO. It is well settled that as per rule 46A of the Income-tax Rules, 1962, the appellant is precluded from furnishing such fresh evidences before the CIT(A) unless he proves that the case is covered under any of the four clauses a)to (d) of sub-rule (1) of rule 46A. It is not a case at all that the AO had refused to admit such evidence and the fact reveals that the AO had, in fact, requisitioned these details but not furnished before him. The appellant has not shown any sufficient cause which had prevented it from producing these details before the AO. The appellant has also not made out a case which may indicate that sufficient opportunity was not afforded to it by the AO during the assessment proceedings. In such backdrop, the appellant has not fulfilled the ingredients of rule 46A for the purpose of presenting the aforesaid fresh/ additional evidences at the present appellate stage. In this view of the matter, I find no good and sufficient reasons to admit such fresh/ additional evidences at this stage whose admission, in view of the

aforesaid reasons, would militate against the provisions of rule 46A of the Income-tax Rules, 1962. Accordingly, the fresh evidences pertaining to item nos. (j) to (ix) and part of expenses excluding excise duty/ sales tax in item no.(x) are not admitted and hence, rejected.”

11. Aggrieved with such order of the learned Cit (A) NFAC the assessee is in appeal before the Tribunal.

12. The learned Counsel for the assessee at the time of hearing submitted that the Assessing Officer has asked for all the bills and vouchers along with ledger a/c which are not produced before him due to voluminous bills and vouchers which were required to be filed during the then prevailing pandemic period. He submitted that the accounts of the assessee are audited and all vouchers item wise are maintained and given an opportunity, the assessee is in a position to substantiate with evidence to the satisfaction of the Assessing Officer regarding the nature and purpose of the expenses. He accordingly submitted that he has no objection if the matter is restored to the file of the Assessing Officer with a direction to give an opportunity to the assessee to submit all the bills and vouchers.

13. The learned DR, on the other hand, strongly supported the order of the learned CIT (A) NFAC and submitted that despite number of opportunities granted by the Assessing Officer, the assessee failed to produce the relevant bills and vouchers for which the Assessing Officer has very reasonably disallowed 10% of such expenses. After considering the nature of expenses the Assessing Officer has already excluded an amount of Rs.4,19,93,967/- out of other expenses and therefore, the adhoc disallowance is applicable to the expenditure of Rs.7,05,18,698/- which comes to Rs.70,51,870/- which is very reasonable under the facts and circumstances of the case.

14. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A)/NFAC and the paper book filed on behalf of the assessee. We find the Assessing Officer in the instant case made adhoc disallowance of Rs.1,12,51,266/- being 10% of the various expenses debited to the P&L A/c amounting to Rs.11,25,12,665/-. We find the learned CIT (A) NFAC directed the Assessing Officer to exclude the excise duty paid of Rs.4,17,70,010/- and sales tax paid of Rs.2,23,957/- which are included in other expenses of Rs.6,29,15,604/- and sustained the 10% adhoc disallowance on the balance expenditure. It is the submission of the learned Counsel for the assessee that the assessee company maintaining is full records and the books of account are audited and given an opportunity he is in a position to substantiate with evidence to the satisfaction of the Assessing Officer regarding the nature and purpose of each and every expenditure.

14.1 We find some force in the above arguments of the learned Counsel for the assessee. Admittedly, the case was under scrutiny during the then prevailing pandemic. The Assessing Officer asked the assessee to produce all the bills/vouchers for verification in respect of the above expenditure which according to the learned Counsel for the assessee were voluminous and could not be produced due to the prevailing pandemic. Now that the learned Counsel for the assessee submits that the assessee is in a position to produce each and every voucher relating to all the expenses debited to the P&L A/c, therefore, considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to give an opportunity to the assessee to substantiate with evidence to his satisfaction regarding all the

expenditure debited to the P&L A/c. Needless to say the Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The second issue raised by the assessee in the grounds of appeal is allowed for statistical purposes.

15. In the result, ITA No.130/Hyd/2023 for the A.Y 2014-15 is dismissed and ITA No.60/Hyd/2023 for the A.Y 2018-19 is partly allowed for statistical purposes.

Order pronounced in the Open Court on 28th April, 2023.

Sd/- (K. NARASIMHA CHARY) JUDICIAL MEMBER	Sd/- (R.K. PANDA) ACCOUNTANT MEMBER
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Hyderabad, dated 28th April, 2023

Vinodan/sps

Copy to:

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1	Icomm Tele Ltd, Plot No.40 46 IDA Phase-I, Cherlapally, HCL, Post Ranga Reddy, Hyderabad 500051
2	Dy.CIT, Circle 2(1) Signature Tower, Opp: Botanital Gardens, Kondapur, Hyderabad
3	DR, ITAT Hyderabad Benches
4	Guard File

By Order