

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI J.S.REDDY, ACCOUNTANT MEMBER
AND
SHRI A. T. VARKEY, JUDICIAL MEMBER**

ITA No.3984/Del/2013
(Assessment Year: 2002-03)

DCIT Central Circle-1, Room No.322, IIIrd Floor, ARA Centre, Jhandewalan Extension, New Delhi (Appellant)	Vs	Page Point Service (India) Pvt. Ltd., 1501, 15 th Floor, Hemkunt Tower, 89, Nehru Place, New Delhi PANAABCP9794Q (Respondent)
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Appellant by : Vivkek Wadekar, CIT DR
Respondent by : Varun Mahalawal
Shri Ankit Bhatnagar, Adv

Date of Hearing	07.05.2015
Date of pronouncement	22.05.2015

ORDER

PER A. T. VARKEY, JUDICIAL MEMBER

This appeal filed by the Revenue is directed against the order dated 08.04.2013, passed by the Ld. CIT(A)-III, New Delhi, pertaining to assessment year 2002-03.

2. The Revenue has raised the following grounds in its Appeal:-

“10. On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.32,29,938/- made by the Assessing Officer on account of late deposit of employee's contribution towards provident fund in view of the provisions of section 2(24)(x) read with section 36(1)(va) of the Income tax Act, 1961.

11. On the facts and in the circumstance of the case, the CIT(A) has erred in deleting the addition of Rs. 84,076/- made by the Assessing Officer on account of late deposit of employee's contribution towards ESI in view of the provisions of section 2(24)(x) read with section 36(1)(va) of the Income Tax Act, 1961.”

3. Apropos deletion of addition of Rs.32,29,938/- on account of late deposit of employees contribution towards provident fund and deletion of addition of Rs.84,076/- on account of late deposit of ESI.

4. The brief facts of the case are that the assessee filed return at loss of Rs.5,72,93,915/- and the AO assessed the assessee at a loss of Rs.5,39,64,553/-. This reduction of loss was on account of following additions/ disallowance:-

S. No.	Particulars	Amount (in Rs.)
1.	Delayed payment of Contribution to Provident Fund	32,29,938
2.	Delayed payment of ESI	84,076
3.	Penalties on delayed payments	15,348
	Total	33,29,362

5. As per the AO the payment of provident fund and ESI was not within the specified dates. The AO observed that the due date of payment in case of contribution toward's provident fund is 20th of each succeeding month which includes grace period of five days as per CBFC's Circular, which allows 5 days grace period for the employers for payment of PF contribution, administrative charges and DLI charges. In view of the said statutory requirement the AO noticed the assessee has made later deposit of employees contribution towards provident fund in the following months, the delay in payment fund has been noticed in the following months:-

Month	Amount	Due Date for deposit	Date of Deposit
May	298922	20.06.01	05.07.01
June-01	344557	20.07.01	12.09.01
July-01	342538	20.08.01	17.09.01
August-01	320910	20.09.01	01.01.02
Sep-1	310209	20.10.01	28.01.02
Oct-01	327060	20.11.01	19.02.02
Nov-01	339740	20.12.01	19.02.01
Dec-01	340513	20.01.02	19.02.02
Feb-02	307391	20.03.02	26.04.02
Mar-02	298098	20.04.02	Not paid
	32,29,938		

6. And the AO observed that assessee had made later deposit of employee's contribution towards ESI

Month	Amount	Due date of deposit	Date of deposit
Apr-01	28,057	21.05.01	24.05.01
Aug-01	27,773	21.09.01	01.01.02
Sep-01	28,246	21.10.01	24.10.01
	84,076		

7. After observing, that assessee had not deposited the employees contribution towards provident fund and ESI before due date as given above, he held as under:-

"The employee's contribution to the provident fund is allowable deduction u/s 36(1) (Va) only if the payment is made on or before the due date prescribed in the statute. The due date for the posting the employees contribution to provident fund is 15th of the succeeding month. Even if the grace period of 5 days are considered as the assessee has contested in the test audit report, even then, in the above noted instances the assessee has failed to deposit the provident fund within the stipulated period. In view of these facts, the amount of Rs.32,29,938/- is taken as income of assessee u/s 2(24)(x) of the Act and this amount is not allowed as deduction u/s 36(1) (V)(a) of Act. Addition of Rs.32,29,938/- is accordingly made.

8. And in respect of late deposit of employee's contribution towards ESI also he held as follows:-

" 4.1 The above payment of employee contribution towards ESI are income of the assessee as per section 2(24) (10) of the Income Tax Act, 1961. These amounts are allowable as deductions only if these are paid on or before the prescribed due date.

4.2 The due date for the depositing the employee contribution towards ESI is 16th of the succeeding month. Even if the grace period of five days is considered, the assessee has failed to deposit this amount within the due date. In view of these facts, the amount of Rs.84,076/- is taken as the income of the assessee u/s 2(24)(x) of the Income Tax Act, 1961 and this amount is not allowed as deduction u/s 36(1) (V)(a) of Income Tax Act 1961. Addition of Rs.84,076/- is accordingly made."

9. Against the aforesaid order of the Assessing, officer, assessee appealed before the Ld. CIT(A)-III, who vide his order dated 08.04.2013 has partly allowed the appeal of the assessee.

10. Now the Revenue is in appeal before us.

11. We have heard both the parties and have perused the records of the case and we find that in the assessment order AO has categorically stated the amount due for which month in respect of EPF and ESI deposits and has stated the due dates for these deposits to have been deposited and on which date actually these deposits were made by the assessee. The dates of deposits are mentioned between 05th July 2001 to 26th April 2002. We find that the latest payment is made on 26th April 2002 and assessee being a limited company had filed its return on 20th October, 2002, so the assessee had deposited the amount before the due date of filing of the return. Thus, it is clear beyond doubt that all the payments which have been disallowed were made much earlier to the due date of filing of the return. The disallowance is not made by the AO on the ground that there is no proof of making such payment but disallowance is made only on the ground that these payments have been made beyond the due dates of making these payments as stipulated under the respective statute. Thus, it was not an issue that the payments were not made by the assessee on the dates which have been stated to be the dates of deposits in the assessment order. In such a scenario, according law clarified by Hon'ble Supreme Court in the case of CIT Vs Vinay Cement Ltd, that no disallowance could be made if the payments are made before the due date of filing the return of income. This issue came before Hon'ble Supreme Court in the case of CIT Vs. Vinay Cement Ltd. which was a special leave petition filed by the department against the High Court Order of 26th June, 2006 in ITA No. 2/05 and ITA No. 56/03 and ITA No. 80/03 of the High Court of Guwahati, Assam and its order dated 7th March, 2007. The observations of their Lordships on the issue are as under:

"In the present case we are concerned with the law as it stood prior to the amendment of Sec. 43B. In the circumstances the assessee was entitled to

claim the benefit in See 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return.

The special leave petition is dismissed."

11. The Id AR relied on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Aimil Limited, reported in 321 ITR 508, wherein the Hon'ble High Court has held as under:-

"17. We may only add that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income Tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement (supra)."

12. Respectfully following the decision of the Hon'ble High court, we are inclined to dismiss the appeal filed by the revenue.

13. In the result the appeal filed by the revenue is dismissed.

Order pronounced in the Open Court on 22.05.2015.

**Sd/-
(J.S.REDDY)
ACCOUNTANT MEMBER**

**Sd/-
(A. T. VARKEY)
JUDICIAL MEMBER**

Dated: 22/05/2015

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

**ASSISTANT REGISTRAR
ITAT, New Delhi**