

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

श्री विक्रम सिंह यादव, लेखा सदस्य एवं डॉ. एस.सीतालक्ष्मी, न्यायिक सदस्य के समक्ष
BEFORE: SHRI VIKRAM SINGH YADAV, AM & DR. S. SEETHALAKSHMI, JM

आयकर अपील सं./ITA. No. 121/JP/2022
निर्धारण वर्ष/Assessment Years : 2019-20

| | | |
|---|-------------|--|
| Lalit Kumar Arora C-60 C-60, Shyam Nagar, Sodala, Jaipur. | बनाम Vs. | ADIT, CPC, Bengaluru./ ACIT, Circle-2, Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABCPA6868M | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती की ओर से / Assessee by : None (Written Submission)
राजस्व की ओर से / Revenue by : Shri A. S. Nehara (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 05/05/2022
उदघोषणा की तारीख / Date of Pronouncement : 09/05/2022

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This appeal by the assessee is directed against the order of the Id. CIT(A), National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] dated 23.03.2022 for the AY 2019-20.

2. The assessee has raised the following grounds:-

"1.The Id. CIT(A) erred in confirming the addition of Rs. 46,527/- made by the Assessing Officer representing delay in remittance of employees contribution towards provident fund.

2. The Id. CIT(A) erred in confirming the addition of Rs. 9,680/- made by the Assessing Officer representing delay in remittance of employees contribution to ESI.”

3. None has appeared on behalf of the assessee, however Bench has decided to dispose of the appeal ex-parte based on the material available on record. The only grievance of the assessee relates to the additions of Rs. 46,527/- and Rs. 9,680/- total Rs. 56207/- made by the A.O on account of late payments towards PF and ESI under section 36(1)(va) of the Income Tax Act, 1961 (for short the ‘Act’), however, before furnishing the return of income under section 139(1) of the Act. When the matter was taken to the Ld. CIT(A) the said disallowance was sustained.

4. Being aggrieved by the impugned order issued U/s 143(1) of the IT Act, the assessee is preferred an appeal before the Id. CIT(A). The assessee filed complete details of the entire payments i.e. employee’s PF & ESI contribution paid before the due date of filing of return of income which are produced in CIT(A) order:-

“Details of deposition of P.F.

| Month | Employees Contribution | Due date of payment | Actual date of payment | Evidence of payment is at page No. |
|-------|------------------------|---------------------|------------------------|------------------------------------|
| June | 23,537 | 15.07.2018 | 17.07.2018 | 15 |
| July | 22,990 | 15.08.2018 | 17.08.2018 | 16 |
| Total | 46,527 | | | |

Details of Deposition of E.S.I.

| Month | Employees Contribution | Due date of payment | Actual date of payment | Evidence of payment is at page no. |
|---------|------------------------|---------------------|------------------------|------------------------------------|
| June | 3265 | 15.07.2018 | 17.07.2018 | 17 |
| July | 3249 | 15.08.2018 | 16.08.2018 | 18 |
| January | 3166 | 15.02.2019 | 16.02.2019 | 19 |

5. The assessee before the ld. CIT(A) contended that when the amount of employee's contribution to ESI & PF is deposited before the due date of filing of return of income, no disallowance U/s 36(1)(va) can be made and that this issue is settled in favour of the assessee by the judgments of Hon'ble High Court, which are produced as under:-

1. State Bank of Bikaner & Jaipur, [2014] 43 taxmann.com 411 (Rajasthan).
2. Rajasthan State Seed Corporation Ltd. [2017] 88 taxmann.com 445 (Rajasthan)
3. Udaipur Dugdh Utpadak Sahakari Sangh Ltd., [2013] 35 taxmann.com 616 (Raj.)
4. Rajasthan Revewable Energy Corp. ltd., D.B. Income Tax Appeal No. 49/2019.

6. The assessee before the ld. CIT(A) also contended that the amendment brought in by the Finance Act, 2021 in Section 36(1)(va) of the Act and has also referred to the rationale of the amendment as explained by the memorandum in the Finance Bill, 2021.

7. The ld. CIT(A) finally held that the adjustment made by the AO will fall in the category of S.143(1)(a)(ii) of the Act as it was an incorrect

claim of deduction u/s 36(1)(va) of the Act. The ld. CIT(A) observed that it is not in dispute that appellant's ROI itself shown the delay in payments of Employee's contribution to PF/ESIC amounting to Rs. 56207/- within the "due date" prescribed as per Explanation 2 Section 36(1)(va) and that by virtue of deeming provision of Section 2(24)(x) r.w.s 36(1)(va) of the Act, deduction was not admissible to the assessee for Rs. 56207/- based on the ROI and the information contained therein.

8. Aggrieved by the order of the ld. CIT(A), the assessee is in appeal before us. The Ld. AR for the assessee at the time of hearing submitted that the payment to employee's contribution towards PF and ESI was made before the date of filing the return of income by the assessee U/s 139(1) of the Act. The ld. Counsel for the assessee apart from that relied on the decisions in case of Dhabriya Plywood Ltd. vs. ADIT, CPC, Bengaluru 133 taxmann.com 135 (Jaipur-Trib.), Nazin Ahmad vs. ADIT in ITA No. 269/JP/2021 and Ravi Goenka vs. ADIT in ITA No. 265 & 268/JP/2021. Further, he relied on the decision of the Chennai Bench of the ITAT in the case of M/s Adyar Ananda Bhavan vs. ACIT in ITA No. 402 & 403/Chny/2021 order dated 08.12.2021 where in the Tribunal held that

“ 6.9 Thus, from the above, it is clear that the amendment brought in the statute i.e., by Finance Act, 2021, the provisions of Section 36(1)(va) r.w.s. 43B of the act amended by inserting explanation in prospective and not retrospective. Hence, the amended provisions of Section 43B r.w.s. 36(1)(va) of the act are not applicable for the assessment year 2018-19 but will apply from assessment year 2021-22 and subsequent assessment year. Hence, this issue of assessee's appeal is allowed.

9. Similarly the Jaipur Bench of the ITAT in the case of Dhabriya Polywood Ltd. vs. ADIT, CPC, Bengaluru 133 taxmann.com 135 (Jaipur-Trib.) held as under:-

“Admittedly and undisputedly, the employee’s contribution to ESI and PF collected by the assessee from its employees have been deposited well before the due date of filing of return of income u/s 139(1) of the Act. Further, it is noted that the ld CIT(A) has referred to the explanation to section 36(1)(va) and section 43B introduced by the Finance Act, 2021 and has also referred to the rationale of the amendment as explained by the Memorandum in the Finance bill, 2021, however, he has simply failed to consider the express wordings in the said memorandum which say “these amendments will take effect from 1st April, 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years”. The impugned assessment year is assessment year 2019-20 and therefore, the said amendment cannot be applied in the instant case.”

10. The reliance was also placed on the decisions of the ITAT Benches in the following cases:-

- *Deeksha Bhala vs. DCIT, CPC in ITA No. 215/JP/2021 dated 15.11.2021 (Jaipur-Trib.)*
- *Mohangarh Engineers and Construction Company vs. DCIT, CPC in ITA No. 405/Jodh/2021 dated 12.08.2021 (Jodhpur-Trib.)*
- *Shri Gopalkrishna Aswini Kumar vs. ACIT in ITA No. 359/Bang/2021 dated 12.10.2021 (Bangalore- Trib.)*

- *Moona Dewan vs. CPC, Bengalure in ITA No. 282/JP/2021 dated 19.01.2022 (Jaipur-Trib.)*
- *M/s Punjab Engineering Works vs. DCIT in ITA No. 132/JP/2021 dated 15.11.2021 (Jaipur-Trib.)*
- *M/s Mohanlal Khatri vs. ACIT in ITA No. 144/JP/2021 dated 29.11.2021 (Jaipur-Trib.)*

11. On the other hand, the ld. CIT-DR only relied on the order of ld. CIT(A) and stated that ld. CIT(A) has passed exhaustive order explaining the provisions of the Act.

12. We have considered the rival contention and perused the orders of the authorities and the material available on record. Admitted facts of the present case are that the payments of PF & ESI contribution relating employee's contribution are before the due date of filing of return of income U/s 139(1) of the Act. We have noted that the issue under consideration is covered by the decision of the Coordinate Bench in case of M/s Mohanlal Khatri vs. ACIT in ITA No. 144/JP/2021 order dated 29.11.2021 (Supra) wherein it is held as under:-

“7. I have considered the submissions of both the parties and perused the material available on record. In the present cases, it is noticed that an identical issue having similar facts has already been adjudicated by the ITAT, Jodhpur Bench in the aforesaid referred to cases, wherein one of us is author of the order dated 27/09/2021. In the said order it has been held vide paras 7 to 11 in ITA No. 59/Jodh/2021 for the assessment years 2015-16 in the case of Mohangarh Engineers and Construction Company Vs. DCIT and in the case of Bikaner Ceramics Private Limited, Bikaner Vs. ADIT, CPC, Bangaluru, in ITA No. 60/Jodh/2021 for the A.Y. 2019-20 as under:-

7. We have considered the submission of both the parties and perused the material available on record.

8. In the present cases, it is not in dispute that the assessee deposited the contribution of PF & ESI belated in terms of section 36(1)(va) of the Act, however, the said deposits were made prior to filing of return of income u/s 139(1) of the Act.

8.1 Identical issue with the similar facts have already been adjudicated by the various Benches of the ITAT.

8.2 In the case of Harendra Nath Biswas vs DCIT Kolkata, ITA No. 186/Kol/2021 for the A.Y. 2019-20, similar issue has been decided vide order dated 16.7.2021 by the ITAT 'B' Bench, Kolkata. The Relevant findings have been given in para 4 of the said order, which read as under;-

“4. We have heard both the parties and perused the record. First of all we do not countenance this action of the Ld. CIT(A) for the simple reason that the Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and relevant assessment year before us is AY 2019-20. Therefore the law laid down by the Jurisdictional Hon'ble High Court will apply and since this Explanation-5 has not been made retrospectively. So we are inclined to follow the same and we reproduce the order of Hon'ble Calcutta High Court in the case of Vijayshree Ltd. supra wherein the Hon'ble Calcutta High Court has taken note of the Hon'ble Supreme Court decision in CIT vs. Alom Extrusion Ltd. reported in 390 ITR 306. The Hon'ble Calcutta High Court's decision in Vijayshree Ltd. supra is reproduced as under:

“This appeal is at the instance of the Revenue and is directed against an order dated 28th April, 2011 passed by the Income Tax Appellate Tribunal, “A” Bench, Kolkata in ITA No.1091/Kol/2010 relating to assessment year 2006-

07 by which the Tribunal dismissed the appeal preferred by the Revenue against the order of CIT(A).

The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of Employees Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.

It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.

Being dissatisfied, the Revenue has come up with the present appeal.

After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.

Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.”

In the light of the aforesaid discussion we do not accept the Ld. CIT(A)'s stand denying the claim of assessee since assessee delayed the employees contribution of EPF & ESI fund and as per the binding decision of the Hon'ble High Court in Vijayshree Ltd. (supra) u/s 36(1)(va) of the Act since assessee had deposited the employees contribution before filing of Return of Income. Therefore, the assessee succeeds and we allow the appeal of the assessee.”

9. *Similar view has been taken by the ITAT Hyderabad ‘SMC’ Bench in ITA No. 644/Hyd./2020 for the AY 2019-20 in the case of Salzgitter Hydraulics Private Ltd, Hyderabad vs ITO vide order dt 15.6.2021. The relevant findings given in para 2 of the said order read as under:-*

“2. Coming to the sole substantive issue of ESI/PF disallowance of Rs.1,09,343/- and Rs.3,52,622/-, the assessee's and revenue's stand is that the same has been paid before the due date of filing sec. 139(1) return and after the due date prescribed in the corresponding statutes; respectively. I notice in this factual backdrop that the legislature has not only incorporated necessary amendments in Sections 36(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 1.4.2021 only. It is further not an issue that the foregoing legislative amendments have proposed employers contributions; disallowances u/s 43B as against employee u/s 36 (va) of the Act; respectively. However, keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1.4.2021, I hold that the impugned disallowance is not sustainable in

view of all these latest developments even if the Revenue's case is supported by the following case law.

(i) CIT vs. Merchem Ltd, [2015] 378 ITR 443(Ker)

(ii) CIT vs. Gujarat State Road Transport Corporation (2014) 366 ITR 170 (Guj.)

(iii) CIT vs. South India Corporation Ltd. (2000) 242 ITR 114 (Ker)

(iv) CIT vs. GTN Textiles Ltd. (2004) 269 ITR 282 (Ker)

(v) CIT vs. Jairam & Sons [2004] 269 ITR 285 (Ker)

The impugned ESI/PF disallowance is directed to be deleted therefore.”

10. On an identical issue, this Bench of the Tribunal vide order dated 12.8.2021 in the case of Mohangarh Engineers and Construction Company, Jodhpur & Others vs CPC, Bangalore in ITA No. 5/Jodh/2021 and others held vide para 13 to 18 as under:-

“13. We have heard the rival contentions and perused the material available on record. On perusal of the details submitted by the assessee as part of its return of income, it is noted that the assessee has deposited the employees's contribution towards ESI and PF well before the due date of filing of return of income u/s 139(1) and the last of such deposits were made on 16.04.2019 whereas due date of filing the return for the impugned assessment year 2019-20 was 31.10.2019 and the return of income was also filed on the said date. Admittedly and undisputedly, the employees's contribution to ESI and PF which have been collected by the assessee from its employees have thus been deposited well before the due date of filing of return of income u/s 139(1) of the Act.

14. The issue is no more res integra in light of series of decisions rendered by the Hon'ble Rajasthan High Court

starting from CIT vs. State Bank of Bikaner & Jaipur (supra) and subsequent decisions.

15. In this regard, we may refer to the initial decision of Hon'ble Rajasthan High Court in case of CIT vs. State Bank of Bikaner & Jaipur wherein the Hon'ble High Court after extensively examining the matter and considering the various decisions of the Hon'ble Supreme Court and various other High Courts has decided the matter in favour of the assessee. In the said decision, the Hon'ble High Court was pleased to held as under:

“20. On perusal of Sec.36(1)(va) and Sec.43(B)(b) and analyzing the judgments rendered, in our view as well, it is clear that the legislature brought in the statute Section 43(B)(b) to curb the activities of such tax payers who did not discharge their statutory liability of payment of dues, as aforesaid; and rightly so as on the one hand claim was being made under Section 36 for allowing the deduction of GPF, CPF, ESI etc. as per the system followed by the assesseees in claiming the deduction i.e. accrual basis and the same was being allowed, as the liability did exist but the said amount though claimed as a deduction was not being deposited even after lapse of several years. Therefore, to put a check on the said claims/deductions having been made, the said provision was brought in to curb the said activities and which was approved by the Hon'ble Apex Court in the case of Allied Motors (P) Ltd. (supra).

21. A conjoint reading of the proviso to Section 43-B which was inserted by the Finance Act, 1987 made effective from 01/04/1988, the words numbered as clause (a), (c), (d), (e) and (f), are omitted from the above proviso and, furthermore second proviso was removed by Finance Act, 2003 therefore, the deduction towards the employer's

contribution, if paid, prior to due date of filing of return can be claimed by the assessee. In our view, the explanation appended to Section 36(1)(va) of the Act further envisage that the amount actually paid by the assessee on or before the due date admissible at the time of submitting return of the income under Section 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income. It is also clear that Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1) (va) and if read in isolation Sec. 43B would become obsolete. Accordingly, contention of counsel for the revenue is not tenable for the reason aforesaid that deductions out of the gross income for payment of tax at the time of submission of return under Section 139 is permissible only if the statutory liability of payment of PF or other contribution referred to in Clause (b) are paid within the due date under the respective enactments by the assesseees and not under the due date of filing of return.

22. We have already observed that till this provision was brought in as the due amounts on one pretext or the other were not being deposited by the assesseees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said amounts were not deposited. It is pertinent to note that the respective Act such as PF etc. also provides that the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income under sub-section (1) of Section 139 of the IT Act.

23. Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income

under Section 139(1), cannot be disallowed under Section 43B or under Section 36(1)(va) of the IT Act.”

16. The said decision has subsequently been followed in CIT vs. Jaipur Vidyut Vitran Nigam Ltd. (supra), CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. (supra), and CIT vs Rajasthan State

Beverages Corporation Limited (supra). In all these decisions, it has been consistently held that where the PF and ESI dues are paid after the due date under the respective statues but before filing of the return of income under section 139(1), the same cannot be disallowed under section 43B read with section 36(1)(va) of the Act.

17. We further note that though the ld. CIT(A) has not disputed the various decisions of Hon'ble Rajasthan High Court but has decided to follow the decisions rendered by the Hon'ble Delhi, Madras, Gujarat and Kerala High Courts. Given the divergent views taken by the various High Courts and in the instant case, the fact that the jurisdiction over the Assessing officer lies with the Hon'ble Rajasthan High Court, in our considered view, the ld CIT(A) ought to have considered and followed the decision of the jurisdictional Rajasthan High Court, as evident from series of decisions referred supra, as the same is binding on all the appellate authorities as well as the Assessing officer under its jurisdiction in the State of Rajasthan.

18. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, the addition by way of adjustment while processing the return of income u/s 143(1) amounting to Rs 4,38,530/- so made by the CPC towards the delayed deposit of the employees's contribution towards ESI and PF though paid well before the due date of filing of return of income u/s 139(1) of the Act is hereby directed to be deleted as the same cannot be

disallowed under section 43B read with section 36(1)(va) of the Act in view of the binding decisions of the Hon'ble Rajasthan High Court. “

11. Since the facts of the present cases are identical to the facts involved in the aforesaid referred to cases, therefore respectfully following the earlier orders as referred to herein above of the different Benches of the ITAT, the impugned additions made by the Assessing Officer and sustained by the Ld. CIT(A) on account of deposits of employees contribution of ESI & PF prior to filing of the return of income u/s 139(1) of the Act, in both the years under consideration prior to the amendment made by the Finance Act, 2021 w.e.f. 1.4.2021 vide Explanation 5, are deleted.

8. Since the facts involved in the present case are identical to the facts involved in the case of Mohangarh Engineers and Construction Company Vs. DCIT (supra) and in the case of Bikaner Ceramics Private Limited, Bikaner Vs. ADIT, CPC, Bangaluru (supra). So respectfully following the aforesaid referred to order, the disallowances sustained by the Ld. CIT(A) are deleted.”

13. A similar issue has been decided by the Hon'ble Delhi High Court in the case of CIT vs. AIMIL Ltd., (2010) 321 ITR 508 wherein it has been held as under:-

“The deletion with effect from April 1, 2004 by the Finance Act, 2003 of the second proviso to section 43B of the Income-tax Act, 1961, which stipulates that contributions to the provided fund and Employees State Insurance Fund should be made within the time mentioned in section 36(1)(va), that is, the time allowed under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, as well as the Employees' State Insurance Act, 1948, it treated as retrospective in nature. If the employees' contribution is not deposited thereafter, the employer not only pays interest and delayed payment but can incur penalties also, for which specific provisions are made in the those Acts. In so far as Income-tax Act, 1961, is concerned, the assessee can get the

benefit of deduction of the payments, if the actual payment is made before the return is filed.

Where for the assessment year 2002-03 the assessee had deposited employer's contribution as well as employees' contribution towards provident fund and ESI after the due date, as prescribed under the relevant Act/Rules but before the due date for filing the return under the Income-tax Act:

Held accordingly, that no disallowance could be made in view of the provisions of Section 43B as amended by the Finance Act, 2003."

14. From the above discussion, it is clear that there are series of decisions of various Hon'ble High Courts on this issue and even Hon'ble Jurisdictional High Court in the case of M/s. Industrial Security & Intelligence India P Ltd., (supra) held that the payment of employees contribution in regard to PF & ESI if made before the due date of filing of return of income u/s.139(1) of the Act, the same is allowable as deduction as per the provisions of Section 2(24)(x) r.w.s. 36(1)(va) r.w.s. 43B of the Act.

Now, the question arises, whether by the Finance Act, 2021, the provisions of Section 36(1)(va) by inserting the Explanation 2 r.w.s. 43B of the Act have been amended, whereby it is clarified that the provisions of Section 43B of the Act shall not apply and shall be deemed ought to have been applied for the purpose of determining the due date under this clause. In our opinion, this amendment has been brought in the statute book to provide certainty about the applicability of provisions of Section 43B of the Act inspite of belated payment of employee's contribution. We also noted from the memorandum explaining the provisions to Finance Act, 2021, wherein relevant Clauses to said memorandum clearly intended that the amendment shall take effect from 01.04.2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years. The relevant Clauses 8 & 9 of the memorandum explaining the provisions are reproduced as under:-

"Rationalisation of various Provisions Payment by employer of employee contribution to a fund on or before due date

Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide 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 profession’. 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 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. 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.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.”

15. The present appeal is filed by the assessee against disallowance of Rs. 56,207/- pertaining to employees contribution made towards ESI & PF which was paid by the appellant company after the "due date" under respective statute of ESIC/PF. This disallowance was made by the AO under section 143(1) of the Act on the basis of remarks in the relevant column of Form no. 3CD report attached with the return of income. The assessee has stated that disallowance of Rs. 56,207/- was not in accordance with the provision of Section 43B of the Act as the said amount were duly remitted before the due date of filling of return of income. The appellant has

referred to the decisions of various High Courts including the decision of jurisdictional Rajasthan High Court in the case of Rajasthan State Beverages Corporation Ltd 392 ITR 2 and similar other decisions on this issue.

16. After considering the above findings of CIT(A), now we have gone through ratio laid down by the Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd. (2014) 367 ITR 466, wherein the Hon'ble Supreme Court held that unless contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. The law passed today cannot be applied to the events of the past. The Hon'ble Supreme Court held that if somebody does something today, he do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. According to Hon'ble Apex court every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*, which means law looks forward not backward. In the case of Vatika Township Pvt. Ltd., (Supra), the issue under challenge before Hon'ble Supreme Court was the insertion of proviso to section 113 of the Act by the Finance Act 2002 for charging of surcharge. Hon'ble Supreme Court noted that though provision for surcharge under the Finance Acts have been in existence since 1995, the charge of surcharge with respect to block assessments, having been created for the first time by the insertion of proviso to Section 113 of the Act, by Finance Act, 2002, it is clearly a substantive provision and is to be construed as prospective in operation. The Hon'ble Supreme Court held that the amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by parliament.

The Hon'ble Supreme Court finally held that the proviso to Section 113 of the Act is prospective and not retrospective. For this proposition their lordships of the Hon'ble Supreme Court observed at page 495 as under:-

“Notes on Clauses” appended to Finance Bill, 2002 while proposing insertion of proviso categorically states that “this amendment will take effect from 1st June, 2002”. These become epigraphic words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that few other amendments in the Income Tax Act were made by the same Finance Act specifically making those amendments retrospectively. For example, clause 40 seeks to amend S.92F. Clause iii (a) of S.92F is amended “so as to clarify that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract.” This amendment takes effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of 3 concepts:

- (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.*

Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the proviso, that the amendment is to operate prospectively. Learned counsel appearing for the assessee sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. In so far as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1st June, 2002.

(e) There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT

itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002 – Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. For example, explanation to Section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BE, would be prospective i.e. it will take effect from 1st June, 2002.

(f) Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in second proviso to sub-section (3) of Section 2 of Finance Act, 2003. This proviso reads as under:

"Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act."

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be

intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from June 1, 2002."

17. As per ratio laid down by the judgment of Hon'ble Supreme Court in Vatika Township P. Ltd. (Supra), there cannot be imposition of any tax without the authority of law and such law has to be unambiguous and should prescribe the liability to pay taxes in clear terms.

18. By considering various decisions passed by this Bench, that this issue is settled in favour of the assessee by the judgments of this Hon'ble Bench :

- Pratap Technocrats Pvt, Ltd. vs. ADIT in ITA No. 18/JP/2022 dated 22.02.2022.
- Prahlad Narayan Bairwa vs. ADIT in ITA No. 33/JP/2022 dated 22.02.2022.
- Jairaj vs. ADIT in ITA No. 24,25 & 26/JP/2022 dated 22.02.2022.
- The Earth House Resorts LLP vs. ADIT in ITA No. 28/JP/2022 dated 22.02.2022.
- Group Zeor vs. ITO in ITA No. 250/JP/2021 dated 01.03.2022.
- Karni Kehar Security Co-operative Society Ltd. vs. DCIT in ITA No. 310/JP/2021.
- Devi Shanker vs. DCIT in ITO 35/JP/2022 dated 01.03.2022.

19. By considering the totality of the facts and the various judicial pronouncements, we are of the view that the amendment brought in the statute i.e., by Finance Act, 2021, the provisions of Section 36(1)(va) r.w.s. 43B of the

Act amended by inserting explanation 2 is prospective and not retrospective. Hence, the amended provisions of Section 43B r.w.s. 36(1)(va) of the Act are not applicable for the assessment year under consideration i.e. 2018-19 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue raised in assessee's appeal is allowed.

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

Order pronounced in the open Court on 09/05/2022.

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Sd/-

(एस.सीतालक्ष्मी)
(Dr. S. Seethalashmi)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 09/05/2022.

***Santosh**

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

1. अपीलार्थी / The Appellant- Lalit Kumar Arora, Jaipur.
2. प्रत्यर्थी / The Respondent- ADIT, CPC, Bengaluru/ ACIT, Circle-2, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 121/JP/2022 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar