

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

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA Nos. 71 & 72/JP/2022
निर्धारण वर्ष/Assessment Year : 2018-19 & 2019-20

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| Lalit Kumar Chabra 36, Lalit Enterprises New Market Rawat-Bhata Kota | बनाम Vs. | ITO Ward 2(2), Kota |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AERPC0669J | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

निर्धारिती की ओर से / Assessee by : Shri Vinod Kumar Gupta, CA
राजस्व की ओर से / Revenue by: Smt. Monisha Choudhary, JCIT

सुनवाई की तारीख / Date of Hearing : 12/04/2022
उदघोषणा की तारीख / Date of Pronouncement: 06/05/2022

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

These appeals by the assessee are directed against the order passed by the National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] dated 14-07-2021 & 29-04-2021, for the assessment year 2018-19 & 2019-20.

2. The hearing of the appeal was concluded through video conference by both the parties in view of the prevailing situation of Covid-19 Pandemic.

3. Since, the facts of both the cases are identical, we have heard these cases together and passing the order together. The facts and grounds are taken from the folder of Lalit Kumar Chabra in ITA No. 71/JP/2022 and this case is taken as lead case. In this appeal the assessee has raised following grounds:-

4. There was delay of about 157 days in filling this appeal. The assessee has moved an application for seeking the condonation of delay vide their application dated 10.01.2022. The contentions raised in the petition are that the order was passed by NFAC, Delhi on 17.05.2021. Due to pandemic Covid-19, offices of the counsels remained closed from mid-March till 31.05.2021. That on 27.04.2021, owing to the new surge of cases, the Supreme Court vide miscellaneous Application no. 665/2021 in SMW (C) No. 03/2020, restored its order dated 23.03.2020 and 08.03.2021 (whereby limitations were extended originally) and further suspended limitation under general or special laws in respect of all judicial or quasi-judicial proceedings till further orders under article 142 read with article 141 and listed the matter for 19.07.2021. Thereby, effectively, limitation stands suspended from 15.03.2020. That, again Hon'ble Supreme Court, vide order dated 10.01.2022 in MA no. 21 of 2022 restored its original order whereby limitation period was extended and further extended period upto 28.02.2022. Thus, it is submitted that the delay in filling the appeal is absolutely inadvertent and has occurred due to circumstances beyond the control of assessee. It was further

submitted that the assessee has always acted bonafide and the delay is of only 157 days. Based on this fact the assessee prayed that the delay may be condone in the interest of justice.

5. We have heard the ld. counsel for the assessee as well as the ld. DR. The Ld. DR has not objected to the facts placed on record and left the decision to the bench considering the interest of justice.

6. It is beyond doubt that there was sufficient cause for not bringing the appeal in time by the assessee as it evident from the petition filed by the company. Considering the rival submission, and the decision of the supreme court relied upon by the assessee we are of the view that there is no intention to file this appeal belatedly but the delay in filing the appeal was due to a reasonable cause and beyond the control of the assessee. Accordingly, we condone the delay in filing this appeal and decided to take the appeal on its merits.

7. The assessee has taken following grounds in this appeal (ITA No. 71/JP/2022):

‘1. Due to the spread of COVID-19 pandemic and in view of the Hon’ble Supreme Court judgment in Miscellaneous Application No. 21/2022 in SMW(C) No. 03/2020 vide order dated 10.01.2022, there is a delay of 157 days in filing of appeal, please condone.

2. The impugned order dated 12.05.2020 passed by CPC u/s 154 is bad in law and on the facts of the case, for want of jurisdiction and various other statutory reasons, and hence, the same may kindly be quashed and in any case, the impugned additions made there in are bad in law and on the facts

for want of jurisdiction and various other statutory reasons and hence the same may kindly be deleted in full.

3. The Ld. CIT(A) erred in confirming the action of the CPC in making addition of Rs. 6,95,850/ on account of contribution of PF/ESI vide order dated 14.07.2021. The Action of the CPC and conformation thereof is bad in law and on facts of the case, for want of jurisdiction, principal of natural justice and various other statutory, principal of natural justice and various other statutory reasons and hence, kindly be deleted.

4. That the appellant craves your indulgence to add, amend or alter all or any grounds of appeal before or at the time of hearing.”

8. The main issue arises in this appeal of the assessee is regarding disallowance of employee's contribution of PF and ESI deposited after the due date under the specified act but before due date of filing of return of income U/s 139(1) of the Income Tax Act, 1961 (in short, the Act).

9. The assessee filed its return of income on 30.09.2018 which was processed u/s 143(1) of the Act whereby an adjustment was made on account of disallowance of claim of deduction with respect to employees' contribution towards PF and ESIC deposited after the due date specified under the respective Act. During the course of assessment proceedings, the CPC, Bangalore made disallowance of Rs.6,95,850/- on account of late deposit of employees contribution towards PF/ESI as prescribed under the respective act but before due date of filling return of income. The assessee challenged the said adjustment before the Id. CIT(A)/NFAC and contended that as per the binding precedents if the payment is made even though belatedly but before due date of filing of return of income U/s 139(1) of the

Act then as per provisions of Section 43B of the Act, no disallowance can be made. The Id. CIT(A)/NFAC did not accept this contention of the assessee and confirmed the disallowance by considering the amendment in Section 36(1)(va) of the Act whereby an explanation (2) as well as explanation (5) to Section 43B of the Act was inserted by the Finance Act, 2021, being retrospective in nature.

10. The Hon'ble Rajasthan High Court as well as other Hon'ble High Courts are consistently holding that where Assessee had paid employees contribution of PF and ESIC, though beyond due date(s) under respective Acts but prior to due date of filing the Return of income under sec. 139(1) of IT Act, the payments cannot be disallowed u/s. 43B. The assessee contended that avoiding the binding nature of judgments, the CPC, Bangalore was not justified in making addition of Rs.6,95,850/- which was paid before due date of filing of Return of Income and in rejecting application.

11. Based on the stated facts the matter was carried to CIT(A)/NFAC by the assessee, wherein the Id. CIT(A))/NFAC confirmed the addition of Rs. 6,95,850/- made by the AO on account of late deposit of Employees contribution to PF & ESI by the assessee and the decision of the Jurisdictional High court is not considered while passing the order by the CIT(A)/ NFAC. In ITA No. 71/JP/2022, the relevant

observation of the Id. CIT(A) /NFAC confirming the addition at paras 5-6 onwards which reads as under:-

"5. In the written arguments, the appellant tried to demonstrate the payment schedule and argued that since the disputed was made before filing the return of income, the same is allowable. It is a fact 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) of the Act. This is based on the reasoning that employee's contribution to PF/ESI is covered u/s 43B (b) of the Act. The appellant has further submitted that his case is covered by the decisions of various Courts and ITAT and therefore the disallowance made by the CPC should be deleted. However, it is also a fact that various courts have considered that Section 43B of the Act is applied only to the extent of the Employer's contributions and has uphold the disallowances made on delayed payments on account of Employee's contribution. Thus, this issue has become a debatable. However, certain amendments to the sections 43B & 36(10)(va) of the Act were made in the Finance Bill of 2021 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 purposes of determining the "due date" under this clause."

5.1 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. Admittedly, the employees' contribution to PF & ESI are included in the definition of income u/s 2(24)(x)

of the Act and form a part of the income of the appellant. Whenever the appellant pays the said contribution 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) of the Act, that sec 43B would expressly not apply to the employees' contribution. It could be seen from a plain reading of sec 43B that clause (b) covers only EMPLOYERS' contribution and not employees' contribution. In fact, a perusal of the Memorandum explaining the clauses of Finance Bill 1983 (through which Sec 43B was brought into the Act), reveals that the Legislature never intended to include employees' contribution in Sec 43B(b). The memorandum explaining the provisions in the Finance Bill of 1983 [1983] 140 ITR (St.) 160 states as under:

"59. Under the Income-tax Act, profits and gains of business and profession are computed in accordance with the method of accounting regularly employed by the assessee. Broadly stated, under the mercantile system of accounting, income and outgo are accounted for on the basis of accrual and not on the basis of actual disbursements or receipts. For the purposes of computation of profits and gains of business and profession, the Income-tax Act, defines the word 'paid' to mean 'actually paid or incurred' according to the method of accounting on the basis of which the profits or gains are computed.

60. Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, Employees' State Insurance Scheme, etc., for long period of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other, undisputed liabilities also are not paid. To curb this practice, it is proposed to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force (irrespective of whether such tax or duty is disputed or not) or any sum payable by the assessee as an employer by way of contribution to any provident fund, or superannuation fund or gratuity

fund or any other-fund for the welfare of employees shall be allowed only in computing the income of that previous year in which such sum is actually paid by him." (emphasis supplied)

It could be seen that at each instance, the Memorandum mentions only "employers' contribution" and not "employees' contribution". Similarly, sec 43B(b) also specifically mentions 'employer's contribution" and not "employees' contribution". The only conclusion to be drawn is that employee's contribution to PF & ESI would not be covered by sec 43B.

5.2 The present amendment to Sec 43B of the Act through insertion of Explanation 5 and to Sec 36(1)(va) of the Act through insertion of Explanation 2, serve to only reiterate and reinforce this intention of the Legislature. Firstly, as discussed earlier in this order, the language of the Explanations make it evident that Sec 43B shall be deemed to have never been applied. Secondly, the Explanatory notes to Finance Bill 2021 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 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 438 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 438. 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 subsection (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 40 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."

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 of the Act. 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.

5.3 It remains 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.r.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 become 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 31st 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 the 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 the case of Allied Motors (P) Ltd. vs. CIT reported in 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. 01/04/1984. While holding so, Hon'ble 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 01/04/1984 and would therefore be retrospective. Any other interpretation would lead to an anomaly, whereby the section and the 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 438(a), the first proviso to section 43B and Explanation 2 have to be read together as giving effect to the true intention of section 438. 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 438 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 438, the proviso and Explanation 2 have to be read together as expressing the true intention of section 438. Explanation 2 has been expressly made retrospective. The first proviso, however, cannot be isolated from Explanation 2 and the main body of section 438. Without the first proviso, Explanation 2 would not obviate the hardship or the unintended 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 be prohibited from the category of permissible deductions."

5.4 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 and

harmoniously. As discussed in this order, it is evident from the language of Sec 43B(b) of the Act and the explanatory notes to Finance Act 1983, that employees' contribution was never intended to be covered by Sec 43B of the Act. This has been reiterated and reinforced through Explanation 5 to Sec 43B and Expl 2 to Sec 36(1)(va) inserted by Finance Act 2021. If such was the intention of the Legislature expressly made clear in the Finance Act 2021, through the explanatory notes, it would necessarily to be held that Expl 5 to Sec 43B & Expl 2 to Sec 36(1)(va) would apply to all pending matters as on date. On these arguments, it is held that the late payment of PF, ESI etc are not covered by Sec 43B of the Act.

5.5 The Appellant has also relied on the decision of the Hon'ble Rajasthan High Court in the case of CIT vs. JWNL & RRVUNL (2014) 363 ITR 307 (Raj.) in his favor. These decisions are not applicable in the present case of the appellant in view of the subsequent clarifications and explanations brought in the Finance Act by the Parliament in this regard by inserting explanations to 36(1)(va) and 43B (cited supra).

6. Admittedly in the present appeal, the facts indicate that the sum of Rs. 6,95,850/- being employees contribution to PF/ESI has been paid late under that Act. Based on the reasoning above, the addition made by the CPC deserves to be upheld. Therefore, the addition made of Rs. 6,95,850/- is confirmed and the relevant grounds raised in this regard are dismissed."

12. During the course of hearing, the Id. AR of the assessee prayed that Id, CIT(A)/NFAC has erred in confirming the addition of Rs. 6,95,850/- on account of late payment of employees PF and ESI Contribution under the prescribed act but before the due date of filling the ITR the same has been paid which has not been disputed by the lower authorities. To this effect, the Id. AR of the assessee also relied upon the recent decision dated 06.04.2022 of this Bench in the case of Shri

Sanjay Porwal (ITA No.63/JP/2022) praying that the addition so sustained by the Id. CIT(A)/NFAC amounting to Rs. 6,95,850/- may kindly be deleted.

13. On the other hand, the Id. DR supported the orders of the lower authorities and submitted that since the law is changed the amount is not allowable and thus heavily relied upon the orders of the lower authorities.

14. We have heard both the parties and perused the materials available on record. The Bench noted during the course of hearing that the AO made an addition of Rs. 6,95,850/- on account of late deposit of employees PF & ESI by the assessee under the prescribed act but before the due date of filing the return of income u/s 139 of the Act. It is further observed that the Id. CIT(A)/NFAC has confirmed the action of the AO holding that the sum of Rs. 6,95,850/- being employees contribution to PF/ESI has been paid late under that Act and thus the addition made by the CPC deserves to be upheld. The Bench has taken into consideration its various orders wherein similar issue has been decided in favour of the assessee on the very same issue. Recently, the similar issue of late deposit of employees PF/ESI contribution by the assessee but paid the same before due date of filing of return of income in the case of

