IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'SMC' : NEW DELHI)

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No.94/Del./2022
(ASSESSMENT YEAR : 2018-19)

Manful Solutions, 1480/20, Wazir Nagar, Kotla Mubarak Pur Chaudhary, Netram, Delhi – 110 014.	vs.	Ward 54 (4), Delhi.
(PAN : AAIFP7888B)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Ravi, CA
REVENUE BY : Ms. Radha Katyal Narang, Senior DR

Date of Hearing : 05.04.2022
Date of Order : 05.04.2022

O R D E R

The aforesaid appeal has been filed by the assessee against the impugned order passed by the National Faceless Appeal Centre (NFAC), Delhi for the Assessment Year 2018-19 vide order dated 25.11.2021.

2. In the aforesaid appeal, the assessee had challenged the disallowance of payment of employees contribution towards Provident Fund and ESI under section 36(1)(va) read with section 43B of the Income-tax Act, 1961 (for short 'the Act').

3. In this case, the CPC had made a disallowance vide intimation u/s 143(1) of the Act by enhancing the total income by making addition of Rs.28,83,403/-, on account of disallowance of PF/ESI u/s

36(1)(va). NFAC has upheld the disallowance after detailed discussion and referring to various judgments in support of the legal proposition that the amendment which has been brought into by Finance Act, 2021 w.e.f. 01.04.2021 by bringing **Explanation 5** in section 43B and amending clause (va) of section 36(1) is retrospective being clarificatory amendment.

4. Now, this issue stands covered by series of decisions of this Tribunal following various judgments of Hon'ble High Courts including Delhi High Court that, if the payment of employees contribution to PF/ESI though has been made beyond the amendment of statutory date but much before filing of return of income, then no disallowance can be made. This Tribunal in the case of **Flying Fabrication vs. DCIT in ITA No.1049/Del/2021 order dated 17.11.2021**, after taking note of the judgment of Hon'ble Delhi High Court observed and held as under:-

> *"7. We have heard the rival submissions and also perused the finding given in the impugned orders. From the perusal of the intimation order, it is seen that disallowance has been made u/s.36(1)(va) and assessee has clearly explained in reply to the notice issued by CPC, Bengaluru that the claim of such payment is allowable by the decision of Hon'ble Apex Court as well as by Hon'ble Jurisdictional High Court and no disallowance should be made once the factum of the claim is based on the decision of Hon'ble Apex Court and Jurisdictional High Court. Thus, making disallowance merely by issuing an intimation cannot be made as it becomes a debatable issue. Here, in this case, intimation order has been passed on 06.06.2019 and 04.01.2021, that is, before the amendment in Section 36(1)(va) brought by the Finance Act, 2021 which was brought in the statute from the later date and was applicable w.e.f. 1st April, 2021. Thus, there was no occasion for making such a disallowance when assessee's claim at the time of filing of return of income was based on certain binding judicial precedents*

that if the payment of employee's contribution regarding PF and ESI have been paid before the due date of filing of return of income u/s.139(1), then it is allowable under the provision of Section 43B. This position was clear by the judgment of Hon'ble Jurisdictional High Court in the case of ***CIT vs. AIMIL Ltd.*** *as reported in* ***(2009) 321 ITR 508 (Delhi)*** *wherein following the ratio and principle laid down by the Hon'ble Apex Court in the case of* ***Vinay Cement (supra), t****heir Lordship have held as under:*

"14. When we keep that proposition in mind and also take into consideration various judgments where Vinay Cement (supra) is applied and followed, it will not be possible to accept the contention of the Revenue.

15. In CIT v. Dharmendra Sharma, 297 ITR 320, this Court specifically dealt with this issue and relying upon the aforesaid judgment of the Guwahati High Court, as affirmed by the Supreme Court in Vinay Cement (supra), the appeal of the Revenue was dismissed. More detailed discussion is contained in another judgment of this Court in CIT v. P.M. Electronics Ltd. (ITA No. 475/2007 decided on 3.11.2008). Specific questions of law which were proposed by the Revenue in that case were as under :-

"(a) Whether amounts paid on account of PF/ESI after due date are allowable in view of Section 43B, read with Section 36(1)(va) of the Act?

(b) Whether the deletion of the 2nd proviso to Section 43B by way of amendment by the Finance Act, 2003 is retrospective in nature?"

16. These questions were answered by the Division Bench in the following manner :-

"7. Having heard the learned counsel for the Revenue, as well as, the assessee, we are of the view that the view taken by the Tribunal deserves to be sustained as it is no longer res integra in view of the decision of the Supreme Court in the case of CIT v Vinay Cement Ltd: 213 ITR 268 which has been followed by a Division Bench of this Court in the case of CIT v. Dharmendra Sharma: 297 ITR 320.

8. Despite the aforesaid judgments, the learned counsel for the

Tribunal has contended that in view of the judgment of the Division Bench of the Madras High Court in the case of CIT v. Synergy Financial Exchange Ltd: (2007)288 ITR 366 and that of the Division Bench of the Bombay High Court in the case of CIT v. M/s Pamwi Tissues Ltd: (2008) Taxindiaonline.com 104 (TIOL) the issue requires consideration. According to us, in view of the dismissal of the Special Leave Petition in the case of Vinay Cement (supra) by the Supreme Court by a speaking order, the submission of the learned counsel for the Revenue has to be rejected at the very threshold. The reason for the same is as follows:-

9. The Gauhati High Court in the case of CIT v. George Williamson (Assam) Ltd: (2006) 284 ITR 619 (Gauhati) dealt with the very same issue. In the said judgment the Division Bench of the Gauhati High Court noted a contrary view taken by the Kerala High Court in the case of CIT v. South India Corporation Ltd: (2000) 242 ITR 114. After noting the said judgment the fact that the amendments had been made to the provisions of Section 43B of the Act by virtue of Finance Act, 2003 w.e.f 1.4.2004 it agreed with the submission of the learned counsel for the assessee that by virtue of the omission of the second proviso and the omission of Clauses (a), (c), (d), (e) and (f) without any saving clause would mean that the provisions were never in existence. For this purpose, in the said case the assessee had placed reliance on the judgment of a Constitution Bench of the Supreme Court in the case of Kolhapur Canesugar Works Ltd v. Union of India: (2000) 2 SCC 536 and Rayala Corporation P. Ltd v. Director of Enforcement (1969) 2 SCC 412 and General Finance Co. v. Asst. CIT: (2002) 257 ITR 338 (SC) . The said submissions found favour with the Division Bench of the Guahati High Court and relying on earlier decisions of its own Court in CIT v. Assam Tribune: (2002) 253 ITR 93 and CIT v. Bharat Bamboo and Tiber Suppliers: (1996) 219 ITR 212 the Division Bench dismissed the appeal of the Revenue. It transpires that the aforesaid matter was taken up in appeal alongwith other matters including Vinay Cement (supra). The order in Vinay Cement (supra) was passed by the Supreme Court on 7.3.2007 wherein it observed as follows:- "Delay condoned. In the present case we are concerned with the law as it stood prior to the amendment of Section 43-B. In the circumstances, the assessee was entitled to claim the benefit in Section 43-B for that period particularly in view of the fact

that he has contributed to provident fund before filing of the return. Special Leave Petition is dismissed."

10. In view of the above, it is quite evident that the special leave petition was dismissed by a speaking order and while doing so the Supreme Court had noticed the fact that the matter in appeal before it pertain to a period prior to the amendment brought about in Section 43B of the Act. The aforesaid position as regards the state of the law for a period prior to the amendment to Section 43B has been noticed by a Division Bench of this Court in Dharmendra Sharma (supra). Applying the ratio of the decision of the Supreme Court in Vinay Cement (supra) a Division Bench of this Court dismissed the appeals of the Revenue. In the passing we may also note that a Division Bench of the Madras High Court in the case of CIT v. Nexus Computer (P) Ltd by a judgment dated 18.8.08 passed in Tax Case (A) No. 1192/2008 discussed the impact of both the dismissal of the special leave petition in the case of George Williamson (Assam) Ltd (supra) and Vinay Cement (supra) as well as a contrary view of the Division Bench of its own Court in Synergy Financial Exchange (supra). The Division Bench of the Madras High Court has explained the effect of the dismissal of a special leave petition by a speaking order by relying upon the judgment of the Supreme Court in the case of Kunhayammed and Others v. State of Kerala and another: 119 STC 505 at page 526 in Paragraph 40 and noted the following observations:-

> *"It the order refusing leave to appeal is a speaking order, ie., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country, But, this does not amount to saying that the order of the Court, Tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."*

11. Upon noting the observations of the Supreme Court in Kunhayammed and Others (supra) the Division Bench of the Madras High Court in the case of Nexus Computer Pvt Ltd (supra) came to the conclusion that the view taken by the Supreme Court in Vinay Cement (supra) would bind the High Court as it was non declared by the Supreme Court under Article 141 of the Constitution. 12. We are in respectful agreement with the reasoning of the Madras High Court in Nexus Computer Pvt Ltd (supra). Judicial discipline requires us to follow the view of the Supreme Court in Vinay Cement (supra) as also the view of the Division Bench of this Court in Dharmendra Sharma (supra). 13. In these circumstances, we respectfully disagree with the approach adopted by a Division Bench of the Bombay High Court in M/s Pamwi Tissues Ltd (supra).

14. In these circumstances indicated above, we are of the opinion that no substantial question of law arises for our consideration in the present appeal. The appeal is, thus, dismissed."

17. It also becomes clear that deletion of the 2nd proviso is treated as retrospective in nature and would not apply at all. The case is to be governed with the application of the 1st proviso.

18. We may only add that if the employees‟ contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income Tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement (supra).

19. We, thus, answer the question in favour of the assessee and against the Revenue. As a consequence, the appeals filed by the assessees stand allowed and those filed by the Revenue are dismissed."

8. Apart from above, there are series of judgment of Hon'ble Jurisdictional High Court on the same principle, like in the case of

> ***CIT vs. PM Electronics Ltd. 171 taxmann. com 1, CIT vs. SPL Industries Ltd. (2011) 9 taxmann.com 195, CIT vs. Dharmendra Sharma, 297 ITR 220****. Again following the decision of the Jurisdictional High Court which are based on the principle laid down in the case of* ***Vinay Cement (supra),*** *the co-ordinate Bench have passed series of judgment holding the same proposition that prior to the amendment brought in the statute w.e.f. 01.04.2021, no disallowance can be made that the payment to the employee's contribution to PF and ESI paid by the assessee before the due date of filing of return of income u/s.139(1). Accordingly, we hold that no disallowance can be made in the assessment year prior to Assessment Year 2021-22. In the result, the disallowance confirmed by the Appeal Centre is deleted."*

5. Thereafter, now in the latest judgment of the coordinate Bench of the Tribunal in case of **Raj Kumar vs. ITD, CPC, Bengaluru (2022) 136 taxman.com 244 (Delhi-Trib.**),the Tribunal held that amendment regarding due date of deposit of employees contribution of PF/ESI are prospective, i.e., beyond AY 2021-22 and the same is allowed if it is paid before the due date of filing of Income-tax return prior to AY 2021-22 and same cannot be disallowed u/s 36(1)(va). In this judgment, the Tribunal has taken note of various judgments of Hon'ble High Courts and also the orders of the coordinate Bench of the Tribunal and observed & held as under :-

> *"34. Having gone through the Orders of the Co-ordinate Bench of Tribunal allowing the delayed payment pertaining to employees contribution, Orders of the Co-ordinate Bench of Tribunal disallowing the delayed payment pertaining to employees contribution, Judgments of various Hon'ble Courts disallowing the delayed payment, Judgments of various Hon'ble Courts disallowing the delayed payment, provisions of Section*

2(24)(x), Section 36(1)(va), Section 43B, Section 139(1) of the Income Tax Act, 1961, provisions of Finance Act 2021, Memorandum explaining the provisions in Finance Bill, 2021 and the specific amendments which will take effect from 01.04.2021, we hereby hold that no disallowance is called for belated payment of the employee's contribution to the respective ESI and EPF fund in the case of assessee who have deposited the same before the due date of filing of Income Tax Return."

6. Thus, the disallowance as sustained by the ld. CIT (A) is directed to be deleted and the appeal filed by the assessee is allowed.

Order was pronounced on 5TH day of April, 2022.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 05.04.2022
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Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.