

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE MRS. DIVA SINGH, JUDICIAL MEMBER & SHRI RIFAUR RAHMAN,
ACCOUNTANT MEMBER
ITA NO.680/MUM/2021 (A.Y.2017-18)

Newage Fire Protection Engineers Pvt. Ltd.
101, Champaklal Udyog Bhavan,
Sion, Mumbai-400022.

PAN: **AACCN9026C**

..... Appellant

Vs.

CIT (Appeals),
National Faceless Appeal Centre
Delhi.

..... Respondent

Appellant by : Sh. Manish Sanghavi, C.A.

Respondent by : Sh. Kishore Dhule, Sr. DR

Date of hearing : 22/11/2021

Date of pronouncement : 23/11/2021

HEARING VIA WEBEX

ORDER

PER DIVA SINGH, J.M:

By the present appeal filed by the assessee, the correctness of the order dated 02.03.2021 passed under section 250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) [hereinafter referred to as 'the CIT(A)'] pertaining to Assessment Year (AY) 2017-18 is assailed on the following grounds:

"1. The Learned CIT (Appeal) has not allowed late payment of employees contribution and Administration Charges of Provident Fund and ESIC of Rs. 10,83,269/on ground that said amount of contribution to ESIC and PF is not paid within due date u/s. 36 (1) (va)

The Learned CIT Appeals has ignore the Jurisdiction Bombay High Court decision in the case of Ghatge Patil Transport Ltd (supra) 368 ITR 749 (2015) in which Hon Court has allowed the deductions of Employee's contribution to PF and ESIC which was paid before the due date of filing the return of Income as per section 43 B but paid after the due date of the respective Acts and considered the decision of Gujarat High Court"

2. Sh. Manish Sanghavi appearing on behalf of the assessee submitted that the point at issue is fully covered in favour of the assessee. Attention was invited to the decision of the jurisdictional High Court in the case of **CIT Vs. Ghatge Patil Transport Ltd. (2014) 368 ITR 749 (Bombay)**. Reliance was also placed upon the order dated 25.03.2021 in the case of Salzgitter Hydraulics Pvt. Ltd. Vs. ITO and order dated 27.07.2021 in the case of the DCIT Vs. Maharashtra Tourism Development Corporation in ITA No. 6426/Mum/2017.

3. Sh. Kishore Dhule, Sr. DR relied upon the impugned order. No contrary decision in support of the impugned order was referred to on behalf of the Revenue.

4. We have heard the parties and perused the material available on record. In the facts of the present case admittedly the Employee Contribution of PF & ESI of Rs. 10,83,269/- was paid beyond the statutory limits of the specific Act(s), however before the filing of the return of income. The addition made by way of disallowance was sustained in appeal in view of the fact that there was a delayed payment in terms of the specific statutes. The amendments carried out by the Finance Act, 2021 to sections 36(1)(va) and 43B were considered to be clarificatory in nature. We are of the view that the position of law as appreciated by the First Appellate Authority is not correct. Moreover, this issue is no longer *res-integra* as consistently over a period of time various benches of the ITAT have repeatedly held on considering the Notes on clauses and concluded that the amendments carried out are prospective in nature and not clarificatory.

Hence, the decision to consider the same with retrospective effect cannot be upheld. The Notes on Clauses which were appended to the Finance Bill, 2021 at the time of the proposed amendments clearly bring out this position. For the sake of completeness they are extracted here-in-under:

*"Clause 8 of the Bill seeks to amend section 36 of the Income-tax Act, relating to other deductions. Sub-section (1) of the said section provides for allowing of deductions provided for in the clauses thereof for computing the income referred to in section 28 of the said Act. Clause (va) of the said sub-section provides for allowance of deduction for any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that for the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise. It is proposed to insert Explanation 2 to clause (va) of sub-section (1) of the said section so as to clarify 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 the said clause. **This amendment will take effect from 1st April, 2021.** And will accordingly, apply in relation to the assessment year 2021-2022 and subsequent assessment years."*

5. The year under consideration in the facts of the present case as we have noted is 2017-18 Assessment Year. WE may also refer to **order dated 18.11.2021 in ITA No. 194/Chd./2021** in the case of **Surya Resorts Pvt. Ltd.** wherein it has been held:

"6. Accordingly, on account of the aforementioned reasoning, we hold that the disallowance of Rs. 5,24,104/- sustained in the present appeal by the CIT(A) qua the employees' contribution despite late payment qua the specific Act cannot be made. Admittedly, in the facts of the present case the payment has been made well within the time line as set out under the Income Tax Act u/s 139(1) of the Income Tax Act. Thus, admittedly the return of income was filed well within time after making the specific payments. The position of law that the Amendments carried out by the Finance Act, 2021 are prospective in nature and not

declaratory stand well settled. The disallowance, accordingly, cannot be sustained.

7. Before parting, it is necessary to refer to the decision of the jurisdictional High Court referred to by the assessee in the specific ground No. 2 raised in the present appeal wherein the decision of the Hon'ble Himachal Pradesh High Court in the case of **CIT vs Nipso Polyfabrika Ltd. [2013] 350 ITR 327** has been relied upon. The said decision, it is seen, specifically deals with the employees' contribution. Their Lordships relying upon decision of the Apex Court in the case of **CIT Vs Alom Extrusions Ltd. (2009) 319 ITR 306** (which was in the context of employers' contribution) referring to the decision of the Hon'ble Delhi High Court in the case of **CIT Vs Aimil Ltd. (2010) 321 ITR 508** took specific cognizance of the fact that this decision pertained to the employee's contribution wherein again a reference had been made to the decision of the Apex Court in the case of **CIT Vs Vinay Cement 313 ITR 1**. Considering the reasoning in these decisions, Their Lordships in the case of *Nipso Polyfabriks Ltd.* (supra) consciously followed the view taken by the Hon'ble Delhi High Court in *Aimil's case* and concluded that the view expressed by the Hon'ble Kerala High Court in **CIT Vs Commonwealth Trust Ltd. (2004) 269 ITR 290** was not being followed as it was considered to be "*no longer good law in view of the judgement of the Apex Court in Alom Extrusions Ltd.*" Accordingly, reliance placed by the Id. AR on the decision of the jurisdictional High Court qua the employee's contribution stands addressed in favour of the assessee. However, the said decision has not taken into consideration the change proposed by the Amendments carried out by Finance Act, 2021 which we have addressed at length in the earlier part of this order. This issue stands covered by various decisions of the ITAT which stand addressed. Accordingly, the ground of the assessee is allowed. Said order was pronounced in the presence of the parties via Webex."

6. Admittedly, the amount stands paid before the filing of the return before the due date as per the time lines of the Income Tax Act laid down under section 139(1). The disallowance on these facts for the assessment years prior to 2021-22 assessment year cannot be made. The amendment shall have prospective effect. On behalf of the assessee, the decision of the jurisdictional High Court in the case of **CIT Vs. Ghatge Patil Transport Ltd. (supra)** has also

been referred to. A perusal of the same shows that their Lordships were seized of the late payment of the employees contribution to P.F. Considering the position of law as settled by the Apex Court in the case of **CIT Vs. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC)** and **CIT Vs. Hindustan Organics Chemicals Ltd. (2014 366 ITR 1 (Bombay))**, their Lordships qua the employee contribution decided the issue in favour of the assessee. No doubt the said decision did not take into consideration these specific amendments carried out by the Finance Act, 2021, however, the issue of retrospective effect of specific amendments stands well examined. This decision we note fully supports the case of the assessee. Accordingly, the addition made by way of a disallowance is directed to be deleted.

7. In the result, appeal of the assessee is allowed.

The said order was pronounced in the court at the time of hearing itself on 23.11.2021.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 23/11/2021
SK, PS

प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai