

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI**

**BEFORE SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI SUDHIR PAREEK, JUDICIALMEMBER**

**ITA No.1009/DEL/2023
(Assessment Year : 2018-19)**

**ITA No.1010/DEL/2023
(Assessment Year : 2019-20)**

Bird Worldwide Flight Service Mumbai Pvt. Ltd., vs. ACIT, Circle 4(2),
E-9, Connaught Hose, New Delhi.
Connaught Place,
New Delhi – 110 001.
(PAN: AAGCB5959C)

**ITA No.1017/DEL/2023
(Assessment Year : 2019-20)**

Bird Execujet Airport Services Pvt. Ltd., vs. ACIT, Circle 4
(2),
E-9, Connaught Hose, New Delhi.
Connaught Place,
New Delhi – 110 001.
(PAN: AACCB7218E)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Tarandeep Singh, Advocate
Shri Sandeep Yadav, Advocate

REVENUE BY : Shri Kanv Bali, Sr. DR

Date of Hearing : 23.09.2024

Date of Order : 11.12.2024

ORDER

PER S. RIFAUR RAHMAN, AM :

1. The assessee has filed three appeals against the separate orders of Id.
Commissioner of Income-tax (Appeals)/National Faceless Appeal Centre

(NFAC) (hereinafter referred to 'Ld. CIT (A)') dated 04.01.2023 for AY 2018-19 & 2019-20 and 08.12.2021 for AY 2019-20.

2. Since the issues are common and the appeals are connected, hence the same are heard together and being disposed off by this common order.
3. The only issue involved in all these appeals is that the ld. CIT (A) has erred upholding the disallowances of expenditure made by the Assessing Officer representing delay in remittance of Employee's Contribution towards ESIC and Provident Fund invoking provisions of section 36(1)(va) of the Income-tax Act, 1961 (for short 'the Act').
4. At the time of hearing, ld. AR for the assessee submitted as under :-

"A. The disallowance made by CPC while processing the return u/s 143(1) is beyond the scope of provisions of section 143(1)(a) and, therefore, the disallowance made merits deletion - In this case, CPC vide order dated 06-06-2020 has made an adjustment u/s 143(1)(a)(ii) / 143(1)(a)(iv) of the Act of Rs.9,12,361/- i.e. disallowance of expenditure being "any sum received from employees as contribution to any provident fund or superannuation fund or any other fund for the welfare of employees to the extent not credited to the employees account on or before the due date [36(1)(va)]". It is submitted that the proposed adjustment falls outside the scope of adjustments envisaged u/s 143(1). In this regard it is submitted as under:

(1) Scope of Adjustment u/s 143(1)(a)(iv) - Provisions of section 143(1)(a)(iv) as applicable to the year under consideration merely provided for an adjustment in respect of "disallowance of expenditure" indicated in the audit report but not taken into account in computing the total income in ROL Finance Act 2021 made an amendment w.e.f. 1-4-2021 and expanded the scope of adjustment u/s 143(1)(a)(iv) from "disallowance of expenditure" to "increase in income". This amendment is prospective applicable w.e.f 01-04-2021. For AY 2015-16 therefore the

scope of adjustment u/s 143(1)(a)(iv) is restricted to "disallowance of expenditure" indicated in the audit report. At the outset it is 'stated that in the present case Tax Auditor has not made /directed /indicated any disallowance on account of delay in payment of employee share of PF /EPF. Kind reference is invited to pages 7 and 16 of the PB. After providing relevant details as required under clause 20(b) of Tax Audit Report form it is stated by the Tax Auditor that "No disallowance for late deposit of employee's contribution towards provident fund & ESI is being made following the Judgement of Delhi High Court in CIT vs Aimil Ltd 321 ITR 508(Del)". Therefore clearly this adjustment is outside the scope of section 143(1)(a)(iv) as the Tax Auditor himself did not make any disallowance."

5. Ld. AR further made alternative plea as under :-

"B. Without Prejudice, it is requested that the matter be remanded back to the AO for re-computation of disallowance with a direction that the term "every month" specified in Section 38 of the Provident Fund Scheme signifies the month in which the salary or wages are actually paid and irrespective of the month to which salary / wages relate. Refer: M/s Benson Movers Pvt Ltd ITA No. 2710/Del/2022 for AY 2019-20; M/s WON Technologies Pvt Ltd ITA No. 164/Del/2023 for AY 2018-19; MTR Maiya vs ITA (2023) 152 taxmann.com 189(Bang-Trib); Sai Computers Ltd (2023) 155 taxmann.com 607(Del-Trib); Sentinel Consultants (P) Ltd 202 ITO 154(Del). Relevant details are enclosed at page 1 of the PB."

6. On the other hand, ld. DR for the Revenue objected to the submissions made by the ld. AR for the assessee and submitted that the issue is squarely covered by the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT 143 taxmann.com 178.
7. Considered the rival submissions and material placed on record. We observed that the first plea of the assessee that the issue under consideration is beyond the scope of section 143(1)(a) of the Income-tax

Act, 1961 (for short 'the Act'). In our considered view, this issue is already settled in favour of the Department and ld. AR for the assessee relied on the decision of PR Packaging Services 199 ITD 724 (Mum.) and other similar case laws. These case laws are already distinguished by the coordinate Benches. Accordingly, this plea of the assessee is rejected.

8. Coming to alternative plea of the assessee. Considered the rival submissions and this plea was considered by the coordinate Bench in the case of Benson Movers Pvt. Ltd. (supra) and the relevant decision of the coordinate Bench is as under :-

“5. In so far as employees contributions towards PF & ESI it is noticed 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 in the case of Sentinel Consultants Pvt. Ltd. Vs. ACIT (supra) and the Tribunal restored the issue to the file of the AO 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 deptt. 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. We find similar view has been taken by the coordinate benches in the cases of B. L. Kashyap & Sons Ltd. (supra) and VVDN Technologies Pvt. Ltd. (supra). The ld. Counsel submits that in view of these decisions the matter may be restored to the Assessing Officer to ascertain the due date for remittance of the PF/ESI contributions of employees. Considering the decisions of the coordinate benches referred to above we restore this issue to the file of the Assessing Officer to decide in the light of the observations made by the Tribunal in the case of Kanoi Paper & Industries Ltd. Vs. ACIT (supra). Needless to say that the Assessing Officer 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. Since the above issue is squarely covered by the above decision, we are inclined to remit the issue back to the file of AO to consider the alternative plea of the assessee as per law after giving proper opportunity of being heard to the assessee.
10. The issues raised in the AY 2019-20 by the assessee and by the sister concern ‘Bird Execujet Airport Services Pvt. Ltd.’ are exactly similar the issues raised in A.Y. 2018-19, the decision adjudicated in A.Y. 2018-19 are applicable *mutatis mutandis*. Hence, these appeals also allowed for statistical purposes.

11. In the result, all the appeals of the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on this 11th day of December, 2024.

**Sd/-
(SUDHIR PAREEK)
JUDICIAL MEMBER**

**sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER**

Dated : 11.12.2024

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR
ITAT, NEW DELHI**