

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

**BEFORE N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 269/Del/2023
Asstt. Year: 2018-19

RSB Projects Ltd., A-34, Ward-20(4), Tehkand, South East Delhi, New Delhi 110 020 PAN AAACR0205R	Vs.	DCIT, Circle-19(1), New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Baldev Raj, CA Shri Manish UPNEJA, CA
Department by :	Shri Vivek Vardhan, Sr. DR
Date of Hearing	04/12/2023
Date of pronouncement	04/12/2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order of Ld. Commissioner of Income Tax-(Appeals), NFAC, Delhi (**"CIT(A)"**) dated 21.12.2022 pertaining to Assessment Year (**"AY"**) 2018-19.

2. The assessee has raised the following grounds:-

"1. That on the facts and circumstances of the case, the order dated as 04.06.2020 passed by the Assistant Director of Income Tax, CPC Bangalore (hereinafter for the sake of brevity referred to as "The Ld. A.O.") under section 143(1) of the Income-tax Act, 1961 (hereinafter for the sake of brevity referred to as "The Act") and as upheld by the Ld. Commissioner of Income-tax (Appeals) - NFAC (hereinafter for the sake of brevity referred to as "The CIT (A)") is bad at law and void ab initio.

2. *That on the facts and in circumstances of the case, the Ld. CIT(A) erred in upholding the addition to the tune of Rs. 25,64,321/- on account of employee's contribution of PF under section 36(1) (va) of the Act and the same is not sustainable on various legal and factual ground.*
3. *That on the facts and in circumstances of the case, the Ld. CIT(A) erred in upholding the addition to the tune of Rs. 1,67,462/- on account of employee's contribution of ESI under section 36(1) (va) of the Act and the same is not sustainable on various legal and factual ground.*
4. *That on the facts and in circumstances of the case, the Ld. CIT(A) erred in Law in holding that explanation 2 to u/s 36(i)(va) is applicable in A.Y. 2018-19 when it is provided as applicable w.e.f. A.Y. 2021-22.*
- 5.1 *All the above-mentioned grounds are independent and without prejudice to other; and*
- 5.2 *That the appellant carves the right to add, alter, amend and delete the ground(s) of appeal during the course of hearing."*

3. Briefly stated, the facts are that the assessee company is engaged in the business of civil construction activities. It filed its return for AY 2018-19 declaring income of Rs. 4,73,77,020/-. An intimation under section 143(1) of the Income Tax Act, 1961 (**the "Act"**) was issued on 04.06.2020 wherein an addition of Rs. 27,31,783/- was made by way of adjustment on account of late receipt of Provident Fund and ESI of employees contribution due to non-compliance of provisions of section 36(1)(va) of the Act. The assessee responded to the Centralized Processing Centre (CPC) on-line opposing the said adjustment which was not replied.

4. Aggrieved, the assessee filed appeal before the Ld. CIT(A) but without success. This has brought the assessee before the Tribunal and all the grounds of appeal relate thereto.

5. The Ld. AR submitted before us a copy of statement containing therein monthwise detail of payment of salary, due date of deposit and date of deposit of ESI/PF. The Ld. AR contended 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. Relying on various decision of the co-ordinate Benches of the Tribunal, the Ld. AR urged that the issue be restored to the file of the Ld. Assessing Officer (“AO”) for decision afresh.

6. The Ld. DR supported the order of the Ld. AO/CIT(A).

7. We have considered the submission of the parties and perused the records. In our view the issue is covered by the decision of the Co-ordinate Bench in the case of Vigilant Security Placement & Detective Services Pvt. Ltd. Vs. DCIT Circle 16(1), New Delhi in ITA No. 2740/Del/2022 rendered on 13.06.2023 wherein on identical facts, the Tribunal held as under:-

“7. We have considered rival submissions and perused the materials on record. In our view, after the decision of Hon’ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT, 448 ITR 518 (SC), the disputed issue is no more res integra, as the Hon’ble Supreme Court has clearly and categorically held that in case employees contribution to PF and ESI have not been deposited within the due date prescribed under the PF and ESI Acts, the same cannot be allowed as deduction in view of the provisions contained under section 36(1)(va) of the Act. Hon’ble Supreme Court has further held that in such circumstances, the employees contribution to PF and ESI not deposited within the due date, shall be treated as income of the assessee u/s. 2(24)(x) of the Act. In that view of the matter, we are unable to accept assessee’s contention that the disallowance cannot be the subject matter of adjustment u/s. 143(1) of the Act.

8. As regards the alternative contention of the assessee that the employees contribution to PF and ESI have been deposited within the due date keeping in view the fact that the months to be considered should be the month, in which, salary/wages are disbursed, we direct the Assessing Officer to examine the claim of the assessee strictly with reference to the provisions contained under the PF and ESI Acts in respect of the mode and manner of depositing the employees contribution towards PF & ESI and decide the issue accordingly. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee before deciding the issue.”

8. Respectfully following the decision (supra) we restore the matter to the file of the Ld. AO for verification of the assessee’s claim and fresh

adjudication of the issue in accordance with law. Of course, the Ld. AO shall afford reasonable opportunity of being heard to the assessee.

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

Order pronounced in the open court on 4th December, 2023.

sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

sd/-
(ASTHA CHANDRA)
JUDICIAL MEMEBR

Dated: 04/12/2023

Copy forwarded to-

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	19.01.2024
Date on which the typed draft is placed before the dictating Member	19.01.2024
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	