

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

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 531/KOL/2021
Assessment Year: 2018-2019**

&

**I.T.A. No. 532/KOL/2021
Assessment Year: 2019-2020**

Shrachi Burdwan Developers (P) Limited,.....Appellant
'Shrachi Tower',
686, Anandapur Road,
E.M. Bye Pass,
Kolkata-700107
[PAN: AAKCS2315M]
-Vs.-

Deputy Commissioner of Income Tax,.....Respondent
Circle-5(1), Kolkata,
P-7, Chowringhee Square, 6th Floor,
Aayakar Bhawan,
Kolkata-700069

Appearances by:

Sri Subir Kumar Ray, Advocate, appeared on behalf of the assessee
Shri P.P. Barman, Sr. DR, appeared on behalf of the Revenue

Date of concluding the hearing : March 09, 2022

Date of pronouncing the order: March 09, 2022

O R D E R

Per Bench:-

These appeals filed by the assessee are directed against the orders of Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) Delhi dated 07.10.2021 for A.Y. 2018-19 and 20.08.2021 for A.Y. 2019-20 passed under section 250 of the Income Tax Act, 1961. The only issued involved in these appeals is whether the assessee is entitled for deduction of employees' contribution paid before the due date of filling of the return.

2. With the assistance of ld. representatives, we have gone through the record carefully. It revealed from the record that the appellant failed to make the payments of employees' contribution to ESI & PF account within the due date provided under the PF & ESI Act. Therefore, the ld. Assessing Officer has disallowed the claim of assessee for grant of deduction of such contributions. This disallowance was made with the aid of section 36(1)(va) read with section 2(24)(x) of the Income Tax Act. Before us, it was contended that the issue in dispute is squarely covered by the judgment of the Hon'ble Calcutta High Court in the case of (i) CIT – vs.- Vijayshree Ltd. in ITAT No. 243 of 2011 & GA No. 26607 of 2011;(ii) CIT –vs.- Philips Carbon Black Ltd. in GA No. 1382 of 2014 & ITAT 31 of 2014; (iii) CIT –vs.- M/s. Coal India Ltd. in ITA 12 of 2015 and (iv) M/s. Akzo Nobel India Ltd. –vs.- CIT in ITA No. 110 of 2011. This aspect has been considered by the Coordinate Bench in the case of Lumino Industries Ltd. –vs.- ACIT (ITA No. 231 & 365/KOL/2021). On the other hand, ld. Sr. D.R. has contended that section 36(1)(va) as well as section 43B has been amended by the Finance Act, 2021, whereby Explanation (2) has been attached with section 36(1)(va). As per this Explanation, it has been provided that 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 this clause. He filed a written note in this connection, which we have gone through.

3. On due consideration of the above facts and circumstances, we find that ITAT, Kolkata has duly examined the amendment brought in by virtue of Finance Act, 2021. On the proposition and the discussion made by the ITAT in the case of Lumino Industries Limited & Others 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 Snowtex 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 1st 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".

4. A perusal of the above would reveal that the ITAT, Kolkata has specifically propounded that if employees' contribution received by an assessee and paid to ESI and PF accounts before the due date of filing of the return, then the assessee will be eligible to claim the deduction of such amounts. With the assistance of ld. representatives, we have specifically gone through the record and find that payments have been made within the due dates of filing of the return. With the above observation, these appeals of the assessee are treated as allowed. The disallowances stand deleted in both the appeals.

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

Order pronounced in the open Court on March 9th, 2022.

**Sd/-
(Rajesh Kumar)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President (KZ)**

Kolkata, the 9th day of March, 2022

**Copies to : (1) Shrachi Burdwan Developers (P) Limited,
'ShrachiTower',
686, Anandapur Road,
E.M. Bye Pass, Kolkata-700107**

**(2) Deputy Commissioner of Income Tax,
Circle-5(1), Kolkata,
P-7, Chowringhee Square, 6th Floor,**

Aayakar Bhawan, Kolkata-700069

***(3) Commissioner of Income Tax (Appeals),,
National Faceless Appeal Centre (NFAC), Delhi***

*(4) Commissioner of Income Tax- ,
(5) The Departmental Representative
(6) Guard File*

TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.