

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'SMC' NEW DELHI**

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No. 186/Del/2023
Assessment Year: 2018-19

Ashok Kumar, C/o The Tax Chamber, Advocates & Legal Advisors, C-177, Defence Colony, LGF, New Delhi-1100 24	Vs.	ITO, Ward 1(5), Gurgaon
PAN :BBOPK6740B		
(Appellant)		(Respondent)

Appellant by	Ms. Swati Talwar, Adv.
Respondent by	Shri Om Parkash, Sr. DR

Date of hearing	13.04.2023
Date of pronouncement	27 .04.2023

ORDER

This is an appeal by the assessee against order dated 06.02.2023 passed by the National Faceless Appeal Centre (NFAC) for the assessment year 2018-19.

2. The dispute in the present appeal is confined to disallowance of deduction claimed of Rs.27,07,802, being delayed payment of employee's contribution to Provident Fund (PF) and Employees State Insurance (ESI).

3. Briefly, the facts are, while processing the return of income filed by the assessee for the impugned assessment year, the Centralized Processing Centre (CPC) noticed that, though, the assessee had not deposited employee's contribution to PF/ESI, however, the assessee had claimed deduction of such payment.

4. Being of the view that the deduction claimed is not allowable under Section 36(1)(va) read with section 2(24)(x) of the Act, the CPC made an adjustment to the income of the assessee by disallowing the deduction claimed. Though, assessee contested the aforesaid disallowance by filing an appeal before the first appellate authority, however, the first appellate authority upheld the disallowance.

5. Before us, learned counsel appearing for the assessee submitted that the disallowance cannot be made by way of adjustment under Section 143(1) of the Act, as, it is not covered under Section 143(1)(a)(iv) of the Act. In this context, he relied upon a decision of

the Co-ordinate Bench in case of M/s. P.R. Packaging Services – ITA No.2376/Mum/2022 dated 07.12.2022. He submitted, since, the employee's contribution to PF and ESI is not in the nature of expenditure, the auditor has not reported it as disallowable expenditure in the tax audit report.

6. Without prejudice, she submitted, the deduction is otherwise allowable under Section 37(1) of the Act. For such proposition, he relied upon the decision of Co-ordinate Bench in case of BBG Metal Syndicate Pvt. Ltd. vs DCIT – ITA No.112/CTK/2022 dated 17.11.2022. Finally, she submitted, the payments made within the due date prescribed in PF/ESI statutes, including the grace period, should be allowed. Learned Departmental Representative strongly relied upon the observations of the first appellate authority.

7. I have considered rival submissions and perused material on record.

8. In so far as assessee's claim that deduction on account of payment of employees contribution to PF and ESI has to be allowed, in case, it is paid before the due date of filing of return, I am unable to accept such contention of the assessee in view of the binding ratio laid

down by the Hon'ble Supreme Court in case of Checkmate Services P. Ltd. – CIT-I [2022] 143 taxmann.com 178 (SC), wherein, it has been held that unless employees contribution to PF and ESI is not deposited within the due date prescribed under the relevant statutes governing such payment, the amount in question has to be treated as income of the assessee in terms of section 36(1)(va) read with section 2(24)(x) of the Act. Therefore, the disallowance has to be upheld. In so far as the contention of learned counsel for the assessee that such adjustment is not contemplated under Section 143(1)(a) (iv) of the Act, I am unable to accept the contention in view of the decision of the Co-ordinate Bench, in case of Savleen Kaur Vs. ITO – ITA No.2249/Del/2022 dated 09.01.2023.

9. As regards, the contention of the assessee that the deduction is otherwise allowable under Section 37(1) of the Act, I do not find merit in such submission. In case of BVG Metal Syndicate Pvt. Ltd. Vs. DCIT – ITA No.112/CTK/2022 dated 17.11.2022 (supra), the Co-ordinate Bench, while considering such submission, has not expressed any opinion and has simply restored the issue to the file of the Assessing Officer. Therefore, the decision cited cannot be regarded to

be a precedent for laying down the ratio that the payment made can be allowed as deduction under Section 37(1) of the Act. In so far as, learned counsel's contention that the payments made within the due date provided in the respective statutes, I direct the Assessing Officer to factually verify the date of payment of employees contribution to PF and ESI and, in case, they are found to have been paid within the due date prescribed under the PF and ESI Act or within the grace period, if any, under these Acts, then, deduction can be allowed. Ground is allowed for statistical purposes.

10. In ground no.10, assessee has challenged disallowance of GST late fee of Rs.2100.

11. Briefly, the facts relating to this issue are, while processing the return of income of the assessee, the Centralized Processing Centre (CPC) disallowed GST late fee. The assessee contested the aforesaid disallowance by submitting that the GST late fee is neither in the nature of penalty for violation/infraction of law nor it is prohibited under the law. Therefore, it is an allowable deduction under Section 37(1) of the Act

12. Learned Commissioner (Appeals) did not find merit in the submissions of the assessee and accordingly upheld the disallowance.

13. I have considered rival submissions and perused the material available on record.

14. Before us, it is submitted by learned counsel for the assessee that identical disallowance made by the Assessing Officer was deleted by learned Commissioner (Appeals) while deciding assessee's appeal in assessment year 2020-21. It is also noted, merely because the tax auditor in the audit report has given a note that GST late fee is an expenditure by way of a penalty or fine for violation of any law for the time being in force, the disallowance has been sustained.

15. In my view, this cannot be the position in law. Unless the expenditure is for any purpose which is an offence or which is prohibited by law, it cannot be disallowed.

16. Considering the nature of payment, I am of the opinion that it is not covered under the exception provided in Explanation 1 to section 37(1) of the Act. Accordingly, I delete the disallowance. This ground is allowed.

17. Ground no.11 being consequential, does not require adjudication.

18. In the result, the appeal is partly allowed.

Order pronounced in the open court on 27th April, 2023.

**Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER**

Dated: 27th April, 2023.

Mohan Lal

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi