

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

**(Before Sri Aby T. Varkey, Judicial Member & Sri Manish Borad, Accountant Member)**

**I.T.A. No.: 355/Kol/2021  
Assessment Year: 2018-19**

***Pengg Usha Martin Wires Private Limited.....Appellant  
[PAN: AADCP 9007 G]***

***Vs.***

***DCIT, Circle-8(2), Kolkata.....Respondent***

**Appearances by:**

*None appeared on behalf of the Assessee.*

*Sh. Biswanath Das, Addl. CIT, appeared on behalf of the Revenue.*

Date of concluding the hearing : February 22<sup>nd</sup>, 2022

Date of pronouncing the order : March 04<sup>th</sup>, 2022

**ORDER**

**Per Manish Borad, Accountant Member:**

This is an appeal preferred by the assessee against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi dated 03.08.2021 for AY 2018-19.

2. None appeared on behalf of the assessee. The first ground involved in this appeal of assessee is against the action of the Ld. CIT(A) in confirming the disallowance of Rs.86,477/- made in respect of PF & ESI in respect employees' contribution u/s. 36(1)(va) r.w.s. 2(24)(x) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"). According to the authorities below, since the assessee has not remitted the employees' contribution on the due date as prescribed by the PF & ESI Act, the contribution made belatedly cannot be allowed.

3. We have heard the ld. D/R and perused the records placed before us. We find that the ld. CIT(A) has referred to the Amendment brought in by Finance Act 2021 w.e.f. 01.04.2021 which inserted Explanation-2 to section 36(1)(va) but erred in holding it as clarificatory and so, retrospective in nature. However, we find that any way this issue is no longer *res-integra* as

held by this Tribunal in the case of *Lumino Industries Ltd. vs. ACIT, Circle-5(1), Kolkata* in I.T.A. No.365/Kol/2021 for AY 2015-16 order dated 17.11.2021, wherein assessee's favour view was taken by the Tribunal after holding that the Amendment brought in by Finance Act, 2021 w.e.f 1.04.2021 is prospective in operation and so will be in force from AY 2021-22 onwards and not retrospective. The relevant portions of decision read as under:

*"17. Have heard both the parties. We note that the Finance Bill, 2021 has brought in an amendment which disallows the employees' contribution made in PF and ESI if not made within the due date as prescribed by the respective statutes (PF and ESI Act). So after the amendment has been inserted according to Shri Miraj D Shah takes effect from 1st April, 2021 i.e. AY 2021-22 and subsequent assessment year and if the remittance of PF/ESI Employees' Contribution is not made within the time prescribed by the PF/ESI Act then the remittance cannot be allowed as a deduction which is prospective in operation. Whereas according to Ld. CIT(A), the amendment brought in is clarificatory in nature so, retrospective in operation. So we have to adjudicate this issue whether the amendment brought in by Finance Act, 2021 is prospective or retrospective in operation. We note that before this amendment has been inserted by Finance Bill, 2021, the Hon'ble Jurisdictional Calcutta High Court in the case of Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra) has held that the payment of employees' contribution if made by an assessee before the due date of filing of return of income u/s 139(1) of the Act, is allowable as a deduction. We note that by Finance Act, 2021, the provision of Section 36(1)(va) as well as Section 43B has been amended to this extend by inserting the Explanation 2 whereby it is clarified that the provision of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the due date under this clause. For ready reference, we reproduce the Explanation-2 to Section 36(1)(va) as under:*

*"Section 36(1)(va)*

*Explanation-2 - For the removal of doubts, it is hereby clarified that the provisions of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the 'due date\*' under this clause."*

*18. We find that this amendment has been brought in the Act to provide certainty about the applicability of Section 43B in respect of belated payment of employees' contribution. In order to test whether the amendment brought in later is retrospective or not one has to apply the test as laid by the Hon'ble Supreme Court in the case of M/s Snoutex Investment Ltd. (supra) wherein the Hon'ble Supreme court took note of the law laid down on this issue by the Constitution Bench in M/s Vatika Township Ltd. and held that the intent of the Parliament/legislature need to be looked into for ascertaining whether the amendment should be retrospective or not. In Vatika Township Ltd. (supra) the Hon'ble Supreme Court held that the notes on clauses appended to the Finance Bill will throw light as to the legislative intent; because it has to be borne in mind that Parliament/legislature is aware of three concepts before an amendment is brought in, which can be discerned from reading of the "Notes on Clauses" to the Bill which are (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. So when we adjudicate whether the view of Ld CIT(A) that the explanation 2 brought in by Finance Act, 2021 is retrospective, let us look at the "Notes on Clauses and the relevant clauses 8 & 9 of the Finance Bill, 2021 (supra) pertaining to the issue in hand which in clear and unambiguous terms spells out the intention of Parliament that the amendment shall take effect from 1<sup>st</sup> April, 2021 and therefore will accordingly apply to Assessment Year 2021-22 and subsequent years. So since the legislative intent is clear, the amendment brought in by Finance Act, 2021 on this issue as discussed is prospective and Ld. CIT(A) erred in holding otherwise. So till AY 2021-22, the Jurisdictional High Court's view in favor of assessee will hold good and is binding on us. As discussed the decision of the Hon'ble Delhi High Court in Bharat Hotels Ltd. (supra) which was in favor of revenue has not considered the decision of the Co-ordinate Division Bench decision in M/s Aimil Ltd.(supra) which is in favour of assessee. So we note that later decision of the Delhi/Hyderabad Tribunal have followed the decision favouring assessee in the light of the Hon'ble Supreme Court decision in M/s Vegetable Products (supra). In the light of the aforesaid decision and relying on the ratio of the Hon'ble Supreme Court in the case of Vatika Township Pvt. Ltd. (supra) and M/s Snowtex Investment Ltd. (supra) and also taking note of the binding decision of the Hon'ble Jurisdictional Calcutta High Court on this issue before us in Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra), we set aside the impugned order of Ld CIT(A) and direct the AO to allow the claim of deduction in respect of employees contribution shares towards ESI, PF, by the assessee before the due date of filing of return u/s 139(1) of the Act. Therefore the appeal of assessee succeeds and so, it is allowed in favor of assessee."*

5. In the impugned order of ld. CIT(A), it is noticed that the ld. CIT(A) has acknowledged that the assessee had made the remittance/payment of employees' contribution towards PF & ESI before the due date of filing of return of income. Therefore, in the light of the above judicial precedents (*supra*), which is squarely applicable on the issue raised before us in the instant appeal, we are inclined to allow the appeal of the assessee and direct the A.O. to delete the addition and hold that the Amendment brought in Finance Act 2021 w.e.f. 01.04.2021 by inserting an Explanation to section 36(1)(va) and section 43B of the Act is prospective in nature and would apply from AY 2021-22 onwards and, therefore, the Amendment is not applicable to this assessment years (Assessment Year 2018-19) under consideration. Therefore, the first ground raised by the assessee on the issue of disallowance of employees' contribution towards PF & ESI is allowed.

6. Coming to the second issue which is against the action of the Ld. CIT(A) in not even admitting the additional ground raised by the assessee before him in respect of disallowance of education cess and secondary

Higher Education Cess. We note that the assessee had raised this additional ground but the Ld. CIT(A) even did not bother to admit the same for adjudicating, which omission on the part of the Ld. CIT(A) cannot be countenanced. We note that the assessee has raised this additional ground which is undisputedly emanating from the assessment order against which assessee has preferred an appeal before the Ld. CIT(A). If the assessee is aggrieved by the decision of the AO, it has got the statutory right to file an appeal before the Ld. CIT(A). And even if the assessee has not made a claim regarding this issue during assessment proceedings/ROI due to any reason (ignorance), then also the assessee has the right to raise the ground before the Ld. CIT(A) to adjudicate the validity of the same as the Ld. CIT(A) has the plenary and co-terminus powers of AO to admit the same and adjudicate the same in accordance with law. Therefore, we restore this issue of Education Cess claimed as an expenditure by the assessee to the file of the ld. CIT(A) for adjudication afresh in accordance with law.

7. In the result, the appeal of the assessee is partly allowed for statistical purposes.

***Kolkata, the 04<sup>th</sup> March, 2022.***

Sd/-  
[Aby T. Varkey]  
Judicial Member

Sd/-  
[Manish Borad]  
Accountant Member

Dated: 04.03.2022

*Bidhan (P.S.)*

*Copy of the order forwarded to:*

1. **Pengg Usha Martin Wires Private Limited, 2A, Victoria Plaza, Shakespeare Sarani, Theatre Road, Kolkata-700 071.**
2. **DCIT, Circle-8(2), Kolkata.**
3. CIT(A)- National Faceless Appeal Centre (NFAC), Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar  
ITAT, Kolkata Benches  
Kolkata

Date of Dictation	03.03.2022
Date on which the typed order is placed before the dictating Member and other Member	03.03.2022
Date on which the order came back to Sr. P.S.	04.03.2022
Date on which file(s) go(es) to the Bench Clerk	04.03.2022
Date on which file(s) go(es) to the O.S.	
Date of despatch of the order	