Sanjay Porwal vide order dated 06.04.2022 which was also relied upon by the

Id. AR of the assessee wherein it has been observed as under:-

4.7. We have considered the rival submissions as well as the relevant material on record. There is no dispute that prior to the amendment brought by the Finance Bill, 2021 in Section 36(1)(va) as well as Section 43B of the Act, the issue of allowability of employees contribution towards PF and ESI and depositing the same in the government account before the due date of filing of return of income U/s 139(1) of the Act was settled and decided in favour of the assessee by various binding precedents of Hon'ble High Courts including the Jurisdictional High 7 ITA No. 63/JP/2022 SANJAY PORWAL VS CPC, BENGALURU/ ITO Ward- 6(4), Jaipur Court. The limited controversy is whether the amendment brought to Section 36(1)(va) as well as 43B of the Act is applicable retrospective or from assessment year 2021-22 as it is specifically stated in the memorandum of Finance Bill, 2021. At the outset, it is noted that the Coordinate Bench of this Tribunal in the case of M/s Kogta Financial (India) Ltd. Vs CPC (supra) has considered this issue in para 5 to 7 as under: "5. We have heard the rival contentions and perused the material available on record. In case of Mohangarh Engineers and Construction Company vs DCIT, CPC (Supra), speaking through one of us, we have extensively dealt with the identical matter relating to employee's contribution towards ESI/PF and our findings therein read 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 8 ITA No. 63/JP/2022 SANJAY PORWAL VS CPC, BENGALURU/ ITO Ward- 6(4), Jaipur 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 assessee 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 assessee 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 assessee 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." 9 ITA No. 63/JP/2022 SANJAY PORWAL VS CPC, BENGALURU/ ITO Ward- 6(4), Jaipur 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 statutes 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 Id. 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 Id 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' 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." 6. In the instant case, admittedly and undisputedly, the employees' 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, the Id D/R has referred to the explanation to section 36(1)(va) and section 43B 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, I find that there are express wordings in the said memorandum which says "these amendments will take effect from 1st April, 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years". In the instant case, the impugned assessment year is assessment year 2018-19 and therefore, the said amended provisions cannot be applied in the instant case. Similar view has been taken by the Coordinate Bangalore Benches in case of Shri Gopalkrishna Aswini Kumar vs. ACIT (supra) wherein it has held as under:- "7. The Hon'ble Karnataka High Court in the case of Essae Teraoka Pvt. Ltd., (supra) has taken the view that employee's contribution under section 36(1)(va) of the Act would also be covered under section 43B of the Act and therefore if the share of the employee's share of contribution is made on or before due date for furnishing the return of income under 10 ITA No. 63/JP/2022 SANJAY PORWAL VS CPC, BENGALURU/ ITO Ward- 6(4), Jaipur section 139(1) of the Act, then the assessee would be entitled to claim deduction. Therefore, the issue is covered by the decision of the Hon'ble Karnataka High Court. The next aspect to be considered is whether the amendment to the provisions to section 43B and 36(1)(va) of the Act by the Finance Act, 2021, has to be construed as retrospective and applicable for the period prior to 01.04.2021 also. On this aspect, we find that the explanatory memorandum to the Finance Act, 2021 proposing amendment in section 36(1)(va) as well as section 43B is applicable only from 01.04.2021. These provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect unless the legislature specifically says so. In the decisions referred to by us in the earlier paragraph of this order on identical issue the tribunal has taken a view that the aforesaid amendment is applicable only prospectively i.e., from 1.4.2021. We are therefore of the view that the impugned additions made under section 36(1)(va) of the Act in both the Assessment Years deserves to be deleted." 7. In light of the aforesaid discussions and in the entirety of facts and circumstances of the case and following the consistent decisions taken by the various Benches of the Tribunal, the addition by way of adjustment while processing the return of income u/s 143(1) amounting to Rs. 37,62,586/- so made by the CPC towards the deposit of the employees's contribution towards ESI and PF though paid before the due date of filing of return of income u/s 139(1) of the Act is hereby directed to be deleted." Thus, it is clear from the above cited decision that this Tribunal has considered various decisions on this issue and by following decisions of the Coordinate Benches of the Tribunal, this issue was decided in favour of the assessee by holding that amendment in Section 36(1)(va) as well as Section 43B of the Act by way of inserting the explanation vide Finance Bill, 2021 are applicable only from A.Y. 2021-22 and subsequent assessment years and therefore, the said amendment is not applicable to the assessment year under consideration. 4.8. Similar view has been taken by the Delhi Benches of the Tribunal in the case of Chatru Mal Garg Vs ACIT (supra) in para 7 as under: 11 ITA No. 63/JP/2022 SANJAY PORWAL VS CPC, BENGALURU/ ITO Ward- 6(4), Jaipur "7. I have heard the rival submissions and perused the materials on record. The issue in the present ground is with respect to disallowance under section 36(1)(va) of the Act. It is an undisputed fact that there has been slight delay in the deposit of employees' contribution of PF and ESI by the assessee and the contribution have been deposited beyond the due date prescribed by the relevant authorities but at the same time it is also a fact that the amounts have been deposited with the appropriate authorities by the assessee before filing the return of income for the relevant

assessment year. I find that Hon'ble Delhi High Court in the case of CIT vs. AIMIL Ltd. (supra) has held that no disallowance under section 36(1)(va) of the Act is called for when the amounts are deposited before filing the return of income. Similar view has also been taken by the Hon'ble Punjab & Haryana High Court in the case of CIT vs. Hemla Embroidery Mills (P) Ltd (supra) and Indian Geotechnical Services (supra). As far as the applicability of amendment made by Finance Act 2021 is concerned, I find that the Co-ordinate Bench of Tribunal in the case of Indian Geotechnical Services (supra) has held that amendment made by Finance Bill 2021 shall take effect from 1st April 2021 and will accordingly apply to A.Y. 2021-11 and subsequent years. In the present case assessment year involved is 2018-19 and therefore following the aforesaid decision in the case of Indian Geotechnical Services (supra), I am of the view that the amended provisions would have no application to the case under consideration. Before me, Learned DR has relied on the decision of Co-ordinate Bench of Tribunal in the case of Vedvan Consultants Pvt. Ltd. (supra). It is settled law that when two judgments are available giving different views then the judgment which is in favour of the assessee shall apply as held in case of Vegetable Products Ltd. 82 ITR 192 by the Hon'ble Supreme Court. I therefore following the decision of High Courts cited hereinabove and the decision of the Co-ordinate Bench of Tribunal, I am of the view that no addition u/s 36(1)(va) of the Act is called for in the present case. Therefore I direct the AO to delete the addition. Thus the ground of assessee is allowed." Thus, it is clear that the Delhi Benches of the Tribunal has considered the earlier decision of the Tribunal in the case of Vadvan Consultants Pvt. Ltd. (supra) which was relied upon by the Id. CIT(A) as well as the Id. DR and the issue was decided by following the decisions of Hon'ble Delhi High Court and Hon'ble Punjab & Haryana High Court and the decisions of the Division Bench of the Delhi Tribunal in the case of Indian Geotechnical Services in ITA No. 622/Del/2018 order dated 27/08/2021. Accordingly, in view of the above discussions as well as following the 12 ITA No. 63/JP/2022 SANJAY PORWAL VS CPC, BENGALURU/ ITO Ward- 6(4), Jaipur decisions of the Coordinate Benches of the Tribunal, this issue is decided in favour of the assessee and consequently, the disallowance made on account of employees contribution towards PF & ESIC deposited before due date of filing of return of income U/s 139(1) of the Act amounting to Rs. 2,90,435/- is deleted.

15. Respectfully following the order of this Bench in the case of Shri Sanjay Porwal (supra), the disallowance made on account of employees contribution towards PF & ESI deposited before due date of filing of return of income u/s 139(1) of the Act amounting to Rs. 6,95,850/- is deleted and thus, **the appeal of the Assessee in ITA NO. 71/JPR/2022 is allowed.**

16. The fact of the case in **ITA No. 72-JP-2022** is similar to the case in **ITA No. 71-JP-2022** and we have heard both the parties and persuaded the materials

available on record. The bench has noticed that the issues raised by the assessee in this appeal No. 72/JP/2022 is equally similar on set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the bench feels that the decision taken by us in ITA No. 71/JPR/2022 for the Assessment Year 2018-19 shall apply mutatis mutandis in the case of Lalit Kumar Chabra in ITA No. 72-JP-2022 for the Assessment Year 2019-20.

17. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 06/05/2022

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

Sd/-

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 06/05/2022

*Ganesh Kumar

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

1. The Appellant- Lalit Kumar Chabra, Kota
2. प्रत्यर्धी / The Respondent- ITO, Ward 2(2), Kota
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA Nos. 71 & 72/JP/2022)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar