

ITA NO.121/JP/2023

SPC INFRASTRUCTURE PVT LTD. VS DCIT,CIRCLE-4, JAIPUR

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डॉ. एस.सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 121/JPR/2023
निर्धारण वर्ष / Assessment Years : 2020-21

S.P.C. Infrastructure Private Limited C-74, Amba Bari, Jaipur	बनाम Vs.	DCIT, Circle-4,Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAFCS 8079 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mukesh Khandelwal (C.A.)
राजस्व की ओर से / Revenue by : Shri A.S. Nehra (Addl. CIT)

सुनवाई की तारीख / Date of Hearing 18/04/2023
उदघोषणा की तारीख / Date of Pronouncement : 25 /05/2023

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This is an appeal filed by the assessee against the order of the ld. CIT(A), National Faceless Appeal Centre, Delhi [hereinafter referred to as "NFAC"], dated 24.01.2023 for the assessment year 2020-21 wherein the assessee has raised the followings grounds:-

"1. That the ld. CIT(A) has erred seriously in sustaining the action of the ld. AO in disallowing a sum of Rs. 16,62,178/- on account of delayed deposit of employees contribution to PF/ESI in the respective fund ignoring the binding judgement of the Hon'ble Rajasthan High Court.

2. That without prejudice to ground No. 1 the ld. CIT(A) further erred in disallowing even the employers contribution to PF/ESI which is covered u/s 43B of the Income Tax Act, 1961 and which amount was included in the above stated amount of Rs. 16,62,178/-."

2.1 Briefly the facts of the case are that the assessee is a Private Limited Company and filed its return of income for the A.Y. 2020-21 on 22.01.2021 declaring total income of Rs. 2,88,42,590/- and claiming refund of Rs. 72,16,160/-. The same was processed at CPC, Bengaluru at an income of Rs.3,05,04,772/- and refund of Rs.67,97,821/- had been calculated. While processing the return of income at CPC, Bengaluru, the following disallowance/ addition was made.

Particulars	Amount (Rs.)
Disallowance under section 36(1)(va) on account of employees contribution to PF/ESI paid beyond the due date specified under relevant Act but before the due date of filing of return of income	Rs. 16,62,178/-
Total	Rs. 16,62,178/-

2.2 Being aggrieved by the order of the AO, the assessee carried the matter before the ld. CIT(A) who in spite of providing various opportunities to the assessee passed the ex-parte order by taking into consideration the materials available on record and also dismissed the appeal of the assessee in view of the decision of Hon'ble Supreme Court

in the case of Checkmate Services (P) Ltd. (2022), 143 taxmann. Com

178 (SC) with following observations.

‘5.1.1 Ground of appeal no.1 & 2 are against disallowance of Rs.16,62,178/- on account of delayed deposit of sum received from employees as contribution to any Provident Fund or any fund setup under ESI Act under section 36(1)(va).

5.2.1 Held: I have considered the submissions made by the appellant on the basis of facts and circumstances of the case along with the order of the AO and perused the material available on record.

5.2.2 With reference to the grounds of appeal no. 1 & 2, it is observed that the appellant has collected employees' monthly contributions to EPF/ ESI out of which Rs.16,62,178/- was not paid into the respective employees' accounts maintained under the EPF/ ESI Acts within the due date prescribed under those Acts and as a result, the appellant has violated the provisions of section 36(1)(va) of the Income-tax Act (the Act, for short). While processing the return of income u/s 143(1), the AO(CPC) had made addition of the said amount u/s 36(1)(va) read with section 2(24)(x) of the Act. In the ground of appeal, the appellant has contended that though the impugned amount was not paid within the due date prescribed in section 36(1)(va) of the Act, the section 36(1)(va) must be read in conjunction with the provisions of section 43B of the Act which provides for deduction if the amount is paid on or before the due date for furnishing the return of income u/s 139(1) of the Act and the appellant has already paid the said amounts within the due date for filing the return of income. Upon due consideration of facts of the case and the provisions of section 36(1)(va), it is observed that the appellant's contentions are not tenable.. Section 36(1)(va) operates quite differently from what has been envisaged in section 43B of the Act. Once it is found that employees contribution to EPF/ ESI are not paid within the

due date prescribed/under the respective EPF/ ESI Acts, such delayed payment has to incur disallowance addition to income as per the clear and unambiguous provisions of section 36(1)(va) and it cannot be saved by virtue of provisions of section 43B of the Act. In a recent landmark judgment in the case of Checkmate Services (P.) Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC), 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 allowance/ 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 of contribution to any provident fund or superannuation 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' income/salary. The former are sums which are liabilities of the employer to be borne by him out of his own income. The latter are sums deducted from others income and held in trust by him and deemed to be his income under section 2(24)(x) unless deposited with concerned authorities on or before the due date as defined in Explanation (now Explanation 1) below section 36(1)(va) i.e. due dates under the relevant employee welfare legislation like PF Act. ESI Act etc.

- The non-obstante clause in section 438 cannot be interpreted as overriding section 36(1)(va) and cannot be interpreted to mean that employer will get deduction in respect of employees' contributions deducted from their

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.

5.2.3 In view of the aforesaid, it is amply clear that even prior to insertion of Explanation 2 in section 36(1)(va) and Explanation & th Section 43B by the Finance Act,2021 we.f. 1-4-2021,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. The case law relied upon by the appellant are no longer good law after the afore-cited judgment of the Hon'ble Supreme Court. Therefore, I am of the considered view that the AO(CPC) has rightly disallowed of Rs.16,62,178/- on account of delayed deposit of sum received from employees as contribution to any Provident Fund or any fund setup under ESI Act under section 36(1)(va). Hence, as per discussion above and in view of the judgement of the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC), the action of the AO in this regard is, therefore, confirmed and the ground of appeal No. 1 & 2 are not allowed.”

2.3 During the course of hearing, the ld. AR of the assessee prayed that the ld. CIT(A) has confirmed the action of the AO in view of the decision of Hon'ble Supreme Court in the case Checkmate Services (P) Ltd. vs.

CIT (2022) 143 taxmann.com 178 (SC) but the issue is related to calculation mistake by the AO while making the disallowance which means that the AO has added the amount of employer's contribution with the employees contribution and it inflated the addition and the same should also be re-looked into and thus decide the actual disallowance to be made in the case of the assessee. The ld. AR thus prayed to restore the issue to file of the AO for afresh calculation of disallowance and relief provided as per law.

2.4 On the other hand, the ld. DR supported the order of the ld.CIT(A).

2.5 We have heard both the parties and perused the materials available on record. The Bench noted from the assessment order that the AO made an addition of Rs.16,62,178/- u/s 36(1)(va) of the Act on account of employees contribution to PF/ESI paid beyond the due date specified under relevant Acts before the due date of filing of return of income which in first appeal has been confirmed by the ld CIT(A) in view of the decision of Hon'ble Supreme Court in the case Checkmate Services (P) Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC). It is also noted from the submissions/ arguments of the ld. AR of the assessee wherein he had prayed that the amount of ESI/PF contribution so disallowed by the AO comprised of the employers contribution as well as employees

contribution for which the Id. AR filed the detailed bifurcation as to difference of amount in both the contributions by the employers and the employees whose details are placed hereunder.

“Provident Fund

Month	Employers Contribution	Employees Contribution	Total
(1)	(2)	(3)	(4)
April 2019	260	240	500
April 2019	3204	2956	6160
April 2019	910	840	1750
April 2019	29870	27546	57416
May 2019	250	240	490
May 2019	3095	2851	5946
May 2019	91	84	175
May 2019	33915	31285	65200
June 2019	442	408	850
June 2019	3225	2975	6200
June 2019	416	384	800
June 2019	10418	9594	20012
June 2019	27164	25070	52234
July 2019	468	432	900
July 2019	5865	5409	11274
July 2019	1932	1782	3714
July 2019	28105	31443	59548
August 2019	3042	2808	5850
August 2019	42126	38860	80986
September 2019	60490	55826	116316
October 2019	41500	38284	79784
November 2019	2643	2443	5086
November 2019	32668	35744	68412
December 2019	41454	38236	79690
January 2020	35378	37275	72653
February 2020	26324	28189	54513
March 2020	32916	30358	63274
TOTAL	468171	451562	919733

ESI

Month	Employers Contribution	Employees Contribution	Total
April 2019	46771	17232	64003
April 2019	712	264	976
April 2019	285	105	390
April 2019	5852	2156	8008
April 2019	475	175	650
May 2019	55216	20343	75559
May 2019	805	296	1101
May 2019	285	105	390

ITA No. 121/JPR/2023
S.P. C Infrastructure Pvt. Ltd. vs. DCIT

May 2019	5650	2082	7732
May 2019	475	175	650
June 2019	44691	16465	61156
June 2019	1188	438	1626
June 2019	17093	6297	23390
June 2019	1049	386	1435
June 2019	1034	381	1415
June 2019	5890	2170	8060
July 2019	40411	9326	49736
July 2019	2547	588	3135
July 2019	649	150	799
July 2019	5575	1286	6861
August 2019	49142	11340	60482
September 2019	47921	11059	58980
October 2019	5992	1383	7375
October 2019	42746	9865	52611
November 2019	488	113	600
November 2019	759	175	934
November 2019	1705	394	2099
November 2019	42507	9809	52316
December 2019	42872	9894	52766
January 2020	43756	10098	53854
February 2020	32910	7595	40505
March 2020	312	72	384
March 2020	34504	7963	42467
TOTAL	582267	160180	742445

Total amount deposited lately = Rs. 9,19,733 + Rs. 7,42,445 = Rs. 16,62,178/-"

It is a peculiar case wherein such mistake has been substantiated by the Id. AR of the assessee. In order to provide justice to the assessee and to ameliorate the calculation mistake made by the Department, the appeal of the assessee is restored to the file of the AO to decide it afresh in view of the submissions of the Id. AR only relating so as to arrive at the correct amount of disallowance to be made. Thus the appeal of the assessee is allowed for statistical purposes.

3.0 In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 25 /05/2023.

Sd/-

Sd/-

(राठोड कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

(डॉ.एस.सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 25 /05/2023.

*Mishra

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- S.P.C. Infrastructure Private Limited, Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT, Circle-4, Jaipur.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
5. गार्ड फाईल / Guard File { ITA No. 121/JPR/2023 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar