

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA**

(Before Sri Sanjay Garg, Judicial Member)

**I.T.A. No. 537/Kol/2021
Assessment Year: 2019-20**

Prasenjit Sarkar.....Appellant
[PAN: AXPPS 5280 A]

Vs.

ACIT, Circle- Durgapur.....Respondent

Appearances by:

Sh. U. Dasgupta, Adv., appeared on behalf of the Assessee.

Sh. Sandip Sengupta, Addl. CIT, appeared on behalf of the Revenue.

Date of concluding the hearing : January 31st, 2022
Date of pronouncing the order : January 31st, 2022

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order passed by the Commissioner of Income Tax (Appeals) National Faceless Appeal Centre (NFAC) [hereinafter referred to as ld. 'CIT(A)] u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act') dated 26.10.2021 for AY 2019-20.

2. The assessee in this appeal has taken the following grounds of appeal:

"1) For that on the facts of the case the CIT(A) was not legally justified in sustaining the addition of Rs. 5,81,982/-, u/s 43B of the Act 61 , on account of delayed contribution of EPF and ESI, (employees portion), holding the amendment of section 36 to be clarificatory, in nature , ignoring the judicial pronouncements laid down by the jurisdictional high court, and the addition may please be deleted.

2) For that on the facts of the case the CIT(A), should have deleted the addition of Rs.5,81,982/-, on account of delayed payment of EPF and ESI, when the same is already paid within the time allowed u/s 139(1), and the amendment of section 36(1)(va) rws 43(B), is prospective and not retrospective , and the claim of deduction being covered by the jurisdictional high court in the case of "Vijayshree Synthetics and Akizo Global ", the addition may please be deleted.

3) For that the appellant craves leave to add, alter, amend any further grounds of appeal before or at the time of hearing."

3. At the outset, the ld. Counsel for the assessee has submitted that there was a delay in depositing employee's as well as employer's contribution to the Employee's

Provident Fund/ESI fund. However, the amount was deposited before the due date of the filing of the return. The Id. Counsel has submitted that this issue is squarely covered by the decision of the Hon'ble Jurisdictional Calcutta High Court in the case of *CIT, Kolkata vs. M/s. Vijay Shree Limited* reported in 43 taxman.com 396(Cal) which has been further followed by the Coordinate Calcutta Bench of this Tribunal in the case of *Harendra Nath Biswas vs. DCIT* in ITA No.186/Kol/2021 by the order dated 16.07.2021. The Id. D/R could not show any decision contrary to the case law cited by the Id. Counsel for the assessee.

4. I find that the issue is covered in favour of the assessee as the assessment year involved is AY 2019-20 and the Explanation-5 inserted by Finance Act, 2021 to section 43B w.e.f. 01.04.2021 is not applicable to the assessment year under consideration. The relevant portion of the Coordinate Bench decision of the Tribunal in the case of *Harendra Nath Biswas vs. DCIT* (supra) for the sake of reference is reproduced as under:

"2. The sole grounds of appeal raised by the assessee is against the Ld. CIT(A) in confirming the action of AO who disallowed/added back a sum of Rs. 1,10,62,263/- on account of delayed deposit of employees contribution to PF and ESI u/s 36(1)(va) read with Section 2(24)(x) of the Income Tax Act, 1961 (hereinafter referred to as the Act) despite the assessee contributing/depositing the same before the due date of filing of return of income u/s 139(1) of the Act.

*3. Brief facts of the case is that the CPC while processing the return disallowed/added Rs. 1,10,62,263/- on the ground that employees contribution to employees provident fund (EPF) and ESI fund has been deposited beyond the due date applicable under the provision of ESI Act, 1948 and EPF Act by invoking the provision of Section 36(1)(va) of the Act. Aggrieved by this disallowance, the assessee filed the appeal before the national Faceless Appeal Centre (NFAC), Delhi where the Ld. CIT(A) has taken note of the assessee's submission that no disallowance was warranted in respect of delayed deposit of employees contribution to EPF /ESI fund since the assessee has deposited the employees contribution in respect of both these Acts (EPF & ESI Act) before filing the return of income and relied on the various judicial decision including that of the jurisdictional Hon'ble High Court of Calcutta in the case of *CIT vs. Vijayshree Ltd.* in [2014] 43 taxman.com 396(Cal). However the Ld. CIT(A) did not accept the contentions of the assessee in this regard and by relying on the Explanation-5 below section 43B which was brought in by Finance Act, 2021 to deny the claim of assessee. Therefore, the assessee is before us by preferring this appeal.*

*4. We have heard both the parties and perused the record. First of all we do not countenance this action of the Ld. CIT(A) for the simple reason that the Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and relevant assessment year before us is AY 2019-20. Therefore the law laid down by the Jurisdictional Hon'ble High Court will apply and since this Explanation-5 has not been made retrospectively. So we are inclined to follow the same and we reproduce the order of Hon'ble Calcutta High Court in the case of *Vijayshree Ltd.* supra wherein the Hon'ble Calcutta High Court has taken note of the Hon'ble Supreme Court decision in *CIT vs. Alom Extrusion Ltd.* reported in 390 ITR 306. The Hon'ble Calcutta High Court's decision in *Vijayshree Ltd.* supra is reproduced as under:*

"This appeal is at the instance of the Revenue and is directed against an order dated 28th April, 2011 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA No. 1091/Kol/2010 relating to assessment year 2006-07 by which the Tribunal dismissed the appeal preferred by the Revenue against the order of CIT(A).

The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of Employees' Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.

It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.

Being dissatisfied, the Revenue has come up with the present appeal.

After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.

Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities."

In the light of the aforesaid discussion we do not accept the Ld. CIT(A)'s stand denying the claim of assessee since assessee delayed the employees contribution of EPF & ESI fund and as per the binding decision of the Hon'ble High Court in Vijayshree Ltd. (supra) u/s 36(1)(va) of the Act since assessee had deposited the employees contribution before filing of Return of Income. Therefore, the assessee succeeds and we allow the appeal of the assessee."

5. In view of the above proposition of law and the issue being squarely covered in favour of the assessee, the impugned order of the ld. CIT(A) is set aside. The appeal of the assessee is hereby allowed and the impugned addition made by the lower authorities is ordered to be deleted.

6. In the result, the appeal of the assessee stands allowed.

Order is pronounced in the open court on 31.01.2022.

Sd/-
[Sanjay Garg]
Judicial Member

Dated: 31.01.2022

Bidhan (P.S.)

Copy of the order forwarded to:

1. **Prasenjit Sarkar, SF 1, Tapoban Abasan, Faridpur, Durgapur-713 213.**
2. **ACIT, Circle- Durgapur.**
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Senior Pvt. Secy./DDO/H.O.O.
ITAT, Kolkata Benches,
Kolkata