



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
MANISH AGARWAL, ACCOUNTANT MEMBER**

ITA Nos.235 & 236/CTK/2023
Assessment Years : 2013-14 & 2014-15

Gorakhnath Construction Pvt.ltd., E-42, Rourkela	Koel Nagar,	Vs.	DCIT, Circle, Rourkela
PAN/GIR No.AABCG 4382 R			
(Appellant)		..	(Respondent)

Assessee by : Shri P.R.Mohanty, Adv
Revenue by : Shri S.C.Mohanty, Id Sr DR

Date of Hearing : 17/04/2024
Date of Pronouncement : 17/04/2024

ORDER

Per Bench

Both the appeals filed by the assessee are against the order of the Id CIT(A), NFAC, Delhi dated 28.03.2023 in Appeal No.CIT(A), Cuttack/11090/2016-17 for the assessment year 2013-14 and dated 20.6.2023 in Appeal No.CIT(A), Sambalpur/10059/2017-18 for the assessment year 2014-15.

2. Shri P.R.Mohanty, Id AR appeared for the assessee and Shri S.C.Mohanty, Ld Sr. DR appeared for the revenue.

3. The appeal filed for the assessment year 2013-14 is time barred by 37 days and the appeal filed for the assessment year 2014-15 is 315 days. The assessee has filed condonation petitions supported by affidavit for both the assessment year, inter alia, stating the reasons in filing the appeals delay by 37 days and 315 days, respectively. Ld Sr DR did not oppose the condonation petitions. In view of above, we condone the delay of days and days and admit the appeals for hearing.

4. The common issue taken in both the appeals is in regard to disallowance of PF & ESIC contributions to the extent of Rs.12,27,689/- and Rs.1,93,618/- totaling to Rs.14,21,307/- for the assessment year 2013-14 and Rs.6,37,793/- and Rs.1,12,143/- totaling to Rs.7,49,936/- made by the AO and confirmed by the Id CIT(A).

5. It was submitted by Id Sr DR that the issue involved in these appeals is delayed payment of PF and ESI in respect of employees contribution. Ld Sr DR submitted that the issue is now squarely covered by the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd vs CIT in Civil Appeal No.2833 of 2016 dated 12.10.2022, wherein, the Hon'ble Supreme Court has categorically held that if the employees contribution to PF and ESI has been paid beyond the time prescribed under the relevant PF Act, then same is not allowable under section 43B even after the payment has been made before the due date of filing of return under the Income tax Act. It was the submission that the amount of employees contribution to PF

and ESI, which has not been paid within the due date as prescribed under the relevant Act, has been held by Hon'ble Supreme Court to be not allowable u/s.36(1)(va) of the Act. It was the submission that the Hon'ble Supreme Court in paras 52 & 53 has also categorically held that the provisions of section 43B would not apply to the employees' contribution to PF and ESI.

6. We have considered the rival submissions. Admittedly, the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd (supra) has categorically held that the employees contribution to PF and ESI to the extent it is not paid within due date prescribed under the PF Act, is not allowable u/s.36(1)(va) of the Act. The Hon'ble Supreme Court has also admittedly held that the provisions of section 43B would not apply to the provisions of section 36(1)(va) of the Act in respect of employees contribution. Respectfully following the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd(supra), we are of the view that the delayed payment in respect of employees contribution to PF and ESI is not allowable.

7. In the case of Nirakar Security & Consultancy Services Pvt Ltd vs ITO in ITA No.98/CTK/2022 for Assessment Year 2016-17, order dated 17.10.2022, the Co-ordinate Bench of this Tribunal after considering the arguments of Id AR, has restored the issue to the file of the Assessing officer with the following directions:

“6. Liberty is granted to the Id AR to make all submissions in respect of allowability of disallowed contribution of the employees to PF and ESI under other relevant provisions in the interest of justice. This direction is being given because Id AR has submitted that as the amount is not allowable under section 36(1)(va) of the Act and same is also not covered under section 43B of the Act, the amount of delayed contribution to PF and ESI in respect of employees contribution would be treated as income in the hands of the assessee u/s.2(24)(x) and on subsequent payment of the same, it would be a business expenditure, which can be claimed u/s.37(1) of the Act. We are not expressing any opinion in regard to his arguments as it has not been examined by the lower authorities. Liberty is also granted to the assessee to raise all arguments as are found necessary by him before the lower authorities.”

8. As the issue in the present appeals is also identical to the issue in the case of Nirakar Security & Consultancy Services Pvt Ltd.,(supra), on identical findings the issue in these appeals is restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity of being heard.

9. The other ground taken in the assessment year 2013-14 is in regard to the disallowance of expenses towards service tax contribution to the extent of Rs.22,77,910/- u/s.43B of the Act.

10. Ld A.R. submitted that although the amount of Rs.22,77,910/- has been made beyond the due date as provided in Service Tax Act, but well within the time for filing of return of income and, therefore, should be allowed.

11. This issue is also restored to the file of the AO for examination as to whether same had been paid before the due date of filing of return under the Income tax Act. If the same has been paid before the due date of filing

of return, then in view of the provisions of section 43B, no disallowance is called for.

12. In the result, appeals of the assessee stand partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 17/04/2024.

Sd/-
(Manish Agarwal)
ACCOUNTANT MEMBER
Cuttack; Dated 17/04/2024
B.K.Parida, SPS (OS)

sd/-
(George Mathan)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant : Gorakhnath Construction
Pvt.ltd., E-42, Koel Nagar, Rourkela
2. The Respondent: DCIT, Circle, Rourkela
3. The CIT(A)- NFAC, Delhi
4. Pr.CIT, Cuttack/Sambalpur
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack