IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

(VIRTUAL COURT)

BEFORE SH. N. K. SAINI, VICE PRESIDENT AND
SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. No. 4/Asr/2022
Assessment Year: 2018-19

J.M.C. Plywood Focal Point Mansurpur Goraya, Distt. Jalandhar 144409-Punjab [PAN: AAHFJ 8455B]	Vs.	Income Tax Officer, Ward-3, Phagwara Punjab
(Appellant)		**(Respondent)**

Appellant by : Sh. P. N. Arora (Adv.)
Respondent by: Sh. S. M. Surendranath, Sr. DR

I.T.A. No. 20/Asr/2022
Assessment Year: 2019-20

Khalsa Bakery Sadar Bazar, Kapurthala 144601 (Punjab) [PAN: AAHFK 1650K]	Vs.	DCIT, CPC, Bangalore
(Appellant)		**(Respondent)**

Appellant by : Sh. Gunjeet Singh Syal (Adv.)
Respondent by: Sh. S. M. Surendranath, Sr. DR

I.T.A. No. 21/Asr/2022
Assessment Year: 2019-20

M/s Diamond Red Tanneries Near Hathi Khana Kapurthala, (Punjab) [PAN: AABFD 0155C]	Vs.	Dy. Commissioner of Income Tax, Central Circle-1, Jalandhar
(Appellant)		**(Respondent)**

Appellant by : Sh. Samir Mahajan, C.A.
Respondent by: Sh. S. M. Surendranath, Sr. D.R.

Date of Hearing: 31.01.2022
Date of Pronouncement: 24.02.2022

ORDER

Per Anikesh Banerjee, JM:

1. All the aforesaid appeals have been filed by the different assessees against the orders which were passed by National Faceless Appeal Centre Delhi (in brevity NFAC)/CIT(A) on dated 05/11/2021, 24/12/2021 & 28/12/2021 for AY 2018-19, 2019-20 & 2019-20 respectively.

2. First we will consider the appeal No.4/Asr/2022 for AY 2018-2019 as lead case.

3. Grounds of the Assessee are as follows:-

> *"1. That the order passed by the Assistant Director of Income Tax, CPC, Bangalore u/s 143(1) and the order of the Learned CIT(A) thereby confirming the same are both against the facts of this case and are untenable under the law.*
>
> *2. That no reasonable and proper opportunity of being heard was allowed before passing the said order. As such the order passed by the Assistant Director of*

Income Tax and the order of the worthy CIT(A) thereby confirming the same are bad in the eyes of law and the same are liable to be cancelled.

3. *That the A.O. has grossly erred in making the addition of Rs.3,21,740/- on account of late payment of ESI/Provident Fund by few days only. The Ld. CIT(A) has again grossly erred in confirming the same without appreciating the facts of this case and without applying his mind and without following the judgments of this very bench and various High Courts and Supreme Court of India.*

4. *That the authorities below may kindly be directed to allow the sum of Rs.3,21,740/- on account of payment of ESI and PF. The authorities below did not appreciate that this payment was made before the due date of filing the return. As such there was no reason and occasion for disallowing the said payment. As such the assessee was clearly entitled for deduction of Rs.3,21,740/-.*

5. *That any other ground of appeal which may be argued at the time of hearing of the appeal"*

4. The counsel of the assessee filed the written submission on dated 28/01/2022 which is kept in record. Ground no 1to 4 preferred by assessee are against the action of CIT(A) who upheld the action of the Assessing Officer (in brevity AO) disallowing the sum amount of Rs. 312,740/- being contribution of employees' share towards ESI, PF or any other fund set up for the welfare of the employee u/s 36(1)(va) read with Section 2(24)(x) of the Income Tax Act, 1961 [hereinafter referred to as the Act] when the payments were made before filing of return u/s 139(1) of the Act.

5. Facts of the case, in brief are that the AO disallowed the deduction amounting to Rs.312,740/- during processing of the return U/s 143(1) of the Act in respect of employees' contribution towards provident fund deducted as per the Provident Fund Act (hereinafter referred to as the PF Act) & Employees' State Insurance Act, 1948 (hereinafter referred to as the ESI Act). The AO made the disallowance by keeping in view the provision of Section 2(24)(x) rws 36(1)(va) of the Act, as the employees contribution is to be paid within the due date of payment

as prescribed in the respective Acts (PF/ESI Acts) to claim deduction. The assessee paid the amount before filing of Income tax Return U/s 139(1) of the Act but not within the stipulated dates under PF & ESI Acts.

