

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, KOLKATA
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sharma, Judicial Member]**I.T.A. No. 555/Kol/2021**
Assessment Year: 2018-19

Gargi Poddar (PAN: AGQPP6634B)	Vs.	Deputy Commissioner of Income-tax, Circle-49(1), Kolkata
Appellant		Respondent

Date of Hearing	04.05.2022
Date of Pronouncement	04.05.2022
For the Appellant	Shri D. K. Saha, FCA
For the Respondent	Smt. Ranu Biswas, Addl. CIT, DR

ORDER**Per Shri Rajesh Kumar, AM**

This is an appeal preferred by the assessee against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi dated 21.09.2021 for AY 2018-19.

2. This appeal of assessee is time barred by 18 days. The assessee has filed an Affidavit duly notarized explaining the cause of the delay which is due to late receipt of appellate order and due to non-access of the portal of the ITAT. We have heard rival submissions and since the Ld. DR did not raise any objection for condoning the delay, we condone the delay in filing the appeal and admit the appeal for hearing.

3. The sole grievance revolves around the action of ld. CIT(Appeals) in confirming the disallowance of Rs.45,58,960/-, which was disallowed by the Assessing Officer with the aid of section 36(1)(va) on the ground that the assessee failed to make the payment of employees' contribution to ESI & PF account within the due date provided under the PF & ESI Act. He pleaded that the issue in dispute is squarely covered by the decisions of Hon'ble Jurisdictional High Court namely in the case of (i) CIT –vs.- Vijayshree Ltd. in ITAT No. 243 of 2011 & GA No. 26607 of 2011;(ii) CIT –vs.- Philips Carbon Black Ltd. in GA No. 1382 of 2014 & ITAT 31 of 2014; (iii) CIT – vs.- M/s. Coal India Ltd. in ITA 12 of 2015 and (iv) M/s. Akzo Nobel India

Ltd. –vs.- CIT in ITA No. 110 of 2011. This aspect has been considered by the Coordinate Bench in the case of Lumino Industries Ltd. –vs.- ACIT (ITA No. 231 & 365/KOL/2021). The ld. D.R., on the other hand, relied upon the orders of revenue authorities.

4. Recently the coordinate bench has considered this aspect in ITA Nos. 531 & 532/KOL/2021, wherein the coordinate bench took note of the earlier order of ITAT, Kolkata dated 09.03.2022 whereby the Tribunal considered the impact of amendment brought into section 36(1) as well as 43B by Finance Act, 2021. The discussion made in that order read as under:

“3. On due consideration of the above facts and circumstances, we find that ITAT, Kolkata has duly examined the amendment brought in by virtue of Finance Act, 2021. On the proposition and the discussion made by the ITAT in the case of Lumino Industries Limited & Others read as under:-

“17. Have heard both the parties. We note that the Finance Bill, 2021 has brought in an amendment which disallows the employees’ contribution made in PF and ESI if not made within the due date as prescribed by the respective statutes (PF and ESI Act). So after the amendment has been inserted according to Shri Miraj D Shah takes effect from 1st April, 2021 i.e AY 2021-22 and subsequent assessment year and if the remittance of PF/ESI Employees’ Contribution is not made within the time prescribed by the PF/ESI Act then the remittance cannot be allowed as a deduction which is prospective in operation. Whereas according to Ld. CIT(A), the amendment brought in is clarificatory in nature so, retrospective in operation. So we have to adjudicate this issue whether the amendment brought in by Finance Act, 2021 is prospective or retrospective in operation. We note that before this amendment has been inserted by Finance Bill, 2021, the Hon’ble Jurisdictional Calcutta High Court in the case of Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra) has held that the payment of employees’ contribution if made by an assessee before the due date of filing of return of income u/s 139(1) of the Act, is allowable as a deduction. We note that by Finance Act, 2021, the provision of Section 36(1)(va) as well as Section 43B has been amended to this extend by inserting the Explanation 2 whereby it is clarified that the provision of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the due date under this clause. For ready reference, we reproduce the Explanation-2 to Section 36(1)(va) as under:

“Section 36(1)(va)

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 purpose of determining the ‘due date’ under this clause’

18. We find that this amendment has been brought in the Act to provide certainty about the applicability of Section 43B in respect of belated payment of employees’ contribution. In order to test whether the amendment brought in later is retrospective or not one has to apply the test as laid by the Hon’ble Supreme Court in the case of M/s Snowtex Investment Ltd. (supra) wherein the Hon’ble Supreme court took note of the law laid down on this issue by the Constitution Bench in M/s Vatika Township Ltd. and held that the intent of the Parliament/legislature need to be looked into for

ascertaining whether the amendment should be retrospective or not. In Vatika Township Ltd. (supra) the Hon'ble Supreme Court held that the notes on clauses appended to the Finance Bill will throw light as to the legislative intent; because it has to be borne in mind that Parliament/legislature is aware of three concepts before an amendment is brought in, which can be discerned from reading of the "Notes on Clauses" to the Bill which are (i) prospective amendment with effect from a fixed date; (ii) retrospective amendment with effect from a fixed anterior date; and (iii) clarificatory amendments which are retrospective in nature. So when we adjudicate whether the view of Ld CIT(A) that the explanation 2 brought in by Finance Act, 2021 is retrospective, let us look at the "Notes on Clauses and the relevant clauses 8 & 9 of the Finance Bill, 2021 (supra) pertaining to the issue in hand which in clear and unambiguous terms spells out the intention of Parliament that the amendment shall take effect from 1st April, 2021 and therefore will accordingly apply to Assessment Year 2021-22 and subsequent years. So since the legislative intent is clear, the amendment brought in by Finance Act, 2021 on this issue as discussed is prospective and Ld. CIT(A) erred in holding otherwise. So till AY 2021-22, the Jurisdictional High Court's view in favor of assessee will hold good and is binding on us. As discussed the decision of the Hon'ble Delhi High Court in Bharat Hotels Ltd. (supra) which was in favor of revenue has not considered the decision of the Co-ordinate Division Bench decision in M/s Aimil Ltd.(supra) which is in favour of assessee. So we note that later decision of the Delhi/Hyderabad Tribunal have followed the decision favouring assessee in the light of the Hon'ble Supreme Court decision in M/s Vegetable Products (supra). In the light of the aforesaid decision and relying on the ratio of the Hon'ble Supreme Court in the case of Vatika Township Pvt. Ltd. (supra) and M/s Snowtex Investment Ltd. (supra) and also taking note of the binding decision of the Hon'ble Jurisdictional Calcutta High Court on this issue before us in Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra), we set aside the impugned order of Ld CIT(A) and direct the AO to allow the claim of deduction in respect of employees contribution shares towards ESI, PF, by the assessee before the due date of filing of return u/s 139(1) of the Act. Therefore the appeal of assessee succeeds and so, it is allowed in favor of assessee".

4. *A perusal of the above would reveal that the ITAT, Kolkata has specifically propounded that if employees' contribution received by an assessee and paid to ESI and PF accounts before the due date of filing of the return, then the assessee will be eligible to claim the deduction of such amounts. With the assistance of ld. representatives, we have specifically gone through the record and find that payments have been made within the due dates of filing of the return. With the above observation, these appeals of the assessee are treated as allowed. The disallowances stand deleted in both the appeals".*

5. Respectfully following the order of the Coordinate Bench, we allow this appeal of the assessee and delete the disallowance.

6. In the result, the appeal of assessee allowed.

Order is pronounced in the open court.

Sd/-

(Sonjoy Sharma)
Judicial Member

Sd/-

(Rajesh Kumar)
Accountant Member

Dated: 4th May, 2022

JD, Sr. PS

Copy of the order forwarded to:

1. Appellant– Sm. Gargi Poddar, FD-57/1A, Vidyasagar Pally, Baguiati, Kolkata-700059.
2. Respondent – DCIT, circle-49(1), Jolkata.
3. CIT(A), NFAC, Delhi.
4. CIT ,
5. DR, ITAT, Kolkata, (sent through e-mail).

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Bench, Kolkata