आयकर अपीलीय अधिकरण,'डी' न्याय पीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपीलसं./**ITA Nos.: 424 & 425/CHNY/2021**

निर्धारण वर्ष / Assessment Years: 2017-18 & 2018-19

M/s. DAY N DAY Services Pvt. Ltd., No.1, Second Main Road, Ramakrishna Nagar, Chennai – 600 028.	Vs	The DCIT, Corporate Circle-1(1), Chennai.
PAN: AABCD 0609G		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओ रसे/Appellant by : Shri H. Surendar, Advocate

प्रत्यर्थी की ओर से/Respondent by : Shri Sanat Kumar Raha, Addl.CIT

सुनवाई की तारीख/Date of Hearing : 02.12.2021

घोषणा की तारीख/Date of Pronouncement : 12.01.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

These appeals by assessee are arising out of two different orders of Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi in ITBA/NFAC/S/250/2020-21/1034482940(1) & ITBA/NFAC /S/250/2020-21/1034436576(1) vide orders dated 28.07.2021 & 26.07.2021,. The assessments were framed by ADIT, Centralized Processing Centre, Income Tax Department, Bengaluru

vide orders dated 21.02.2020 & 12.01.2020 for the assessment years 2017-18 & 2018-19 respectively u/s. 143(1) of the Income Tax Act (hereinafter the 'Act').

2. The only common issue in these two appeals of assessee for assessment years 2017-18 & 2018-19 is as regards to the disallowance of Employees' contribution to PF & ESI not credited before the due date of payment under respective Acts. For this, the assessee has raised various argumentative grounds running into 13 pages, but the only issue is as noted above. Hence, we need not to reproduce or adjudicate each and every ground.

3. Brief facts are that the Employees' contribution payment was made within the due date of filing of return of income i.e., within 31.10.2017 for assessment year 2017-18. These details are provided by assessee before the CIT(A) and the CIT(A) noted these facts. Now before us, the subject matter is in respect of payment of Employees' contribution and the amendment made by the Finance Act, 2021 to Section 36(1)(va) r.w.s. 43B of the Act.

4. We noted from the order of CIT(A) that he has confirmed the processing done and adjustment made by the ADIT, Centralized Processing Centre, Bengaluru by observing in Para 6.9 as under:-

"6.9 Under these circumstances and following the clarificatory amendments made by the Finance Act, 2021 to section 36(1)(va) and section 43B, the contentions made in the submissions are not found acceptable and the additions of Rs.4,33,19,930/- made by AO,CPC for not depositing of employee's contribution to the PF and ESIC covered under section 36(1)(va) rws 2(24)(x) of "the Act" but paid to the respective funds after the due dates as specified by rules of relevant funds are correctly held as deemed income and, therefore, the disallowance is hereby confirmed as the said late payments are not covered under 43B of the Act. Accordingly, this ground of appeal is dismissed."

5. Similar are the facts in ITA 425/Chny/2021 for assessment year 2018-19.

6. We noted that this issue has been decided by the Co-ordinate Bench of this Tribunal in the case of M/s.Adyar Ananda Bhavan Sweets India Pvt. Ltd., in ITA No.402 & 403/CHNY/2021 vide order dated 08.12.2021, wherein it was held as follows:

"6.5 In view of the above findings of CIT(A), now we have gone through the decision of Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd., 367 ITR 466, wherein the Hon'ble Supreme Court held that unless contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. The law passed today cannot be applied to the events of the past. The Hon'ble Supreme Court held that if somebody does something today, he do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. According to Hon'ble Apex court every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit, which means law looks forward not backward. In the case of Vatika Township Pvt. Ltd., supra, the issue before

Hon'ble Supreme Court was the insertion of proviso to section 113 of the act by the Finance Act 2002 for charging of surcharge was under challenge. Hon'ble Supreme Court noted though provision for surcharge under the Finance Acts have been in existence since 1995, the charge of surcharge with respect to block assessment years, having been created for the first time by the insertion of proviso to Section 113 of the Act, by Finance Act, 2002, it is clearly a substantive provision and is to be construed as prospective in operation. The Hon'ble Supreme Court held that the amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by parliament.

6.6 The Hon'ble Supreme Court finally held that the proviso to Section113 of the Act is prospective and not retrospective. For this Hon'ble Supreme Court held as under:-

> *""Notes on Clauses" appended to Finance Bill, 2002 while proposing insertion of proviso categorically states that "this amendment will take effect from 1st June, 2002". These become epigraphic words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that few other amendments in the Income Tax Act were made by the same Finance Act specifically making those amendments retrospectively. For example, clause 40 seeks to amend S.92F. Clause iii (a) of S.92F is amended "so as to clarify that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract." This amendment takes effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of 3 concepts:*
>
> *(i) prospective amendment with effect from a fixed date;*
> *(ii) retrospective amendment with effect from a fixed anterior date; and*
> *(iii) clarificatory amendments which are retrospective in nature.*

Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the proviso, that the amendment is to operate prospectively. Learned counsel appearing for the assessees sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. In so far as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1st June, 2002.

(e) There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002 – Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. For example, explanation to Section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BE, would be prospective i.e. it will take effect from 1st June, 2002.

(f) Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in second proviso

to sub-section (3) of Section 2 of Finance Act, 2003. This proviso reads as under:

> *"Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act."*

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from June 1, 2002.

6.7 We noted from the judgment of Hon'ble Supreme Court in Vatika Township P. Ltd., supra, that there cannot be imposition of any tax without the authority of law and such law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. In present case before us, as noted by CIT(A) that their exists divergent judgements of various High Courts. The CIT(A) has noted the case laws in favour of Revenue:

1. *Popular Vehicles & Services (P) Ltd. Vs. CIT [2018] 96 taxmann.com 13 (Kerala),*
2. *CIT v. Gujarat State Road Transport Corporation [2014] 41 taxmann.com 100 (Gujarat)*

3. CIT v. Merchem Ltd. [2015] 378 ITR 443 (Kerala).

The CIT(A) himself noted the ambiguity in para 7.4 of his order, which reads as under:

> *7.4 While rendering above decisions the Hon'ble High Courts had the occasion to examine and distinguish a catena of judgements which are usually relied upon by appellants to advance the proposition that the provisions of section 43B encompass within its scope the employees' Contribution as well and therefore any such contribution though not remitted by the employer within due date specified by the PF/ESI Acts, will still be permissible deduction if the same is actually paid in pursuance of Sec. 43B.*

The CIT(A) further noted the decisions in favour of assessee in para 7.7, and the same are as under:

> *1. Alom Extrusions Ltd. (supra)*
> *2. CIT v. Aimil Ltd. [2010] 321 ITR 508/188 Taxman 265 (Delhi);*
> *3. CIT v. NispoPolyfabriks Ltd. [2013] 350 ITR 327/213 Taxman 376/30 taxmann.com 90 (HP);*
> *4. CIT v. Alembic Glass Industries ltd. [2015] 279 ITR 331/149 Taxman 15 (Guj.);*
> *5. CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.);*
> *6. CIT v. Pamwi Tissues Ltd. [2009] 313 ITR 137 (Bom.);*
> *7. Spectrum Consultants India (P.) Ltd. V. CIT [2013] 215 Taxman 597/34 taxmann.com 20 (Kar.);*
> *8. CIT v. Udaipur Dugdh Utpadak Shakari Sangh Ltd. [2013] 217 Taxman 64/35 taxmann.com 616 (Raj.) and*
> *9. CIT v. Hemla Embroidery Mills (P) Ltd. [2013] 217 Taxman 207 (Mag.)/37 taxmann.com 160 (Punj. & Har.).*

6.8 In the present case also, before insertion of Explanation 2 to Section 36(1)(va) of the Act, there is ambiguity regarding due date of payment of employees' contribution on account of provident fund and ESI, whether the due date is as per the respective acts or up to the due date of filing of return of income of the assessee. As noted by Hon'ble Supreme Court an amendment made to a taxing statute can be said to be intended to remove hardship only of the assessee and

not of the Department. Imposing of a retrospective levy on the assessee would be caused undue hardship and for that reason Parliament specifically chose to make the proviso affective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 01.04.2021 i.e. for and from assessment year 2021-22 of Explanation-2 to s. 36(1)(va) of the Act and not retrospectively.

6.9 Thus, from the above, it is clear that the amendment brought in the statute i.e., by Finance Act, 2021, the provisions of Section 36(1)(va) r.w.s. 43B of the Act amended by inserting Explanation 2 is prospective and not retrospective. Hence, the amended provisions of Section 43B r.w.s. 36(1)(va) of the Act are not applicable for the assessment year 2018-19 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue of assessee's appeal is allowed.

7. Respectfully following the Co-ordinate Bench decision in the case of M/s.Adyar Ananda Bhavan Sweets India Pvt. Ltd., *supra,* we allow the appeals of the assessee.

8. In the result, both the appeals of the assessee are allowed.

Order pronounced in the court on 12th January, 2022 at Chennai.

Sd/-	Sd/-
(जी. मंजुनाथ)	(महावीर सिंह)
(G. MANJUNATHA)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 12th January, 2022

RSR
आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त /CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.