

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI**

**BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No. 597/DEL/2024
(Assessment Year: 2019-20)**

SHEO PARSHAD,
C/o CA M.R. Sahu,
House No. 651, 1ST Floor,
Sector-10A,
Nr. G.D. Goenka public school,
Gurgaon - 122001 (Haryana)

vs. ITO, Ward 4(1),
Gurgaon.

(PAN : ALQPP4334H)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri M.R. Sahu, CA
REVENUE BY : Shri Anuj Garg, Sr. DR.

Date of Hearing : 03.07.2024
Date of Order : 13.09.2024

ORDER

PER S.RIFAUR RAHMAN,AM:

This appeal has been filed by the Assessee against the order of Learned Addl/JCIT(A)-3, Bengaluru ["Ld. JCIT(A)", for short] dated 15.12.2023 for Assessment Year 2019-20.

2. Brief facts of the case are, that the assessee had filed the income tax return and claimed refund of Rs. 2,87,353/-. The CPC has processed the ITR and issued intimation under section 143(1) of the Income-tax Act, 1961 (for short 'the Act') by disallowing Employees contribution towards ESI and EPF of

Rs.43,28,430. Resultantly, returned income has been increased by Rs.43,28,430/- and CPC computed the total income at Rs.64,12,622/-.

3. Against the aforesaid order, assessee preferred an appeal before the Id. JCIT (A), who vide his impugned order dated 15.12.2023 confirmed the action of the AO by way of dismissing the appeal of the assessee.

4. Aggrieved, the Assessee is in appeal before us. Assessee has filed an application dated 10.2.2024 for admission of additional jurisdictional legal grounds of Appeal under Rule 11 of the ITAT Rules, 1963, which is reproduced as under:-

“Sub: Application for admission of additional jurisdictional legal grounds of appeal under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 in the case of "Sheo Parshad Vs. ITO, Ward 4(1), Gurgaon & ADIT, CPC, Bangalore". PAN NO:ALQPP4334H. A.Y.2019-20.

Dear Sir,

It is humbly prayed before your honour to admit the following additional jurisdictional legal grounds of appeal:

(A) Additional jurisdictional legal grounds of appeal:

1. That on the facts, and in the circumstances of the case and in law, the CIT(A) erred in confirming the adjustment of Rs.43,28,430/- made by the ADIT, CPC, Bangalore (here in after referred as AO) in the intimation dated 08/12/2020 [here in after referred as intimation] on account of delayed deposit of employees contribution to PF & ESI without appreciating the fact that mandatory prior intimation before making adjustment as per proviso 1 to section 143 (1)(a) was transmitted electronically on 12/10/2020 using unrelated/wrong Email id: yadavparveen01 @gmail.com not in the correct Email id: cabharatyadav@gmail.com, reflected on the face of the return of income filed on 30/09/2020, thus mandatory procedures for transmitting communications electronically by Email as specified u/s.288 r.w.r 127(2)(b) not followed, accordingly prior intimation sent on 12/10/2020 was not served upon the assessee, as a result it can be held that prior intimation sent on 12/10/2020 was neither issued nor

served upon the assessee, thus the adjustment of Rs.43,28,430/- confirmed by the CIT(A) deserves to be deleted in full.

2. *Without prejudice to the contention raised in the Grounds of Appeal No.1 above, the CIT(A) erred in confirming addition of Rs.43,28,430/- on account of delayed deposit of employees contribution to PF & ESI in the intimation dated 08/12/2020 without appreciating the fact that standard/stereotype template "As there has been no response/the response given is not acceptable the adjustment(s) as mentioned below are being made to the total income as per the provisions of section 143(1)/a)" which creates not only doubt regarding issuance of prior intimation before making adjustment but also objections if any raised by the assessee towards proposed adjustment in the prior intimation was rejected in a mechanical manner and without application of mind, accordingly 'Principles of Natural Justice' offended, thus the adjustment of Rs.43,28,430/- confirmed by the CIT(A) deserves to be deleted in full.*

3. *That on the facts, and in the circumstances of the case and In law, the CIT(A) grossly erred in confirming adjustment of Rs.43,28,430/- u/s.36(1)(va) r.w.s 2(24)(x) on account of delayed deposit of employees contribution to PF and ESI in the intimation u/s.143(1) dated 08/12/2020 under the types of adjustment i.e "section 143 (1) (a) (1), 143(1)(a)(1) and 143(1)(a)(v) without appreciating the fact the each type of adjustment specified in the section 143(1)(a) are separated by semi-colon (:), that means each type of adjustment is separate, distinct and have different meaning thus reflecting more than one type of adjustment in the intimation shows that AO is not clear which type of adjustment is applicable, accordingly the right of the assessee for filing appeal against the adjustment made in the intimation before the CIT(A) is affected as a result "Principles of Natural Justice" offended , hence the adjustment of Rs.43,28,430/- confirmed by the CIT(A) is not sustainable in the eye's of law.*

4. *That on the facts, and in the circumstances of the case and in law, the CIT(A) erred in confirming adjustment of Rs.43,28,430/- u/s.36(1)(va) r.w.s 2(24)(x) on account of delayed deposit of employees contribution to PF and ESI made in the intimation u/s.143(1) dated 08/12/2020, without appreciating the fact that employees contribution to PF and ESI are recovered from the employees on disbursement of salary and wages, accordingly due date for deposit of employees contribution to PF and ESI that is within 15 days of the following*

month during which salary and wages was actually disbursed among the employees, thus assessee claims that employees contribution to PF and ESI were deposited on or before 15th of the following month in which salary and wages were actually disbursed, accordingly prays for relief of the adjustment of Rs.43,28,430/- made in the intimation and confirmed by the CIT(A).

5. That on the facts, and in the circumstances of the case and in law, the CIT(A) erred in confirming the interest of Rs.62,025/- u/s.234C charged in the intimation dated 08/12/2020 without appreciating the fact that interest u/s.234C is being charged on the basis of returned income and tax liability of Rs.4,10,667/- as per the return of income filed on 30/09/2020 was fully satisfied by the TDS credit of Rs.6,98,020/- availed, thus assessee prays for deletion of the interest of Rs.62,025/- in full.

6. That on the facts, and in the circumstances of the case and in law, the CIT(A) erred in confirming the interest of Rs.24,564/- u/s.234A and interest of Rs.2,33,604/- u/s. 234B charged in the intimation dated 08/12/2020 without appreciating the fact that deduction u/s.36(1)(va) on account of late deposit of employees contribution to PF and ESI was taken in the return of income filed on 30/09/2020 having regard to the ratio of the jurisdictional Punjab & Haryana High Court order in the case of "CIT Vs. Mark Auto Industries Ltd [2004] 358 TR 43 (P&H.HC)" and Supreme Court order in the case of 'Checkmate Services Pvt Ltd Vs. CIT [Civil Appeal No.2833,dated 12/10/2022] was not In operation, thus assessee prays for deletion of the interest having regard to the decision of the Hon'ble Bombay High Court in the case of "Pr.CIT Vs.Mangalore Refinery & Petrochemicals Ltd [2020] 426 ITR 266 (Bom.HC)".

7. That the above additional jurisdictional grounds of appeal are independent to each other and the assessee craves, leave to add, alter, amend or vary and/or withdraw any or all of the grounds of Appeal either before the date of hearing or at the time of hearing of the above appeal.

(B). Additional grounds raised above by the assessee are purely legal in nature goes to the root of the matter and are emanating out of the facts appearing in the impugned intimation dated 08/12/2020.The

legal grounds do not require any investigation and all materials are already on record before the Tribunal.

(C). It is humbly prayed before your honour to admit and adjudicate the legal additional jurisdictional grounds raised above. Reliance in this regard is placed in the decisions in the cases of "National Thermal Power Corporation vs. CIT (1998) 229 ITR 383 (SC)", "VMT Spinning Co. Ltd Vs. CIT (2016) 389 ITR 326 (P&H)", "Siksa O Anusadhan Vs. CIT (2011) 336 TR 112 (Orissa HC)", "CIT Vs. Anand Prasad [1981] 128 ITR 254 (Del.HCY, "CIT Vs. Cellulose Products of India Ltd [1985] 151 ITR 499 (Guj.HC)-(FB)", "P.V. Doshi Vs. CIT [1978] 113 ITR 22 (Guj.HC)".

5. After perusing the aforesaid Application for admission of Additional Grounds, we are of the considered opinion that the aforesaid grounds being purely legal in nature goes to the root of the matter and are emanating out of the facts appearing in the impugned intimation dated 08/12/2020, which do not require any investigation and all materials are already on record before the Tribunal. Hence, in view of the Hon'ble Supreme Court decision in the case of National Thermal Power Corporation vs. CIT (1998) 229 ITR 383, we admit the aforesaid Additional Grounds of Appeal.

6. At the time of hearing, ld. counsel for the assessee submitted that the solitary issue involved is relating to confirmation of adjustment of Rs.43,28,430/- u/s.36(1)(va) r.w.s 2(24)(x) on account of delayed deposit of employees contribution to PF and ESI made in the intimation u/s.143(1) dated 08.12.2020, without appreciating the fact that employees contribution to PF and ESI are recovered from the employees on disbursement of salary and wages. Accordingly, due date for deposit of employees contribution to PF and ESI i.e. within 15 days of the following month during which salary and wages was actually disbursed among the employees, thus he submitted that employees contribution to PF and ESI was actually deposited on or before 15th of the following month in which salary and wages actually disbursed. In order to support this contention, reliance is placed on the decision of the Coordinate

Bench of the Tribunal in the case of Bensons Movers Pvt. Ltd. vs. ACIT dated 17.11.2023 passed in ITA No. 2710/Del/2022 for assessment year 2019-20.

6.1 Insofar as employees contributions towards PF and ESI, ld. AR submitted 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 before the Tribunal in the case Bensons Movers Pvt. Ltd. vs. ACIT dated 17.11.2023 and the Tribunal restored the issue to the file of the AO to ascertain the due date for remittance of the PF/ESI contributions of employees 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 depts. 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."

6.2 The Ld. Counsel for the assessee submitted that in view of the aforesaid decision, the matter may be restored to the file of AO to ascertain the due date for remittance of the PF/ESI contributions of employees in the present case.

7. On the other hand, ld. DR for the Revenue relied on the orders of the lower authorities, however, he did not have any serious objection if the matter is remitted back to the file of Assessing Officer.

8. Considered the rival submissions and perused the material on record. We have carefully gone through the order of the Coordinate Bench of the Tribunal in the case of Bensons Movers Pvt. Ltd. vs. ACIT (supra) and found that the issue is squarely covered in favour of the assessee and accordingly, we restore this issue to the file of the AO to decide the same in the light of the observations made by the Tribunal. Needless to add that the AO 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.

9. Further, the ld. AR has contended that the AO/Centralized Processing Centre (CPC) has sent intimation on account of delayed deposit of employees contribution to PF & ESI without appreciating the fact that mandatory prior intimation before making adjustment as per proviso 1 to section 143 (1)(a) was transmitted electronically on 12.10.2020 using unrelated/wrong Email id: yadavparveen01 @gmail.com and not in the correct Email id: cabharatyadav@gmail.com, reflected on the face of the return of income filed on 30/09/2020, thus mandatory procedures for transmitting communications electronically by Email as specified u/s.288 r.w.r 127(2)(b) was not followed. He submitted that accordingly prior intimation sent on 12/10/2020 was not served upon the assessee and as a result, it can be held that prior intimation sent on 12.10.2020 was neither issued nor served upon the assessee. In order to support this contention, reliance is placed on the decision of the Coordinate Bench in the case of Rinki Adhana vs. ITO dated 27.05.2024 passed in ITA No.

3879/Del/2023 (AY 2018-19) as well as CBDT Notification No. 2/2016 dated 3.2.2016.

10 As regards issue of intimation being sent to wrong email id, in our considered opinion, there is no doubt that the Centralized Processing Centre (CPC), Bangalore has erred in sending the intimation on a wrong address and ends of justice will be served by restoring the issue to the file of the AO for examining and deciding the issue afresh, as per law. Our view is supported by the Coordinate Bench decision in the case of Rinki Adhana vs. ITO (supra) as well as CBDT Notification No. 2/2016 dated 3.2.2016.

11. Since the aforesaid legal issues have been restored to the file of the AO, as aforesaid, the other issues have become academic, hence, do not require any adjudication. The Assessing Officer is directed to issue the relevant notices in the proper email id.

12. In the result, the appeal of the assessee is allowed for statistical purposes in the aforesaid manner.

Order pronounced in the open court on this 13th day of September, 2024.

Sd/-

sd/-

**(ANUBHAV SHARMA)
JUDICIAL MEMBER**

**(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER**

**Dated: 13.09.2024
TS**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. JCIT(Appeals)-3, Bengaluru.
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI