

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"E" BENCH, MUMBAI**

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.1866/Mum./2022**

**(Assessment Year : 2017-18)**

Khushalrao Keshavrao Garje  
101, Harmony Apartments  
St. Francis Road, Vile Parle (W)  
Mumbai 400 056 PAN – AIWPG2557L

..... Appellant

v/s

Dy. Commissioner of Income Tax  
Central Processing Centre  
Bengaluru 560 500

..... Respondent

Assessee by : Ms. Rucha Vaidya  
Revenue by : Shri P.D. Chogule

Date of Hearing – 04/09/2023

Date of Order – 11/09/2023

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 26/05/2022, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [*"learned CIT(A)"*], which in turn arose from the rectification order passed under section 154 of the Act, for the assessment year 2017-18.

2. The present appeal has been listed for hearing before us pursuant to the order dated 07/07/2023, passed by the coordinate bench of the Tribunal in ITO v/s Khushalrao Keshavrao Garje, M.A. no.260/Mum./2023 (in ITA no.1866/Mum./2022, for the assessment year 2017-18), whereby, the earlier

order dated 10/08/2022, passed under section 254(1) of the Act was recalled and the appeal was directed to be re-fixed for hearing.

3. In this appeal, the assessee has raised the following grounds:-

*"1. On the facts and circumstances of the case and in law, the Id. CIT(A)/NFAC erred in sustaining addition of Rs.72,16,850/- made by rectification order u/s 154 of the Act read with intimation under 143(1) of the Act, wherein the Id. AO/CPC disallowed claim of ESI/EPF contribution, although the same was paid before due date for filing return of income under section 139(1)*

*2. On the facts and circumstances of the case and in law, the Id. CIT(A)/NFAC erred in not appreciating that the issue of payments of ESI/EPF contribution before due date for filing return was covered in favour of the assessee in several judgments, and the amendments made by Finance Act, 2021 on the said issue were prospective and did not apply to AY 2017-18.*

*3. On the facts and circumstances of the case and in law, the Id. CIT(A)/NFAC erred in not appreciating that in any event, addition on the issue of disallowance of ESI/EPF contribution before due date for filing return could not be made either by adjustment under s 143(1) or by rectification under s 154 and the addition made was entirely beyond the scope of the said sections.*

*4. On the facts and circumstances of the case and in law, the Id. CIT(A)/NFAC erred in upholding charging of interest under sections 234B and 234C of the Act, when the addition made itself was unsustainable.*

*5. The Appellant craves leave to add, alter or amend the above grounds of appeal."*

4. The only dispute raised by the assessee, in the present appeal, is against the disallowance of delayed payment towards employee's contribution to Provident Fund (P.F.) / Employees State Insurance Corporation (E.S.I.C.) under section 36(1)(va) vide order passed under section 154 of the Act.

5. The brief facts of the case are that the assessee is an individual and has filed its return of income on 28/10/2017, declaring a total income of Rs.82,20,550, for the year under consideration. The return filed by the assessee was initially processed vide intimation dated 26/07/2018, issued under section 143(1) of the Act computing the total income of Rs.82,20,550, without disallowing delayed payment towards employee's contribution to P.F./E.S.I.C. Since TDS credit was not granted as per Form 26AS, the assessee filed rectification application under section 154 of the Act on 26/11/2019. The

said application was disposed off vide order dated 03/12/2019, passed under section 154 of the Act, computing the total income of the assessee at Rs.1,54,37,400. As per the assessee, vide aforesaid rectification order not only the complete claim of TDS of Rs.13,59,883, as prayed by the assessee, was granted, but the AO-CPC also made the disallowance of Rs.72,16,855 for non-deposit of employee's contribution to P.F. and E.S.I.C. in time. The assessee again filed the rectification application under section 154 of the Act on 28/12/2019. However, the same was disposed off vide order dated 01/01/2020, passed under section 154 of the Act without amending the total income of the assessee.

6. The learned CIT(A), vide impugned order, in light of the amendment vide Finance Act 2021 to section 36(1)(va) and section 43B of the Act upheld the addition of Rs.72,16,855, on account of delayed payment towards employee's contribution to P.F./E.S.I.C. Being aggrieved, the assessee is in appeal before us.

7. We have considered the submissions of both sides and perused the material available on record. As per the assessee, no disallowance under section 36(1)(va) of the Act was made on account of delayed payment towards employee's contribution to P.F./E.S.I.C., while processing assessee's return under section 143(1) of the Act. It is only pursuant to the rectification application filed by the assessee under section 154 of the Act, which was limited to the grant of TDS credit as per Form 26AS, the AO-CPC made the impugned disallowance under section 36(1)(va) of the Act. As per the assessee, before making the aforesaid disallowance vide order dated 03/12/2019, passed under section 154 of the Act no notice was issued to the assessee.

8. Before proceeding further, it is pertinent to note certain provisions of the Act which are relevant for the adjudication of the issue at hand. It is undisputed that under section 154 of the Act, the AO has been conferred with power to rectify any mistake which is apparent from the record. As per section 154(2) of the Act, such rectification/amendment can be made by the AO on its

own motion or pursuant to an application by the assessee. It is evident from the record that in the present case, the rectification order dated 03/12/2019, under section 154 of the Act was not passed by the AO-CPC on its own motion, and rather the same was passed pursuant to the rectification application dated 26/11/2019, filed by the assessee. As per section 154(8) of the Act in case of an application for amendment by the assessee, an order under section 154 of the Act can be passed either making the amendment or refusing to allow the claim. In the present case, undoubtedly the AO-CPC though allowed the relief claim by the assessee vide its application under section 154 of the Act and granted the complete claim of TDS credit of Rs.13,59,883, vide order dated 03/12/2019. However, it is evident that vide the same order the AO-CPC made the disallowance under section 36(1)(va) of the Act on account of delayed payment towards employee's contribution to P.F./E.S.I.C. Thus, the AO-CPC made the amendment suo moto while deciding the application under section 154 of the Act filed by the assessee, which was on completely different aspect. In this regard, it is relevant to note that as per section 154(3) of the Act, an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee cannot be made under section 154 of the Act unless notice is issued to the assessee in this regard and reasonable opportunity of being heard has been allowed to the assessee. However, no material has been brought on record by the Revenue to show that prior to making the impugned disallowance in the present case, while deciding the rectification application under section 154 of the Act filed by the assessee, such a notice as required under the provisions of section 154(3) of the Act was issued to the assessee in respect of the impugned disallowance. Since, in the present case, the impugned disallowance under section 36(1)(va) of the Act was made vide order passed under 154 of the Act without following the jurisdictional pre-condition as laid down in the statute, we are of the considered view that the said disallowance is void ab initio and accordingly is directed to be deleted. Accordingly, the impugned order on this issue is set aside and grounds no. 1-3 raised in assessee's appeal are allowed.

9. The issue arising in ground no.4, pertains to the levy of interest under sections 234B and 234C of the Act, which is consequential in nature. Accordingly, ground no.4, is allowed for statistical purposes.

10. In the result, the appeal by the assessee is allowed.

Order pronounced in the open Court on 11/09/2023

**Sd/-**  
**AMARJIT SINGH**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 11/09/2023**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai