

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 97/Kol/2022
Assessment Year : 2013-14

Macneil Engineering Ltd. (PAN: AABCM 7149 L)	Vs.	DCIT, Circle-1(1), Kolkata
Appellant		Respondent

Date of Hearing	05.05.2022
Date of Pronouncement	13.05.2022
For the Appellant	Shri Soumitra Choudhury , Advocate Mrs. Saswati Mitra Dutta, Advocate
For the Respondent	Smt. Ranu Biswas, Addl.CITDR

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 20.12.2021 for the assessment year 2013-14.

2. The issue raised in ground no. 1 is general in nature and do not require any adjudication .

3. The issue raised in ground nos. 2 to 4 involved in this appeal of assessee is against the action of the Ld. CIT(A) confirming the disallowance made qua PF & ESI in respect employee’s contribution u/s. 36(1)(va) r.w.s. 2(24)(x) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) of Rs.51,73,980/-.

4. At the outset, the Ld. AR of the assessee pointed out that this issue raised by the assessee is no longer res integra. According to the authorities below, since the assessee has not remitted the employees’ contribution on or before the due date as prescribed by the PF & ESI Act, the contribution made belatedly cannot be allowed. However, according to the assessee, since the assessee has undisputedly made the remittance in respect of employees’ contribution of PF as well as ESI before filing of the return of

income u/s 139(1) of the Act, no disallowance is warranted. According to the Ld. AR, the CIT(A) has erred in referring to the Amendment brought in by Finance Act 2021 w.e.f. 01.04.2021 inserting an Explanation to section 36(1)(va) and section 43B of the Act and holding it to be clarificatory and so, retrospective in nature. Whereas according to Ld.AR, it is only prospective in nature and cannot disturb the binding judicial precedents in favour of assessee. According to the Ld. AR, any way this issue is no longer res integra as held by this Tribunal in the case of Lumino Industries Ltd. vs. ACIT, Circle-5(1), Kolkata in I.T.A. No.365/Kol/2021 for AY 2015-16 order dated 17.11.2021, wherein assessee's favour view was taken by the Tribunal after holding that the amendment brought in by Finance Act, 2021 w.e.f 1.04.2021 is prospective in operation and so will be in force from AY 2021-22 onwards and not retrospective. The relevant portions of decision which reads 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 ShriMiraj 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 ShriVijayshree 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 LdCIT(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 *ShriVijayshree 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 favour of assessee.

5. Therefore, in the light of the above judicial precedent (*supra*), we are inclined to allow the appeal of the assessee and direct the A.O. to delete the addition and hold that the Amendment brought in Finance Act 2021 w.e.f. 01.04.2021 by inserting an Explanation to section 36(1)(va) and section 43B of the Act is prospective in nature and would apply from AY 2021-22 onwards. Consequently ground no. 2 to 4 are allowed.

6. The issue raised in ground no. 5 is against the order of Ld. CIT(A) setting aside the issue of Rs. 89,269/- to the file of AO for verification as the Ld. CIT(A) has no power to set aside the issue despite all the facts and records available before the Ld. CIT(A).

7. The facts in brief are that during the assessment proceedings , the AO observed from the reconciliation statement filed by the assessee that amount as appearing in Form 26AS is more than what has been shown in profit and loss account and accordingly added the same to the income of the assessee. The Ld. CIT(A) restored to the issue to the file of AO to verify the documents submitted before him and decide the issue accordingly which is not correct and in violation of the provision of section 251(1)(a) of the Act.

8. We have heard the rival contentions and perused the records as placed before us carefully. We observe that the assessee's total turnover during the year was Rs. 39,43,47,812/-. The assessee is engaged in the business of manufacturing and dealing in material handling equipments, electric starters and spares, service etc. We observe from the reconciliation statement filed before us that the amount of difference as added by the AO is very negligible. Keeping in view the total turnover of the assessee and the fact that the assessee has duly explained as to how the discrepancy has occurred between books of account and form 26AS, we are fully convinced with the reply of the assessee on this issue and find that the addition needs to be deleted. Accordingly we set aside the order of Ld. CIT(A) on this issue and direct the AO to delete the disallowance.

9. The issue raised in ground no. 7 is against the order of Ld. CIT(A) confirming the addition of Rs. 12,420/- as interest on TDS which has been disallowed by the AO on the ground that the same is not allowable u/s 37 of the Act as the interest on Govt. liability is not permissible and preliminary in nature.

10. After hearing the rival parties and perusing the material on record, we find that the interest on delayed payments of TDS is an expense which is incurred wholly and exclusively for the purpose of business as the interest has been paid on delayed payment of TDS which was the liability of the assessee. Accordingly we set aside the order of the Ld. CIT(A) on this issue and direct the AO to delete the disallowance.

11. The issue raised in ground no. 8 is against the order of Ld. CIT(A) in not deciding the issue of liability of business loss and unabsorbed depreciation claimed in the computation by the assessee thereby upholding the order of AO.

12. Having heard rival submissions and perusing the material on record, we find that the assessee has same brought forward business loss and unabsorbed depreciation which the assessee is entitled to claim set off in terms of provision of section 74 of the Act. However, we are of the considered view that the issue is factual and needs to be examined at the level of AO. Accordingly we restore the issue to the file of the AO with the direction to verify the same and allow in terms of provision of section 74 of the Act. This ground is allowed for statistical purposes.

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

Order is pronounced in the open court on 13th May, 2022

Sd/-

(Sonjoy Sarma)
Judicial Member

Sd/-

(Rajesh Kumar)
Accountant Member

Dated: 13th May, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Macneil Engineering Ltd., Diamond Harbour Road, Bishnupur, Konchowki, South 24 Parganas-743503.
2. Respondent – DCIT, Circle-1(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