

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "G" : DELHI]

BEFORE SHRI G. S. PANNU, HON'BLE VICE-PRESIDENT
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No.361/Del/2023
निर्धारणवर्ष/Assessment Years: 2018-19

Subodh Kumar Choudhary, M/s. BAC Equipments, D-85, 1 st Floor, Street No. 4, Laxmi Nagar, Delhi - 110 092.	<u>बनाम</u> Vs.	Income Tax Officer, Ward : 32 (3) Delhi.
PAN No. ADJPC6448A		
अपीलार्थी / Appellant		प्रत्यर्थी/ Respondent

निर्धारितकीओरसे /Assessee by :	Shri Saurav Rohatgi, C. A.;
राजस्वकीओरसे / Department by :	Shri Anuj Garg, Sr. D. R.

सुनवाईकीतारीख/ Date of hearing :	02/11/2023
उद्घोषणाकीतारीख/Pronouncement on :	09/11/2023

आदेश / ORDER

PER C. N. PRASAD, J. M. :

1. This appeal is filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals) [hereinafter referred to

CIT (Appeals)]/National Faceless Appeal Centre [NFAC] Delhi, dated 19.12.2022 for assessment year 2018-19.

2. The assessee has raised the following substantive grounds:-

“1. That CIT Appeal NFAC erred in upholding disallowance of Rs.34,88,721/-on account of delay in making the payment towards the employees contribution for the provident fund, under section 36(1)(va) r.w.s. 2(24)(x) of the Act.

2. That learned CIT (A) was not justified in upholding the adjustment, made by the Centralized Processing Centre Bengaluru while processing income tax returns under section 143(1).

3. That without prejudice such a debatable and controversial issue cannot be invoked by making adjustments u/s 143(1) of Income Tax.

4. That on facts and circumstances of the case, the Ld. AO (CPC) also erred in exceeding this power, authority an jurisdiction u/s 143(1) of the Income Tax Act, 1961 in processing the return.

5. That the insertion of Explanations to section 36(1)(va) and 43B (explanation 5), by the Finance Bill 2021, is prospective in nature, and, accordingly, so far as the period prior to 1st April 2021 is concerned, such a disallowance cannot come into play and liable to be deleted.”

3. The Ld. Counsel for the assessee submits that for computing the period of delay “month” to be taken should be the month in which salary/wages are disbursed by the assessee and not calendar month. Reliance is placed on the decisions of Kolkata Bench of the Tribunal in the case of Kanoi Paper Industries Ltd. Vs. ACIT

(75 TTJ 448) and the Delhi Benches in the cases of Sentinel Consultants Pvt. Ltd. Vs. ACIT in ITA. Nos. 7 & 8/Del/2023 dated 12.06.2023, B. L. Kashyap & Sons Ltd. in ITA. No. 2622/Del/2022 dated 18.07.2023 and VVDN Technologies Pvt. Ltd. in ITA. No. 164/Del/2023 dated 4.07.2023.

4. Heard rival submissions, perused the orders of the authorities below.

5. In so far as employees contributions towards PF & ESI it is noticed that the issue as to whether the due date under PF/ESI Acts should be as per the calendar month for which the salary is payable or from the month in which the salary is paid to the employee by the employer came up for adjudication in the case of Sentinel Consultants Pvt. Ltd. Vs. ACIT (supra) and the Tribunal restored the issue to the file of the AO with the following observations:-

“9. We have carefully considered the rival submissions and perused the material available on record. The disallowance of employees’ contribution to PF/ESIC for breach of condition under Section 36(1)(va) is in controversy.

9.1 We notice at the outset that an opportunity was given via electronic platform of the deptt. for the proposed adjustments and in the absence of e-response, the adjustments were carried out the CPC-Bangluru and intimation was issued enhancing the assessed income in the captioned assessment years. The CIT(A) in the first appeal has sustained the adjustments towards belated deposits of employees’ contribution to PF/ESIC in the light of the judgment rendered by the Hon’ble Supreme Court in Checkmate Pvt. Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC). The contention of the Assessee that such additions cannot be made under

the umbrella of S. 143(1) is covered against the assessee the decision of the co-ordinate bench in the case of Weather Comfort Engineers Private Limited vs. ACIT-CPC ITA No. 959/Del/2021 order dated 15/02/2023. The action of CPC and CIT(A) thus cannot be faulted where some opportunity was admittedly given for e- response.

9.2 We now turn to alternate plea on behalf of the assessee for grant of deduction under general provisions for deduction of expenditure under S. 37 of the Act. We do not see any merit in such plea that the belated deposit of employees contributions to PF/ESIC governed under Section 36(1)(va) is also simultaneously amenable to deduction under Section 37(1) of the Act. In terms of the provision, Section 37(1) permits deduction of expenditure which is not in the nature of expenditure prescribed in Sections 30 to 36 of the Act and also not being in the nature of capital expenditure or personal expenses of the assessee. Thus, in view of such mandate of law, the deduction of expenditure under the general clause of Section 37(1) would not extend to expenditure specially covered within the ambit of Section 36(1)(va) of the Act. The Hon'ble Supreme Court in the case of Checkmate Pvt. Ltd. (supra) itself explains this position in Para 32 of the Judgment. Such view also draws support from the observations made in recent judgment of the Hon'ble Supreme Court in the case of Pr.CIT vs. Khyati Realtors (P) Ltd. (2022) 141 taxmann.com 461 (SC). The alternate plea is thus without any merit.

9.3 We also take note of yet another plea made out on behalf the assessee towards methodology of calculation of default under the relevant PF/ESIC Act. The Ld. Counsel contends that the month during which the disbursement of salary is actually made would be relevant for the purposes of determination of due date of deposit under the respective statute. The accrual of liability towards payment of salary without actual disbursement would not fasten obligation for deposits of employees contribution in the labour Acts per se. as observed by the co-ordinate

bench in Kanoi Paper and Industries Ltd. vs. ACIT (2002) 75 TTJ 448 (Cal). This aspect has not been found to be examined by the Assessing Officer or CIT (A). Hence without expressing any opinion on merits on this aspect, we deem it expedient to restore the matter to the file of designated AO. It shall be open to the assessee to place factual matrix before the AO and take such plea for evaluation of the AO. The AO shall examine this aspect and fresh order in accordance with law after giving proper opportunity.”

6. We find similar view has been taken by the co-ordinate benches in the cases of B. L. Kashyap & Sons Ltd. (supra) and VVDN Technologies Pvt. Ltd. (supra). The ld. Counsel submits that in view of these decisions the matter may be restored to the Assessing Officer to ascertain the due date for remittance of the PF/ESI contributions of employees. Considering the decisions of the co-ordinate benches referred to above we restore this issue to the file of the Assessing Officer to decide in the light of the observations made by the Tribunal in the case of Kanoi Paper & Industries Ltd. Vs. ACIT (supra). Needless to say that the Assessing Officer shall provide adequate opportunity of being heard to the assessee and the assessee is at liberty to provide all the necessary information in support of its contention.

7. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on : 09/11/2023.

Sd/-
(G. S. PANNU)
VICE-PRESIDENT

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 09/11/2023.

MEHTA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक / Assessee
2. राजस्व / Revenue
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, DELHI /
DR, ITAT, DELHI
6. गार्ड फाइल / Guard file.

By order

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	02.11.2023
Date on which the typed draft is placed before the dictating Member	03.11.2023
Date on which the typed draft is placed before the Other Member	09.11.2023
Date on which the approved draft comes to the Sr. PS/PS	09.11.2023
Date on which the fair order is placed before the Dictating Member for pronouncement	09.11.2023
Date on which the fair order comes back to the Sr. PS/PS	09.11.2023
Date on which the final order is uploaded on the website of ITAT	09.11.2023
Date on which the file goes to the Bench Clerk	09.11.2023

I.T.A. No. 361/Del/2023

Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	