आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH
BENCH 'B' CHANDIGARH

BEFORE: SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER
AND SHRI PARESH M. JOSHI, JUDICIAL MEMBER,

आयकर अपील सं./ITA No. 786/CHD/2023
निर्धारण वर्ष / Assessment Year : 2018-19

M/s G.G. Agricultural Industries, Barnala Road, Barnala.	बनाम VS	The DCIT, CPC, Bangalore.
स्थायी लेखा सं./PAN /TAN No: AADFG5228R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : None (Adjournment Application)
राजस्व की ओर से/ Revenue by : Shri Vivek Vardhan, JCIT Sr. DR
तारीख/Date of Hearing : 01.10.2024
उदघोषणा की तारीख/Date of Pronouncement : 30.10.2024

PHYSICAL HEARING

आदेश/ORDER

PER PARESH M. JOSHI, JM

This is an appeal filed by the assessee under Section 253 of the Income Tax Act, 1961 before this Tribunal as and by way of second appeal under the Income Tax Act, 1961 (hereinafter referred to as the "Act"). The relevant assessment year is assessment year 2018-19. The corresponding previous year is from 01.04.2017 to 31.03.2018. The assessee is aggrieved by an order bearing No. ITBA/REC/M/154/2023-24/1057512359(1) dated 30.10.2023 under Section 150/250(6) of the Act in first

appeal No. 10399/CIT(A)-S/LDH/(388)/2019-20, which is hereinafter referred to as the “impugned order”.

Factual Matrix

2. That an appellate order under Section 250(6) of the Act was passed by the office of CIT(A) (5) Ludhiana dated 14.08.2020 in which the issue of employee’s share of ESI/PF/LWF was allowed as deduction and that the appeal was decided in the assessee's favour on this issue.

3. That now in view of the judgement of the Hon'ble Supreme Court of India in Civil Appeal No. 2833 of 2016 in the case of Checkmate Services P. Ltd. Vs Commissioner of Income Tax-1 the allowance of expenditure of employee’s share of ESI/PF/LWF needs to be rectified appropriately which was decided in the original appellate order in the favour of the assessee on 14.08.2020.

4. That it is required to be noted and well appreciated that the CIT(A)-5, Ludhiana vide order dated 14.08.2020 had allowed the expenditure amounting to Rs.63,790/- on account of ESI/PF/LWF.

5. That in so far as present proceedings under Section 154 is concerned, a notice giving opportunity to the appellant/assessee as per the provisions contained under Section 154 was issued

vide notice No. ITBA/REC/F/REC-1/2023-24/105221522(1) dated 20.04.2023 but request for adjournment was received.

6. That a second notice in addition to (supra) giving opportunity to the appellant/assessee once again as per the provision of Section 154 was again issued vide Notice No. ITBA/REC/F/REC-1/2023-24/1056921970(1) dated 10.10.2023 but once again the assessee requested for adjournment.

7. That the ld. CIT(A) in the circumstances mentioned above was left with no other alternative but to exercise power under Section 154 of the Act in respect of above issue of allowability of employee's share of ESI/PF/LWF in view of change in law on account of the judgement of Hon'ble Supreme Court of India in case of Checkmate Services P. Ltd. Vs CIT(A)-1.

8. That the ld. CIT(A) while exercising power under Section 154 of the Act in the impugned order has observed as under :

> ***CURRENT LEGAL POSITION IN VIEW OF DECISSION OF HON'BLE SUPREME COURT***
>
> *Now Hon'ble Supreme Court of India in Civil appeal no. 2833 of 2016 in the case of Checkmate Services P. Ltd. Versus Commissioner of Income Tax-1 has held as under:-*
>
> *Para 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(l)(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. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B".

"Para- 54 "In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. 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. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction."

Para - 55 "In the light of the above reasoning, 'this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed."

Therefore now this issue has been settled. The Hon'ble Supreme Court has decided that deduction of employee's share of ESI/PF can be allowed only if the deposit has been made before the due date under the respective Acts.

DISCUSSION ON APPLICABILITY OF SECTION 154 OF THE ACT:

Now the question arises as to whether this is mistake appeared from record in view of section 154 of the Act.

Further in the following cases it has been held by Hon'ble Courts that decision of Hon'ble Supreme Court and High Courts can be considered for rectifying any issue under consideration :-

The jurisdictional High Court i.e Hon'ble High Court of Punjab and Haryana in the case of Commissioner of Income-tax Smt. Aruna Luthra reported in [2001] 252 ITR 76 (P&H) has held that proceedings for rectification of an order passed under provisions of Act can be initiated on basis of a judgment delivered by Jurisdictional High Court or a superior court after passing of said order".

ii) "The Hon'ble ITAT Delhi Bench 'B' (Decided by President of ITAT as Third Member case) in the case of Assistant Commissioner of Income-tax Hughes Services (FE) Ptd. Ltd. reported in [2005] 93 ITD 77 (DELHI)(TM)has held that in view of subsequent binding decision of High Court, there was a mistake apparent from record in order of Tribunal holding a contrary view. Therefore, order of Tribunal was liable to be rectified under section 254(2)".

iii) "The ITAT Delhi Bench in the case of Deputy Commissioner of Wealth-tax Sanjay Singh Sandhu reported in [1994] 51 ITD 560 (DELHI) has held that where decision was rendered by Tribunal following High Court decision which was subsequently reversed by Supreme Court, it could be said there was mistake apparent from record in order of Tribunal and Tribunal was bound to rectify it".

iv) "The ITAT Jodhpur Bench in the case of Bank of Rajasthan Ltd. v. Inspecting Assistant Commissioner reported in [2004] 88 ITD 577 (JODH.) has held that the subsequent decision of the Supreme Court over-ruling the decision of the Tribunal, would render that decision as a mistake apparent from records".

Since, the appellant has not submitted any reply, it means there is no objection to the proposed rectification. Therefore as per above legal position, allowing late deposit of employee's share of ESI/PF/LWF beyond the due date as per the Act is a mistake apparent from record in view of decision of Hon'ble Apex Court in the case of Checkmate Services P. Ltd. Versus Commissioner of Income Tax-l(Supra). Therefore delayed payment of the employee's shares of ESI/PF/LWF of Rs. 63,790/- beyond due date as per these Act, allowed as an expenditure in the appellate order dated 14.08.2020 is held to be mistake apparent from record and is being rectified accordingly. This amount of Rs, 63,790/- is to be disallowed and added back to the income of appellant.

8.1 That the assessee being aggrieved by the impugned order (supra) has now preferred an appeal before us and in Form No.36 has raised following grounds of appeal which are as under :

1. The Ld. CIT (A) has passed the order under section 154 of the Act, without giving proper opportunity of hearing to the appellant. Thus, the

order passed under section 154 by the Ld. CIT (A) is liable to be set aside.

2. *The Ld. CIT (A) has erred in confirming the addition to total income made by the AO Rs. 63790/- without knowing the* facts o f *the case.*
3. *That the appellant craves leave for permission to add, amend or alter any ground of appeal at the time of hearing.*

Record of Hearing

9. The hearing in the matter was fixed before this Tribunal on 01.10.2024 when ld. DR appeared before us and pressed for hearing and rejection of adjournment application which was moved by ld. AR vide his application dated 30.09.2024 as ld. counsel was out of station in connection urgent official work and few other contentions too were made. After hearing the ld. DR and after carefully perusing the application for adjournment, the reasons of which we found to be not spelt out expressly and lacking in material particular, we rejected the same and then proceeded to hear the ld. DR who explained to us in details that the impugned order under Section 154 r.w.s. 250(6) is justifiable and fair. It was contended that the same should be upheld, in view of change of law by virtue of the judgement of Hon'ble Supreme Court of India (supra). The disallowance of Rs.63,790/- which was earlier allowed vide order dated 14.03.2020 was correctly modified as mistake was apparent on record. The same was rightly disallowed and added back to the income of the assessee on account of late deposit of ESI/PF/LWF beyond due date under the respective Acts.

Findings and conclusions

10. In the premises set out hereinabove and after examining the paper and proceedings of the present case, we are of the considered view that the impugned order of ld. CIT(A) is legal and proper. It cannot be said to be illegal and bad in law. The law on the allowability towards ESI/PF/LWF is suitably given finality and that such expenses incurred would be duly allowed if appropriate correct amount of ESI/PF/LWF is suitably paid in the year under consideration on or before due date under respective statutes/law which governs such payment/dues. Accordingly, we hold that CIT(A) has rightly exercised his power under Section 154 of the Act and we find no infirmity in the impugned order whatsoever. We also hold that in passing the present order under Section 254, no serious prejudice is being caused to the appellant as law on issue is finally settled.

Order

11. In result, the impugned order is upheld.

12. Appeal of the assessee is dismissed

Order pronounced on 30.10.2024.

Sd/-	**Sd/-**
(VIKRAM SINGH YADAV)	**(PARESH M. JOSHI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

"Poonam"

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
5. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar