

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES “SMC-1” : DELHI
[THROUGH VIDEO CONFERENCING]

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA.No.1823/Del./2020
Assessment Year 2018-2019

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| M/s. Worldwide Facility Management Services Pvt. Ltd., New Delhi - 110037 C/o. Sh Vijay Kumar Gupta, Advocate, Opp. Jain Mandir, Main Bazaar, Ballabgarh, Faridabad. PIN 121 004. PAN AABCW3770H. | vs. | The DCIT, CPC New Delhi |
| (Appellant) | | (Respondent) |

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| For Assessee : | Shri Vijay Gupta, Advocate. |
| For Revenue : | Shri Rajesh Kumar Dhanesta, Sr. DR |

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| Date of Hearing : | 29.07.2021 |
| Date of Pronouncement : | .10.2021 |

ORDER

This appeal filed by the Assessee is directed against the Order dated 25.08.2020 of the Ld. CIT(A)-9, New Delhi, relating to the A.Y. 2018-2019.

2. Although a number of grounds have been raised by the assessee, however, these all relate to the order of the Ld. CIT(A) in confirming the disallowance of Rs.21,40,164/-

made by the DCIT/A.O, CPC passed order under section 143(1) in respect of delayed payment of employees' contribution to PF & ESI.

3. Facts of the case, in brief, are that the assessment of the assessee relevant to the A.Y. 2018-19 has been made under section 143 [1] of the I.T. Act, 1961 vide order dated 15.11.2019, wherein, employees' contribution of Rs.21,40,164/- towards ESIC and EPF were paid late in terms of the provisions of ESIC and EPF, but before the filing of return of income for the present period. The return of income for the present period was to be filed by 31.10.2018 [extended date] and the assessee filed the same on 13.10.2018. The assessee paid the entire amount before 13.10.2018.

3.1. The DCIT, CPC Bangalore vide order dated 15.11.2019 made addition/disallowance of Rs.21,40,164/- under section 36(1)(va) of the I.T. Act, 1961.

3.2. In appeal, the Ld. CIT(A) rejecting the various explanations given by the assessee, sustained the addition

made by the DCIT, CPC on the ground that the assessee failed to deposit the employees' contribution towards PF & ESI before the date dates. The Ld. CIT(A) relied on various decisions including the decision of Hon'ble Delhi High Court in the case of CIT vs., M/s. Bharat Hotels Ltd., [2019] 410 ITR 417 (Del.) and held that the assessee is not entitled to deduction under section 36(1)(va) of the I.T. Act, 1961, in respect of delayed payment of employees' contribution towards PF & ESI paid before the due date of filing of the income tax return amounting to Rs.21,40,164/-.

4. Aggrieved with such order of the Ld. CIT(A), the assessee is in appeal before the Tribunal.

5. Learned Counsel for the Assessee submitted that in the Finance Bill 2021, amendments were made in Sections 36 and 43B vide Clauses 8 and 9 and in the Memorandum of Explanation according to which the amendments will take effect from 01.04.2021 and will accordingly apply to A.Y. 2021-2022 and subsequent assessment years. He submitted that Section 1 (2)(a) of Finance Act, 2021 specifically mentions that Sections 2 to

88 shall come into force on the First Day of April, 2021. However, as per Finance Act, 2021, Section 9 relates to amendment to Section 36 and Section 11 relates to amendment to Section 43B. Referring to various decisions, he submitted that after considering the various decisions relied on by the Ld. CIT-DR, the Coordinate Benches of the Tribunal are consistently taking the view that employees' contribution to PF & ESI, if paid before the due date of filing of the income tax return under section 139(1), is an allowable deduction and no disallowance can be made.

1. Order of the ITAT, Hyderabad in the case of Crescent Roadways Pvt. Ltd., vs., DCIT vide ITA.No.1952/ Hyd/2018 dated 01.07.2021.
2. Order of the ITAT, Delhi in the case of DCIT vs., Dee Development Engineers Ltd., vide ITA.No.4959/Del./2016 dated 08.04.2021.
3. Order of the ITAT, Delhi in the case of DCIT vs., Planman HR (P) Ltd., vide ITA.No.5152/ Del./2017 dated 15.07.2021.

4. Order of the ITAT, Chennai in the case of DCIT vs., Talenpro India HR Pvt. Ltd., vide ITA.No.265/Chennai/2019 dated 09.04.2021.
 5. Order of the ITAT, Agra in the case of Mahadev Cold Storage vs., Jurisdiction Assessing Officer vide I.T.A. Nos. 20 & 21/Agra/2021 dated 14.06.2021.
 6. Order of the ITAT, Chennai in the case of DCIT vs., Repco Home Finance Pvt. Ltd., reported in [2020] 183 ITD 782 ITAT-Chennai.
6. The Ld. D.R. on the other hand strongly supported the order of the Ld. CIT(A) and submitted that since the assessee has not made the deposits on account of employees' contribution to PF & ESI before the specified dates as mentioned in the Statute, therefore, the Ld. CIT(A) was fully justified in sustaining the addition made by the CPC. He submitted that there are various decisions in favour of the Revenue where the Hon'ble Courts have held that the Amendment by Finance Act, 2015 in Section 43B is

restricted only in respect of employers contribution to PF & ESI and if the same is paid on or before the due date of filing of the income tax return under section 139(1), the same is an allowable deduction under section 43B of the I.T. Act, 1961. However, the same amendment would not be applicable for the belated payment to employees' contribution to PF & ESI. He submitted that since the assessee has received the money by taking it from the salary of the employees and kept the same without making payment to the Government Account, the concession given in Section 43B is not available with respect to employees' contribution. Referring to the amendments in the provisions of Section 43B as well as 36(1)(va), he submitted that the Explanation-2 inserted by Finance Act, 2021 clarifies that the definition of "Income" as provided in Section 2(24)(x) remains unchanged and provision of Section 43B does not apply and deemed to never have been applied for the purpose of determining the due date of payment of employees' contribution to PF & ESI. He accordingly

submitted that the grounds raised by the assessee should be dismissed.

7. I have considered the rival arguments made by both the sides, perused the orders of the A.O. and the Ld. CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find the DCIT, CPC in the instant case has computed the income of the assessee at Rs.41,98,640/- as against the returned income of Rs.20,58,480/- by making an adjustment for a sum of Rs.21,40,164/- on account of belated payment to employees' contribution towards PF & ESI by invoking the provisions of Section 143(1)(a)(iv) of the I.T. Act, 1961. I find Ld. CIT(A) dismissed the appeal filed by the assessee. It is the submission of the Learned Counsel for the Assessee that payment for employees' contribution towards PF & ESI have been made before the due date of filing of the income tax return under section 139(1), therefore, in view of the consistent decisions of the Coordinate Benches of the Tribunal, the same does not call for any disallowance. It is also his submission that after the

decision of the Hon'ble Delhi High Court in the case of CIT vs., M/s. Bharat Hotels Ltd., (supra), the Hon'ble Delhi High Court in the case of PCIT vs., Pro Interactive Service (India) Pvt. Ltd., vide ITA.No.983/2018 order dated 10.09.2018 has held that no disallowance is called for where the assessee had paid the employees' contribution to PF & ESI before the due date of furnishing of return of income under section 139(1) of the I.T. Act, 1961.

7.1. I find the Hon'ble Delhi High Court in the case of PCIT vs., Pro Interactive Service (India) Pvt. Ltd., (supra), following the decision in the case of CIT vs., AIMIL Ltd., (supra), has held that legislative intent was/is to ensure that the amount paid is allowed as expenditure only when payment is actually made. It was further held that it was not the legislative intent and objective to treat belated payment of Employees' Provident Fund & Employees' State Insurance Scheme as deemed income of the employer under section 2(24)(x) of the I.T. Act, 1961.

7.2. I find the Coordinate Bench of the Tribunal in the case of Insta Exhibitions Pvt. Ltd., New Delhi vs., Addl. CIT,

Special Range-4, New Delhi vide ITA.No.6941/Del./2017 order dated 03.08.2021 while allowing such belated deposit of employees' contribution to PF & ESI as per the respective Act, but, paid before the due date of filing of the income tax return, deleted such disallowance by observing as under :

“8. We have carefully considered contentions of the learned departmental representative and perused the orders of the lower authorities. The facts shows that the assessee has collected the sum of Rs. 12,16,260/- being employee's contribution under the provident fund and with respect to ESI laws. The above contribution was admittedly not deposited by the assessee within the due date prescribed under the respective ESI and PF statute however, same was deposited before the due date of filing of return of income. Therefore, the ld AO as well as the ld CIT(A) disallowed the same holding that such contribution becomes the income of the assessee under the provision of section 2(24)(x) of the Act and thereafter if the same is deposit within the due date prescribed under the respective laws then same is

allowable as deduction u/s 36(1)(va) of the Act. Coordinate bench in case of DCIT Vs Dee Development Engineers in ITA No. 4959/DEL/2016 (A.Y 2011-12) has held as Under:-

“7. We have heard both the parties and perused all the relevant material available on record. As regards Ground No. 1, the assessee company has not deposited the employees’ contribution within the due date which is prescribed under the said statute i.e. Provident Fund and ESIC. This issue is dealt by the Hon’ble Delhi High Court in case of CIT vs. M/s Bharat Hotels Ltd. 410 ITR 417 wherein the issue is decided in favour of the revenue, without considering the decision of the Hon’ble Delhi High Court in case of CIT vs. AIMIL Ltd.(2010) 321 ITR 508 (Del.). But the Ld. AR relied upon the decision of the Hon’ble Delhi High Court in case of Pr. CIT vs. Pro Interactive Service (India) Pvt. Ltd. ITA No. 983/2018 pronounced on 10.09.2018 wherein the Hon’ble High Court

decided the issue in favour of the assessee relying upon the judgment of AIMIL Ltd. (supra). The Hon'ble Delhi High Court held that the legislative intent was/is to ensure that the amount paid is allowed as expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPF) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act. It is settled law that when two judgments are available giving different views then the judgment which is in favour of the assessee shall apply as held in case of Vegetable Products Ltd. 82 ITR 192 by the Hon'ble Supreme Court. Hence, in light of the latest decision in case of Pro Interactive Service (India) Pvt. Ltd., the issue is covered in favour of the assessee. Hence, Ground No. 1 is dismissed."

7. *Further with respect to the argument of the learned departmental representative that amendment made*

with finance act 2021 wherein explanation 1 is added u/s 36 (1) (va) of the act with effect from 1 April 2021, is applicable to the present case, we referred to the “Notes on clauses” at the time of introduction of the finance bill 2021 which says as Under:-

“Clause 8 of the Bill seeks to amend section 36 of the Income tax Act, relating to other deductions. Sub-section (1) of the said section provides for allowing of deductions provided for in the clauses thereof for computing the income referred to in section 28 of the said Act. Clause (va) of the said sub-section provides for allowance of deduction for any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that for the purposes of this clause, "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. It is proposed to insert Explanation 2 to clause (va) of sub-section (1) of the said section so as to clarify that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under the said clause.

This amendment will take effect from 1st April, 2021 and will, accordingly, apply in relation to the assessment year 2021- 2022 and subsequent assessment years."

Therefore it is apparent that the above amendment do not apply to the assessment year 2014-15 in this appeal.

8. *In view of this we allow the solitary ground of appeal raised by the assessee holding that the addition/disallowance made by the learned assessing officer of late deposit of employees contribution to the provident fund and ESI, as it is deposited before the due date of the filing of the return of an income but beyond the due date prescribed Under the respective provident fund and ESI laws is not sustainable in law.*

9. *In the result, appeal of the assessee is allowed.”*

7.3. Since in the instant case the assessee admittedly has deposited the employees' contribution to PF & ESI before the due date of filing of the income tax return, therefore, respectfully following the decisions cited (supra), I hold that the Ld. CIT(A) is not justified in sustaining the adjustment made by the A.O-CPC of Rs.21,40,164/- on account of belated payment of employees' contribution to PF & ESI. I, therefore, set aside the order of the Ld. CIT(A) and direct the A.O. to delete the disallowance. The grounds raised by the assessee are accordingly allowed.

8. In the result, appeal of the Assessee is allowed.

Order pronounced in the open Court on 13.10.2021.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

Delhi, Dated 13th October, 2021

VBP/-

Copy to

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| 1. | The appellant |
| 2. | The respondent |
| 3. | CIT(A) concerned |
| 4. | CIT concerned |
| 5. | D.R. ITAT 'SMC-1' Bench, Delhi |
| 6. | Guard File. |

// By Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.