

आयकर अपीलिय अधिकरण, चण्डीगढ न्यायपीठ "बी.", चण्डीगढ
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH
BENCH 'B' CHANDIGARH

BEFORE: SMT. DIVA SINGH, JUDICIAL MEMBER &
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 323/CHD/2021

Assessment Year : 2018-19

M/s Sushma Buildtech Ltd., B-107, Business Complex, Elante Mall, First Floor, Phase-1, Industrial Area, Chandigarh.	बनाम VS	The DCIT CPC, Bangaluru.
स्थायी लेखा सं./PAN /TAN No: AAJCS8156M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Parikshit Aggarwal, CA

राजस्व की ओर से/ Revenue by : Dr. Ranjeet Kaur, Sr.DR

तारीख/Date of Hearing : 15.03.2022

उदघोषणा की तारीख/Date of Pronouncement : 24.03.2022

आदेश/ORDER

PER DIVA SINGH

The present appeal has been filed by the assessee wherein the correctness of the order dated 02.09.2021 of CIT(A) (NFAC i.e. National Faceless Appeal Centre) Delhi pertaining to 2018-19 assessment year on the following grounds :

1. That on the facts, circumstances and legal position of the case, the Worthy CIT(A), NFAC in Appeal No. CIT(A)/Chandigarh/10057/2020-21 has erred in passing the order in contravention of the provisions of S. 250(6) of the Income Tax Act, 1961.

2. That on law, facts and circumstances of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO in making addition of Rs. 12,06,620/- u/s 36(1)(va) of the Act even when the appellant collected ESI and PF from salary of the employees and whole of the amount had been deposited well before the due date of filing of Income Tax Return.

3. That on law, facts and circumstances of the case, the Worthy CIT(A) has erred in confirming the action of Ld. AO (CPC) in making addition of Rs. 12,06,620/- u/s 36(l)(va) of the Act even when the Ld. AO lacked powers to make such addition in the assessment order passed u/s 143(1).

4. That on law, facts and circumstances of the case, the Worthy CIT(A) has erred in holding that the newly inserted explanation u/s 36(l)(va) by Finance Act, 2021 is retrospective in nature basis even when the same was prospective and therefore was not applicable to the year in question.

5. That the appellant craves leave for any addition, deletion or amendment in the grounds of appeal on or before the disposal of the same.

2. The short issue involved in the present appeal is the late deposit of employees' contribution towards ESI & PF disallowed u/s 36(1)(va) by order u/s 143(1) passed by CPC Bangaluru. The assessee carried the issue in appeal before the NFAC who confirmed the addition made by way of a disallowance.

3. The ld. AR relied upon order of the ITAT which had followed the decision of the jurisdictional High Court and argued that it is a covered issue in favour of the assessee.

4. The ld. DR relied upon the impugned order.

5. We have heard the rival submissions and perused the material available on record. The said issue has been considered at length by various orders of the ITAT including the Chandigarh Bench in ITA 194/CHD/2021 dated 18.11.2021 in the case of **Surya Resorts Pvt. Ltd. Dharamshala**, ITA No. 255/CHD/2011 dated 02.11.2021 in the case of **CZAR Faucets Limited in ITA No. 255/CHD/2021 order dated 01.11.2021**. In the facts of the present case also, it is seen

that the amendments carried out by the Finance Act, 2021 in Section 36(1)(va) and 43B were considered by the First Appellate Authority to be clarificatory in nature, hence, retrospective in operation. We have seen that this issue has been considered by the jurisdictional High Court in the case of CIT Vs Hemla Embroidery Mills (P) Ltd. (2014) 366 ITR 167(P&H). The jurisdictional High Court relying upon its own decision in the case of CIT Vs Rai Agro Industries 334 ITR 122 and considering the principle laid down by the Apex Court in the case of CIT Vs Alom Extrusions Ltd. 319 ITR 306 (S.C) have addressed the legal position, though it need be clarified that the decision rendered was in the context of amendments carried out by way of Second Proviso to Section 43B which was omitted by Finance Act, 2003. This Amendment was held to be clarificatory and hence would operate retrospectively. In the facts of the present case, Amendment by way of Explanation 2 to Section 36(va) and Explanation 5 to Section 43B by Finance Act, 2021 had been held to be having prospective effect. For the said purposes relying upon the Notes on Clauses at the time of introduction of the Finance Bill, 2021, the Co-ordinate Benches have consistently held that the said amendments have been inserted w.e.f. assessment year 2020-21 assessment year. For ready reference, relevant extract

from ITA No. 194/CHD/2021 in the case of **Surya Resorts Pvt.**

Ltd. Dharamshala is given below :

“4. We have heard the rival submissions and perused the material available on record. It is an admitted fact that there was a delay in the payment of EPF relatable to the employees’ contribution as far as the time limit set out by the specific Act is concerned. It is also an admitted fact that the return was filed by the assessee within the due date as per the time limit as set out u/s 139(1) of the Income Tax Act. Hence, the amount of the employees’ contribution of the EPF amounting to Rs. 5,24,104/- stood paid before the filing of the return. It is seen that the disallowance made was sustained by Addl. Commissioner on account of the fact that the Amendments carried out by Finance Act 2021 in Sections 36(1)(va) and Sec. 43B were considered to be clarificatory, hence retrospective in nature. The said view has consistently been held to be incorrect by various orders of the ITAT as on a bare consideration of the Notes on Clauses appended to the Finance Bill it was clarified that the Amendment will take effect from the First April 2021. Thus, the legal position thereon is well settled. The Co-ordinate Benches have consistently right from order dated 03.08.2021 of the Delhi Benches in *Insta Exhibitions Pvt. Ltd. Vs Addl. CIT, New Delhi* in ITA No. 6941/Del/2017 and Hyderabad Benches vide order dated 01.07.2021 in *M/s Crescent Roadways Pvt. Ltd. V Dy. CIT, Hyderabad* in ITA No. 1952/Hyd./2018 have held that the amendments are prospective and not retrospective in nature. The reasoning has been addressed at length in the order dated 02.11.2021 in the case of **Shri Sukhdev Singh, Mohali Vs ITO, Chandigarh** in ITA 250/CHD/2021 wherein it was held:

“4. We have heard the submissions and perused the material available on record. **It is seen that the issue is no longer res-integra** as the decision of the jurisdictional High Court amongst others has been followed by the ITAT Chandigarh Benches vide its order dated 01.07.2021 in the case of *M/s Jupiter Aqua Lines Pvt. Ltd. Vs DCIT* ITA 83/CHD/2021 and order dated 04.10.2021 in the case of *Ajay Piplani Vs Assistant Director of Income Tax, CPC, Bengaluru* in ITA No. 114/CHD/2021. Similar view has been expressed by the Delhi Benches vide order dated 03.08.2021 in *Insta Exhibitions Pvt. Ltd. Vs Addl. CIT, New Delhi* in ITA No. 6941/Del/2017, Hyderabad Benches vide order dated 01.07.2021 in *M/s Crescent Roadways Pvt. Ltd. V Dy. CIT, Hyderabad* in ITA No. 1952/Hyd./2018. We find that the issue has been elaborately discussed by the Co-ordinate Benches for example in **Insta Exhibitions Pvt. Ltd.** (supra) as under :

6. We have carefully considered contentions of the learned departmental representative and perused the orders of the lower authorities. The facts shows that the assessee has collected the sum of Rs. 12,16,260/- being employee's contribution under the provident fund and with respect to ESI laws. The above contribution was admittedly not deposited by the assessee within the due date prescribed under the respective ESI and PF statue however, same was deposited before the due date of filing of return of income. Therefore, the Id AO as well as the Id CIT(A) disallowed the same holding that such contribution becomes the income of the assessee under the provision of section 2(24)(x) of the Act and thereafter if the same is deposit within the due date prescribed under the respective laws then same is allowable as deduction u/s 36(1)(va) of the Act. Coordinate

bench in case of DOT Vs Dee Development Engineers in ITA No. 4959/DEL/2016 (A.Y 2011-12) has held as Under:-

7. We have heard both the parties and perused all the relevant material available on record. As regards Ground No. 1, the assessee company has not deposited the employees' contribution within the due date which is prescribed under the said statute i.e. Provident Fund and ESIC. This issue is dealt by the Hon'ble Delhi High Court in case of CIT vs. M/s Bharat Hotels Ltd. 410 ITR 417 wherein the issue is decided in favour of the revenue, without considering the decision of the Hon'ble Delhi High Court in case of CIT vs. AIMIL Ltd.(2010) 321 ITR 508 (Del.). But the Ld. AR relied upon the decision of the Hon'ble Delhi High Court In case of Pr, CU vs. Pro Interactive Service (India) Pvt. Ltd. ITA No. 983/2018 pronounced on 10.09.2018 wherein the Hon'ble High Court decided the issue in favour of the assessee relying upon the judgment of AIMIL Ltd. (supra). **The Hon'ble Delhi High Court held that the legislative intent was/is to ensure that the amount paid is allowed as expenditure only when payment is actually made.** We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPD) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act. It is settled law that when two judgments are available giving different views then the judgment which is in favour of the assessee shall apply as held in case of Vegetable Products Ltd. 82 ITR 192 by the Hon'ble Supreme Court. Hence, in light of the latest decision in case of Pro Interactive Service (India) Pvt. Ltd., the issue is covered in favour of the assessee. Hence, Ground No. 1 is dismissed."

7. Further with respect to the argument of the learned departmental representative that amendment made with finance act 2021 wherein explanation 1 is added u/s 36 (1) (va) of the act with effect from 1 April 2021, is applicable to the present case, we referred to the **"Notes on clauses" at the time of introduction of the finance bill 2021 which says as 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."*

Therefore it is apparent that the above amendment do not apply to the assessment year 2014 - 15 in this appeal.

