

Vgb IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCH "SMC", HYDERABAD  
(Through Virtual Hearing)

BEFORE SHRI A. MOHAN ALANKAMONY,  
ACCOUNTANT MEMBER

ITA No. 605/Hyd/2020		
A.Y. 2018-19		
Sundar Tajmahal Hotels Private Limited, Hyderabad. PAN: AAFCS 9682 N	VS.	DCIT, Circle-3(2), Hyderabad.
(Appellant)		(Respondent)
Assessee by:	Shri K.C. Devdas	
Revenue by:	Shri M.N. Murthy Naik, DR	
Date of hearing:	11/03/2021	
Date of pronouncement:	16/06/2021	

ORDER

This appeal is filed by the assessee against the order of the Ld. CIT(A)-3, Hyderabad in appeal No. 10224/2019-20/B3/CIT(A)-3, dated 07/09/2020 passed U/s. 143(1) r.w.s 250(6) of the Act for the A.Y. 2018-19.

2. The assessee has raised three grounds in its appeal and they are extracted hereinbelow for reference:-

- "1. The order of the Ld. CIT(A) in confirming / sustaining the addition made towards belated payment of employee's contribution to PF and ESI amounting to Rs. 6,90,356/- is wholly unsustainable both on facts and in law.*
- 2. The order of the Ld. CIT(A) failed to consider that the employees' contribution to EPF and ESI at Rs. 6,90,356/- was duly paid before the due date of filing the return of income and thereby erred in disallowing the same.*

3. *Any other ground or grounds that may be urged at the time of hearing.”*

3. The brief facts of the case are that the assessee is a private limited company filed his return of income on 30/10/2018. Thereafter, the return was processed by the Centralised Processing Centre and the assessment was completed on 12/11/2019 wherein certain additions were made. Amongst which one of the issues was with respect to addition made for, non-remittance of employee's contribution towards EPF and ESI deducted from their salary, in the Government treasury, within the due date provided under those Acts. During the course of appellate proceedings, the Ld. CIT (A) after examining the facts of the case came to the conclusion that the addition made by the Ld.AO on that regard is as per the provisions of the Act and therefore the Order of Ld.AO does not call for any interference.

4. Before us, the Ld. DR vehemently argued in support of the order of the Ld. CIT (A) and prayed for confirming the same whereas the Ld. AR relied on various decisions and argued in support of the same.

5. I have heard the rival submissions and carefully perused the materials on record. After considering all the decisions cited by the Ld. AR and perusing the recent order of the Division Bench of the Hyderabad Tribunal in ITA No. 237/HYd/2019 (AY 2015-16) in the case of Café D Lake Private Limited vs. ITO, I find merit in the order of the Ld. CIT

(A). The gist of the order of the Tribunal is reproduced herein below for reference.

*“4. On appeal, the Ld. CIT (A) confirmed the order of the Ld. AO by observing as under with respect to addition made towards non remittance of employee’s contribution to provident fund and ESI.:-*

*“6.3. The submissions of the appellant have been carefully considered. There is no dispute that Employee’s contribution to PF, has been made after the statutory due date as prescribed by the Provident Fund Act and ESI Act. The appellant has submitted that if the payments are made before the filing of return of income, they should be allowed. However, it should be noted that section 43B(b) refers to the ‘Employer’s contribution’ to the Provident Fund or ESI and not ‘Employee’s contribution’ to Provident Fund or ESI. This distinction has been understood in light of the CBDT Circular No. 22/2015 dated 17/12/2015. In this background, the contention of the appellant is not accepted as it is not allowable as per Income Tax Act. The disallowance made by the Assessing Officer is upheld.”*

*5. Before us, the Ld. AR submitted that the assessee had remitted the employee’s contribution towards PF and ESI which was deducted from their salary within the due date of filing the return under the Income Tax Act, 1961 and therefore, the disallowance is not warranted. It was therefore pleaded that the addition made by the Ld. AO on those grounds may be deleted. The Ld. AR also relied on certain decisions of the Judiciary. The Ld. DR on the other hand vehemently argued in support of the orders of the Ld. Revenue Authorities and pleaded for confirming the same.*

*6. We have heard the rival submissions and carefully perused the materials on record. We do not find any merit in the submission of the assessee on this issue. Section 36(1)(va) of the Act specifically provides that if the assessee remits the employee’s contribution to Provident Fund/ESI within the due date mentioned in the relevant Act P.F Act, then the deduction will be allowable. The relevant portions of Section 36(1)(va) is reproduced herein below for reference:-*

*36(1)(va) 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:- 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 there-under or under any standing order, award, contract of service or otherwise;*

7. Further Section 43B of the Act, only provides that deduction will be allowed with respect to employer's contribution to provident fund if the same is remitted within the due date of filing the return of income. The relevant portion of Section 43B is extracted herein below for reference:-

*“[Certain deduction to be only on actual payment.] 43B “notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act in respect of ---*

*(a)-----*

*(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees”*

*-----*

*-----*

*-----*

*provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.”*

8. Thus Section 36(1)(va) of the Act refers to employee's contribution to P.F./ESI while as Section 43B of the Act refers to employer's contribution to P.F. Hence Section 43B of the Act has no application with respect to employee's contribution to P.F./ESI. Accordingly Section 43B of the Act will not override the provisions of Section 36(1)(va) of the Act with respect to employee's contribution to provident fund. It is pertinent to mention that though employee's & employer's contribution to P.F./ESI are remitted by the employer into the Government treasury, they are separate and distinct for which independent provisions have been cast under the Act. Employee's contribution to P.F./ESI, is nothing but appropriation of a portion of the salary which is legitimately due to the employee and remitted by the employer in the Government treasury on behalf of the employee in accordance with the provisions of the relevant P.F., Act. Hence it is crystal clear from Section 36(1)(va) of the Act that with respect to remittance of employee's contribution to recognized Provident Fund/ESI, deduction will be allowable to the assessee only if the same is remitted within the due date mentioned in the relevant P.F. Act and with respect to employer's contribution to recognized Provident Fund, Section 43B of the Act makes it clear that deduction will be allowable if the remittance is made within the due date of filing the return of income. The Hon'ble Gujarat High Court in the case CIT vs. Gujarat State Road Transport Corporation reported in [2014] 366 ITR 170 (Guj.) has observed as under on the issue:-

*“Under section 2(24)(x) of the Income Tax Act, 1961 any sum received by the assessee-employer from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of the Employees’ State Insurance Act, 1948, or any other fund for the welfare of such employees shall be treated as an “Income”. Under section 36(1)(va) the assessee shall be entitled to the deduction in computing the income referred to in section 28 with respect to any sum received by the assessee from the 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 employees’ accounts in the relevant fund or funds on or before the “due date”. As per the Explanation to section 36(1)(va) for the purpose of clause (x), “due date” means the date by which the assessee is required as an employer to credit the employees’ contribution to the employees account in the relevant fund under the Act, Rule, order or notification issued thereunder or under any standing order, award, contract or service or otherwise. Section 43B is with respect to certain deductions only on actual payment. The deletion of the second proviso to section 43B and the amendment in the first proviso to section 43B alone and the deletion of the second proviso to section 43B by the amendment pursuant to the Finance Act, 2003, cannot be made applicable with respect to section 36(1)(va) of the Act. Therefore, with respect to any sum with respect to the employees’ contribution as mentioned in section 36(1)(va) of the Act, the assessee shall be entitled to the deduction of such sum towards the employees’ contribution if it is deposited in the accounts of the concerned employees and in the concerned fund such as provident fund, employees’ State insurance contribution fund etc., provided the sum is credited by the assessee to the employees’ accounts in the relevant fund or funds on or before the “due date” under the Provident Fund Act, Employees’ State Insurance Act, Rule, Order or Notification issued thereunder or under any standing order, award, contract or service or otherwise. There is no amendment in section 36(1)(va) and even the Explanation to section 36(1)(va) is not deleted and is still on the statute and is required to be complied with. Merely because the second proviso to section 43B which provided that even with respect to the employer’s contribution (section 43(b)), the assessee was required to credit the amount in the relevant fund under the Provident Fund Act or any other fund for the welfare of the employees on or before the due date under the relevant Act is deleted. It cannot be said that section 36(1)(va) is also amended or the Explanation to section 36(1)(va) has been deleted or amended. Therefore, if the assessee has not credit the employees’ Contribution to the employees’ account in the relevant fund or funds on or before the due date mentioned in the Explanation to section 36(1)(va), the assessee shall not be entitled to deduction of such amount in computing the income referred in section 28”.*

9. Similarly the Hon'ble Kerala High Court in the case of *CIT vs. Merchem Ltd* reported in [2015] 378 ITR 443 (Ker) held as under:-

*“on a reading of section 36(1)(va) of the Income Tax Act, 1961 along with section 2(24)(x), it is categoric and clear that the contribution received by the assessee from the employees alone was treated as income for the purpose of section 36(1)(va) and therefore, the assessee is entitled to get deduction for the sum received by the assessee from his employees towards contribution to the fund or funds so mentioned only if, the amount was credited by the assessee on or before the due date to the employees account in the relevant fund as provided under Explanation to section 36(1)(va) of the Act. So far as the section 43(b) is concerned, it takes care of only the contribution payable by the employer or the assessee to the respective funds. Therefore, sections 36(1)(va) and 43B(b) operate in different fields, i.e., the former takes care of the employees' contribution and the latter the employer's contribution. The assessee is entitled to get the benefit of deduction under section 43B(b) as provided under the proviso thereto only with regard to the portion of the amount paid by the employer to the contributory fund.*

*Held, allowing the appeal, that since the assessee had admittedly not paid the remittance of the employees' contribution to the provident fund and ESI within the dates prescribed under the respective Act, the assessee was not entitled to deduction U/s. 43B of the amounts deducted thereunder for and on behalf of the employees.”*

10. Similar view was vented by the Hon'ble Madhya Pradesh High Court in the case of *B.S. Patel vs. DCIT* reported in [2010] 326 ITR 457 (MP).

11. For the above stated reasons, We do not find any infirmity in the orders of the Ld. Revenue Authorities. Accordingly, We hereby confirm the Orders of the Revenue Authorities on these issues. Accordingly, Ground No.1 is held against the assessee.”

6. Following the decisions of the Hon'ble Higher judiciary the Hyderabad Division Bench of the Tribunal on the earlier occasion had held that the provisions of section 43B of the Act can be invoked on the assessee if the employee's contribution towards EPF & ESI deducted from the employee's salary by the assessee is not remitted in the Government Treasury within the due date specified under the EPF&ESI

Act. Under these circumstances, I have no hesitation to uphold the order of the Ld. CIT (A) as well as the Order of the Ld. AO on the issue.

7. In the result, appeal of the assessee is dismissed.

8. Before parting, it is worthwhile to mention that this order is pronounced after 90 days of hearing the appeal, which is though against the usual norms, I find it appropriate, taking into consideration of the extra-ordinary situation in the light of the lock-down due to Covid-19 pandemic. While doing so, I have relied in the decision of Mumbai Bench of the Tribunal in the case of DCIT vs. JSW Ltd. In ITA No.6264/M/2018 and 6103/M/2018 for AY 2013-14 order dated 14th May 2020.

Pronounced in the open Court on the 16<sup>th</sup> June, 2021.

Sd/-  
(A. MOHAN ALANKAMONY)  
ACCOUNTANT MEMBER

Hyderabad, Dated: 16<sup>th</sup> June, 2021.

OKK

Copy to:-

- 1) M/s. Sundar Tajmahal Hotels Pvt Ltd, 4-1-999, Abids Road, Hyderabad – 500 001.
- 2) DCIT (CPC), Bangalore.
- 3) The CIT (A)-3, Hyderabad.
- 4) The Pr. CIT-3, Hyderabad.
- 5) The DR, ITAT, Hyderabad
- 6) Guard File