

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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI YOGESH KUMAR U.S, JUDICIAL MEMBER**

ITA No. 327/DEL/2022 [A.Y. 2018-19]

Vaco Binary Semantics LLP
Plot No. 38, Sector - 18
Electronic City, Gurugram

Vs.

The C.I.T(A)
Circle - 4(1)
Gurgaon

PAN - AAOFV 6331 M

(Applicant)

(Respondent)

Assessee By : Shri Saurav Sood, Adv

Department By : Shri Vivek Vardhan, Sr. DR

Date of Hearing : 09.01.2024

Date of Pronouncement : 09.01.2024

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 20.12.2021 by the NFAC, Delhi pertaining to A.Y. 2018-19.

2. The grievances of the assessee read as under:

- I. That the Ld. CIT(A) erred both in law and in respect of facts of the case, while dismissing the appeal filed by the Appellant vide its order dated 20.12.2021 bearing order no. TBAINFAC/S/250/2021-2211037938846(1) under section 250 of the Income Tax Act, 1961 (the 'Act') for assessment year 2018-19 and upholding the order passed by the CPC.
2. That the Ld. CIT(A) failed to appreciate the intent of law and amendments brought in by the Finance Act, 2021 wherein a clarificatory amendment was made in Section 36 and 43B of the Act to address the ambiguity. The amendment was necessary to provide the clarity in relation to allowability of employee contribution to various funds. The Ld. CIT(A) erroneously and over-zealously stated that the language and rationale for these amendments clearly indicate that these amendments are retrospective in nature. Further, the Ld. CIT(A) overlooked the fact that effective date for the purpose of applicability of these amendments is 1st April, 2021. Consequently, the amendment is applicable to assessment year 2021-2022 and onwards. The Ld. CIT(A) completely ignored the fact that the case of the Appellant pertains to AY 2018-2019 where there was no bar on allowability of payment of employee contribution where such payment is made on or before the due date of filing of the return, as held by various courts in different cases.

3. That the Ld. CIT(A) failed to understand the Principles of Interpretation of Statutes and held the amendment made by the Finance Act, 2021 to be clarifactory or explanatory amendments and to be effective from date when the original provision was introduced. The Ld. CIT(A) completely ignored the fact that the memorandum to Finance Bill 2021 clearly states that these amendments are effective from 1st April, 2021 and will consequently apply to assessment year 2021-2022 and subsequent assessment years.

4. That the Ld. CIT(A) overlooked the precedents set by the Apex Court in case of Commissioner of Income Tax Vs. Vinay Cement Limited and Hon'ble Delhi High Court in the cases of Commissioner of Income Tax, Delhi Vs. Bharat Hotels Limited dated 06.09.2018 and Commissioner of Income Tax, Delhi Vs. AIMIL Limited, wherein it was held that employee contribution to statutory Labour welfare funds is an allowable expense, if paid on or before due date of return of income under section 139(1) of the Act and the Ld. CIT(A) completely overlooked and ignored the above precedents, thereby arbitrarily doubting the judgement of higher prevailing judicial authority.

5. That the CIT(A) relied upon the contrary judgements of other Hon'ble High Courts and completely ignored the precedents set by jurisdictional High Court and also the Hon'ble Supreme Court in its landmark judgement of Vegetable Products Limited wherein it was held that when two judgments are available giving different views then the judgment which is in favour of the Assessee.

6. That the Ld. CIT(A) completely ignored the fact that various judgements have been pronounced by the jurisdictional Hon'ble ITAT of Delhi in the case of Flying Fabrication Vs. Deputy Commissioner of Income-tax in the ITAT Delhi Bench 'B', Yogi Ji Technoequip (P.) Ltd. Vs. Deputy Commissioner of Income-tax CPC, Bengaluru tax in the IT AT Delhi Bench 'SMC-1' and Maksat Technologies (P.) Ltd.. Vs. Deputy Commissioner of Income-tax, Circle - 16(1), New Delhi in the ITAT Delhi Bench 'E' and the same are directly applicable in the case of the Appellant.
7. That the CIT(A) failed to appreciate the fact that the case of the Appellant is covered by the various judgements against the revenue and no substantial question of law arises for consideration in this and it should have been decided in favour of the Appellant.
8. That the Ld. CIT(A) is not justified to upheld the disallowance arbitrarily made by the CPC and withholding the refund amounting to Rs. 10,39,02
9. That Appellant was not given reasonable and sufficient opportunity of personally heard to explain or discuss the submissions filed on record.
10. That Appellant reserves its right to add, amend or withdraw any grounds of appeal, before the appeal is finally heard."

3. Vide letter dated 10.03.2023, the assessee has also raised the following two additional grounds :

“3. The Id. CIT(A) has erred on facts and failed to appreciate that out of the total impugned disallowance made Rs. 66,848/- pertaining to employees contribution towards provident fund for the month of January was paid before the due date and accordingly should be allowed as a deduction u/s 36(1)(va) of the Act.

4. The Id. CIT(A) has erred on facts and failed to appreciate that out of ht total impugned disallowance made, Rs. 30430/- pertaining to employees contribution towards Labour Welfare Fund was paid before the due date and accordingly should be allowed as a deduction u/s 36(1)(va).”

4. Grievances raised vide grounds taken in Form No. 36 has to be decided against the assessee and in favour of the Revenue in as much as the there is no dispute that the employees contributions towards Provident Fund is deposited beyond the prescribed due date and therefore the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd 448 ITR 518 squarely apply. It would be pertinent to refer to the most relevant observations of the Hon'ble Supreme Court on the impugned quarrel which read as under:

“32. The scheme of the provisions relating to deductions, such as Sections 32 - 37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfillment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection. In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of Section 36 (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) - which defines various kinds of “income” - inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee’s income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression “due date” was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the

concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

33. The significance of this is that Parliament treated contributions under Section 36(1)(va) differently from those under Section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

34. It is therefore, manifest that the definition of contribution in Section 2 (c) is used in entirely different senses, in the relevant deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

35. It is instructive in this context to note that the Finance Act, 1987, introduced to Section 2(24), the definition clause (x), with

effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill, 1987, presented to the Parliament, is extracted below:

“Measures of penalising employers mis-utilising contributions to the provident fund or any funds set up under the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees

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12.1. The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section 43B). The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. “Due date” means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise.

(Explanation to Section 36 (1) of the Finance Act)

12.2. In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due

date. Where such income is not chargeable to tax under the head “profits and gains of business or profession” it will be assessed under the head “income from other sources.”

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44. There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers’ contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available.

45. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers’ contribution and employees’ contribution, too went unnoticed. The court observed inter alia, that:

“15. ...It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in Allied Motors (P) Limited (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that

Finance Act, 2003 will operate retrospectively with effect from 1st April, 1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year] but before filing of the Returns under the Income Tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under Section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under Section 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003”.

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48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. Eagle Flask Industries Ltd Vs. Commissioner of Central Exercise 2004 Supp (4) SCR 35. This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations.

49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in State of Jharkhand v Ambay Cements as follows:

“23.... In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be

mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein.”

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53. The distinction between an employer’s contribution which is its primary liability under law - in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers’ income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts - the employer’s liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees’ income and held in trust by the employer.

54. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees’ contributions- which are deducted from their income. They are not part of the assessee employer’s income, nor are they heads of deduction per se in the form of statutory pay out. They are others’ income,

monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date.”

5. The contention of the ld. counsel for the assessee that the disallowance could not have been made while processing the return u/s 143(1) of the Act is not acceptable because the Hon'ble Supreme Court has nowhere held that the disallowance can be made only by way of assessment u/s 143(3) of the Act and not while processing the return u/s 143(1) of the Act. What is paramount is the dates for depositing the employees contribution and if the deposit is made beyond the specified date, disallowance has to be made.

6. In so far as additional grounds are concerned, we direct the Assessing Officer to verify the deposit made for the month of January and if found to be deposited before the due date, the same should be allowed. Similarly, the deposit of Rs. 30,430/- is to be verified whether it is towards labour welfare fund and if found correct, no disallowance need to be made.

7 In the result, the appeal of the assessee in ITA No. 327/DEL/2022 is allowed in part for statistical purposes.

The order is pronounced in the open court on 09.01.2024.

Sd/-

Sd/-

[YOGESH KUMAR U.S.]
JUDICIAL MEMBER

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 09th JANURARY, 2024

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Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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