IN THE INCOME TAX APPELLATE TRIBUNAL,
JABALPUR BENCH, JABALPUR
(through virtual hearing)

BEFORE SH. SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER &
SH. MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER

ITA No.18/JAB/2022
Assessment Year: 2018-19

Gujral Hotels Private Limited, Jabalpur (M.P.) [PAN:AAACG 8410 B]	vs.	Dy. CIT, Circle-2(1), Jabalpur, (M.P.)
(Appellant)		(Respondent)

ITA No. 62/Jab/2021
Assessment Year : 2019-20

Jasuja Enterprises Private Limited, Jabalpur (M.P.) [PAN:AABCJ 3158 L]	vs.	Asst. DIT, CPC, Bengaluru
(Appellant)		(Respondent)

Appellant by	Sh. Sapan Usrethe, Adv.
Respondent by	Sh. Rajesh Kumar Gupta, Sr. DR
Date of hearing	07/04/2022
Date of pronouncement	07/04/2022

ORDER

Per Bench

This is set of two Appeals by two different Assessees directed against separate Orders by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi ('CIT(A)' for short) dated 12/11/2021 and 29/11/2021 for two consecutive years, being assessment years 2018-19 & 2019-20, dismissing/partly allowing the assessee's appeals contesting the processing

of its' returns of income for the relevant years under section 143(1) of the Income Tax Act, 1961 ('the Act' hereinafter) vide orders dated 28/8/2020 and 15/11/2019 for the said two consecutive years respectively. The appeals were; the issue/s involved being the same, taken for hearing, and are being decided per a common order, together.

2. At the very outset, it was submitted by the ld. counsel for the assessee, Sh. Usrethe, that the only issue arising in the instant appeals is the addition of the employee's contribution to the employee welfare funds for the reason of the same having been deposited beyond the due date specified in its respect u/s. 36(1)(va), even as the same stand deposited by the due date/s of filing the return of income u/s. 139(1) of the Act for the relevant year/s. He would, toward the same, take us to the audit report u/s. 44AB of the Act for both the years (at PB pgs. 12-13 / PB pgs.27-28). The addition, being debatable, could not have been made under section 143(1), even as clarified by the Hon'ble jurisdictional High Court in *CIT v. Shikarchand Jain* [2003] 263 ITR 221 (MP); *CIT v. GEI Engineering Ltd*. [2009] 310 ITR 112 (MP), as indeed by the Tribunal in *Nikhil Mohine v. Dy. CIT* (in ITA Nos. 37 & 38/Jab/2021, dated 18.11.2021/PB pg. 17), a decision which is squarely on the point, and on which the assessee places total reliance. He, on being inquired by the Bench, stated of there being no decision by the Hon'ble jurisdictional High Court to the contrary, i.e., opining that the employee's contribution to the employee welfare funds is to be, as required u/s. 2(24)(x) r/w s. 36(1)(va), deposited by the assessee-employer by the due date of deposit under the relevant Act for the same not to be added to his total income under the Act. The ld. Sr. DR, Sh. Gupta, even as he relied on the impugned orders, could not rebut the said contentions by Sh. Usrethe and, further, on asking, could not state of any decision by the Hon'ble jurisdictional High Court directly on the point, even as he relied on the impugned order.

3. We have heard the parties, and perused the material on record.

The Tribunals' decision in Nikhil Mohine

3.1 The Revenue has, invoking section 2(24)(x) r/w s. 36(1)(va), added the Employees' contribution to the Employee Provident Fund to the assessee's returned income u/s. 143(1) as the same stood deposited beyond the due date/s specified u/s. 36(1)(va), even as, admittedly, prior to the due date of filing the return of income u/s. 139(1) for the relevant years. Reliance stands placed by it on, among others, *CIT v. Gujarat State Road Transport Corporation* [2014] 366 ITR 170 (Guj); *CIT v. Merchem Ltd*. [2015] 378 ITR 443 (Kerala); and *Unifac Management Services (India) P. Ltd. v. Asst. CIT* [2018] 409 ITR 225 (Mad). The matter stands examined at length by the Tribunal in *Nikhil Mohine* (supra), relied upon by the appellant, wherein, noticing, *inter alia*, the cited decisions, it held that in view of the cleavage of judicial opinion in the matter and the limited scope of an adjustment u/s. 143(1)(a) (or an amendment u/s. 154), the same could not be decided on merits. The decisions by the Hon'ble High Courts holding the employee's contribution as being covered by s. 43B(b), implying, in context, u/s. 37(1) r/w s. 43B(b), which were aplenty (para 4, 8 of the impugned order), it opined, could be validated only by disregarding the clear language of the relevant provisions, upheld constitutionally and not read down. The said decisions must nevertheless be respected, so that, there being no decision by the Hon'ble jurisdictional High Court in the matter, no adjustment contrary thereto could be made u/s. 143(1) or u/s. 154. The only manner, therefore, available for the Revenue to effect an adjustment u/s. 143(1)/154 is where the *Explanations* to section 36(1)(va) and s. 43B(b) inserted by Finance Act, 2021, which attempt to resolve the issue of the employee's contribution to the employee welfare funds as being governed by section 43B(b), i.e., to the exclusion of s. 36(1)(va), are held as retrospective. Legislative intent being the cornerstone and the sole determinant of any interpretative exercise, both the language of the relevant provisions, as well as of the recently inserted *Explanations* thereto, introduced

with a view to, as stated therein, remove any doubt in the matter, it opined, are unambiguously clear, so that s. 36(1)(va) and s. 43B operate in different fields and are applicable on different sums. Further, the stated date of the coming into effect (of the *Explanations*), i.e., 01/4/2021, it explained, would though be of no moment in view of the express language deeming the stated position as applicable since inception; that being the reason for bringing the *Explanations* on the statute, as the said amendments could otherwise have been effected through prospective clause/s to the relevant provisions. Rather, the tenor of the language employed, clearly giving the stated position a retrospective effect, necessarily requires the *Explanations* to be read as inserted from a later date. That is, the fact of insertion of the said *Explanations* w.e.f. a later date is consistent with the language giving it a retrospective effect and, thus, does not impinge adversely on it being regarded as so. Further still, noticing the settled legal position *qua* the test for determining retrospectivity, i.e., if a provision could be construed without the aid of the subsequent amendment thereto to take within its ambit the said amendment, the issue was also examined by the Tribunal on merits, i.e., for the said limited purpose, to find that the view canvassed by or on the assessee's behalf could be sustained only by ignoring the existence of s. 36(1)(va) – which governs the deductibility of the employees' contribution to the employee welfare funds, on the statute-book; clearly, an impermissibility. Another fundamental infirmity in the assessee's argument is in regarding the employee's contribution, deemed by the legal fiction of s. 2(24)(x) as the assessee-employer's income, as an expense deductible u/s. 37(1), which could be so only where it is not recoverable – an impossibility, as the said deeming applied only on receipt thereof, again bringing s. 36(1)(va) into play for its deduction, and which would therefore have to be given effect to. That is, even regarding the same, for the sake of argument, as covered by s. 43B, a *non-obstante* provision, inasmuch as s. 43B applied only *qua* deductions 'otherwise allowable', i.e., under any provision of the Act, it rendered the

question of law posed before the Hon'ble Courts, i.e., if the employee's contribution to the employee welfare funds is exclusively covered u/s. 43B, as itself, with respect, misplaced, if not irrelevant. The view being canvassed was, thus, it held, viewed from any angle, wholly untenable. The view expressed by the Tribunal is in fact in agreement with that projected by the Board per its Circular (No. 22/2015, dtd. 17/12/2015), as also that canvassed per the impugned order/s with reference to several decisions, both explaining, as did the Explanatory Notes on the insertion of s. 36(1)(va) on the statute, the object of the said provision. It is this view, which in fact, as also noticed by the Tribunal, represented the uniform view across all the Hon'ble Courts prior to the deletion of the second *proviso* to s. 43B by Finance Act, 2003, w.e.f. 01/4/2004, and which (view) the *Explanations* to ss. 36(1)(va) and 43B by Finance Act, 2021 seek to statutorily clarify in view of the conflict of judicial opinion, passing thus the test of retrospectivity, even as unequivocally expressed per the unambiguous language thereof. The *Explanations* under reference were therefore clarificatory and, thus, retrospective.

3.2 The said *Explanations*, the Tribunal continued, had however been, as clear from a reference to the Notes on the Clauses to, and the Memorandum explaining the Provisions of, the Finance Bill, 2021, reproducing the same, proposed as prospective amendments. The amendments by way of *Explanation 5* to s. 43B and *Explanation 2* to s. 36(1)(va), it concluded, are to therefore take effect only from AY 2021-22, and which view is unmistakable on a plain reading of the said documents.

Decision

4.1 The view recorded in the impugned order/s on the merits of the additions – even as the same agrees with that expressed by the Tribunal in *Nikhil Mohine* (supra)(see para 3.1 of this order), is of little consequence in view of the limited scope of an adjustment u/s. 143(1), the law on which is well-settled, with the

Explanatory Notes to the Provisions of the Finance Bill, 2021 itself admitting of a conflict of judicial opinion, explaining that to be the reason for effecting the amendments per the said *Explanations*. The only circumstance justifying the impugned addition/s is a decision/s by the Hon'ble jurisdictional High Court (also see para 4.2). No such decision, however, despite asking, stands brought to our notice by the parties, or otherwise found. The decision by the Hon'ble jurisdictional High Court in *B.S. Patel v. Dy. CIT* [2010] 326 ITR 457 (MP), also noticed in *Nikhil Mohine* (supra), is not squarely on the point and, therefore, of no assistance to the Revenue. As regards the aspect of the retrospective nature of the *Explanations* under reference, we again find no difference in the view expressed in the impugned order/s, with that by the Tribunal in *Nikhil Mohine* (supra), i.e., *per se*. So, however, as afore-noted, the said *Explanations* themselves stand proposed as prospective amendments, as stated in the Notes on the Clauses to, and the Memorandum explaining the Provisions of, the Finance Bill, 2021, with a view to, as explained, settle the controversy arising due to the contrary view expressed by some High Courts, for which reference may be made to para 5.4 of the Tribunal's order (also refer paras 3.1 & 3.2 above). There is, accordingly, no question of the same being given a retrospective effect.

4.2 There is, in view of the foregoing, no question of the said *Explanations* being read as retrospective, so as to apply for the relevant years, sustaining the impugned additions, which therefore fail. This is, however, subject to any decision/s by the Hon'ble jurisdictional High Court, which would, where so, hold, even justifying a rectification u/s. 154/254(2), and even where rendered after the date of the order sought to be rectified (*Asst. CIT v. Saurashtra Kutch Stock Exchange Ltd.* [2008] 305 ITR 227 (SC); *CIT v. Aruna Luthra* [2001] 252 ITR 76 (P&H)(FB)). No such decision has been found, or otherwise pointed out by the parties, as was the case before the Tribunal in *Nikhil Mohine* (supra).

Any such decision, even if discovered later, may operate to amend this order, or the order giving appeal effect thereto, to bring it in conformity or agreement with the said decision/s, of course, after allowing a fair opportunity of hearing to the assessee.

4.3 The impugned additions, therefore, could not have been made under the given facts and circumstances of the case, and are directed for deletion. We decide accordingly.

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

Order pronounced in the Open Court on April 07, 2022

Sd/-	sd/-
(Manmohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Dated: 07/04/2022

Copy of the Order forwarded to:

1. The Appellant:
   a) Gujral Hotels Private Limited, Opposite State Bank of India, Civil lines, Jabalpur - 482001 (M.P.)
   b) Jasuja Enterprises Pvt. Ltd., Jasuja City, Hotel Jabali Palace, Dhanwantari Nagar, Bheragath Road, Jabalpur -482003 (M.P.)
2. The Respondent:
   a) Dy. CIT, Circle 2(1), Jabalpur
   b) Asst. DIT, CPC, Bengaluru
3. The Principal CIT-1, Jabalpur
4. The CIT(Appeals), National Faceless Appeal Centre, Delhi
5. The Sr. DR, ITAT, Jabalpur
6. Guard File