6. The disallowances made in the order passed u/s 143(1) of the Act was challenged before the CIT(A). The CIT(A) upheld the order of the AO. The observations of CIT(A) in Page no. 6-7 of the impugned order are as follows:-

> *"4.3.3 it is relevant to refer to the following case laws which have been decided against the appellant.*
>
> *(i)* ***M/s Unifac Management Services (India) Pvt. Ltd. vs DCIT***
>
> ***The Hon'ble Madras High Court vide its order dated October 23, 2018 has held scope of Section 43B and Section 36(1)(va) is different and there is no question of reading both provisions together to consider as to whether the assessee is entitled to deduction in respect of the sum belatedly paid towards such contribution, especially when such sum is admittedly, a sum received by the assessee /employer from his employee. Therefore, for considering such question, application of Section 36(1)(va) r.w.s. 2 (24)(x) alone is the proper course and any other interpretation would defeat the object and scope of both the provisions viz., 43B and 36(1)(va). Accordingly, the writ petition fails and the same is dismissed.''***
>
> *(ii)* ***Hon'ble Kerala High Court in CIT vsMerchem Ltd. 378 ITR 443 (ker)held that in case of employee's contribution, an assessee is entitled to deduction u/s 36(1)(va) only if the amount so received from employee is credited in specified account within the due date as per the relevant statute.***
>
> ***(iii) Hon'ble Delhi Court in case of Bharat Hotels Ltd. 410 ITR 417 (Del.)***
>
> ***(iv) Hon'ble Gujarat State Road Transport Corporation 366 ITR 170 (Gujarat)held that where assessee did not deposit employees contribution in relevant fund before the due date prescribed in Explanation to Section 36(1)(va), no deduction would be admissible even though he deposits the same before due date of ITR u/s 43B.***
>
> ***(v) Hon'ble MP High Court in B.S. Patel vs. DCIT reported in 326 ITR 457 (MP)***

(vi) The decision of CIT vs. Alom Extrusions Ltd. The Hon'ble Supreme Court is not applicable to the facts and circumstances of the case because Hon'ble Supreme Court has decided the issue in Alom Extrusions Ltd. case qua employer's contribution as per Section 43B(b) of the Act and not employees contribution u/s 36(1)(va) of the Act.

(vii) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision of an explanation can add to and widen the scope of the main section.

If it is in its nature clarificatory then the explanation must be read into the main provision with effect from the time that the main provision came into force.

[Shyam Sunder vs. Ram Kumar (2001) 8 SCO 24 (para 44)]

[Brij Mohan Das Laxman Das vs. CIT (1997) 138 CTR (SC) 214]

4.4 In view of the above discussion, decisions of the various High Courts as discussed supra, the explanation and the intention of the legislature set out through the Memorandum to the Finance Act, 2021, it is evident that the employee's contribution was never intended to be covered by Section 43B.

This has been reiterated and reinforced through Explanation 5 to Section 43 B and Explanation 2 to the Section 36(1)(va) inserted by Finance Act, 2021.

Therefore, the case laws relied by the appellant are not applicable to the facts and circumstance of the case.

4.5 Accordingly, the Ground of Appeal No.1 and 2 of the appellant is dismissed and the addition of Rs. 3,21,747/- is confirmed.

4.6 In the result, the appeal is ***dismissed."***

7. Being aggrieved against the order of CIT(A), the assessee has filed appeal before us.

8. The Ld. Counsel of the assessee also vehemently argued the matter before us. He placed the reliance on the orders of jurisdictional High Court & coordinate benches which are in favour of asseessee. The orders are as follows.

a. Jurisdictional High Court:-

i. CIT vs Lakhani Rubber Udyog (P) Ltd ITA no 215 of 2010 (Punjab & Haryana)
ii. CIT vs Nuchem Ltd [2015] 59 taxmann.com 455 (Punjab & Haryana) and [2013] 40 taxmann.com 371 (Punjab & Haryana)

b. Coordinate Benches:-

a) M/s Jalandhar Leather (India) Pvt Ltd vs DCIT, ITA 75/Asr/2021 order dated 09.11.2021
b) M/s Speedways Electric Vs ACIT ITA:- 115 &116/Asr/2021 order dated 22.12.2021
c) M/s Padmavati Mfg Co Vs ACIT, ITA:- 171/Asr/2021 order dated 19.1.2022
d) M/s Mohan Bekary Vs DCIT, ITA:- 273/Chd/2021 order dated 2.12.2021
e) Nipun Jain Vs. DCIT, ITA:- 71&72/Asr/2021 order dated 09.11.2021
f) M/s New Light Facility Management Vs. DCIT ITA:- 176&177/Asr/2021 order dated 22.12.2021

The counsel also submitted that all the payments have been made before the due date of filing of return of income u/s. 139(1) of the Income-tax Act and as such payment has been made and deposited in the Government account within the stipulated time u/s. 139(1) then no disallowance can be made in view of the decision of the Hon'ble Apex Court in the case of *CIT* v. *Vinay Cement Ltd.* [2007] 213 CTR 268, Hon'ble Delhi High Court in the case of CIT v. AIMIL Ltd. [2010] 188 Taxman 265/321 ITR 508 and Commissioner Of Income Tax, Circle-I, Kolkata vs M/S. Vijay Shree Limited, 43 taxmann.com 396 (Calcutta).

9. We have heard both the parties. The Departmental Representative of the Revenue (in brevity D/R) vehemently argued on the issues. The D/R relied on the order of CIT(A) and also submitted that the employee's contribution to PF/ESI can be allowed only if the same has been deposited within the due date prescribed under the respective Act (PF and ESI Act) and not before the due date of filing of return of income. He also mentioned that the Ld. CIT(A) has taken note of the amendment brought in by Finance Act, 2021, by virtue of which it has been clarified that Section 43B of the Act does not apply to Section 36(1)(va) of the Act and it is deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of Section 2(24)(x) applies. And thus according to Ld. DR, it is a clarificatory amendment and so is retrospective in operation and therefore the Ld. CIT(A) rightly upheld the action of AO.

9.1. During the course of argument, the D/R, relied on the paragraph 4.3 of the order of CIT(A) which reads as follows:-

> *"4.3 I have gone through the submissions of the appellant. The Grounds of Appeal are discussed and decided as under:*
>
> *It is relevant to note that clause 24 of Section 2 of the Income Tax Act, 1961 provides an inclusive definition of the income. Section 2 (24) (x) provides that income includes any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.*
>
> *It needs to be emphasized that the employer's contribution towards welfare funds such as ESI and EPF is clearly distinguishable from the employee's contribution towards welfare funds.*
>
> *Employee's contribution is employee's own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employer gets unjustly enriched by keeping the money belonging to the employees.*

4.3.1 Clause (va) of sub-section (1) of Section 36 of the Income Tax Act, 1961 was inserted vide Finance Act 1987 w.e.f. 1/4/1988 as a measure of penalizing those employers who mis-utilize employee's contributions.

It is relevant to note that the Finance Act, 2021 has inserted explanations to Section 36(1)(va) as well as Section 43B.

Explanation 2 to Section 36(1)(va) reads as under: -

For the removal of doubts, it is hereby clarified that the provisions of section 43 B shall not apply and shall be deemed never to have been applied for the purposes of determining the ***due date'*** *under this clause.*

Further, Explanation 5 to section 43B reads as under: -

For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub - clause (x) of clause (24) of Section 2 applies.

It is important to note that both the explanations use the phrase ***shall not apply and shall be deemed never to have been applied".***

This indicates that in respect of Employee's contribution to EPF and ESI, the provisions of Section 43B shall be deemed to have never been applied.

Further, it is abundantly clear from the explanations inserted in Section 36(1)(va) and Section 43B that section 43B would expressly not apply to the Employee's contribution.

4.3.2 It is also pertinent to refer to the Explanatory Notes to Finance Bill 2021 which states that clause (va) of Sub-section (1) of the Section 36 provides for deduction of 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 provides that "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 there-under or under any standing order, award, contract of service or otherwise.

Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of Section 43B. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

The Explanatory Memorandum to Finance Bill 2021 has highlighted that though Section 43 B of the Act covers only employer's contribution and does not cover employee contribution, some Courts have applied the provision of Section 43B on employee contribution as well. There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds."

10. The reliance was placed on the judgment of Hon'able Supreme Court in the case of M/s M.M. Aqua Technologies Ltd. vs. CIT, Delhi and our attention was drawn to Para 22 wherein the Hon'ble Supreme Court has held that if the retrospectivity of a taxing statute is urged due to the expression used in the Statute is "for the removal of doubts" cannot be presumed to be retrospective, if it alters or changes the law as it earlier stood.

11. The D/R had drawn our further attention on the judgment of Hon'able Delhi High Court in the case of CIT vs Bharat Hotels Ltd 410 ITR 417 (DEL). Hon'able court upheld the action of the Department disallowing the amount deposited by the assessee in respect of the employees' contribution since it was not deposited within the due date as prescribed by PF Fund and ESI Act. So therefore the Ld. D.R. requested us not to interfere in the impugned order passed by the authorities below.

12. After considering the submissions of both the parties, it is noticed the Hon'ble Delhi High Court in the case of C.I.T *v.* AIMIL Ltd. [2010] 188 Taxman 265 (Delhi) held as under:-

17. 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 Ltd.'s case (supra).

18. 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."

A similar view has been taken by the coordinate Bench ITA Nos. 115 & 116/ ASR/2021 for the AYs 2018-19 & 2019-20 in the case of M/s Speedways Electric v. ACIT, Bengaluru order dated 22.12.2021. Relevant findings are given as under:-

> *"3. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Holding a conviction that the respective clarificatory amendments made available on the statue vide the Finance Act, 2021 i.e 'Explanation 5' to Section 43B and 'Explanation 2' to Section 36(1)(va) of the Act, revealed, that the provisions of section 43B were never applicable qua the employees share of contributions to PF and ESI, the CIT(A), finding no infirmity in the disallowance of the employees share of contribution towards PF and ESI of Rs. 9,09,857/- which the assessee had failed to deposit within the stipulated time period contemplated in the said respective Acts, upheld the same. For the sake of clarity the observations of the CIT(A) qua the issue in question are reproduced as under:-*
>
> > *"4. Decision*
> >
> > *The ground No. 1& 2 of the appeal agitates against the disallowance made by the AO, of Rs. 9,09,857/- On account of delayed*

deposit of employee's contribution towards ESI and PF and are hence adjudicated together.

4.1.1 The submissions of the appellant have been carefully considered. It is the case of the appellant that several courts have held that the employee's contribution to PF/ESI even if paid late under the respective Act, is to be allowed as a deduction u/s 43B, as long it is paid within the time available u/s 139(1). This is based on the reasoning that employee's contribution to PF/ESI is covered u/s 43B (b). The reasoning that employee's contribution to PF/ ESI is covered u/s 43B(b). The appellant has further submitted that his case is covered by the decisions of the various High Courts and ITATs and therefore the disallowance made by the CPC should be deleted. However, the Act has now been amended.

4.1.2 The Finance Act 2021 has amended sec 43B as well as sec 36(1) (va) by insertion of Explanations to those sections. Explanation 5 to Section 43B, reads as under:-

> *Explanation 5. —For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies.*

Explanation 2 to section 36(1)(va) reads as under:

> *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 determining the "due date" under this clause.*

4.1.3 It may be noted that: both the.-explanations use the phrase "shall not apply and shall be deemed never to have been applied". This indicates that in respect of employees' contribution to PF & ESI, the provisions of sec 43B SHALL deemed to have never applied.

4.1.4 The present amendment to section 43B through insertion of Explanation 5 and to sec 36(1)(va) through insertion of Expl. 2, serve to only reiterate and reinforce this intention of the Legislature. As discussed earlier in this order, the language of the Explanations make it evident that sec 43B shall be deemed to have never applied.

It is imperative to peruse the Explanatory notes to Finance Bill 2021 to seek insight into the minds of the Law makers. The Explanatory notes to this amendment state as under

> *Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provides that income to include any sum received by the assessee from his*

employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees. Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head 'Profits and gains of business or profession1. Clause (va) of the said sub-section provides for deduction of 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 to mean 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 there-under or under any standing order, award, contract of service or otherwise. Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled'-to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of Section 36 of the Act. Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer's contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employer's of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished -from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions. Accordingly, in order to provide'

certainty, it is proposed to - (i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the —due date under this clause; and (ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

It is evident from the above that the Legislature never intended that sec 43B would apply to employees' contribution. The language of Expl. 5 to sec 43B, Expl. 2 to sec 36(1)(va)-and that of the above Memorandum explaining the Finance Act 2021, make it abundantly clear that employees contribution is out of the ambit of sec 43B. In fact; the present amendments and the corresponding explanatory notes to finance act 2021:, only seek to reinforce and reiterate the original intention of the legislature in 1983.

Admittedly, the employees' contribution to PF & ESI are included in the definition of income u/s 2(24)(x) and form income of the appellant. Whenever the appellant pays this to the PF/ESI authorities, a deduction for the same is allowed to him. The question therefore is whether provisions of sec 43B would apply to such payments. It is evidently clear from the above Explanations inserted in sections 43B and 36(1)(va), that sec 43B would expressly not apply to the employees' contribution.

However, a plain reading of sec 43B along with clause (b) covers only EMPLOYERS contribution and not employees' contribution.

4.1.5 It remain to decide whether the Explanation 5 to sec 43B & Expl 2 to sec 36(1)(va) would apply to the present AY. To decide this, a little history of sec 43B and subsequent amendments would be in order. Sec 43B was brought into the statute book w.e.f 01.04.1984, thereafter, the proviso to sec 43B was inserted w.e.f 01.04.1988, while Explanation 2 to that proviso was inserted w.e.f. 01.04.1984 by the Finance Act 1989. Before the insertion of the proviso and Explanation 2, the words 'any sum payable' was interpreted by various high courts to mean that 'to attract the provisions of section 43B it is not sufficient to have incurred the liability. Rather the payment has also to be come due. E.g. Sales tax collected for March ending quarter does not become due by 31st March and though by collection of such sales tax in the last quarter, liability stands incurred, the same does not fall due by 31 st March and hence no disallowance can be made u/s 43B in respect of such sales tax'. This was the interpretation of sec 43B before insertion of Proviso to Section 43B. The proviso inserted w.e.f 01.04.1988 allowed payment till the due date for filing the return. The proviso was apparently prospective as it was

inserted w.e.f. 01.04.1988, but it did not resolve the controversy so far as employer's contribution to PF & ESI was concerned. The issue of interpretation of the words "any sum payable" continued. To cure this lacuna Explanation 2 was inserted by the Finance Act, 1989 with retrospective effect from 01.04.1984. While making the amendment the memorandum to Finance Bill was quite specific in stating that the amendment by way insertion of the Explanation 2 is with retrospective effect from 01.04.1984. The controversy and various interpretations gained a quietus by the decision of the Hon'ble Supreme Court in Allied Motors (P) Ltd vs CIT 91 Taxman 205 (SC). Therein it was held that the proviso to Section 43B allowing payment till the due date for filing the return was to have retrospective effect from 01.04.1984 even though the same was inserted w.e.f. 01.04.1988. While holding so the Supreme Court took into account the intent of the proviso as well as of the Explanation 2 and taking a combined view of both the amendments, it held that the proviso has been brought in to cure undue difficulty for the tax payers and hence held to be having retrospective application. It is therefore now settled law that the proviso to sec 43B itself has retrospective effect as held by the Hon'ble Supreme Court in the case of Allied Motors (supra). It naturally follows that an Explanation to either sec 43B or the proviso, would also be effective from the date from which the section or proviso was inserted. In the present amendment, Explanation 5 seeks to clarify that provisions of sec 43B shall deemed to have never applied to employees' contribution. As has been held by the Hon'ble Supreme Court, it has to naturally follow that this explanation 5 would also apply from 1/4/1984 and would therefore be retrospective. Any other interpretation would lead to an anomaly, whereby the section and proviso itself would be effective from 01/04/1984, but the explanation thereof would be prospective. In this connection, the observation of the Hon'ble Supreme Court in the case of Allied Motors (supra) are relevant in so far as they explain unintended consequences of an amendment.

7……..

Therefore, section 43B(a), the first proviso to section 43B and Explanation 2 have to be read together as giving effect to the true intention of section 43B If Explanation 2 is retrospective, the first proviso will have to be so construed Read in this light also, the proviso has to be read into section 43B from its inception along with Explanation 2.

8. This position is reinforced by a departmental Circular No. 550 dated 1-1-1990 (See Taxmann's Direct Taxes Circulars, Vol. 4, 1995 edn., pp. 2.1741, 2.1750):

The departmental understanding also appears to be that section 43B, the proviso and Explanation 2 have to be read together as expressing\ the true intention of section 43B. Explanation 2 has been expressly made retrospective. The first proviso, however, cannot be isolated from

Explanation 2 and the main body of section 43B. Without the first proviso, Explanation 2 would not obviate the hardship or the unitended consequences of section 43B. The proviso supplies an obvious omission. But for this proviso the ambit of section 43B becomes unduly wide bringing within its scope those payments which were not intended to the prohibited from the category of permissible deductions.

4.1.6 It is evident from the above observations of the Hon'ble Supreme Court that the main section, the explanation and the intention of the Legislature set out through the Memorandum to the Finance Act have to be read together harmoniously.

As discussed above, it is evident from the language of sec 43B(b) and the explanatory. notes to Finance Act 1983, that employees' contribution was never intended to be covered by sec 43B.

4.1.7 Reference is also made to the Supreme Court Judgment in the case of Commissioner of Income Tax-1, Ahmedabad vs Gold Coin Health Food Pvt. Ltd (2018) 9 SCC 622, wherein while dealing with a similar issue, Hon'ble Supreme Court in Para 15 of its decision has again quoted from the book "In Principles of Statutory Interpretation, 11th Edn. 2008, Justice G.P. Singh" regarding retrospective operation of statutes as follows;

> *" In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language shall be deemed always to have meant' or 'shall be deemed never to have included" is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be s.o construed when the amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law."*
>
> *"The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory*

Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended... An amending Act may be purely declaratory to dear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69)".

"Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to 'explain' a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature."- Zile Singh vs. State of Haryana, (2004) 8 SCC 1.

4.1.8 In the instant appeal also, the issue involved had conflicting judgments from the different High Courts. The Finance Act, 2021 has brought out the amendments, as extracted above, which are purely clarificatory, to clear a meaning of a provision of the principal Act which was already implicit. Based on the judicial pronouncements as extracted out, it can be safely concluded that the clarificatory amendment brought out by the Finance Act, 2021 will be applicable to the issue in the instant appeal for the earlier year also. It is also clear that the scope of Section 43B and Section 36(1)(va) are different and thus, there is no question of reading both provisions together to consider as to whether the taxpayer is entitled to deduction in respect of the sum belatedly paid towards such contribution, especially when such sum is, admittedly, a sum received by the taxpayer/employer from his .employee. Therefore, for considering such question, application of Section 36(1)(va) read with Section 2(24)(x) alone is the proper course an,d any other interpretation would only defeat the object and scope of both the provisions viz., 43B and 36(1)(va). If the payment was not done within the stipulated time prescribed Cinder the relevant enactment, the benefit of deduction cannot be claimed:, since such belated payment is not a valid payment to attract deduction, under the purview of the Income Tax Act.

4.1.9 The Ground No.1, & 2 of the appeal are disallowance related to PF/ESI. In view of the aforesaid facts,, if is held that the AO has correctly disallowed a sum of Rs.9,09,857/-being employee's contribution to PF & ESI. As the appellant failed to deposit the same within due dates specified in the respective Acts by invoking provisions of. Sec36(1)(va) read with Section 2(24)(x) and, provisions of sec 43B are not applicable to the employees contribution to PF/ESI. Therefore, I have no reason to deviated from the decision of the AO. Accordingly, the disallowance made by the AO is confirmed and Ground no. 1 & 2 of the appeal are dismissed."

4. The assessee being aggrieved with the order of the CIT(A) has carried the matter before us. At the very outset of the hearing of the appeal, it was submitted by the ld Authorized Representative (for short 'AR') for the assessee that the issue in hand was squarely covered by the order of the Tribunal in the case of Vinko Auto Industries Ltd Vs. DCIT, CPC, Bangalore in ITA No. 63 & 64/ASR/2021 dated 08/11/2021. Our attention was drawn by the ld A.R to the observations made by the tribunal in the aforesaid order. On a specific query by the bench as regards the bearing of the amendments made available on the statue vide the Finance Bill, 2021 i.e "Explanation 5" to Section 43B and "Explanation 2" to section 36(1)(va) of the Act qua the adjudication of the issue in hand, it was submitted by Mr. S.S Kalra, the ld A.R, that as both of the said amendments were prospective in nature that were effective from 01.04.2021, therefore, the same would not be applicable to the present case of the assessee which pertained to a period prior to the aforesaid amendments i.e A.Y 2019-20. In order to buttress his aforesaid claim the ld A.R had drawn support from the aforesaid order of this tribunal in the case of Vinko Auto Industries Ltd (supra). It was submitted by the ld A.R that the issue as to whether or not the aforementioned amendments that were made available on the statue vide the Finance Act, 2021 i.e "Explanation 5" to Section 43B and "Explanation 2" to Section 36(1)(va) were clarificatory in nature and would be applicable to the earlier years, as was claimed by the department, or, were applicable prospectively, as claimed by the assessee, had exhaustively been deliberated upon and answered in favour of the assessee by the tribunal. Our attention was specifically drawn by the ld A.R to the observations of the tribunal qua the issue in hand. Backed by his aforesaid contention, it was submitted by the ld A.R that the issue in hand was squarely covered by the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Alom Extrusions Ltd (2009) 319 ITR 306 (SC) and was thus no more res integra; and the amendments made available on the statue vide the Finance Act, 2021 i.e "Explanation 5" to Section 43B and "Explanation 2" to Section 36(1)(va) which were applicable prospectively w.e.f 01.04.2021 had no bearing on the case of the assessee before us. It was submitted by the ld. A.R that though the employees share of contributions to PF and ESI were deposited by the assessee beyond the prescribed time limit contemplated in the said respective employee welfare acts, but prior to the 'due date' of filing of its return of income for the year under

consideration, therefore, the same were saved by the provisions of Sec. 43B of the Act and had wrongly been disallowed by the A.O.

5. Per contra, the ld D.R relied upon the orders of the lower authorities. It was vehemently submitted by the ld D.R that as the respective amendments to Sec. 36(1)(va) and Sec. 43B of the Act that were made available on the statue vide the Finance Act, 2021 were clarificatory in nature, therefore, the same were duly applicable to the case of the assessee before us. In order to drive home his aforesaid claim the ld D.R took us through the respective amendments to the aforesaid statutory provisions. It was submitted by the ld D.R that the amendments to section 43B clearly spelt out that the provisions of the said section shall not be applied and shall be deemed never to have been applied to a sum received by the assessee from any of his employee to which the provisions of sub-clause (x) of section (24) of section 2 applied. It was further submitted by the ld D.R that the "Explanation 2" to section 36(1)(va) therein further clarified that the provisions of section 43B shall not be applied and shall be deemed never to have been applied for the purpose of determining the "due date" under the aforesaid clause. In the back drop of his aforesaid contentions, it was submitted by the ld D.R that going by the rule of plain and strict literal interpretation it could safely be gathered that Sec. 43B had no application to the employees contributions to employee welfare funds i.e ESI and PF which fell exclusively within the scope and domain of Sec. 36(1)(va) of the Act. On the basis of his aforesaid contentions, it was submitted by the ld D.R that as the assessee had delayed the deposit of the employees contributions to PF and ESI, therefore, as per the unambiguous provisions of Sec. 36(1)(va) of the Act the said amounts had rightly been disallowed by the ld AO.

6. We have heard the ld. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed by them to drive home their respective contentions. In order to answer the issue as to whether or not the employees contribution to welfare funds fall within the scope and domain of Sec. 43B of the Act, we may herein draw support from the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Hindustan Organic Chemicals Ltd in ITA No. 399/12, dated 11.07.2014. In the said case, the Hon'ble High Court of Bombay was inter alia

called upon to answer the following substantial question of law that was raised in the appeal filed by the revenue :-

> *"(A). Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal, in law, was right in allowing the claim of the Assessee on account of delayed payments of P.F. Of employees' contribution amounting to Rs.1,82,77,138/- by relying on the decision of the Hon'ble Supreme Court in the case of CIT vs. Alom Extrusion Ltd. (319 ITR 306) ?"*

After referring to the amendments that were made available to section 43B of the Act, the Hon'ble High Court answered the aforesaid question in the affirmative and upholding the order of the tribunal qua the aforesaid aspect dismissed the appeal filed by the revenue. Also, we find that a similar view had been arrived at by various Hon'ble High Court, as under:-

a. *CIT Vs. Amil Ltd reported (2010) 321 ITR 508 (Delhi High Court)*
b. *CIT Vs. Hemla Embroidery Mills (P) Ltd. (2014) 366 ITR 167 (P&H)*
c. *Bihar State Warehousing Corporation Ltd.Vs. CIT 386 ITR 410 (Patna)*
d. *Sagun Foundary Pvt. Ltd Vs. CIT 145 DTR 265 (All)*
e. *CIT Vs. Mark Auto Industries (2008) 358 ITR 43 (P&H)*
f. *CIt Vs. Jaipur Vidyut Vitran Nigam Ltd (2014) 363 ITR 307 (Raj)*
g. *Essae Teraoka Pvt. Ltd Vs. DCIT (2014)366 ITR 408 (Kar)*
h. *CIT Vs. Vijay Shree Ltd (2014) 43 Taxmann.com 396 (Cal)*
i. *CIT Vs. Kichha Sugar Co Ltd (2013) 356 ITR 351 (Uttarakhand)*

In the backdrop of the aforesaid settled position of law, we are of the considered view that the no distinction is to be drawn between the employers as well as employees contribution to PF and ESI as both are covered u/s 43B of the Act.

7. Now, we shall take up the claim of the department that the amendments made available on the statue vide the Finance Act, 2021 i.e "Explanation 5" to Section 43B and "Explanation 2" to Section 36(1)(va), being clarifictory in nature, would thus be applicable retrospectively and would take within its sweep the case of the assessee before us. Insofar the aforesaid claim of the revenue is concerned, as stated by the ld A.R, and rightly so, the said issue is squarely covered by the order of this tribunal in the case of Vinco Auto Industries Ltd (supra). As observed by us hereinabove, the tribunal in its

order had after drawing support from the order of the ITAT, Hyderabad Bench in the case of the Value Momentum Software Services Pvt Ltd. Vs. DCIT in ITA No. 2197/Hyd/2017, dated 19.05.2021, had observed, that the amendments in section 36(1)(va) and section 43B of the Act, vide respective explanation that had been made available on the statue by the Finance Act, 2021, as therein provided are applicable only from 01.04.2021 i.e. w.e.f A.Y 2021-22 onwards. For the sake clarity, the observations of the tribunal in its aforesaid order are culled out as under:-

> *"5.1 We may observe that the ld. CIT(A) in its order at para no. 7.15 itself has observed that the issue has been highly contentious and different High Courts have taken divergent views on the same issue, out of which some are in favour of the assessee and some are against the assessee. The ld. CIT(A) further observed that the judgments and orders relied upon by the assessee have been rendered before the clarificatory amendments made in the Finance Act, 2021 and the Finance Act, 2021 has put an end to this controversy.*
>
> *5.2 Admittedly there is plethora of judgments in favour of the Assessee's contention and of the Revenue. The controversy with regard to divergent views of different High Courts, has been settled by the Hon'ble Apex Court in the case of CIT Vs. M/s. Vegetables Products Ltd. (88 ITR 192) by laying the dictum that if two reasonable constructions of a taxing provision are possible that construction which favours the Assessee must be adopted. The Hon'ble jurisdictional High Court in the case of CIT Vs. M/s Hemla Embroidery Mills (P) Ltd. (366 ITR 167) (P&H HC) and in the case of CIT Vs. M/s Mark Auto Industries Ltd. (358 ITR 43) (P&H HC) clearly held that the assessee is entitled to claim deduction of employee's share of ESI & PF u/s.43B of the Act, if the same has been deposited prior to the filing of return of income u/s.139(1) of the Act. From the above judgments of the Hon'ble jurisdictional High Court, it is clear that the Hon'ble Court has not drawn any distinction between the employee's and employer's share qua PF & ESI contributions. Admittedly there are no contrary judgements of the jurisdictional High Court against the assessee on the aspect under consideration hence, first determination of the Ld. CIT(A) qua non-applicability of the provisions of Section 43B of the Act to the employee's share qua PF & ESI, is unsustainable.*
>
> *5.3 Now, coming to the second aspect/determination made by the CIT(A) to the effect that the amendment made in Section 36(1)(va) and 43B of the Act by Finance Act 2021 has to be considered as clarificatory in nature and having retrospective effects, therefore would be applicable to the previous assessment years as well.*
>
> *We may observe that various benches of the ITAT including Hyderabad Bench in the case of Value Momentum Software Services Pvt.*

Ltd. (ITA No.2197/Hyd/2017 decided on 19.05.2021), have taken into consideration the identical issue qua applicability of the amendment to Section 36(1)(va) and Section 43B of the Act, by inserting Explanations by the Finance Act, 2021 and clearly held that the amendment shall be applicable from 1st April, 2021 onwards . It is also relevant to note that the CBDT has also issued Memorandum of Explanation qua applicability of the amended provisions of Section 36(1)(va) & 43B of the Act w.e.f. 1st April, 2021, and Assessment Year 2021-21 onwards, hence there is no doubt qua applicability of the amended provisions referred above, prospectively.

On the aforesaid discussion, the second aspect as considered/determined by the ld. CIT(A) qua retrospective application of the amended provisions of Section 36(1)(va) and 43B of the Act wherein Explanations have been inserted by Finance Act, 2021 qua employees' share in respect of PF & ESI Act, is also unsustainable .

5.4 In view of the above discussions, the disallowances of Rs.5,88,203/- for A.Y.2018-2019 and Rs.60,540/- for A.Y.2019-2020 made by the A.O. and confirmed by the CIT(A) are not sustainable and, hence, the same stands deleted."

On the basis of our aforesaid deliberations, we are of the considered view, that as the amendments made available to the statue vide the Finance Act, 2021 i.e "Explanation 5" to Section 43B and "Explanation 2" to Section 36(1)(va) are applicable w.e.f 01.04.2021 i.e. from A.Y 2021-22 onwards, therefore, the same would not have any bearing on the case of the assessee before us i.e for A.Y 2019-20. Accordingly, as per settled position of law as laid down as per the aforementioned judicial pronouncements, we, herein conclude, that as the employees contributions to PF and ESI of Rs. 9,09,857/- was deposited by the assessee before the "due date" of filing of its return of income for the year under consideration, therefore, the same being saved by the provisions of Sec. 43B of the Act could not have been disallowed by the A.O. We, thus, in the backdrop of our aforesaid deliberations set-aside the order of the CIT(A) and vacate the disallowance of Rs. 9,09,857/- made by the A.O. The ***Grounds of appeal Nos. 1 to 4*** *are allowed in terms of our aforesaid observations."*

13. We, therefore, by considering the totality of the facts as discussed herein above, are of the view that the employees' contribution under PF & ESI Acts are already settled in order of the cases *CIT* v. *Vinay Cement Ltd.* [2007] 213 CTR

268, CIT v. AIMIL Ltd. [2010] 188 Taxman 265/321 ITR 508, CIT vs Nuchem Ltd [2015] 59 taxmann.com 455 (Punjab & Haryana) and [2013] 40 taxmann.com 371 (Punjab & Haryana). The catena of judgments are in favour of assessee.

Accordingly, we hold that no disallowance can be made in the assessment year prior to Assessment Year 2021-22. In the result, the disallowances confirmed by the NFAC/CIT(A) related to ITA No. 4/Asr/2022, 21/Asr/2022 & 20/Asr/2022 are deleted.

14. In the result, the assessee's appeals are allowed.

Order pronounced in the open court on 24.02.2022

Sd/-	Sd/-
(N. K. Saini)	**(Anikesh Banerjee)**
Vice President	**Judicial Member**

Date: 24.02.2022

GP/Sr. PS

Copy of the order forwarded to:

(1) The Appellant:
(2) The Respondent:
(3) The CIT(A),
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T
(6) The Guard File

True Copy

By Order