8. *In view of this we allow the solitary ground of appeal raised by the assessee holding that the addition/disallowance made by the learned assessing officer of late deposit of employees contribution to the provident fund and ESI, as it is deposited before the due date of the filing of the return of an income but beyond the due date prescribed Under the respective provident fund and ESI laws is not sustainable in law.*
9. *In the result, appeal of the assessee is allowed.*

5. We further find that the Chandigarh Benches also consistently following the decisions of the jurisdictional High Court in the case of CIT Vs Nuchem Ltd (ITA No. 323 of 2009) and CIT Vs Hemla Embroidery Mills Pvt. Ltd.(2014) 366 ITR 167 have allowed similar claims of the assessee taking note of the fact the various Co-ordinate Benches have consistently held that the amendment to section 36(l)(va) and u/s 43B of the Act effected by the Finance Act 2021 is applicable prospectively ,reading from the Notes on Clauses at the time of introduction of the Finance Act, 2021, specifically stating the amendment being applicable in relation to assessment year 2021-22 and subsequent years. Accordingly, considering the factual backdrop of the present case and considering the amendments in Section 36(1)(va) as well as Section 43B carried out by Finance Act, 2021 and Memorandum explaining the provisions in Finance Bill, 2021 we hold that the impugned disallowance is not sustainable and is directed to be deleted. The appeal of the assessee is allowed. Said order was pronounced in the presence of the parties via Webex."

(emphasis supplied)

5. *Similar view has also been taken in order dated 02.11.2021 in the case of M/s Czar Faucets Limited Chandigarh Vs DCIT, Bangalore in ITA 255/CHD/2021; in order dated 16.11.2021 in the case of Pooja Sarees, Ambala City in ITA No. 184/CHD/2021 and in order dated 16.11.2021 in the case of M/s A.K. Creative Outsourcing Services Pvt. Ltd., Baddi in ITA No. 252/CHD/2021. The specific reasoning summing up the legal position on similar facts is extracted hereunder from **M/s A.K. Creative Outsourcing Services Pvt. Ltd.:***

*"5. We have heard the submissions and perused the material available on record. **Considering the issue, it is seen that it is no longer res-integra. The controversy whether the Amendments carried out by the Finance Act, 2021 in Section 36(l)(va) and u/s 43B of the Act were prospective in nature or retrospective, hence clarificatory in nature have been put to rest by***

*consistent orders of the different Benches of the ITAT namely order dated 03.08.2021 in Insta Exhibitions Pvt. Ltd. Vs Addl. CIT, New Delhi in ITA No. 6941/Del/2017 of the Delhi Benches; order dated 01.07.2021 of Hyderabad Benches in M/s Crescent Roadways Pvt. Ltd. V Dy. CIT, Hyderabad in ITA No. 1952/Hyd./2018, order dated 27.08.2021 in the case of M/s Jupiter Aqua Lines Pvt. Ltd. Vs DCIT ITA 83/CHD/2021 and order dated 04.10.2021 in the case of Ajay Piplani Vs Assistant Director of Income Tax, CPC, Bengaluru in ITA No. 114/CHD/2021 of the ITAT Chandigarh Benches. Reference may also be made to various other orders of the Chandigarh Benches in ITA 250/CHD/2021 in the case of Shri Sukhdev Singh, Mohali and ITA 255/CHD/2021 in the case of M/s CZAR FAUCETS Ltd. Chandigarh wherein consistently following the decisions of the jurisdictional High Court in the case of CIT Vs Nuchem Ltd (ITA No. 323 of 2009) and CIT Vs Hemla Embroidery Mills Pvt. Ltd.(2014) 366 ITR 167, **the Tribunal has consistently allowed similar claims of the assessee holding that the Amendments effected by the Finance Act 2021 to section 36(l)(va) and u/s 43B of the income Tax Act are not clarificatory in nature and they do not have retrospective effect and are applicable prospectively. Reading from the Notes on Clauses at the time of introduction of the Finance Act, 2021, it has been held that the amendment being applicable in relation to assessment year 2021-22 and subsequent years. Accordingly, considering the factual backdrop of the present case and considering the amendments in Section 36(1)(va) as well as Section 43B carried out by Finance Act, 2021 and Memorandum explaining the provisions in Finance Bill, 2021 we hold that the impugned disallowance is not sustainable. Hence, the addition is directed to be deleted as the amount stood deposited by the due date as held in Section 139(1) of the Act. Hence, within time. The appeal of the assessee is allowed. Said order was pronounced in the presence of the parties via Webex.***

(emphasis supplied)

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 ld. 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. Accordingly, relying on the legal position as set out hereinabove, we hold that the addition sustained on facts has to be deleted. Directed accordingly.

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

Order pronounced on 24TH March, 2022.

Sd/-
(VIKRAM SINGH YADAV)
लेखा सदस्य/ Accountant Member

Sd/-
(DIVA SINGH)
न्यायिक सदस्य/ Judicial Member

"Poonam"

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकारण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar