

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA**

**SHRI SANJAY GARG, JUDICIAL MEMBER  
SHRI SANJAY AWASTHI, ACCOUNTANT MEMBER**

**I.T.A. No. 981/Kol/2024  
Assessment Year: 2017-18**

**I.T.A. No. 999/Kol/2024  
Assessment Year: 2018-19**

**I.T.A. No. 1000/Kol/2024  
Assessment Year: 2020-21**

**I.T.A. No. 1001/Kol/2024  
Assessment Year: 2021-22**

**ACIT, Circle-34, Kolkata,**  
Aayakar Bhawan Poorva,  
110 Shanti Palli, E M Bypass,  
Kolkata – 700107 ..... **Appellant**

**vs.**

**Syama Prasad Mookerjee Port, Kolkata,**  
15, Strand Road, Kolkata, G.P.O.,  
Kolkata - 700001  
[PAN: AAAJK0361L] ..... **Respondent**

**CO No. 10/Kol/2024  
(Arising out of ITA No. 981/Kol/2024)  
Assessment Year: 2017-18**

**CO No. 11/Kol/2024  
(Arising out of ITA No. 999/Kol/2024)  
Assessment Year: 2018-19**

**CO No. 12/Kol/2024  
(Arising out of ITA No. 1000/Kol/2024)  
Assessment Year: 2020-21**

**CO No. 13/Kol/2024  
(Arising out of ITA No. 1001/Kol/2024)  
Assessment Year: 2021-22**

**Syama Prasad Mookerjee Port, Kolkata,**  
15, Strand Road, Kolkata, G.P.O.,  
Kolkata – 700001  
[PAN: AAAJK0361L] ..... **Appellant**

**vs.**

**ACIT, Circle-34, Kolkata,**  
Aayakar Bhawan Poorva,  
110 Shanti Palli, E M Bypass,  
Kolkata – 700107

..... **Respondent**

**Appearances by:**

Assessee represented by : K.M. Sundaram, CA

Department represented by : A. Kundu, CIT-DR

Date of concluding the hearing : 25.09.2024

Date of pronouncing the order : 18.11.2024

**ORDER**

**PER BENCH:**

This is a batch of 8 appeals comprising 4 appeals (ITA Nos. 981, 999, 1000 & 1001/Kol/2024) filed by the Department and 4 Cross Objections (CO Nos. 10, 11, 12 & 13/Kol/2024) filed by the assessee, mainly to support the findings of the Ld. Commissioner of Income Tax (Appeals) (in short “the Ld. CIT(A)”). Since the issues are mainly common all the matters are being dealt with through a common order. For the sake of convenience AY 2018-19 will be taken as the lead case.

1. Before proceeding for adjudicating this matter, it is noticed that the 4 appeals filed by the Department are barred by limitation, comprising of delay ranging from 119 days to 129 days. The application for said condonation of delay are almost identically worded. For the sake of convenience, the application for AY 2018-19 is extracted as under:

*“1. Order of CIT (A) was received in the office of the PCIT-5, Kolkata on 23.01.2024.*

*2. Appeal Scrutiny Report was called by the PCIT-5 vide letter dated 23.01.2024.*

*3. Physical folders were not readily available for as the old set of staff members had been transferred out.*

*4. As per instructions, appeal effects is to be given before sending Appeal Scrutiny Report for which physical folders are mandatorily to be searched or reconstructed.*

5. Even before finding out physical records, the Assessing Officers Shri Sandip Guha was transferred out and I joined as ACIT, Circle-34, Kolkata on 16.02.2024.

6. When I joined the staff members informed me about the pending appeal effects and ASR in case of assessee but they informed that physical folders are still not readily available.

7. With lot of effects, the physical folders were found in the end of February. Time barring orders u/s. 148A (d) was to be passed by this office in large number of cases and the issue being complicated involving bigger additions took substantial time to give appeal effects.

8. Thereafter, ASR was submitted on 22.03.2024 to the Range Head.

9. The Range Head took 23 days to prepare and forward his comments and finally the ASR was submitted in the office of the PCIT-5, Kolkata on 23.04.2024.

10. The PCIT-5, Kolkata directed that facts of the present case with the case of Excide industries relied by CIT (A) for allowing relief is to be re-examined and the judicial notings of filing further appeal or not filing to be ascertained from the JAO of Excide Industries.

11. Thereafter, the JAO of Excide Industries was contacted who took time to give any clarification and finally stated that he is not able to find the folder of Excide Industries.

12. It was also found the facts of the present case are different from Excide Industries case on a/c of Superannuation Fund and hence revised ASR was submitted on 19.04.2024.

13. The office of the PCIT-5 took 5 days' time to finalize filing of appeal and issued authorization to file appeal on 24.04.2024.

14. Thereafter, Xerox/photocopy/preparation of all documents/proforma to file appeal was initiated and finally the appeal is filed on 26.04.2024

15. Some delay at every level is also attributable to time barring proceedings u/s 148A. In view of aforesaid genuine reasons the delay in filing appeal may kindly be condoned.”

Considering the reasons given in the said application, these appeals are admitted for adjudication.

2. The appellant is a local authority engaged in providing port services for over a century. It is functioning under the direct control and supervision of the Ministry of Shipping under the Union Govt. In the 4 years under appeal, the following additions are for consideration:

			ITA No. 981/Kol/2024	ITA No. 999/Kol/2024	ITA No. 1000/Kol/2024	ITA No. 1001/Kol/2024
			CO 10/Kol/2024	CO 11/Kol/2024	CO 12/Kol/2024	CO 13/Kol/2024
			AY 2017-18	AY 2018-19	AY 2020-21	AY 2021-22
S/No.	Nature of Disallowance	Section	Rs.	Rs.	Rs.	Rs.
1.	Contribution to approved Superannuation Fund to part fund the gap in Actuarial Valuation	36(1)(iv) r.w.r 87	2,08,86,57,648	7,10,68,55,297	5,64,49,19,729	6,48,84,64,174
2.	Contribution to approved Gratuity Fund to part fund the gap in Actuarial Valuation	36(1)(iv) r.w.r 103	63,85,13,674	33,11,01,366	-	-
3.	Alleged belated remittance of Employee's Contribution to Provident Fund	36(1)(va)	-	8,38,35,219	-	-
4	Total		2,72,71,71,322	7,52,17,91,882	5,64,49,19,729	6,48,84,64,174

2.1 The grounds of appeals are also on these substantive grounds. During the course of hearing, the Ld. DR read out extensively from various portions of the Ld. AO's order and assailed the action of Ld. CIT(A). On the issue of contribution to approved superannuation fund to bridge the gap between actuarial valuation and actual contribution, the Ld. DR stated that on a strict construction of section 36(1)(iv) read with Rule 87 of IT Rules, the additions made by the Ld. AO were justified. Secondly, on the issue of contribution to approve gratuity fund which was also for funding the gap between actual contribution and actuarial valuation, the Ld. DR relied on the provision of Section 36(1)(v) of the Act and also read out Rule 103 of I.T. Rules to argue that there has to be a cap of 8.33% of salary of each employee for determining the allowable quantum u/s 36(1)(v) of the Act. Regarding the third disallowance (which pertains to AY 2018-19 only) u/s 36(1)(va) of the Act, the Ld. DR averred that the Ld. AO was merely confirming the disallowance already made u/s 143(1) of the Act.

2.2 The Ld. AR, on the other hand supported the finding of the Ld. CIT(A), especially his reliance on the case of Exide Industries reported in 146 taxmann.com 21 (Cal) for the addition u/s 36(1)(iv), read with Rule 8D and the case of Easter Equipments and Sales Ltd. reported in 71 Taxman 226 (Cal) for the addition u/s 36(1)(v) read with Rule 103 of the I.T. Rules. The Ld. AR read out extensively from the Ld. CIT(A)'s order regarding the addition made u/s 36(1)(va) of the Act.

3. We have carefully considered the rival submissions and gone through the orders of authorities below. It is clear that regarding the first issue of contribution made to approved superannuation fund to bridge the gap between actual contribution and actuarial valuations, the order of the Hon'ble Calcutta High Court in the case of Exide Industries (supra) will need to prevail, considering the similarity of facts between that case and the present matter. Relevant portion from the said case law deserves to be extracted.

*“6. In terms of the above rules, what is required to be seen is whether there is any ceiling fixed in respect of the contribution which have been made by the respondent assessee and whether it was towards an ordinary annual contribution or whether it was towards an initial contribution. The factual position is not in dispute which have been noted not only by the learned Tribunal but also by the CIT(A). In terms of the above rules, a contribution to an approved superannuation fund is deductible as long as the quantum of the contribution does not exceed the prescribed limit. As noticed from the rules, the limitations have been prescribed only for the initial contribution and ordinary annual contribution to the funds. Thus, the consequence that would follow is that any other contribution made other than initial contribution or an ordinary annual contribution, would not be covered under the rules and no ceiling has been fixed with regard to the amount of such contribution. This has not been disputed by the revenue that the amount paid by the respondent/assessee in excess of 27% of the salaries of the employees are neither towards ordinary annual contribution nor towards initial contribution and the payment was necessitated due to short-fall discovered in the course of actuarial valuation of the funds which is in exceptional circumstances and has been made to ensure that the superannuation funds will be able to discharge its obligation to the employees. The learned Tribunal bearing the above principle in mind and also taking note of the decision of the co-ordinate bench of the Tribunal in Glaxo Smithkline Pharmaceuticals case (supra) allowed the assessee's appeal. The revenue had challenged the order passed by the learned tribunal in the case of Glaxo Smithkline Pharmaceuticals (supra) before the High Court of Judicature at Bombay CIT v. Glaxo Smithkline Pharmaceuticals IT Appeal No. 2232 of 2011 which was dismissed by judgment dated 6th March, 2013.*

7. However, we are conscious of the fact that the Hon'ble Division Bench while dismissing the appeal had made an observation that even if the expenditure as claimed is not allowable under section 36(1)(iv) of the Act, the same is allowable under section 37 of the Act. However, on this aspect there are other decisions of the Hon'ble Supreme Court which have decided otherwise. Therefore, we do not wish to trade into the said territory. We are satisfied that the amount which was remitted by the respondent assessee is neither towards an initial contribution nor towards an ordinary annual contribution and, therefore, the ceiling fixed under the rules will not apply to such a contribution. That apart, this contribution had to be made considering the peculiar circumstances and it was a one-time payment, therefore we are of the view that the learned Tribunal rightly allowed the appeal filed by the assessee. That apart the decision in the case of Glaxo Smithkline Pharmaceuticals (supra) has been affirmed by the High Court of Judicature at Bombay.”

Respectfully, following this judgment, this ground is decided in favour of the assessee and against the Revenue.

3.1 Regarding the issue of alleged excess contribution to approved gratuity fund to part fund the gap in actuarial valuation and actual contribution, the case of Eastern Equipment and Sales (supra) comes to the Appellant's rescue as under:

2. Section 36(1)(v) of the Act provides that any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of its employees under an irrevocable trust will be allowable as a deduction. The prohibition contained in section 40A(7) will not apply in relation to any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund. It will appear from the aforesaid provisions that deduction is allowed in respect of any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by the employer for the exclusive benefit of its employees under an irrevocable trust.

6. None of the conditions so prescribed enjoins that the contribution shall not exceed 81/3 per cent. The ITO in making the assessment allowing the deduction for contribution towards the approved gratuity fund is concerned with whether the conditions laid down in section 36(1)(v) have been satisfied or not. In other words, whether the contribution is to be approved gratuity fund or not. Section 36(1)(v) does not contain any condition regarding any restriction regarding ordinary annual contribution to the gratuity fund. He cannot take into account any fact other than the fact of compliance with the conditions made in section 36(1)(v); that is to say, that the payment has been made to the contribution towards the approved gratuity fund created for the exclusive benefit of the employees under an irrevocable trust. If for any reason the Commissioner in granting the approval allows the excess contribution to be made, that cannot make the gratuity fund as unapproved. If there be any conflict between rule 103 and rule 3 of the part of the Fourth Schedule regarding the conditions for approval of the gratuity fund, it is for the Commissioner to take appropriate steps in that behalf. But it is not for the ITO to question the validity of the gratuity fund as approved.

7. Our attention has been drawn to a decision of the Andhra Pradesh High Court in *CIT v. Super Spg. Mills Ltd* [1987] 166 ITR 518. In that case also the ITO restricted the claim of the assessee towards contribution to the gratuity fund to 819 per cent but the Commissioner (Appeals) and the Tribunal held that it was not for the ITO to sit in judgment over the approval granted by the Commissioner. It has been held that once approval is accorded by the Commissioner, it is binding on the assessing authority or the AAC and the authorities administering the provisions of the Act, have no power to go behind the approval granted by the Commissioner. Once the Commissioner accords approval, it is binding on the assessing authority and the assessing authority is devoid of power and jurisdiction to go behind the permission to find out whether the contribution made by the assessee is in conformity with the rules or in excess thereof. The Andhra Pradesh High Court relied on the decision of the Supreme Court in *Gestetner Duplicators (P) Ltd. v. CIT* (1979) 117 ITR, where the Supreme Court while considering the approved provident fund held that if the provident fund contravenes any of the conditions to be satisfied for its recognition, the taxing authority may refer the question of withdrawal of recognition to the Commissioner, but until the Commissioner acting under the powers reserved to him withdraws such recognition, the taxing authority must proceed on the basis that the provident fund has satisfied all the conditions for its recognition in that year, any other course is bound to result in chaos and uncertainty which has to be avoided.”

Following this order, we have no hesitation in upholding the findings of Ld. CIT(A) on this issue. Accordingly, this issue is decided in favour of the appellant and against the Revenue.

3.2 Regarding the issue of addition u/s 143(1) being sustained at the level of Ld. AO (relevant for AY 2018-19 only) it is felt that we can do no better than to support the following findings of the Ld. CIT(A):

“9.4 The above submissions of the appellant have been considered. On perusal of the copy of the concerned notification dated 11.06.1988 issued by the Ministry of Surface Transport, notifying the Kolkata Port Trust (Non-contributory Provident Fund) Regulations 1988 and its subsequent amendments, framed under clause (b) of section 28 r.w.s. 124 of the Major Port Trusts Act, 1963, the contentions of the appellant are found to be correct. These regulations do not specify any date by which the employee's contribution/ subscription to the PF is to be deposited in the individual employee's account under the Calcutta Port Trust Non-Contributory Provident Fund. The certificate from the Tax Auditor and affidavit from the Financial Advisor and Chief Accounts Officer of the appellant also affirm the same. On perusal of the 3CD report, it is noted that all the impugned contributions were deposited within a couple of days of the artificial due date, the maximum delay being 08 days. The artificial 'due date' mentioned in sr. no 20(b) of the 3CD report as 15th of the following month had to be entered by the Tax Auditor due to limitations of the concerned e-filing software which mandates filing of some date compulsorily in the concerned column. Thus, the usual 'due date' of 15th of the next month as specified under clause 38 of the Employees Provident Fund Scheme framed under Employees Provident Funds Miscellaneous Provisions Act, 1952 is not found applicable to the appellant. Section 36(1) (va) explains the term due date as Due date" means the date by which the assessee is required as an employer to

*credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise". (emphasis supplied). As the concerned Kolkata Port Trust (Non-contributory Provident Fund) Regulations 1988 notified under the Major Port Trust Act does not specify any 'due date for this purpose, no disallowance u/s 36(1)(va) is warranted on account of the delay in deposit of the contribution. It is not disputed by the A.O. that the deposit was actually made within a couple of days from the artificial 'due date'. Perusal of the column 20(b) of Form 3CD reflects that for most of the months the contribution as deposited well before the artificial 'due date' itself. Therefore, in my considered opinion, in the absence of any specified due date, deduction u/s 36(1)(va) cannot be denied when the contribution has actually been credited in the concerned fund within the following month of contribution. Consequently, the disallowance of Rs. 8,38,35,219 made by the A.O. u/s 36(1)(va) is hereby deleted. Ground of Appeal no. 5 is, thus, allowed."*

In result, this issue is also decided in favour of the assessee.

4. In the result, all the grounds filed by the Revenue in all the four years are hereby dismissed.

5. Regarding the Cross Objections filed by the appellant, it is noticed that they were merely in support of the action of Ld. CIT(A) and did not call for any separate adjudication. Accordingly, all CO's in the 4 years under consideration deserve to be dismissed as they have no adjudicable issues once the substantive issues stand decided in the Department's appeal.

6. In the result, the Department's appeals are dismissed and the CO's filed by the appellant are also dismissed.

Order pronounced in the open court on 18.11.2024

Sd/-  
**[Sanjay Garg]**  
**Judicial Member**

Sd/-  
**[Sanjay Awasthi]**  
**Accountant Member**

Dated: 18.11.2024.  
AK, PS

*Copy of the order forwarded to:*

1. Syama Prasad Mookerjee Port, Kolkata
2. ACIT, Circle-34, Kolkata
3. CIT(A)-
4. CIT-
5. CIT(DR)

*//True copy//*

By order

Assistant Registrar, Kolkata Benches