

(2024) 05 ITAT CK 0060

**Income Tax Appellate Tribunal (Delhi H Bench)****Case No:** Income Tax Appeal No. 336/DEL/2024

Bajaj Travels

APPELLANT

Vs

DCIT

RESPONDENT

**Date of Decision:** May 30, 2024**Acts Referred:**

- Income Tax Act, 1961 - Section 36(1)(va), 37(1), 43B, 139, 143(1), 143(3)

**Hon'ble Judges:** Shamim Yahya, (AM); Sudhir Pareek, J**Bench:** Division Bench**Advocate:** Shaantanu Jain, Amit Katoch**Final Decision:** Allowed**Judgement**

1. The instant appeal has been preferred against the order dated 11.01.2024 for the Assessment Year ['AY'] 2018-19 passed by Ld. Commissioner of Income Tax, Appeal, Vadodara [for the sake of convenience hereinafter referred to as 'Ld. CIT(A)'] in the appeal pending with him and arising out of order dated 16/10/2019 under Section 143(3) of the Income Tax Act, 1961 (for the sake of convenience, hereinafter to as 'the Act'), passed by learned Assessing Officer (hereinafter referred to as 'AO')

2. Facts of the case may be summarized as that assessee/ appellant is a firm, has filed the return of income on 09.03.2019 by declaring total income of Rs. 74,18,583/-. Under the provisions of Section 143(1) of the Act, an intimation dated 16.10.2019 passed by ADIT, CPC. In the above intimation, the income from business was computed at Rs. 98,06,110/- against Rs. 74,18,583/-. Adjustment of Rs. 23,87,527/- as abovementioned was made to the returned income as below.

**"Any sum received from employees as contribution to any provident fund or superannuation fund or any fund set up under ESI Act 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)- Rs. 23,87,527/-."**

3. The assessee / appellant has raised substantive grounds for appeal as follows:

1. Because the action is under challenge on facts & law for enhancing the Income of the appellant at Rs.98,06,110/- as against the declared income of Rs.74,18,583/-u/s 143(1) of the Act.

2. Because the action is being challenged on facts and law for disallowance of Employees Provident Fund & ESI amounting Rs. 23,87,527/-u/s 36(1)(va) of the Act as the same has been made by recording incorrect facts and findings and without observing the principles of natural justice as none of the submissions filed by the Assessee has been considered by the Ld. CIT(A) and without appreciating the facts and circumstances of the case.

3. That having regards to the facts and circumstances of the case, the Ld. CIT(A) has erred in upholding the actions of Ld. DCIT, CPC which has erred in law and on facts in making the adjustment of Rs.23,87,527/- u/s 143(1) which could not have been made in law.

4. Because the action is being challenged on facts and law for making disallowance of Employees Provident Fund & ESI amounting Rs. 23,87,527/- u/s 143(1) of the Act as the addition is outside the scope of Section 143(1) of the Act.

5. For any consequential relief and/or legal claim arising out of this appeal and for any addition, deletion, amendment and modification in the grounds of appeal before the disposal of the same in the interest of substantial justice to the assessee."

4. Heard rival submissions and carefully scanned the material available on record. From the bare perusal, it reveals that in this case, the main issue primarily involved with regard to the disallowance of Rs. 23,87,527/- of delayed deposits of the employees contribution towards ESI and EPF.

4.1 In the course of hearing, Ld. AR submitted that the impugned order has been made by recording incorrect fact and findings and without observing the principles of natural justice as none of the submissions filed by the assessee / appellant has been considered by the Ld. CIT(A).

5. He further submitted that the disallowance made on account of employee's contribution to provident fund is not at all an incorrect claim as payments have been made by the assessee before the due date of filing of Income Tax Return. No disallowance towards contribution to employee's PF and ESI is warranted and return of income was filed on 29.10.2018 which is within due date of filing of return in accordance with law and as per clause 20(b) of Tax Audit Report, payments of employees' contribution to PF & ESI were made before the filing of income tax return. He also submitted that the amount of PF and ESI with regard to employee's contribution has been deposited by the assessee much before the return filed u/s 139 of the Act and therefore no addition / disallowance can be made. He further added that this issue has been examined in the Finance Act, 2021 and the provisions

of Section 36(1)(va) as well as Section 43B of the Act have been amended to this extent by inserting the explanation -2 whereby it is clarified that the provision of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the due date under this clause.

6. Per contra, Learned Departmental Representative (hereinafter referred to as 'Ld. DR', for short) relied on order passed by lower authorities.

7. In support of his submissions, Ld. AR has relied on the orders passed by the Co-ordinate Benches of ITAT, which read as under:

a. Order dated 13.10.2023 in the case of Ms. Magna Automation Ltd in ITA No. – 1109/Del/2023

b. Order dated 17.11.2023 in the case of M/s Benson Movers Pvt. Ltd in ITA No. – 2710/Del/2022

c. Order dated 11.10.2023 in the case of Prakul Luthra in ITA No. 385/Del/2023

8. In the case of M/s Benson Movers Pvt. Ltd. (supra), the Tribunal restored the issue to the file of the Assessing Officer (hereinafter referred to as 'AO'), true extract of para 5 and 6 of above order for ready reference 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 Id. 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 (Call). 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 co-ordinate benches in the cases of B. L. Kashyap & Sons Ltd. (supra) and VVDN Technologies Pvt. Ltd. (supra). The Id. 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 co-ordinate 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. In the case of Prakul Luthra (supra), in which one of us (Accountant Member) was in the quorum and therein this issue also have been dealt with and returned to the file of the Ld. AO.

10. After due consideration and the orders passed by the Co-ordinate Benches of ITAT as referred above, we restored this issue to the file of the Ld. AO with the direction to decide the matter afresh in the light of the observations made by Co-ordinate Benches of ITAT. Needless to say, that the Ld. AO shall provide adequate and meaningful opportunity of being heard to the assessee / appellant and the assessee/ appellant is at liberty to submit / provide all the necessary information / materials in support of the contention raised by him.

10. Consequently, the appeal of the Assessee is allowed accordingly for statistical purpose.