

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**ITA No. 1180/KOL/2024
Assessment Year: 2018-19**

M/s Multi Service, Flat No. 28, Ground Floor, Anandam Apartment, 6, Abdul Halim Lane, Taltala, Kolkata - 700016 (PAN: AAIFM1859R)	Vs	ITO, Ward-30(1), Kolkata, Aayakar Bhawan, Dakshin, Kolkata - 700031
(Appellant)		(Respondent)

Present for:

Appellant by : Natabrata Bhattacharya, AR
Respondent by : L.N. Dash, JCIT

Date of Hearing : 24.07.2024
Date of Pronouncement : 15.10.2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi (hereinafter referred to as “the Ld. CIT(A)”) passed u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for AY 2018-2019 dated 27.03.2024, which has been passed against the assessment order u/s 143(3) read with sections 143(3A) & 143(3B) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) passed by the Assessing Officer, National e-Assessment Centre, Delhi, dated 14.04.2021.

2. The grounds of appeal raised by the assessee are reproduced as under:

“01. FOR THAT the Ld. CIT(A) erred in law and facts in affirming the addition of a sum of ₹36,99,862/- to the income of the Appellant.

(1) It is submitted It is submitted that the Impugned Order records 'In view of the above discussion Ld. AO made addition of 36,99,862/- claimed as deduction for contribution to recognized provident fund. During the appellate stage also, the appellatant failed to file any corroborative evidences to substantiate its claim.'

It is most respectfully submitted that the Appellant failed to furnish the Bank Statements and Challans which are necessary documents to address the dispute at hand, for reasons beyond the control of the Appellant. It is humbly submitted that it is only at the present stage that the Appellant for the first time had the opportunity to bring on record Bank Statements (relevant portions of the bank statements are highlighted) along-with Challans (to the extent available) in order to make out a case of defense.

(ii) It is submitted that at the relevant time, when the case proceedings pertaining to the A.Y. 2018-2019 was on-going, the Appellant was being advised on the matter by an Accountant Professional, handling the income tax case proceedings pertaining to the A.Y. 2018-2019. As the email address details of the Accountant Professional was registered on the Income Tax Portal, all Notices/ Communications/intimations from the income tax authorities were being received by him. Such Accountant Professional omitted to furnish the relevant documents to the appropriate authorities to substantiate the alleged addition of ₹36,99,862/-. It is further submitted that the Accountant Professional also failed to intimate the Appellant regarding the personal hearings. It is respectfully submitted that the failure on part of the Appellant was neither intentional not deliberate but due to the negligent conduct of the Accountant Professional

02. FOR THAT the Ld. CIT(A), erred in law in affirming that the Appellant has claimed excess claim of ₹9,89,320/- towards contributions to Recognized Provident Funds, which is more than the statutory limit of 27% prescribed under Rule 87 of the Income Tax Rules, 1962.

(i) It is submitted that the Ld. CIT(A), affirming the Assessment Order has observed and held that the Appellant has claimed an excess amount of ₹9,89,320/- , which is more than the 27% statutory limit prescribed under Rule 87 of the Income Tax Rules, 1962. In this regard, reference may be made to Para 3.2 of the Impugned Order which held “..... While as per Rule 87 of IT Rules, 1962, the statutory limit is 27% of salary i.e. ₹27,10,542/- (27% of ₹1,00,39,046/-). Assessee has claimed excess deduction of ₹9,89,320/ more than the statutory limit under Rule 87 of IT Rules, 1962'.

(ii) It is submitted that social security contributions made by employer for the benefit of its employees are dealt under Part-XII, Part-XIII and Part-XIV of the Income Tax Rules, 1962. It is submitted that Part-XII deals with 'Recognized Provident Funds', Part-XIII deals with 'Approved Superannuation Funds' and Part-XIV deals with 'Gratuity Funds'. It is further submitted that each part deals with different type of social security payments and have their own maximum limits prescribed for contribution by employer. From a plain reading of Rule 87 of the Income Tax Rules, 1962 it is apparent that the maximum limit of 27% prescribed under this Rule pertain to 'Approved Superannuation Funds' and not 'Recognized Provident Funds'.

(iii) It is submitted that in the present case, the provident fund of the Appellant is functioning under the Employee Provident Fund Scheme 1952. As such the Appellant does not fall within the purview of Rule 87 of the Income Tax rules, 1962.

Therefore, the contributions of the Appellant to the Provident Fund may be even exceeding 27% and the same is also allowable.

03. *FOR THAT the Ld. CIT(A) erred in travelling beyond the scope of the alleged excess claim of ₹9,89,320/- by adding back the entire sum of ₹36,99,862/- to the income of the Appellant.*

(i) *It is submitted that the Notices dated 28.09.2019, 24.02.2020, 18.03.2020, 30.12.2020, 28.01.2021 issued by the Assistant Commissioner of income Tax to the Appellant raises the issue 'As per ITR, it can be seen that Salary and Wages amounts to ₹1,00,39,046/- and 'Contributions to Recognized Provident Fund' amounts to ₹36,99,862/-.... Kindly provide the details of the contribution to the recognized provident fund where the contribution exceeds 27% of the salary as laid down in Rule 87 of the IT Rules, 1962.....*

(ii) *It is further submitted that the Assistant Commissioner of Income Tax vide Notice dated 05.02.2021 issued to the Appellant under Section 142(1) of the Income Tax Act, 1961 categorically directed the Appellant toshow cause as to why the amount of ₹9,89,320/- arising due to contribution exceeds 27% of the salary as laid down in Rule 87 of IT Rules, 1962 should not be added back to the assessee's income. Such Notice may be read along-with Para 2.4 of the Assessment Order which categorically records 'The assessee was also show-caused as to the amount of 9,89,320/- arising due to contribution exceeds 27% of the salary as laid down in Rule 87 of IT Rules.'*

(iii) *It is submitted that throughout the course of issuance of the afore-mentioned Notices, the Appellant was formally appraised on the allegation/discrepancy relating to Excess Contribution to Provident Fund for an amount of Rs. 9,89,320/-. Despite the same, at the subsequent stage when the Assessment Order was passed, the Assistant Commissioner of income Tax, erroneously added an entire sum of ₹36,99,862/- which was further affirmed by the Ld. CIT(A). Therefore, the Impugned Order had surpassed the scope of the all the Notices, including the Show-Cause Notice which is clear violation of the principles of natural justice.*

04. *FOR THAT the Appellant reserves its right to add, amend or alter any or all grounds of appeal on or before the date of hearing of appeal."*

3. Brief facts of the case are that the return of income was selected for complete scrutiny on the issue of excess contribution to provident fund, superannuation fund or gratuity fund. Notice under section 142(1) was issued to the assessee seeking clarification and supporting documents with respect to claimed contribution to provident fund or superannuation fund exceeding the statutory limit of 27% of salary and others. As per the return of income, expenses of salaries and wages were debited at ₹1,00,39,046/- and contribution to recognised provident fund of ₹36,99,862/- was claimed by the assessee. Before the Ld. AO, the assessee submitted a copy of reconciliation statement (GSTR-9C), fixed assets details and depreciation

schedule, a list of payment details of employee provident fund, list of salary and bonus paid to staff and driver details etc. It is mentioned in the assessment order that the details were furnished in a tabular format only without any supporting documentary evidence. The assessee was further required to provide details/documentary evidence like bank statement to support the claim of provident fund payments and the assessee submitted again the same specified details in Excel file without any supporting documentary evidence. The Ld. AO granted further opportunity but similar details were furnished. Since documents/explanations submitted by the assessee were incomplete or irrelevant and the assessee had claimed a deduction for contribution to the recognised provident fund of ₹36,99,862, which according to the Ld. AO was in excess of the statutory limit of 27% of the salary i.e. (27% of ₹1,00,39,046/-) and the assessee had claimed excess deduction of ₹9,89,320/-, a final show cause notice was sent to the Assessee. In response to the show cause notice issued, the assessee submitted a table of statement of challan details of PF payments and TRRN details. It was submitted that the entire amount was paid to the respective accounts within the due date as specified in the Act. The assessee also further enclosed the entire payment receipts for the perusal and verification and also requested to verify the said payments before passing a final order. The Ld. AO considered the reply but was of the view that there had been no single instance where the assessee had submitted any satisfactory or substantive evidence to prove the genuineness of the expenses incurred or the contribution made towards the provident fund. In response to the show cause notice issued also the assessee had relied upon Excel sheet and tabular data to show the expenses incurred. There had been no substantive evidence such as bank statement, Challan of payment made towards contribution to provident fund on behalf of the employees, or confirmation of the employees employed by the assessee. Thus, the Ld. AO held that the assessee had falsely claimed deduction for contribution to recognised provident fund of ₹36,99,862/-, therefore a sum of ₹36,99,862/- which was

the contribution to the recognised provident fund claimed by the assessee was disallowed and added to the income of the Assessee.

4. Aggrieved with the assessment order, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) has reproduced the assessment order of the Ld. AO, given details of defaults made by the assessee to various notices issued by him in the course of the appeal, the response of the assessee to the Ld. AO that the queries “asked are irrelevant in connection with the assessment, since the case was selected on specific” being invalid and held that there is no infirmity or illegality in initiating assessment proceedings u/s 143(3) r.w.s. 143(3A) of the Act and the addition/disallowance made was confirmed and the appeal was dismissed. Aggrieved with the order of the Ld. CIT(A), the assessee has filed this appeal before the Tribunal.

5. Rival contentions were heard and the submissions made and the record was examined. The assessee has raised 4 grounds of appeal and has also included sub-grounds thereof; however, the sub-grounds are mere arguments in relation to the main grounds of appeal. While the Ld. Sr. DR defended the order of the Ld. CIT(A), the Ld. AR stated that both the Ld. AO as well as the Ld. CIT(A) had applied rule 87 of the Income Tax Rules, 1962 (“the Rules”), which is not applicable to the facts of the case of the assessee as the same relates to an approved superannuation fund being in Part XIII of the Rules while the assessee had made contributions to the employees provident fund (EPF) and the rules relating to a recognised provident fund appear in Part XII of the Rules. In the Additional Appeal Paper Book filed during the course of the hearing before us, Ground No. 2 has been requested to be admitted as an additional ground of appeal as both at the time of the assessment proceedings as well as the time of the first appeal proceeding, the appellant did not get an opportunity to seek appropriate legal advice and in absence of the same, the aforementioned question of law could not be raised at the assessment as well as the appellate stage. Such failure on the part of the appellant is neither deliberate nor

intentional and the same is stated to be *bona fide*. Reliance has been placed on the decision of the Hon'ble Supreme Court in the case of NTPC vs CIT (1998) 229 ITR 383 (SC) wherein it is held that the Tribunal has the jurisdiction to examine the question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. Since this is a purely legal ground, and goes to the root of the matter, therefore the same was admitted for adjudication, even though the same was not raised before the Ld. AO or the Ld. CIT(A). Our attention was also drawn to Page 2/Para 3 and Page 3/Para 4 of the assessment order wherein the Ld. AO had gone by the premise that the assessee is a recognised provident fund while the contribution was made to the EPF. An application seeking permission to bring on record additional documents under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 has also been made at Page 22 of the Additional Appeal Paper Book. These are True copies of Bank statements of the assessee firm at Annexure A/1 at Pages 66-114 and True Copy of Challans for payment of PF annexed and marked as Annexure A/2 at Pages 115 to 133 in the Additional Appeal Paper Book. These documents were requested to be brought on record for 'any other substantial cause' and such additional documents being of 'relevant nature' in order to enable the Tribunal 'to pronounce its judgement'. It is submitted that at the relevant time, when the case proceedings were going on, the appellant was being advised on the matter by an accounting professional who was responsible for handling the income tax and other allied activities of the firm. Such accounting professional was also handling the income tax proceedings pertaining to the AY 2018-19. It is submitted that the email address of the accounting professional was registered online and under such circumstances, all notices/communications/intimations from authorities were being received by the accounting professional. The accounting professional was responding to these notices on behalf of the appellant. It is submitted that the appellant is a lay man who does not have any knowledge of the income tax proceedings. The appellant had placed

trust in the accounting professional and believed in good faith that the accounting professional would duly perform his obligations towards the proceedings. It is further submitted that although the accounting professional furnished the necessary details, but the same was done by submitting Excel sheets/tabular form without bringing on record the relevant documents to substantiate the information shared in the Excel sheets/tabular formats. It is submitted that on account of the negligent conduct of such professional, the appellant could not avail the opportunity to furnish the necessary documents before the Ld. AO and the Commissioner of Income-tax (Appeals), which are of material nature in order to support the claim of the appellant in the proceeding. It is submitted that the failure on the part of the appellant was neither intentional nor deliberate but *bona fide*. It is stated that it is a settled principle of law that 'an innocent party shall not be made to suffer injustice merely because a professional has defaulted'. Reliance has been placed on the decision in the case of Rafiq & Anr. V Munshilal & Anr, AIR 81 S.C. 1400 as also the decision of the jurisdictional High Court of Calcutta at Jalpaiguri Circuit Bench in the case of Jayshree Bhardwah Vs. Dy Commissioner of Revenue W.B. State Tax & Ors. W.P.A. 1504 of 2023 wherein it is held that the petitioner is entitled to a hearing by the authority on merits before her appeal is disposed of and any liability slapped upon her. Reliance has also been placed upon several other judicial pronouncements, which have been considered. Ld. Sr. DR, on the other hand relied upon the appeal order of the Ld. CIT(A).

6. At this stage, it is relevant to refer to Rule 87 of the Income-tax Rules, 1962 which is reproduced as under:

Ordinary annual contributions.

87. *The ordinary annual contribution by the employer to a fund in respect of any particular employee shall not exceed twenty-seven per cent of his salary for each year as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year.*

6.1 The Ld. AR contended that this rule is appearing in Part XIII of the Rules and not in Part XII of the Rules. This Rule is applicable to an approved superannuation fund for claiming deduction under section 36(1) (iv) of the Act which states that *any sum paid by the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognising the provident fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head "Salaries" or to the contributions or to the number of members of the fund;* while the assessee contends that it was not a recognised provident fund but the contribution was made to the EPF which has no such limit for maximum contribution. PART A of the Fourth Schedule of the Act refers to Recognised Provident Funds.

7. Having examined the facts, it would be appropriate in the interest of justice that the additional evidences filed are taken on record. Rule 29 of the Income Tax (Appellate Tribunal) Rules, 2961 states that *the parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.* Prima facie it is evident that Rule 87 is not applicable to the facts of the case of the assessee. Rule 75 of the

Rules limits the contributions to a recognised provident fund and is as under:

Limits for contributions.

75. (1) *Where an employee of a company owns shares in the company with a voting power exceeding ten per cent of the whole of such power, the sum of the contributions of the employee and employer to the recognized provident fund maintained by the company shall not exceed Rs. 250 in any month.*

(2) *For the purpose of clause (a) of sub-rule (4) of rule 5 of Part A of the Fourth Schedule the employer's aggregate contribution in any year, including the normal contribution, to the individual account of any one employee whose salary does not exceed five hundred rupees per mensem shall not exceed double the amount of the contribution of the employee in that year.*

(3) *The amount of the periodical bonuses and other contributions of a contingent nature which may be credited by an employer in any year under clause (b) of sub-rule (4) of rule 5 of Part A of the Fourth Schedule to the individual account of any one employee shall not exceed the amount of the contributions of the employee in that year:*

Provided, *however, that the above limit shall not apply to bonus contributions made by an employer under an award by an Industrial Tribunal or under an order of a Court or under an agreement with the employees' union(s) to the individual accounts of employees whose salary does not exceed Rs. 500 per month.*

8. Thus, there is merit in the contention of the assessee that Rule 87 of the Rules is not applicable to it. Rule 75 is also not applicable as the contribution is to EPF and not to a recognised provident fund. Since these documents relating to payment to EPF etc. were not filed before the Ld. AO or even before the Ld. CIT(A), the same are hereby admitted for adjudication of the appeal and in order to be fair to both the assessee as well as the Ld. AO, both the appeal order as well as the assessment order are set aside. The Ld. AO is directed to pass the assessment order afresh after considering the evidence filed before us in accordance with law. The assessee is required to produce the same along with the evidence/order for registration with the Provident Fund Commissioner for employee provident fund before the Ld. AO who is directed to examine the same and delete the addition if the payment has been made in accordance with law as Rule 87 of the Rules is not applicable to the facts of the case of the assessee. Hence, Ground Nos. 1, 2 and 3 of the appeal are allowed for statistical purposes.

Ground No. 4 being general in nature, does not require any separate adjudication.

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

Order pronounced in the open court on 15th October, 2024.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Rakesh Mishra)
Accountant Member

Dated: 15th October, 2024

AK, P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A)
4. The CIT,
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata