IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER AND
SHRI BHAGIRATH MAL BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.240/Ind/2021
Assessment Year: 2019-20

Catalyser Eduventures (India) P. Ltd., 163, Catalyser House, Kanchanbagh, Near Geeta Bhawan Square, Indore - 452 001. [PAN – AAECC 0148 A] (Appellant)	vs.	The DCIT 2(1), Indore. (Respondent)

Appellant by	:	Shri Nilesh Maheshwari, AR
Respondent by	:	Shri R.P. Maurya, Sr. D.R.
Date of hearing	:	23.02.2022
Date of pronouncement	:	30.03.2022

O R D E R

PER SUCHITRA KAMBLE, JUDICIAL MEMBER :

This appeal is filed by the assessee against the order dated 29.09.2021 passed by the CIT(A), National Faceless Appeal Centre (NFAC), Delhi for the Assessment Year 2019-20.

2. The grounds of appeal raised by the assessee are as under :

"1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned Commissioner of Income Tax (Appeals)/National Faceless Appeal Centre (NFAC for short) is not justified in upholding the determination of total income of appellant in the limitation u/s. 143(1) of the Act, at Rs.97,96,540/- as against the returned income of Rs.85,37,155/- on account of the disallowance of Rs.12,32,945/- made u/s. 36(1)(va) of the Act, based upon the details in the Tax Audit Report of the Chartered Accountant in Form 3CD, under the facts and in the circumstances of the appellant's case.

3. The learned CIT(A)/NFAC ought to have appreciated that the aforesaid disallowance of Rs.12,32,945/- in respect of the belated payments of the Employee's share of PF and ESI was allowable having regard to the judgement of the Hon'ble M/s. Continental Restaurant & Café Co.

Karnataka High Court in the case of Essae Teroka Limited reported in 366 ITR 408 (Kar) since the same has been paid before the due date for filing the return of income u/s.139(1) of the Act and hence, the disallowance made ought to have been deleted.

4. The learned CIT(A)/ NFAC is not justified in holding that the amendment made by insertion of Explanation 2 to the provisions of section 36(1)(va) of the Act and the insertion of Explanation 5 to section 43B of the Act by Finance Act, 2021 with effect from 01.04.2021 was clarificatory/ declaratory in nature and therefore, these amendments were retrospective in operation under the facts and in the circumstances of the appellant's case.

4.1 The learned CIT(A)I NFAC ought to have appreciated that the aforesaid amendments by the Finance Act, 2021 cannot be regarded as retrospective in nature as they were not in the nature of a beneficial legislation to remove intended hardships cast on the assessee and therefore, the disallowance sustained on this basis is opposed to law and facts of the appellant's case.

4.2 The learned CIT(A)/ NFAC is not justified in refusing to follow the binding judgement of the Hon'ble jurisdictional High Court of Karnataka in favour of the assessee on the ground that the said judgement was rendered before the aforesaid clarificatory amendments made under the facts and in the circumstances of the appellant's case.

5. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s. 234B and 234C of the Act, as computed in the intimation u/s.143(1) of the Act, under the facts and in the circumstances of the appellant's case.

6. For the above and other grounds that may be argued at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs."

3. The assessee company is a private limited company engaged in providing education services. The assessee filed the return of income on 25.12.2019 for the A.Y. 2019-20 declaring the total income of Rs. 85,37,155/-. The Assessing Officer, DCIT, CPC, Bengaluru while passing order under Section 143(1) of the Income Tax

Act, 1961 added an amount of Rs.12,32,945/- on account of disallowance of employees contribution fund after the due date as per the relevant statute.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assesse.

5. The Ld. A.R. submitted that the sole issue in the present assessment is related to upholding addition of Rs.12,32,945/- under Section 36(1)(va) of the Act in respect of delay in payments of Employee's contribution of Provident Fund/Employees' State Insurance. The Ld. A.R. submitted that the Centralized Processing Centre (CPC) has made the said addition without appreciating that the same was deposited within the time available to the assessee under Section 43B of the Act i.e. before filing the return of income. The Ld. A.R. further submitted that the assessee claimed the benefit of Section as the issue is covered in favour of the assessee by the various decisions of the Hon'ble High Courts across the country most specifically that of the decision of Hon'ble Delhi High Court in the case of AIMIL Limited (2010) 321 ITR 508. The Ld. A.R. submitted that *prima facie* adjustment under Section 36(1)(va) of the Act could not be made as the same was beyond the scope of provisions of Section 143(1) of the Act and that the said adjustment was made giving the assessee opportunity of being heard. The assessee challenged the action of the CPC in invoking provisions of Section 143(1)(a)(iv) of the Act based on the Audit Report. The Ld. A.R. submitted that the Visakhapatnam Bench of the Tribunal in the case of M/s. S.V. Engineering Constructions India (P) Limited vs. DCIT (ITA No.130/Viz/2021) has categorically held that the issue on account of late payment of employee's contribution to Provident Fund and Employees State Insurance Corporation is debatable in nature and is outside the purview of Section 143(1) of the Act. The Ld. A.R. further relied upon the following decisions wherein it is held that in case of debatable issues, the assessee will get the benefit of the decisions which are in the favour of assessee:

* Bajaj Auto Finance Limited vs. CIT (2018), 93 Taxmann.com 63 (Bom.HC)
* CIT vs. Nagarjuna Fertilizers and Chemicals Limited (2015) 232 Taxmann 349 (Andhra Pradesh HC)
* DCIT vs. Raghuvir Synthetics Limited in Appeal No.333 of 2004 (Guj. HC)
* Kamal Textiles vs. ITO (1991) 59 Taxmann 555 (M.P. HC)

6. The Ld. D.R. submitted that the CIT(A) has rightly dismissed the appeal of the assessee thereby stating that the Finance Act, 2021 has amended Section 43B of the Act as well as Section 36(1)(va) by inserting Explanation 5 to Section 43B of the Act and Explanation 2 to Section 36(1)(va) of the Act wherein it is categorically stated that the provisions of these Sections 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 as well as it will never be applied for the purpose of determining "due date" under this clause. The Ld. D.R. further submitted that though the insertion of this explanation are w.e.f. 01.04.2021, it is clarificatory in nature and, therefore, it will be applicable retrospectively in the light of the decision of Hon'ble Apex Court in the case of Zile Singh vs. State of Haryana (2014) 5 SCC 1. The explanations' will be applicable for earlier assessment years as well. The Ld. D.R. further submitted that the contribution made by employees have been deposited after the due date of statutory time limit under the PF Act as well as Employees State Insurance Act. The Ld. D.R. submitted that these statues are beneficial legislation and the due date should be adhered to. As regards various decisions cited by the Ld. A.R., the Ld. D.R. submitted that these decisions are contrary to the decision of the Hon'ble Gujarat High Court in the case of CIT vs. Gujarat State Road Transport Corporation, reported in (2014) 41 taxmann.com 100 (Guj.) holding that employees' contribution to the Employees' Provident Fund (EPF) and Employees' State Insurance Corporation (ESIC) deposited beyond the due date prescribed u/s.36(1)(va) of the Income Tax Act, 1961 would not be eligible for deduction u/s. 43B of the Act even after deposited before the due date of filing of tax return. The Ld. DR also relied upon the decision of the Delhi High Court in the case of CIT vs. Bharat Hotels Limited 410 ITR 417 which held against the assessee. The Ld. DR also relied upon the recent decision of the Hon'ble Gujarat High Court in case of Pr. CIT vs. M/s Suzlon Energy Ltd. R/Tax Appeal No. 860 of 2019 order dated 11.02.2020.

7. The Ld. A.R. relied upon the decision of the Indore Bench in the case of Nataraj Dal Mill, Indore vs. ACIT ITA No. 153/IND/2021 order dated 06.12.2021.

8. We have heard both the parties and perused all the relevant materials available on record. The CIT(A) has confirmed the disallowance on the ground that insertion of

Explanation 2 and 5 in Section 43B, 36(1)(va) by Finance Act 2021 is retrospective in nature. Therefore, the payment made to the contribution related to employee's contribution of PF and ESI and after the due date of statutory limit under those Statute but before filing of the return of income was rightly disallowed by the Assessing Officer. Section 36(1)(va) of the Act has stated that any sum received by the assessee from any of his employees to which the provisions of the sub-clause (x) of clause (24) of Section 2 applies 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. Prior to Finance Act, 2021 there was no explanation to the word "due date" given and, therefore, the due date was interpreted by various High Courts as being the due date of filing return of income. As the due date was not specified in the earlier occasion, the Finance Act, 2021 has inserted explanation 1 to the Section thereby clarifying that due date means the statutory due date given under the specific Statute. This amendment/insertion is not clarificatory in nature and therefore not retrospective as there is clear mention in the Finance Act that this explanation will come w.e.f. 01.04.2021, thus it will be applicable to A.Y. 2021-22 and subsequent A.Ys. The assessee's appeal is of 2018-19 which is prior to this explanation. The reliance of the Ld. D.R. upon the decision of Hon'ble Apex Court in the case of Zile Singh (supra) in fact supports the assessee's case and clearly set out that when there is specific effective date given by the Act, the amendment/Insertion/deletion will be effective from that date itself and if there is no mention of retrospective word then it will not be applicable to the earlier dates. Though the Ld. A.R. categorically stated that some of the Hon'ble High Courts has decided this issue against the assessee but majority of the Hon'ble High Court decisions are in favour of the assessee where employee's contribution was paid after the due date but before filing of Income Tax return. The assessee company has not deposited the employees' contribution within the due date which is prescribed under the said statute i.e. Provident Fund and ESI. This issue is dealt by the Hon'ble Delhi High Court in case of CIT vs. M/s Bharat Hotels Ltd. 410 ITR 417 wherein the issue is decided in favour of the Revenue, without considering the decision of the Hon'ble Delhi High Court in case of CIT vs. AIMIL Ltd. (2010) 321 ITR 508 (Del.). But the decision of the Hon'ble Delhi High Court in case of Pr. CIT vs. Pro Interactive Service (India) Pvt. Ltd. ITA No. 983/2018 pronounced on 10.09.2018, the Hon'ble High Court decided the issue in favour of

the assessee relying upon the judgment of AIMIL Ltd. (supra). The Hon'ble Delhi High Court held that the legislative intent is to ensure that the amount paid is allowed as expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPF) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act. 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. Hence, in light of the latest decision in case of Pro Interactive Service (India) Pvt. Ltd., the issue is covered in favour of the assessee. Therefore, the CIT(A) as well as the Assessing Officer was not at all justified in disallowing this claim. Thus, the order of the CIT(A) is not just and proper. The appeal of the assessee is thus allowed.

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

Order pronounced in the open Court on this 30th day of March, 2022.

Sd/-	*Sd/-*
(BHAGIRATH MAL BIYANI)	**(SUCHITRA KAMBLE)**
Accountant Member	Judicial Member

Indore, the 30th day of March, 2022

PBN/*

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore