IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.174/Ind/2021

Assessment Year: 2017-18

Shivganga Drillers Private Ltd. Indore	**Vs. CPC, Income Tax, Bangalore**
[PAN – AAJCS2458Q]	
(Appellant / Assessee)	**(Respondent/Revenue)**

Appellant by : Shri Prakash Jain & Shreya Jain, A.Rs.
Respondent by : Shri R.P. Maurya, Sr. D.R.

Date of hearing : 24.02.2022
Date of pronouncement : 17 .05.2022

O R D E R

Per Bhagirath Mal Biyani, A.M.:

THIS APPEAL:

1. This appeal filed by the assessee is directed against the order dated 03.09.2021 of learned Commissioner of Income-Tax (Appeals)-NFAC **["Ld. CIT(A)"]**, which in turn arises out of the rectification-order dated 17.12.2018, passed by the learned CPC, Bangalore **["Ld. AO"]** u/s 154 of the Income-tax Act, 1961 **["the Act"]** for the Assessment-Year 2017-18.

BACKGROUND:

2. The return of income filed by the assessee was processed by the Ld. AO through Intimation u/s 143(1) of the Act after making two adjustments, viz. (i) disallowance of Rs. 1,02,513/- on account of delayed

payment of employees' contributions to Provident Fund / Employees State Insurance ("PF / ESI"), and (ii) disallowance of the credit of TDS of Rs. 60,49,627/-, claimed by the assessee. Against this Intimation u/s 143(1), the assessee submitted an application for rectification u/s 154 of the Act to the Ld. AO. The Ld. AO, however, passed order of rectification on 17.12.2018 whereby the application filed by the assessee was rejected. Being aggrieved by this order of rectification u/s 154, the assesse filed appeal to Ld. CIT(A). The Ld. CIT(A), however, dismissed the appeal of assessee *in limine*. Against the order of Ld. CIT(A), the assessee has filed this appeal and now before us.

GROUNDS:

3. The assessee has raised following Grounds:

1. That impugned order passed by the National Faceless Appeal Centre, Delhi is bad in law, without jurisdiction, it is based on incorrect interpretation of law and without allowing proper and reasonable opportunity of being heard, moreover the facts have also been incorrectly construed.

2. That on the facts and in the circumstances of case and in law, the National Faceless Appeal Centre, Delhi erred in rejecting appeal filed by the assessee summarily by stating that appellant has not filed appeal against intimation order u/s 143(1) and tried to take back door entry by filing appeal against order u/s 154 for which the original cause of action has arisen at the stage of 143(1) itself without appreciating the fact that on first stage appellant has taken the remedy of filing application u/s 154 which is legal and as per the provision of Income Tax Act. Thus the order of the National Faceless Appeal Centre is illegal and liable to be set aside to decide on merits.

3. That on the facts and in the circumstances of the case and in law the National Faceless Appeal Centre, Delhi erred in not deciding the following grounds of appeal on merits:

a) That on the facts and in the circumstances of the case and in law the Ld. A.O. (CPC) erred in making disallowance of Rs.1,02,513/- u/s 36 of the Income Tax without giving nature of the above disallowance and more so without considering the facts of the case and contents of return filed by the appellant.

b) That on the facts and in the circumstances of the case and in law the Ld. A.O. (CPC) erred in not allowing credit for TDS of Rs. 60,49,627/- as deducted by National Centre for Antarctic & Ocean

Research since it is not appearing in the 26AS statement for the Assessment year 2017-18, without appreciating the fact that the credit of TDS of Rs.59,57,630/- was duly appeared in the 26AS statement for the Assessment year 2018-19 and appellant claimed the TDS credit as per provisions of section 199 of the Income Tax Act since the corresponding income was duly offered for tax in the assessment year 2017-18 itself.

c) That on the facts and in the circumstances of the case and in law the Ld. AO (CPC) erred in charging interest u/s 234B and 234C at Rs. 25,70,673/- and Rs. 12,14,010/- respectively which is very high and excessive."

GROUND No. 1:

4. In the Written-Submission, the assessee has submitted that this ground is general in nature. During hearing, the Ld. AR repeated this version and did not make further submission. Hence this Ground does not require any adjudication.

GROUND No. 2:

5. In this Ground, the assessee has claimed that the Ld. CIT(A) has erred in dismissing the appeal filed by the assessee *in limine*.

6. Facts *qua* this Ground are such that while passing Intimation u/s 143(1) of the Act, the Ld. AO made two adjustments, viz. (i) disallowance of Rs. 1,02,513/- on account of delayed payment of employees' contributions to Provident Fund / Employees State Insurance ("PF / ESI"), and (ii) disallowance of the credit of TDS of Rs. 60,49,627/-. Though the assessee did not file any appeal against this Intimation u/s 143(1), an application for rectification u/s 154 of the Act was filed to the Ld. AO within the time permissible u/s 154 of the Act for seeking redressal of the grievances arising out of the two adjustments made by Ld. AO. However, the Ld. AO rejected the application filed by the assessee. Being aggrieved by rejection, the assessee filed appeal to Ld. CIT(A) and technically such appeal happened to be against the order of rectification u/s 154 and not against the original Intimation u/s 143(1). The Ld. CIT(A) dismissed the appeal of assessee *in limine* by observing in Para No. 5 to 6 of his order as under:

"5. It is pertinent to mention here that the appeal is not against the intimation order u/s 143(1). The appellant had filed an application u/s 154 before CPC. Thereafter, the CPC had passed order u/s 154 rejecting the request of the appellant for rectification of the mistake. It is against this order, the appellant has filed the present appeal. The original cause of action arises at the stage of 143(1) itself when the CPC had processed the return of income. Thereafter, the appellant has filed rectification application which has been rejected and against this, the appellant had filed the present appeal.

5.1 On perusal of these facts, it appears that the appellant is trying to take back door entry by filing an appeal against order u/s 154 for which the original cause of action has arisen at the stage of 143(1) itself. As per the provisions of the Act, the appellant could have filed an appeal against the intimation u/s 143(1) of the CPC dated 09.11.2018. However, the appellant has not filed an appeal against the intimation u/s 143(1). Thereafter, the appellant has filed a rectification application u/s 154 before the CPC. As per the rectification order u/s 154 dated 17.12.2018, the CPC has rejected the request of the appellant for rectification of mistake. There is no mistake apparent from record at the stage of 154 application. If, at all, the issue under consideration would arise only at the stage of intimation u/s 143(1). Therefore, the issue is not adjudicated herein. Accordingly, the grounds of appeal are dismissed.

6. In the result, the appeal is dismissed."

7. Before us, the Ld. AR submitted that the assessee has claimed the deduction of employee's contribution to PF / ESI as well credit of TDS in the Return of Income and it is the Ld. AO who has disallowed both of these claims in the Intimation passed u/s 143(1), though both of these claims were very much allowable in accordance with the law. The Ld. AR went on submitting that under the scheme of the Act, the assessee has two remedies against the Intimation u/s 143(1), viz. (i) file rectification-application u/s 154, or (ii) file appeal u/s 246A. According to Ld. AR, the assessee filed a rectification-application u/s 154 which is not only one of the available remedy but also a simpler remedy and practically resorted to by many of the assessees, particularly in the matter of the two adjustments involved in the present appeal. Accordingly to Ld. AR, it is

not a case that the rectification-application u/s 154 against the Intimation u/s 143(1) is absolutely barred in the scheme of Act. Finally the Ld. AR made a submission that in the law and on facts, the assessee is very much entitled to the deduction of employees' contribution to PF / ESI as well TDS credit and by not allowing the same, would result in computation of taxable income and tax liability beyond and against the scheme of the Act. With these submissions the Ld. AR prayed that the lower authorities be directed to accept the claim of assessee on merit, in accordance with the decision of this Bench on the subsequent Grounds.

8. Per contra, the Ld. DR submitted that the assessee has not filed any appeal against the Intimation u/s 143(1), which necessarily should have been filed. According to Ld. DR, the assessee filed rectification-application u/s 154 against the Intimation u/s 143(1) and thereafter carried the matter to Ld. CIT(A) when the rectification-application itself was rejected. The Ld. DR submitted that this route adopted by the assessee was not permissible in the issues involved and therefore the Ld. CIT(A) was justified in dismissing the appeal of assessee *in limine.* With these submissions, the Ld. DR prayed to uphold the order of Ld. CIT(A).

9. We have considered the rival submissions of both sides and also perused the record. We are very much aware of the recent decision of ITAT, Jodhpur Bench in the case of **Akbar Mohammad, Nagaur Vs. ACIT, CPC, Bangalore ITA No. 108 & 109/Jodh/2021 order dated 31.01.2012** in which the Hon'ble Co-ordinate Bench had resolved an identical controversy by holding as under:

> ***"6.1 Of course, it is a case in point that the assessee did not file any appeal against the intimations passed us 143(1) of the Act and the Ld. Sr. DR is right to the extent that the assessee cannot be given relief for that reason. However, it is also a settled law that the assessee cannot be taxed on an amount on which tax is not legally imposable. Although, the assessee might have chosen a wrong channel for redressal of his grievance, all the same, it is incumbent upon the Tax authorities to burden the assessee only with correct amount of tax and not to unjustly benefit at the cost of tax payer.***

> ***Therefore, in the interest of substantial justice, we deem it expedient to restore the issue to the file of the Assessing officer with a direction to pass appropriate orders deleting the addition / disallowance after duly considering the settled judicial position in this regard, which have been decided in the three cases as enumerated above in Para 5."***

During hearing, we have apprised both sides about this recent decision of the Hon'ble Co-ordinate Bench.

10. Therefore, respectfully following the decision of Hon'ble Co-ordinate Bench, we are inclined to accept the request of assessee. Therefore, Ground No. 2 is allowed.

GROUND No. 3(a):

11. In this Ground, the issue involved is related to the disallowance of Rs. 1,02,513/- u/s 36(1)(va) of the Act in respect of delayed payment of employee's contributions to PF / ESI.

12. The Ld. AR submitted that the Ld. AO has made the disallowance without appreciating that though the assessee had not deposited the employees' contributions to PF / ESI upto the due dates prescribed under the PF / ESI laws, yet the assessee had deposited the same to the respective funds within the time permitted u/s 43B of the Act i.e. upto the due date u/s 139(1) for filing the return of income and hence no disallowance is attracted in view of numerous decisions of Hon'ble High Courts favouring the assessee. Some of the decisions relied upon by Ld. AR are mentioned below:

(a) Hon'ble Delhi High Court in AIMIL Limited (2010) 321 ITR 508.

(b) Hon'ble Allahabad High Court in Sagun Foundary Pvt. Ltd. Vs. CIT 145 DTR 265

(c) Hon'ble Rajasthan High Court in CIT Vs. Rajasthan State Beverages Corporation Ltd. / Rajasthan State Ganganagar Sugar Mill (2017) 250 Taxman 32

The Ld. AR further submitted that the issue is also squarely covered in favour of the assessee by decision of this very Bench of ITAT in the case of **Nataraj Dal Mill, Indore vs. ACIT ITA No. 153/IND/2021 order dated 06.12.2021**.

The Ld. AR also submitted that even otherwise the impugned disallowance is debatable in nature and outside the scope of section 143(1)(iv) of the Act invoked by the Ld. AO and therefore also not sustainable, as held by **ITAT, Visakhapatnam Bench in M/s. S.V. Engineering Constructions India (P) Limited vs. DCIT (ITA No.130/Viz/2021) order dated 23.09.2021**.

With these submissions, the Ld. AR prayed that the disallowance made by Ld. AO is illegal and deserves to be deleted.

13. Per contra, the Ld. DR relied upon the orders of lower authorities. He further submitted that in following decisions it has been held that once the employees' contributions are paid after the due dates under PF / ESI laws, disallowance is attracted even if the assessee has made payments within the time allowed u/s 43B i.e. upto the due date u/s 139(1) for filing of return:

(a) Hon'ble Gujarat High Court in CIT vs. Gujarat State Road Transport Corporation, (2014) 41 taxmann.com 100

(b) Hon'ble Gujarat High Court in Pr. CIT vs. M/s Suzlon Energy Ltd. (2020) 115 taxmann.com 340

(c) Hon'ble Kerala High Court in CIT Vs. Merchem Ltd. (2015) 378 ITR 443

The Ld. DR further submitted that the Finance Act, 2021 has also inserted Explanation 2 to Section 36(1)(va) and Explanation 5 to Section 43B as under:

Section 36(1)(va):
"Explanation 2.—For the removal of doubts, it is hereby clarified 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 this clause;

Section 43B:
"Explanation 5.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies."

The Ld. DR claimed that with the introduction of these amendments, it is very much clear that the due dates specified in section 43B shall not apply. According to the Ld. DR, the impact would be such that if the employees' contributions are paid after the due dates under the PF / ESI laws, disallowance would happen. The Ld. DR further submitted that the words "... ***shall be deemed never to have been applied ..."*** appearing in these newly inserted Explanations clearly demonstrate that the amendments, though inserted from 01.04.2021, are clarificatory in nature and hence they would apply retrospectively in view of the decision of Hon'ble Apex Court in **Zile Singh Vs. State of Haryana (2004) 5 SCC 1**. Therefore, according the Ld. DR the amendments are applicable to the assessment-year involved in the present appeal too and hence the disallowance made by Ld. AO is very much in accordance with the law.

With these submissions, the Ld. DR argued that the Ld. AO has rightly disallowed the employees contributions to PF / ESI not paid by the assessee upto due dates under the PF / ESI laws and therefore the disallowance must be upheld.

14. We have considered the rival contentions and submission of both sides and also perused the relevant materials available on record. Before proceeding further we would like to mention that the assessee has deposited the impugned contributions to the PF / ESI, though after due date under PF / ESI law but within the time allowed u/s 43B i.e. upto the

due date u/s 139(1) for filing return of income and there is no dispute on this point by revenue.

Regarding the decisions relied upon by both sides, we observe that there are divergent views of Hon'ble High Courts on the allowability of employees' contributions to PF / ESI paid after due dates under the PF / ESI laws but within the time allowed u/s 43B. While the Ld. AR has relied upon various decisions favouring to the assessee, the Ld. DR has quoted the decisions against the assessee. We are also informed by both sides that there is no decision of Hon'ble jurisdictional High Court of Madhya Pradesh on this issue. In this situation, we are mindful of the decision in **Vegetable Products Ltd. 88 ITR 192** wherein the Hon'ble Supreme Court has held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. In view of this, the decisions favouring the assessee shall get preference over the decisions against the assessee. Being so we hold that the employees contributions paid after due date under PF / ESI law but within the time allowed u/s 43B, are allowable as deduction.

Regarding the amendments made through Finance Act, 2021, it is specifically mentioned by the legislature that the amendments are effective from 01.04.2021. Further the **Memorandum explaining the Provisions in the Finance Bill, 2021** clearly prescribes thus:

> ***"These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years."***

Thus, the legislature itself has categorically stated that the amendments shall apply to *the assessment year 2021-22 and subsequent assessment years*. Therefore these amendments are not applicable to the assessment-years preceding the assessment-year 2021-22 i.e. not applicable upto assessment-year 2020-21. This has also been held so in several decisions of ITAT Benches including following:

(a) ITAT Kolkata in Harendra Nath Biswas Vs. DCIT, ITA No. 186/Kol/2021 for A.Y. 2019-20, order dated 16.07.2021

(b) ITAT Hyderabad in Salzgitter Hydraulics Private Limited Vs. ITO, ITA No. 644/Hyd/2020 for A.Y. 2019-20, order dated 15.06.2021

(c) ITAT Jodhpur in Akbar Mohammad Vs. ACIT, CPC, Bangalore ITA No. 108 &109 / Jodh / 2021 for A.Y. 2018-19 and 2019-20, order dated 31.01.2022

The reliance of the Ld. DR upon the decision of Hon'ble Apex Court in the case of **Zile Singh (supra)** in fact supports the assessee's case and not revenue's case. The conclusion coming from this decision is very clear that when there is a specific effective date given by the Act, the amendment will be effective from that date only and if there is no mention of retrospective applicability, it will not apply to the earlier dates.

15. It is also noteworthy that this Bench has recently decided several appeals, a few mentioned hereunder, wherein the similar disallowance made by Ld. AO has been deleted:

(a) ITA No. 175 / Ind / 2021 Shri Virendra Kumar Tiwari Vs. CIT(A), NFAC, order dated 30.03.2022

(b) ITA No. 184 / Ind / 2021 M/s Prestige Fabricators Pvt. Ltd. Vs. ACIT-4(1), Indore order dated 30.03.2022

(c) ITA No. 223 / Ind / 2021 Kamal Kumar Jain Vs. DCIT, CPC, Bangalore, order dated 30.03.2022

16. Thus, in view of foregoing discussion, we observe that employees' contributions to PF / ESI paid after due date under PF / ESI laws but within the time allowed u/s 43B i.e. upto the due date u/s 139(1) for filing of return is allowable as deduction in computing taxable income of business and the assesse had rightly claimed the same. Therefore the Ld. AO was not justified in disallowing the claim of the assessee. We therefore

accept this Ground of assessee and direct the Ld. AO to make suitable rectification by deleting the disallowance. Therefore, Ground No. 3(a) is allowed for statistical purpose.

GROUND No. 3(b):

17. In this Ground, the issue involved is related to the credit of TDS amounting to Rs. 60,49,627/-.

18. Before us, the Ld. AR has made a detailed submission on Page No. 6 to 9 of the Written-Submission. The Ld. AR has presented a lengthy reconciliation of the Gross-Receipts and TDS as per books of account and Form 26AS of assessment-year 2017-18 and 2018-19. We are not reproducing the same for the sake of brevity but the crux of the submission is that although the payers have deducted TDS in the financial year relevant to the assessment-year 2018-19, the assessee has offered the relevant income in the assessment-year 2017-18 as per regular method of accounting and therefore claimed the credit of TDS in the assessment-year 2017-18 which is very much correct and allowable in accordance with the following provision of section 199:

> ***"199. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.***
>
> ***(2) Any sum referred to in sub-section (1A) of section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made.***
>
> ***(3) The Board may, for the purposes of giving credit in respect of tax deducted or tax paid in terms of the provisions of this Chapter, make such rules as may be necessary, including the rules for the purposes of giving credit to a person other than those referred to in sub-section (1) and sub-section (2) and also the assessment year for which such credit may be given."***

19. Ld. DR, agreeing with the submission that the credit of TDS is required to be allowed in accordance with section 199, left the issue to the wisdom of the Bench.

20. We have considered submissions of both sides. We observe that the Ld. AR has rightly pressed section 199 before us. We also observe that the sub-section (3) of the said section 199 empowers the Board to make rules and exercising that authority, the Board has made Rule 37BA which provides as under:

> ***"Credit for tax deducted at source for the purposes of section 199.***
>
> ***37BA. (1) and (2) XXX***
>
> ***(3)(i) Credit for tax deducted at sourced and paid to the Central Government, shall be given for the assessment-year for which such income is assessable."***

Thus a bare reading of sub-rule (3)(i) of Rule 37BA makes it unambiguously clear that the credit of TDS shall be allowed in the year in which the relevant income is taxable. As can be seen from the submission of Ld. AR, the relevant-income out of which the TDS was deducted, had been offered by the assessee for taxation in the assessment-year 2017-18 according to the regularly followed method of accounting. Hence the credit of TDS deserves to be allowed in the assessment-year 2017-18 in accordance with the mandate of section 199 read with Rule 37BA.

21. However, the lower authorities did not have occasion to verify the figures of relevant-income and TDS supplied by the assessee and whether the assessee has actually offered the relevant-income in the assessment-year 2017-18 or not. Hence a complete verification is required. Therefore, we think appropriate to remit this issue back to the file of Ld. AO who shall give an adequate opportunity to the assessee, make the necessary verification and allow credit in terms of section 199 read with Rule 37BA. Needless to mention that the Ld. AO shall take a note of all the evidences produced by the assessee and thereafter decide the issue according to the law. Ground No. 3(b) is, therefore, allowed for statistical purpose.

GROUND No. 3(c):

22. In this Ground, the assessee has challenged the charging of interest u/s 234B and 234C amounting to Rs. 25,70,673/- and Rs. 12,14,010/- respectively.

23. The levy of interest is statutory and consequential. Hence this Ground does not require any adjudication at this stage.

DISPOSITION:

24. In the result, the appeal of assessee is allowed for statistical purpose.

Order pronounced as per Rule 34 of I.T.A.T. Rules 1963 on this …17th ….. day of May, 2022.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(B.M. BIYANI)**
Judicial Member	Accountant Member

Indore, 17th May, 2022

Patel/ Sr. P.S.

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore

1. Date of taking dictation: 23.02.2022
2. Date of typing & draft order placed before the Dictating Member: 24.02.2022
3. Date on which the approved draft comes to the Sr. P.S./P.S.: .....
4. Dt. on which the fair order is placed before the Dictating Member for Pronouncement: .....
5. Date on which the file goes to the Bench Clerk: .....
6. Date on which the file goes to the Head Clerk: .....
7. The dt. on which the file goes to the Astt. Registrar for signature on the order: .....
8. Date of despatch of the Order: .....