

**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
[Before Shri Rajpal Yadav, Vice-President & Shri Rajesh Kumar, Accountant Member]

**I.T.A. No. 273/Kol/2021**  
**Assessment Year : 2018-19**

MIR Infrastructure Pvt. Ltd. (PAN: AAGCM 2863 A)	Vs.	DCIT, Circle-13(1), Kolkata
Appellant		Respondent

Date of Hearing	21.04.2022
Date of Pronouncement	09.05.2022
For the Appellant	Shri K. K. Khemka, Advocate
For the Respondent	Shri Biswanath Das, Addl. CIT

**ORDER**

**Per Shri Rajesh Kumar, AM:**

This is an appeal preferred by the assessee against the order of the Commissioner of Income Tax(Appeals)-NFAC-Delhi [hereinafter referred to as ‘CIT(A)’] dated 28.07.2021 for the assessment year 2018-19.

2. The issue raised in ground no. 1 is against the order of Ld. CIT(A) confirming the disallowance of Rs. 1,79,754/- as made by the AO towards PF/ESI which were paid by the assessee before the due date for filing IT Return.

3. The Ld. Counsel for the assessee 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 in ITA Nos. 531 & 532/KOL/2021, 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 the ground no. 1 of the assessee and delete the disallowance.

6. The issue raised in ground no. 2 is against the part confirmation of disallowance of Rs. 83,49,380/- by Ld. CIT(A) as against Rs. 1,17,81,579/- made by the AO on account of unpaid service tax by ignoring the facts on records.

7. Facts in brief are that the service tax payable on 31.03.2018 was shown at Rs. 1,72,81,579/-. The said figure was arrived at as under:

**Breakup of Statutory Liability (Service Tax)**

	Rs.	
Opening Balance B/f	2,17,69,281.00	(Ledger copy at Page 69)
Add: Collected during the year	<u>88,24,584.00</u>	(Ledger copy at Page 69)
	3,05,93,865.00	
Less: Paid during the year	<u>1,33,12,286.00</u>	(Challan & Ledger copy at Page 69 to 80)
Liability C/f	<u>1,72,81,579.00</u>	(See Audit Report at Page 33)

The payments comprised of various payments made during the FY 2017-18 aggregating to Rs. 1,28,37,083/- and input service tax credit of Rs. 4,75,203.37/- and thus the gross payment till the year end worked out to Rs. 1,33,12,286.37. However, in the tax audit report, the figures have been wrongly shown the copy of which is placed in the paper book. While processing the return the ITO, CPC made an addition of Rs. 1,17,81,579/- u/s 43B of the Income Tax Act, 1961 (hereinafter referred to as the Act). In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee by restricting the disallowance to Rs. 83,49,280/- by observing that outstanding service tax as on 31.03.2018 was reported as Rs. 1,17,81,579/- in clause 26(i)(B)(b) which comprised of opening balance of Rs. 34,32,199/- brought forward from the earlier years. The Ld. CIT(A) noted that the current year debit in the profit and loss account was only to the tune of Rs. 83,49,380/- hence restricted the disallowance to this amount.

8. After hearing both the parties and perusing the material on record, we observe that the closing liability as on 31.03.2018 on account of service tax payable was Rs. 1,72,81,579/- as is apparent from the facts stated hereinabove in para 7 supra. We note from the arguments of the Ld. A.R that the figures were incorrectly reported in the tax audit report and addition was made by the AO CPC accordingly. Similar mistake was committed in the appellate proceedings the Ld. CIT(A). The ld AR placed before the Bench the reconciliation of service tax showing the amount of opening balance, collected and paid during the year and the closing liability. The Ld. Counsel for the assessee submitted that in fact whatever collected during the year was duly paid and further the assessee has paid Rs. 44,87,702/- out of opening balance and therefore the assessee should be allowed the deduction of payments made during the year towards the current service tax as well as payments out of opening balance. The Ld. D.R. on the other hand submitted that the issue may restore to the file of AO so that the same could be verified and the correct amount of deduction may be allowed after verification of facts. Considering the facts of the case and the arguments by the rival sides, we are of the considered view that the issue needs to be examined and verified at the end of the AO de novo and therefore we restore the issue back to the file of the AO

with the direction to examine the issue and verify the dates of payment and allow the deduction of correct amount of service tax based upon the payments of service tax after affording a reasonable opportunity of hearing to the assessee to file necessary details in support of its claims. We are also directing the assessee to cooperate and file the correct details before the AO so that the issue to be disposed off in accordance with the Act. The ground no. 2 is allowed for statistical purposes.

9. The issue raised in ground no. 3(a) & (b) are inter connected and is against the order of the Ld. CIT(A) confirming the order of AO wherein the AO, CPC has short allowed the credit of TDS to the tune of Rs. 2,12,676/- being 2% of Rs. 1,06,33,765/- not accounted for by the assessee although the same appeared in Form 26AS.

10. After hearing both the parties and perusing the material on record, we find that the undisputed facts in brief are that the gross receipt /income as per profit and loss account were Rs. 13,33,67,768/- whereas gross receipts as per form 26AS were Rs. 14,39,95,533/-. The AO /CPC noted that there is under reporting of gross receipts to the tune of Rs. 1,06,33,765/- and accordingly TDS relating to the short fall in gross receipts as per profit and loss account and form 26AS was calculated at Rs. 2,12,675/- and the credit was not given to this extent. The assessee claimed TDS in the return of income filed at Rs. 28,79,914/- whereas the CPC has granted credit only to the tune of Rs. 26,67,238/- thereby short credit of Rs. 2,12,676/- was given. In the appellate proceedings,, the Ld. CIT(A) confirmed the order of AO. On this issue during the hearing before us, the Id AR filed reconciliation of gross receipts as accounted in the books of account and as appeared in Form 26AS which was examined by us during the hearing and find merit in the arguments of the Id AR that correct amount of receipts were accounted for in the books. In view of these facts and circumstances of the issue, we find that the issue needs to be examined at the level of AO so that the reconciliation could be verified and assessee could be given credit of correct amount of TDS. Accordingly we restore the issue back to the file of AO and direct AO to examine and verify the same and allow the credit TDS. Accordingly the ground no. 3(a)&(b) are allowed for statistical purposes.

11. In the result, the appeal of the assessee is allowed for statistical purposes.

Order is pronounced in the open court on 9<sup>th</sup> May, 2022

Sd/-

(Rajpal Yadav)  
Vice-President

Sd/-

(Rajesh Kumar)  
Accountant Member

Dated: 9<sup>th</sup> May, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- MIR Infrastructure Pvt. Ltd., 115, Sri Arabinda Road, Salkia, Howrah-711101
2. Respondent – DCIT, Circle-13(1), Kolkata
3. The CIT(A)- NFAC-Delhi
4. Pr. CIT- Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata