

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F': NEW DELHI**

**BEFORE,
SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No.231/Del/2022
(ASSESSMENT YEAR 2018-19)**

SVS Guarding Services Pvt. Ltd. 305, Dhaka Chamber, 206/38, Naiwala Karol Bagh, New Delhi-110005 PAN-AAFCS 2823P (Appellant)	Vs.	Income Tax Officer, Ward-22(4), New Delhi. (Respondent)
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Appellant By	Sh. Manoj Kumar, CA
Respondent by	Sh. Ramdhan Meena, Sr. DR

ORDER

PER ANADEE NATH MISSHRA, AM:

(A) This appeal by Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre (NFAC), New Delhi [Ld. CIT(A)", for short], dated 03.12.2021 for Assessment Year 2018-19. Grounds taken in this appeal of Assessee are as under:

- “1. That the Ld CIT(A)-NFAC has erred in facts and in law in sustaining an addition of Rs. 29,52,674.00 on illegal and untenable grounds. Hence, the addition as such may be deleted.
2. The Ld AO has erred in law and on facts in invoking the provisions of section 36(va) for making addition of late deposits of ESI and EPF as per due date under respective act which is against the spirit of law and intention of legislature. The Honorable CIT(A)-NFAC has erred in confirming the same. Hence, the addition as such may be deleted.
3. The Ld AO has erred in law and on facts for making addition of late deposits of ESI and EPF ignoring the facts that under PF act employer contribution includes employee contribution and hence the section 43B will apply and not 36(va). The Honorable CIT(A)-NFAC has erred in confirming the same. Hence, the addition as such may be deleted.
4. That the LD AO(CPC) has erred in facts and in law in making an addition of Rs. 29,52,674.00 while processing u/s 143(1) on illegal and untenable grounds. The Honorable CIT(A)-NFAC has erred in confirming the same. Hence, the addition as such may be deleted.
5. That the LD AO(CPC) has erred in facts and in law in making an addition of Rs. 29,52,674.00 while processing u/s 143(l)(iv) on illegal and untenable grounds. The Honorable CIT(A)-NFAC has erred in confirming the same. Hence, the addition as such may be deleted
6. That the Honorable CIT(A)-NFAC has erred in law and on facts in sustaining the addition of Rs.29,52,674.00 ignoring the facts that condition stipulated in section 36(va) is impossible to be performed by him. Hence, the addition as such may be deleted.
7. That the appellant craves leave to add, substitute, modify or delete any ground of appeal on or before the date of hearing. All the above grounds of appeal are without prejudice to each other.”

((B) Though there are several grounds of appeal, the only addition in dispute in this appeal is regarding the additions amounting to total of Rs. 29,52,674/- made u/s 36(1)(va) of Income

Tax Act. For the sake of convenience, all the grounds of appeal are being taken up together. These payments by way of employees' contribution to ESI/Provident Fund were deposited by the assessee after the specified date prescribed under the relevant laws governing ESI and Provident Fund. However, payments were deposited by the assessee well before due date of filing of return of income under Section 139(1) of Income Tax Act. The aforesaid additions totaling Rs. 29,52,674/- were made by way of adjustments u/s 143(1) of Income Tax Act; vide intimation dated 14.11.2019. The assessee filed appeal before Ld. CIT(A), which was disposed of by the Ld. CIT(A) vide impugned appellate order dated 03.12.2021; wherein the Ld. CIT(A) confirmed the aforesaid additions amounting to Rs. 29,52,674/-. In coming to this conclusion, the Ld. CIT(A) took the view that the amendment to section 43B of Income Tax Act (by insertion of Explanation-5); and amendment to section 36(1)(va) of Income Tax Act, (by insertion of Explanation -2) by Finance Act, 2021 are retrospective in nature, and are applicable for Assessment Year 2018-19 to which the present case pertains.

(C) Aggrieved, the assessee has filed this present appeal in Income Tax Appellate Tribunal (“ITAT” for short) against the aforesaid impugned appellate order dated 03.12.2021 of the Ld. CIT(A). Vide order sheet noting dated 08.04.2022, Co-ordinate Bench of ITAT, Delhi ordered Early Hearing of this appeal; accepting the assessee’s application for grant of Early Hearing. At the time of hearing before us, the Ld. Authorized Representative (“AR” for short) for the assessee submitted that the Ld. CIT(A) should have deleted the additions, instead of sustaining the aforesaid additions amounting to Rs. 29,52,674/-. The Ld. Sr. DR relied upon the impugned appellate order dated 03.12.2021 of the Ld. CIT(A).

(D) We have heard both sides. We have perused the materials on record. Relevant facts are not in dispute. Employees’ contribution to ESI/Provident Fund, totaling the aforesaid amount of Rs. 29,52,674/- was deposited by the assessee after the specified date prescribed under laws providing ESI/Provident Fund. However, these payments were deposited by the assessee well before due date of filing of return of Income Tax prescribed u/s 139(1) of Income Tax Act. The aforesaid addition of Rs. 29,52,674/-

has been made by way of adjustment and intimation u/s 143(1) of Income Tax Act. The present appeal pertains to Assessment Year 2018-19.

(D.1) The issue before us is whether, the additions amounting to aforesaid total of Rs. 29,52,674/- by way of adjustments and intimation u/s 143(1) of Income Tax Act in respect of payments of Employee's contribution to ESI/Provident Fund, made by the assessee [payments made after stipulated dates prescribed under relevant laws governing provident fund and ESI, but before due date of filing of return prescribed u/s 139(1) of Income Tax Act] are to be sustained or deleted. We are aware about amendments to section 36(1)(va) and 43B of Income Tax Act, brought into effect by Finance Act, 2021. As regards whether these amendments are prospective in nature and applicable with effect from 01.04.2021 or retrospective in nature having applicability even before 01.04.2021; it may be mentioned that the present appeal before us pertains to Assessment Year 2018-19; which is before 01.04.2021. We are aware of some reported orders of ITAT, passed after the aforesaid amendments were brought in by Finance Act, 2021; in which the issue in dispute

for Assessment Years prior to Assessment Year 2021-22 (i.e. for periods before 01.04.2021) has been decided in favour of the assessee and against Revenue. Some such decisions are: *Digiqal Solution Services Pvt. Ltd. vs. Assistant Director of Income Tax [2021] 92 ITR (Tribunal) 404 (Chandigarh) for Assessment Year 2019-20 (order dated 4th October, 2021); Shand Pipe Industry Pvt. Ltd. vs. DCIT (CPC), [2022] 93 ITR (Trib.) 54 (Bangalore) for Assessment Year 2018-19 (order dated 27th Dec., 2021); Mahadev Cold Storage vs. Jurisdictional Assessing Officer [2021] 190 ITD 273 for Assessment Year 2018-19 and 2019-20 in ITA Nos. 41 & 42/Agr/ 2021 (order date 14.06.2021); Nikhil Mohine vs. DCIT [2022] 93 ITR (Trib.) 658 (Jabalpur) for Assessment Year 2018-19 (order dated 18th Nov., 2021 of SMC Bench, Jabalpur); Gopalkrishna Aswini Kumar vs. Assistant Director of Income Tax [2022] 192 ITD 562 (Bangalore-Trib.) for Assessment Year 2019-20 (order dated 13.10.2021 in ITA No.359/Bang./2021); Continental Restaurant and Café Co. vs. Income Tax Officer [2021] 91 ITR (Trib.) (S.N.) 60 (Bangalore) for Assessment Year 2019-20 (order dated 11th October, 2021 of SMC Bench of Bangalore); and TML Business Services Ltd. [2022] 93 ITR*

(Trib.) (S.N.) 35 (Mumbai) for Assessment Year 2017-18 (order dated 29th Dec., 2021). In the cases of Continental Restaurant and Café Co. vs. ITO (supra), Nikhil Mohine vs. DCIT (Supra), Shand Pipe Industry Pvt. Ltd. vs. DCIT (supra); Digiqaal Solution Services Pvt. Ltd. vs. Assistant Director of Income Tax (supra) and Gopalakrishna v/s ADIT (supra), the different Benches of Income Tax Appellate Tribunal have, in fact, specifically considered the aforesaid amendments brought to Income Tax Act by Finance Act, 2021; and have taken the view that the amendments are prospective in nature, having no application for the period prior to 01.04.2021. Even if Revenue does not accept the view, that the aforesaid amendments are prospective in nature having no application for Assessment Years prior to Assessment Year 2021-22; it is clearly established in the light of aforesaid decisions of Income Tax Appellate Tribunal (ITAT); referred to in this paragraph earlier, that the issue whether the aforesaid amendments are prospective or retrospective, is at least debatable and controversial, on which a view in favour of the assessee (that the aforesaid amendments are prospective) can

legitimately exist, even if such a view favorable to the assessee is contested by Revenue.

(D.1.1) Let us consider the two alternate views, one in favour of the assessee and the other in favour of Revenue; more closely. If the view in favour of the assessee, that the aforesaid amendments are prospective, is accepted; then the decisions of Hon'ble Delhi High Court, which is the jurisdictional High Court, in the cases of CIT vs. AIMIL Ltd. 321 ITR 508 (Delhi); and CIT vs. P.M. Electronics Ltd. 313 ITR 161 (Delhi) continue to hold good for Assessment Year 2018-19, to which this appeal pertains. Accordingly, the view taken by Hon'ble Delhi High Court in these cases, that delayed payments of employees contribution of provident fund and ESI [payment made after stipulated dates prescribed under relevant laws governing provident fund and ESI, but before due date of filing of return prescribed u/s 139(1) of Income Tax Act] does not constitute assessee's income, will continue to hold good for Assessment Year 2018-19, to which this appeal pertains. In such a scenario, the aforesaid additions of Rs. 29,52,674/- have no legs to stand; and the same deserves to be deleted. If, however, the contrary view

advanced by Revenue is taken, that the aforesaid amendments are retrospective; then the question that will arise is whether such a debatable and controversial view can be invoked for making adjustments u/s 143(1) of Income Tax as per the intimation issued to the assessee u/s 143(1) of Income Tax Act.

(D.1.2) It is well settled that any adjustments u/s 143(1) of Income Tax Act by way of intimation u/s 143(1) of Income Tax Act, on debatable and controversial issues, is beyond the scope of Section 143(1) of Income Tax Act. In this regard, we respectfully mention the order of Hon'ble Jurisdictional High Court in the case of ACIT vs. Haryana Telecom Pvt. Ltd. 14 taxman.com 122 (Delhi). Similar view was taken by Hon'ble Courts in the cases of George Williamson (Assam) Ltd. vs. CIT & Anr. [2006] 286 ITR 0533 (Gauhati); Tata Yadogawa Ltd. vs. CIT [2011] 335 ITR 0053 (Jharkhand); God Granites vs. Central Board of Direct Taxes & Ors. [1996] 218 ITR 0298 (Karnataka); Swamy Distributors vs. ACIT & Ors. [2003] 180 CTR 0290; 139 Taxman 0310 (Karnatka), CIT vs. Eicher Goodearth Ltd. [2008] 296 ITR 0125 (Delhi); Smt. Shanta Chopra vs. ITO [2004] 271 ITR 0132 (Delhi); Kvaverner John Brown

Engg. (India) (P.) Ltd. vs. ACIT, [2008] 305 ITR 0103 (Supreme Court). In this present case before us, the additions have been made by way of adjustments vide intimation u/s 143(1) of Income Tax Act, dated 14.11.2019. As on 14.11.2019, the aforesaid amendments to Section 36(1)(va) and Section 43B of Income Tax Act had not been enacted; but orders of Hon'ble Delhi High Court (the jurisdictional High Court) in favour of assessee and against Revenue on this issue in aforesaid cases of CIT vs. AIMIL Ltd. (supra); and CIT vs. P.M. Electronics Ltd. (supra) were available. Accordingly, the aforesaid amount of Rs. 29,52,674/- could not have been added to assessee's income as on 14.11.2019 in the light of these binding precedents of the Hon'ble Delhi Court in favour of the assessee. Therefore, we are of the view that the aforesaid adjustments made by Revenue on 31.10.2018, whereby the aforesaid amount of Rs.1,71,75,434/- was added to assessee's income, were unfair, unjust, and bad in law. For this view, we respectfully take support from the order of Agra Bench of ITAT, in the case of Mahadev Cold Storage vs. Jurisdictional Assessing Officer (supra). At the very least, Revenue should have given due

consideration to the fact that the issue was highly debatable and controversial. As already discussed earlier, adjustments u/s 143(1) of Income Tax Act by way of intimation u/s 143(1) of Income Tax Act, on debatable and controversial issues, is beyond the scope of section 143(1) of Income Tax Act. Revenue was clearly in error, in making the aforesaid adjustments u/s 143(1) of Income Tax Act on 31.10.2018 a debatable and controversial issue. We would like to make respectful mention of order of Jabalpur Bench of ITAT in the case of Nikhil Mohine vs. DCIT (supra), in which similar view has been taken.

(D.2) Further, it is also well settled that retrospective amendment cannot be invoked to make addition by way of adjustment and intimation u/s 143(1) of Income Tax Act. This view was taken by the Hon'ble Supreme Court in the case of CIT vs. Hindustan Electro Graphites Ltd. [2000] 243 ITR 0048 (SC), in which the view of Hon'ble Kolkata High Court in the case of Modern Fibotex India Ltd. & Anr. Vs. DCIT & Ors.[1995] 212 ITR 0496 (Calcutta) was approved. Same view was taken by the Hon'ble

Madhya Pradesh High Court in the case of CIT vs. Satish Traders [2001] 247 ITR 0119 (Madhya Pradesh).

(D.2.1) In view of foregoing discussion, we come to the following conclusions:

(a) The fact that payments amounting to aforesaid Rs. 29,52,674/- by way of employees contribution to provident fund and ESI were made by the assessee after stipulated date prescribed under the relevant laws governing provident fund and ESI, but before the due date of filing of return of income prescribed u/s 139(1) of Income Tax Act; is not in dispute.

(b) Whether the aforesaid amendments to Income Tax Act by way of Finance Act, 2021 are retrospective or prospective, is debatable and controversial.

(c) Adjustments made by Revenue u/s 143(1) of Income Tax Act, whereby aforesaid additions of Rs. 29,52,674/- were made, were unfair, unjust and bad in law.

(d) Addition by way of adjustment and intimation u/s 143(1) of Income Tax Act on debatable and controversial issues is beyond the scope of Section 143(1) of Income Tax

Act. Revenue was clearly in error in making the aforesaid adjustments.

(e) Addition by way of adjustment and intimation u/s 143(1) of Income Tax Act, on the basis of retrospective amendment to Income Tax Act is beyond the scope of Section 143(1) of Income Tax Act.

(f) In the present appeal before us, addition of aforesaid amount of Rs. 29,52,674/- has been made by way of adjustments and intimation u/s 143(1) of Income Tax Act, on a debatable and controversial issue, and Ld. CIT(A) did err in law, in not deleting this addition.

(E) In the light of the foregoing conclusions in paragraph (D.2.1) of this order, we are of the view that the aforesaid additions of Rs.29,52,674/- by way of adjustment and intimation u/s 143(1) of Income Tax Act, were beyond the scope of Section 143(1) of Income Tax Act; and further, that the Ld. CIT(A) erred in law in confirming the aforesaid addition on a debatable and controversial issue. Accordingly, we set aside the impugned appellate order dated

03.12.2021 of the Ld. CIT(A), and direct the Assessing Officer to delete the aforesaid addition of Rs. 29,52,674/-.

(E.1) By way of abundant caution, we hereby clarify that we have not expressed any view in this order, on whether the aforesaid amendments brought in by Finance Act, 2021 [whereby Explanation-2 was inserted in Section 36(1)(va) of Income Tax Act and Explanation-5 was inserted in Section 43B of Income Tax Act] are prospective or retrospective. In the light of our decision in foregoing paragraph (E) of this order; this issue is merely academic in nature; hence not decided.

(E.2) In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on 24.05.2022.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER
Dated: 24.05.2022
Pk

Sd/-
(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Copy forwarded to:
1. Appellant
2. Respondent

3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI