

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH "B" KOLKATA**

**Before: Shri Sanjay Garg, Judicial Member and
Shri Girish Agrawal, Accountant Member**

आयकर अपील सं.य/ ITA No. 613/Kol/2021 Assessment Year:2018-19

M/s. Krishna Tissues Pvt. Ltd, BD-33, Sector-1, Salt Lake City, Kolkata-700 064. PAN: AACCK5813G	<u>बनाम</u> V/s.	DCIT, Central Circle 3(1)-1(1), Aaykar Bhawan Poorva, 110 Shantipally, E.M Bypass, Kolkata-700 107/
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Ms. Puja Somani, Ld.AR
प्रत्यर्थी की ओर से/By Respondent	Smt. Ranu Biswas, Addl.CIT, Ld.DR
सुनवाई की तारीख/Date of Hearing	08-03-2022
घोषणा की तारीख/Date of Pronouncement	08-03-2022

आदेश /O R D E R

Per Girish Agrawal, AM :

The present appeal has been preferred by the assessee against the order dated 18-11-2021 passed by the of Commissioner of Income-tax (Appeals), [in short, the Id. CIT(A)], Kolkata-21, which in turn arises out of processing of return of income u/s. 143(1) of the Income-tax Act, 1961 (in short, the 'Act') by the Deputy Commissioner of Income-tax, CPC, Bengaluru (in short the AO) on 01/10/2019 for the A.Y 2018-19, whereby a sum of Rs. 53,04,645/- was disallowed/added back on account of delay on the part of the assessee in deposit of employees contribution to Provident Fund/Employees State Insurance (hereinafter PF/ESI).

2. The assessee has raised the following grounds of appeal:-

1. *That, on the facts and in the circumstances of the case, the Ld. C.I.T.(A) erred in law in upholding the disallowance of Rs.53,04,645/- and addition of the same to the total income of the appellant being contributions from employees to PF & ESI u/s 36(1)(va) of the Act on the alleged ground that the appellant had deposited the said contributions after the due date as prescribed u/s 36(1)(va) of the Act in spite of the fact that the said contributions were admittedly deposited before the due date of filing the ROI u/s 139(1) of the Act.*

2. *That the Ld. CIT(A) further erred in holding that the provision of sec.43B of the Act does not cover employees contributions referred to in sec.36(1)(va) in spite of the fact that the amendments made in sec.43B bringing about uniformity towards employees contributions to PF/ESI would have clearly applied to the case of the appellant and hence no addition is called for u/s 36(1)(va) r.w.s. 2(24)(x) of the Act, as decided by Hon'ble Supreme Court, High Court and Tribunal in their various decisions.*

3. *That, the Ld. C.LT.(A) while upholding the disallowance/addition of Rs.53,04,645/- made for A.Y. 2018-19 under appeal has also misinterpreted the amendments in secs.36(1)(va) and 43B of the Act by inserting corresponding Explanations by The Finance Act, 2021 w.e.f. 01/04/2021 as clarificatory in nature and hence retrospective effect in spite of the fact that the said amendments have prospective effect from A.Y. 2021-22 and subsequent years and the legislature itself has condoned the defaults prior to 01/04/2021.*

4. *That, the action of the Ld. C.LT.(A) in upholding the disallowance Rs.53,04,645/- made for A.Y. 2018-19 is also against the decision of Hon'ble jurisdictional Tribunal in the case of Lumino Industries Ltd. vs. ACIT for A.Y. 2015-16 (ITA No.365/Kol/2021, dated 17/11/2021) wherein identical addition has been deleted by holding that the amendment brought in by The Finance Act, 2021 in Secs. 36(1)(va) and 43B of the Act is prospective and will apply from A.Y. 2021-22 and subsequent years .*

5. *That, therefore, as the order of the Ld. C.LT.(A) on the above issues suffers from illegality and is devoid of any merit, the same should be quashed and your appellant be given such relief(s) as prayed for.*

6. *That, the appellant craves leave to amend, alter, modify, substitute, add to, abridge and! or rescind any or all of the above grounds.*

3. On perusal of above grounds of appeal, it reveals that before us the assessee has contested mainly on the issue of disallowance of Rs. 53,04,645/- made under the head of PF/ESI for delayed payment under section 36(1)(va) read with section 2(24)(x) and section 43B of the Act.

4. Brief facts of the case are that the assessee filed its e-return of income for the A.Y under consideration, which was processed u/s. 143(1) of the Act by DCIT, CPC, Bangaluru on 01-10-2019, whereby a sum of Rs. 53,04,645/- was disallowed/added back on account of failure of the assessee to deposit the employees contribution to PF/ESI beyond the due date. Admittedly, it was not paid on or before the prescribed due date u/s. 36(1)(va) r.w.s 2(24)(x) of the Act but paid before the due date of filing income tax return u/s. 139(1) of the Act. Aggrieved by the order of the Ld.AO, DCIT, CPC. Bangalore, the assessee preferred an appeal before the Id. Commissioner of Income-tax (Appeals), Kolkata, The Id. CIT(A) considering the submissions of assessee and various case laws available in his order dismissed the appeal of assessee by confirming the said disallowance (Rs. 53,04,645/-) as made by the Id.AO.

5. Aggrieved by the above order of the Id. CIT(A), now the assessee is in appeal before us by raising the aforementioned grounds of appeal.

6. At the outset, Ms. Puja Somani, Ld.Counsel for the assessee submitted before us that the issue raised in the instant appeal regarding disallowance on delayed payment of employees' contribution towards Provident Fund and ESI without following the provisions of section 2(24)(x) read with section 36(1)(va) of the Act, is squarely covered in favour of the assessee by the judgment of the Hon'ble Jurisdictional High Court, Calcutta in the case of Vijay Shree Ltd, ITA No. 245 of 2011(G.A No.2607 of 2011) dt. 12.8.2015. She also invited our attention that the issue in hand is covered in favour of assessee by the latest order dt. 17-11-2021 of the Co-ordinate Bench of this Tribunal (ITAT, 'B 'Bench, Kolkata) in ITA Nos. 231,365,366,369,367,368 & 371/Kol/2021 for the AYs. 2015-16, '17-18, '18-19 & '19-20 in the case of Lumino Industries & Ors. In support of her submissions she also relied on the orders dt. 16-07-2021, 04-10-2021 and order dt. 11-02-2022, wherein the Co-ordinate Bench, ITAT, Kolkata on similar issue has allowed the appeal of assessee. Thus, she prayed before us that the disallowance so made by the Id.AO and confirmed by the Id. CIT(A)

kindly be deleted in view of said order of this Tribunal/Hon'ble Jurisdictional High Court.

7. On the other hand, Smt. Ranu Biswas, Addl. CIT, the Ld. Departmental Representative (in short, the Ld.DR) has not objected to the factual position of the case relating to the deposit of the contributions before the due date of filing of return for the year u/s. 139(1) of the Act . However, she submitted that the Id. AO has rightly disallowed the said disallowance and therefore, the Id. CIT(A) rightly dismissed the appeal of assessee by confirming the said disallowance.

8. After hearing the rival submissions and perusing the material available on record, we find that the issue in hand is covered in favour of assessee by the said order of Hon'ble Jurisdictional High Court, Calcutta in the case of Vijay Shree Ltd, ITA No. 245 of 2011(G.A No.2607 of 2011), dt. 12.8.2015 and order dt. 17-11-021 of this Tribunal in the case of Lumino Industries (supra). Relevant findings of the said order of the Co-ordinate Bench is reproduced herein below for the sake of clarity:-

“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 date under this clause. For ready reference, we produce the Explanation-2 to Section 36(1)(va) as under:

“Section 36(1)(va)

Explnation-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 favour 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. “

9. Considering the uncontroverted factual matrix on record about the deposit of the contributions before the due date of filing of return u/s. 139(1) of the Act and respectfully following the above decision of the Hon'ble Jurisdictional High Court, the disallowance made by the Id.AO and confirmed by the Id. CIT(A) is hereby deleted. Grounds raised by the assessee are allowed.

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

Order is pronounced in the open court on 08 March, 2022

Sd/-

(SANJAY GARG)
Judicial Member

Sd/-

(GIRISH AGRAWAL)
Accountant Member

Dated: 08 .03.2022

****PP. Sr. PS**

Copy of the order forwarded to:

1. Assessee – M/s. Krishna Tissues Pvt. Ltd, BD-33, Sector-1, Salt Lake City, Kolkata-700 064.
2. Revenue – DCIT, Central Circle-3(1), Aaykar Bhawan Poorv, 110 Shantipally, E.M Bypass, Kolkata-107.
 1. CIT, Kolkata.
 2. CIT(A)
 3. DR, ITAT, Kolkata, (sent through e-mail)..

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Bench, Kolkata