

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI**

**SHRI AMRJIT SINGH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 6316/MUM/2024
(Assessment Year: 2020-2021)**

Capacite Infraprojects Limited

605 607, Shrikanth Chambers, Phase 1,
Sion Trombay Road, Chembur – 400071.
Maharashtra.
[PAN:AAECC9463G]

..... **Appellant**

Vs

**Assistant Commissioner of Income Tax/
Deputy Commissioner of Income Tax
Central Circle 1(2)**

Prathishtha Bhavan, 9th Floor, Churchgate,
Mumbai - 400020

..... **Respondent**

Appearance

For the Appellant/ Assessee : Shri Viraj Mehta
For the Respondent/Department : Shri Mahesh Pamnani

Date

Conclusion of hearing : 28.01.2025
Pronouncement of order : 31.01.2025

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal preferred by the Assessee against the order, dated 15/10/2024, passed by the Commissioner of Income Tax (A) - 47, [hereinafter referred to as 'the **CIT(A)**'] under Section 250 of the Income Tax Act, 1961 [hereinafter referred to as 'the **Act**'] whereby the Ld. CIT(A) had dismissed the appeal against the Penalty Order, dated 20/02/2024, passed under Section 271AAB of the Act for the Assessment Year 2020-2021.

2. The Assessee has raised following grounds of appeal :

Ground of Appeal No.1: Levy of penalty on Disallowance of Employees contribution towards PF and ESIC is bad in law:

- a) *The Learned Assessing Officer has erred in levying penalty on addition on account of disallowance of employees contribution towards PF and ESIC u/s 36(1)(va) r.w.s. 2(24)(x) and the Ld. CIT(A) has erred in confirming such levy of penalty.*
 - b) *The appellant contends that the disallowance u/s 36(1)(va) r.w.s. 2(24)(x) is purely a legal and debatable issue as it is based on the question in law and not the case of concealment of particulars or furnishing inaccurate particulars. Thus, the same qualifies for non-levy of any penalty based on various judicial precedents.*
 - c) *The appellant contends that they had claimed the deduction of Employees contribution towards PF and ESIC on the basis of reliance on judicial pronouncement of various courts in this regards. The Ld. Assessing Officer had disallowed the claim on the basis of an administrative circular for filing of appeals by the departmental officers. The said circular is not applicable in the instant case and therefore the said disallowance is itself bad in law. Therefore no penalty can be levied in the instant case.*
 - d) *The appellant contends that the levy of penalty on disallowance u/s 36(1)(va) r.w.s. 2(24)(x) is in contravention to the principles of natural justice and needs to be deleted.*
3. The relevant facts in brief are that vide order, dated 20/02/2024, penalty of INR.3,57,406/- was levied on the Assessee under Section 271AAB of the Act in respect of disallowance of INR.23,67,555/- made by the Assessing Officer under Section 36(1)(va) read with Section 2(24)(x) of the Act in respect of employee's contribution to the Provident Fund (PF) and Employee State Insurance Corporation (ESI) which was deposited belatedly.
4. In the regular assessment proceedings the Assessee had claimed that since the employee's contributions towards PF/ESI were deposited before the due date of filing return of income, the Assessee was entitled to claim deduction for the same (even though the same were deposited after the expiry to statutory period) in terms of Section 36(1)(va) read with Section 43B of the Act. However, the aforesaid claim was rejected by the Assessing Officer

in the order passed under Section 143(3) of the Act. In appeal the CIT(A) also declined to grant any relief.

5. Subsequently, the Assessing Officer passed penalty order on 20/02/2024 levying penalty to INR.3,57,406/- under Section 271AAB of the Act. The appeal preferred by the Assessee challenging the aforesaid levy of penalty was dismissed by the CIT(A). Therefore, the Assessee had preferred the present appeal before the Tribunal on the grounds reproduced in paragraph 2 above.
6. The appeal preferred by the Assessee challenging the levy of the aforesaid penalty was dismissed by the CIT(A) vide order dated 15/10/2024. Being aggrieved the Assessee has preferred the present appeal before the Tribunal.
7. We have heard rival submissions and perused the material on record.
8. In the present case the penalty has been levied under Section 271AAB of the Act which provides for levy of penalty in case of 'undisclosed income'. Explanation (c) to Section 271AAB of the Act defined 'undisclosed income' to mean:

"27. Undisclosed Income as per provision of Section 271AAB means –

(c) "undisclosed income" means-

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section-132, which has-

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year, or

- (B) *otherwise not been disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; or*
- (ii) *any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted."*

The contention advance on behalf of the assessee is that in the present case addition has been made on account of rejection of claim of deduction made by the Assessee. The transaction and the connected payments were duly recorded in the books of account and therefore, the disallowance made falls outside the ambit of expression 'undisclosed income' as defined in Explanation (c) to Section 271AAB of the Act. We find merit in the aforesaid contentions advanced on behalf of the Assessee. We note that the Assessing Officer has in paragraph 12 and 12.1 of the Assessment Order, dated 26/07/2021, passed under Section 143(3) of the Act has recorded as under:

"12. *Addition u/s 36(1)(va) r.w.s. 2(24)(x) of the Act*

12.1 *On perusal of the details filed, it is seen that the assessee has deposited the employees' contribution to Provident Fund and ESIC beyond the due date. The assessee is required to deposit the employees' contribution to PF and ESIC by 15th of the following month in which the salary has been paid, failing which the same is required to be added u/s 36(1)(va) r.w.s. 2(24)(x) of the Act. In the instant case, the assessee has not deposited the contribution to PF amounting to Rs.23,33,047/- and ESIC amounting to Rs.34,508/- in the Government treasury within the due date. Further, in view of the Circular No.22/2015 vide F.No.279/Misc/140/2015-ITJ dated 17/12/2015, it is clarified that the claim of deduction relating to employee's contribution to welfare funds is governed by section 36(1)(va) of the Act. In view of the above, the employees contribution of PF totalling to Rs.23,33,047/- and ESIC*

totalling to Rs 34,508/- is hereby disallowed and added back to the total income of the assessee u/s36(1)(va) of the Act."

9. It is admitted position that employees' contribution of INR.23,33,047/- towards PF and employees' contribution of INR.34,508/- towards ESIC aggregating to INR.23,67,555/- was disallowed under Section 36(1)(va) of the Act. The claim of deduction made by the Assessee, at the relevant time, was supported by the judgment of the Hon'ble Bombay High Court in the case of CIT vs. Ghatge Patil Transports Ltd. (2015) 53 taxmann.com 141 (Bombay), and CIT vs. Hindustan Organics Chemicals Ltd. [2014] 366 ITR 1 (Bombay). In the aforesaid judgments it was held that employees' contribution towards PF/ESIC deposited before the due date of filing return was allowable as deduction under Section 36(1)(va) read with Section 43B of the Act.
10. However, subsequently, the Hon'ble Supreme Court in the case of Checkmate Services Private Ltd. v. CIT-1:[2022] 448 ITR 518 (SC)[12/10/2022] had taken a contrary view and had held that deduction for employees' contribution towards PF/ESI shall be allowed as deduction only if the deposit is made by the employer on or before the due date specified in the applicable statute in view of Section 2(24)(x) read with Section 36(1)(va) of the Act. The non-obstante clause under Section 43B or anything contained therein would not absolve the assessee from its liability to deposit the employees' contribution on or before the due date specified in the applicable statute. The fact that employees' contribution towards PF/ESI has been made before the due date of filing of return of income would not entitled the Assessee to claim deduction under Section 36(1)(va) read with Section 43B of the Act.
11. Clearly, the issue was debatable and the Assessee had provided explanation for claiming deduction which we find to be reasonable

and bonafide. Further, given the facts and circumstances of the present case it cannot be said that the increase in income of the Assessee on account to rejection of claim for deduction would qualify as 'undisclosed income' in terms of Explanation (c) to Section 271AAB of the Act. The transaction was recorded in the books of accounts, and therefore, the question of non-disclosure does not arise. It cannot even be said that any entry recorded in the books of accounts was found to be false by the Assessing Officer. Therefore, in our view, given the facts and circumstances of the present case, the Assessing Officer erred in invoking the provisions contained in Section 271AAB of the Act. Accordingly, penalty of INR.3,57,406/- Section 271AAB of the Act is deleted. Thus Ground No.1(a) raised by the Assessee is allowed while all the other Grounds raised by the Assessee are dismissed as having being rendered infructuous.

12. In result, in terms of paragraph 11 above, the present appeal preferred by the Assessee is allowed.
13. In result, the present appeal preferred by the Assessee is allowed.

Order pronounced on 31.01.2025.

Sd/-
(Amrjit Singh)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 31.01.2025
Milan, LDC

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण , मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai