

**IN THE INCOME TAX APPELLATE TRIBUNAL, JABALPUR BENCH,
JABALPUR (SMC)
(through Virtual Hearing)**

BEFORE SH. SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER

ITA Nos.46 to 48/JAB/2021
Assessment Years: 2017-18 to 2019-20

National Hospital, Jabalpur (M.P.) [PAN: AABFN 9318B]	vs.	Deputy Commissioner of Income Tax, CPC, Income Tax Department, Bengaluru 560500
(Appellant)		(Respondent)

Appellant by	Sh. Dhiraj Ghai, FCA
Respondent by	Sh. S.K. Halder, Sr. DR
Date of hearing	16/12/2021
Date of pronouncement	20/12/2021

ORDER

Per Sanjay Arora, AM

This is set of three Appeals by the Assessee directed against separate Orders by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi ('CIT(A)' for short) for three consecutive years, being assessment years 2017-18 to 2019-20, dismissing or partly allowing the assessee's appeals contesting the processing of its' returns of income for the relevant years under section 143(1) of the Income Tax Act, 1961 ('the Act' hereinafter) vide orders dated 06/9/2021, 26/8/2021 and 09/9/2021 respectively for the said three years.

The Arguments

2. Opening the arguments for and on behalf of the assessee-appellant, it was submitted by Sh. Ghai, the ld. counsel for the assessee, that the only issue

arising in the instant appeals is the additions in respect of the employee's contribution to the employee welfare funds on the processing of the assessee's returns u/s. 143(1), despite the same being deposited before the due date of filing the return of income u/s. 139(1) for each of the relevant years, and for which he would then take the Bench to the paper-book filed for each of the three years, being pg. 6, 5 & 4 for the three consecutive years respectively, as well as the corresponding Intimation, which records the due date of filing the return of income. That being the case, no addition could be made u/s. 143(1), even as clarified by the Jabalpur Bench of the Tribunal per its' recent decision in *Nikhil Mohine vs. Dy. CIT* (ITA Nos. 37 & 38/Jab/2021, dated 18.11.2021), on which therefore the assessee places total reliance. No contrary view by the Tribunal, or any other Court for that matter, he continued, has been brought on record by the Revenue, even as there are several by the Tribunal in the assessee's favour, with the decision in *Nikhil Mohine* (supra), copy of which stands placed on record for each of the years, is a detailed order on a conspectus of the matter. No adjustment for the relevant years, being prior to AY 2021-22, he concluded, could therefore hold. He, on being inquired by the Bench, stated of there being no decision by the Hon'ble jurisdictional High Court to the contrary. The Id. Sr. DR, Sh. Halder, could not rebut any of the contentions by Sh. Ghai and, further, on asking, could not state of any decision by the Hon'ble jurisdictional High Court directly on the point.

3. I have heard the parties, and perused the material on record.

The Tribunals' decision in Nikhil Mohine

3.1 The Revenue has, invoking section 2(24)(x) r/w s. 36(1)(va), added the Employees' contribution to the Employee Provident Fund and Employee State Insurance Fund to the assessee's returned income u/s. 143(1)(a) as the same stood deposited beyond the due date specified u/s. 36(1)(va), even as, admittedly, prior to the due date of filing the return of income u/s. 139(1) for the

relevant years. Reliance stands placed by it on the decisions in *CIT v. Gujarat State Road Transport Corporation* [2014] 366 ITR 170 (Guj), *CIT v. Merchem Ltd.* [2015] 378 ITR 443 (Kerala); and *Unifac Management Services (India) P. Ltd. v. Asst. CIT* [2018] 409 ITR 225 (Mad). The matter stands examined at length by the Tribunal in *Nikhil Mohine* (supra), relied upon by the appellant, wherein, noticing, *inter alia*, the cited decisions, it held that in view of the cleavage of judicial opinion in the matter and the limited scope of an adjustment u/s. 143(1)(a), the same could not be decided on merits. The decisions by the Hon'ble High Courts holding the employee's contribution as being covered by s. 43B(b), implying, in context, u/s. 37(1) r/w s. 43B(b), which were aplenty, it opined, could be validated only by disregarding the clear language of the relevant provisions, upheld constitutionally and not read down. The said decisions must nevertheless be respected, and no adjustment contrary thereto could be made u/s. 143(1); there being no decision by the Hon'ble jurisdictional High Court in the matter. The only manner, therefore, available for the Revenue to effect an adjustment u/s. 143(1)/154, is where the *Explanations* to section 36(1)(va) and s. 43B(b) inserted by Finance Act, 2021, which attempt to resolve the issue of the employee's contribution to the employee welfare funds being governed by section 43B(b), i.e., to the exclusion of s. 36(1)(va), are held as retrospective. Legislative intent being the cornerstone and the sole determinant of any interpretative exercise, both the language of the provisions, as well as of the recently inserted *Explanations* thereto, introduced with a view to, as stated therein, remove any doubt in the matter, are unambiguously clear, so that s.36(1)(va) and s. 43B are applicable on different sums. Further, the stated date of the coming into effect (of the *Explanations*), i.e., 01/4/2021, it was explained, would though be of no moment in view of the express language deeming the stated position as applicable since inception; that being the reason for bringing the *Explanations* on the statute, as the amendments could otherwise have been effected through prospective clause/s to the relevant provisions. Rather, the

tenor of the language employed, clearly giving the stated position a retrospective effect, necessarily requires the *Explanations* to be read as inserted from a later date. That is, the fact of insertion of the said *Explanations* w.e.f. a later date is consistent with the language giving it a retrospective effect and, thus, does not impinge adversely on it being regarded as so. Further still, noticing the settled legal position *qua* the test for determining retrospectivity, i.e., if the provision could be construed, without the aid of the subsequent amendment thereto, to take within its ambit the said amendment, the issue was also examined by the Tribunal on merits, i.e., for the said limited purpose, to find that the view canvassed by or on the assessee's behalf could be sustained only by ignoring the existence of s. 36(1)(va) – which governs the deductibility of the employees' contribution to the employee welfare funds, on the statute-book – clearly, an impermissibility. Another fundamental infirmity in the assessee's argument is in regarding the employee's contribution, deemed by the legal fiction of s. 2(24)(x) as the assessee-employer's income, as an expense deductible u/s. 37(1), which could be so only where it is not recoverable – an impossibility, as the said deeming applied only on receipt thereof, again bringing s. 36(1)(va) into play for its deduction, and which would therefore have to be given effect to. This would be so even if the same was regarded, for the sake of argument, as covered by s. 43B, a *non-obstante* provision, inasmuch as s. 43B applied only *qua* deductions 'otherwise allowable', i.e., under any provision of the Act, rendering the question of law posed before the Hon'ble Courts, i.e., if the employee's contribution to the employee welfare funds is exclusively covered u/s. 43B, itself, with respect, misplaced, if not irrelevant. The view being canvassed was, thus, it opined, viewed from any angle, wholly untenable. The view expressed by the Tribunal is in fact in agreement with that projected by the Board per its Circular (No. 22/2015, dtd. 17/12/2015), as also that canvassed per the impugned order with reference to the cited decisions, both explaining, as did the Explanatory Notes on the insertion of s. 36(1)(va) on

the statute, the object of the said provision. It is this view, which in fact, as also noticed by the Tribunal, represented the uniform view across all the Hon'ble Courts prior to the deletion of the second *proviso* to s. 43B by Finance Act, 2003, w.e.f. 01/4/2004, which the *Explanations* to ss. 36(1)(va) and 43B by Finance Act, 2021 seek to statutorily clarify in view of the conflict of judicial opinion, passing thus the test of retrospectivity, even as unequivocally expressed per the unambiguous language thereof. The *Explanations* under reference were therefore clarificatory and, thus, retrospective.

3.2 The said *Explanations*, the Tribunal continued, had however been, as clear from a reference to the Notes on the Clauses to, and the Memorandum explaining the Provisions of, the Finance Bill, 2021, reproducing the same, proposed as prospective amendments. The amendments by way of *Explanation 5* to s. 43B and *Explanation 2* to s. 36(1)(va), it concluded, are to therefore take effect only from AY 2021-22, and which view is unmistakable on a plain reading of the said documents.

Decision

4.1 The view recorded in the impugned orders on the merits of the additions – even as the same agrees with that expressed by the Tribunal in *Nikhil Mohine* (supra)(see para 3.1 of this order), is of little consequence in view of the limited scope of an adjustment u/s. 143(1)(a), law on which is well-settled (see: *CIT v. GEI Engineering Ltd.* [2009] 310 ITR 112 (MP); *CIT v. Shikarchand Jain* [2003] 263 ITR 221 (MP)), with the Explanatory Notes to the Provisions of the Finance Bill, 2021 itself admitting of a conflict of judicial opinion, explaining that to be the reason for effecting the amendments per the said *Explanations*. The only circumstance justifying the impugned additions is a decision/s by the Hon'ble jurisdictional High Court (also see para 4.2). No such decision, however, despite asking, stands brought to my notice by the parties, or otherwise found. As regards the aspect of the retrospective nature of the

Explanations under reference, I again find no difference in the view expressed therein with that by the Tribunal in *Nikhil Mohine* (supra), i.e., *per se*. So, however, as afore-noted, the said *Explanations* themselves had been proposed as prospective amendments, as stated in the Notes on the Clauses to, and the Memorandum explaining the Provisions of, the Finance Bill, 2021, with a view to, as explained, settle the controversy arising due to the contrary view expressed by some High Courts, for which reference may be made to para 5.4 of the Tribunal's order (also refer paras 3.1 & 3.2 above). There is, accordingly, no question of the same being given a retrospective effect.

4.2 There is, in view of the foregoing, no question of the said *Explanations* being read as retrospective, so as to apply for the relevant years, being prior to AY 2021-22, sustaining the impugned additions, which therefore fail. This is, however, subject to any decision/s by the Hon'ble jurisdictional High Court, which would, where so, hold, even justifying a rectification u/s. 154/254(2), even where rendered after the date of the order sought to be rectified (*Asst. CIT v. Saurashtra Kutch Stock Exchange Ltd.* [2008] 305 ITR 227 (SC); *CIT v. Aruna Luthra* [2001] 252 ITR 76 (P&H)(FB)). No such decision has been found, or otherwise pointed out by the parties, as was the case before the Tribunal in *Nikhil Mohine* (supra). Any such decision, even if discovered later, may operate to amend this order, or the order giving appeal effect thereto, to bring it in conformity or agreement with the said decision/s, of course, after allowing a fair opportunity of hearing to the assessee.

4.3 The impugned additions, therefore, could not have been made under the given facts and circumstances of the case, and are directed for deletion. I decide accordingly.

5. In the result, the assessee's appeals are allowed.

Order pronounced in the Open Court on December 20, 2021

Sd/-
(Sanjay Arora)
Accountant Member

Dated: 20/12/2021

Copy of the Order forwarded to:

1. The Appellant: M/s. National Hospital, 703, Dutt Mandir Road, Gole Bazar, Jabalpur 482001.
2. The Respondent: Dy. CIT, CPC, Income Tax Department, Bengaluru 560500, Karnataka {Jurisdictional Officer: Deputy Commissioner of Income Tax, Circle 1(1), Jabalpur}
3. The Pr. CIT-1, Jabalpur
4. The CIT(A), National Faceless Appeal Centre, Delhi
5. The Sr. DR, ITAT, Jabalpur
6. Guard File

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