IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA Nos.2456 & 2457/Mum/2021
(A.Ys. 2018-19 & 2019-20)

Veritas Infratech Pvt. Ltd., 8th Floor K. Raheja Prime, Sagbaug Road, Off. Andheri Kurla Road, Marol, Andheri (East), Mumbai – 400059	Vs.	ITO, Ward-3(3)(1) Aayakar Bhavan, Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAFCV0393R		
Appellant	..	Respondent

Appellant by :	Ashok Mehta
Respondent by :	S.N. Kabra

Date of Hearing	04.05.2022
Date of Pronouncement	12.05.2022

आदेश / O R D E R

PER AMARJIT SINGH, AM:

The present appeals filed by the assessee are directed against the order passed by the ld. CIT(A), NFAC, Delhi, which in turn arises from the order passed by the A.O. u/s 143(1) of the Income Tax Act, 1961, for A.Ys. 2018-19 & 2019-20. We shall first take up the appeal i.e ITA No. 2456/Mum/2021 as a lead case and its finding will be applied to other

case. The assessee has assailed the impugned order on the following grounds before us:

> *"1. The learned assessing officer at CPC and CIT Appeal at NFAC erred in assessing the income of the assessee at Rs.1,63,92,150/- instead of returned income of Rs.54,94,050/-.*
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> *2. The learned assessing officer erred in making addition under the head of Business & Profession of Rs.1,08,97,743/- on debatable issues u/s 143(1) disregarding direct decisions of various courts and CIT Appeal at NFAC erred in confirming the same.*
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> *3. The learned assessing officer erred in disallowing Rs.1,08,97,743/- u/s 36(1)(va) not following the Bombay High Court decision in the case of CIT Pune vs. Ghatge Patil Transports Ltd 53 taxmann.com 141 and the CIT Appeal at NFAC erred in confirming the same based on incorrect interpretation of law.*
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> *4. The learned assessing officer CIT Appeal at NFAC erred in holding that the amendment u/s 36(1)(va) explanation 2 and u/s 43(b) explanation 5 are retrospective in nature in clear violation of provisions of law which state that the same are prospective in nature.*
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> *5. The learned CIT Appeal at NFAC erred in ignoring the Supreme Court judgement in the case of Vatika Township Civil Appeal No.8750, 2014 arising out of SLP (C) No 540 of 2009 which held that the provisions are to be held as prospective unless specifically provided under the relevant law.*
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> *6. The learned CIT Appeal at NFAC further erred in not giving enough opportunity to the assessee and ignoring the ITAT decisions of Bangalore (Environs Management (Bangalore) Private Limited vs. Deputy Commissioner of Income Tax (2021) 63 CCH 0250, ITA No.420/Bang/2021 dated Nov 8, 2021.) and Hyderabad Tribunal (Salzgitter Hydraulics Private Limited vs. 1TO, Hyderabad, appeal no ITA 644/Hyd/2020 order dated 15-06-2021) While deciding retrospective applicability of provisions of the Finance Act 2021 which amended sec 36(1) (va) and sec 43 (b).*
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> *7. The assessee craves to add, alter, amend, and delete any of the above Grounds of Appeal."*

2. The fact in brief is that the A.O made adjustment in the intimation passed u/s 143(1) of the Act by way of disallowance of delayed remittance of employee's contribution to PF & ESI to the amount of Rs.1,08,97,743/- on the ground that the same were paid beyond due date.

3. The assessee filed the appeal before the ld. CIT(A), however, the ld. CIT(A) has dismissed the appeal of the assessee.

4. Heard both sides and perused the material on record. The assessee has deposited employee's contribution to PF/ESIC after due date specified in PF/ESIC Acts but before the due date of filing the return of income as prescribed in section 139(1) of the act. We have perused the decision of Hon'ble Jurisdiction Bombay High Court in the case of CIT v. Hindustan Organics Chemicals Ltd. (2014) 366 ITR 1 (Bom) and decision of GhatgePatil Transports Ltd. (2014) 368 ITR 249 (Bom). In the case of Hindustan Organics Chemicals Ltd. it is held that payment of employees contribution towards provident fund could not be disallowed on account of delayed payment in view of amendment to Section 43B of the Act. In the case of GhatgePatil Transports Ltd. (supra), the Hon'ble jurisdictional High Court held that both employers and employee's contributions are covered under amendment to section 43B and judgment of the Hon'ble Supreme Court in CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306/185 Taxman 416 that payment made was subject to benefit of section 43B. We have perused the decision of ITAT Bangalore in the case of Mavinahalli Shivananjappa Vijay Kumar vide ITA Nos. 596 & 597/Bang/ 2021 dated 13.12.2021 wherein it is held that 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. The relevant part of the decision is reproduced 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 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."

We have also gone through the decision of ITAT Chennai in the case of Adhyar Anand Bhavan Sweets India P. Ltd. (2022) 134 taxmann.com 56 wherein it is held that amendment brought in by inserting Explanation 2 to the provisions of section 36(1)(va) r.w.s. 43B of the Act is prospective in nature and would be applicable from assessment year 2021-22. The relevant part of the decision is reproduced as under:

"6.5 In view of the above findings of CIT(A), now we have gone through the decision of Hon'ble Supreme Court in the case of CIT vs. Vatika Township (P) Ltd., [2014] 49 taxmann.com 249/227 Taxman 121/367 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 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 was under challenge. Hon'ble Supreme Court noted though provision for surcharge under the Finance Acts have been in existence since 1995, the charge of surcharge with respect to block assessment years, 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.

6.6 The Hon'ble Supreme Court finally held that the proviso to Section 113 of the Act is prospective and not retrospective. For this Hon'ble Supreme Court held 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:*
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> *(i) prospective amendment with effect from a fixed date;*
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> *(ii) retrospective amendment with effect from a fixed anterior date; and*
> *(iii) clarificatory amendments which are retrospective in nature.*
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> *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 assessees 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.*
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> *(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.*
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> *(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.

6.7 We noted from the judgment of Hon'ble Supreme Court in Vatika Township P. Ltd., supra, that 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. In present case before us, as noted by CIT(A) that their exists divergent judgements of various High Courts. The CIT(A) has noted the case laws in favour of Revenue:

1. *Popular Vehicles & Services (P) Ltd. Vs. CIT [2018] 96 taxmann.com 13/257 Taxman 120/406 ITR 150 (Ker.)*
2. *CIT v. Gujarat State Road Transport Corporation [2014] 41 taxmann.com 100/223 Taxman 398/366 ITR 170 (Guj)*
3. *CIT v. Merchem Ltd. [2015] 61 taxmann.com 119/235 Taxman 291/378 ITR 443 (Ker.).*

The CIT(A) himself noted the ambiguity in para 7.4 of his order, which reads as under:
7.4 While rendering above decisions the Hon'ble High Courts had the occasion to examine and distinguish a catena of judgements which are usually relied upon by appellants to advance the proposition that the provisions of section 43B encompass within its scope the employees' Contribution as well and therefore any such contribution though not remitted by the employer within due date specified by the PF/ESI Acts, will still be permissible deduction if the same is actually paid in pursuance of Sec. 43B.

The CIT(A) further noted the decisions in favour of assessee in para 7.7, and the same are as under:

1. *CIT v. Alom Extrusions Ltd. [2009] 185 Taxman 416/319 ITR 306 (SC)*
2. *Aimil Ltd. (Supra)*
3. *CIT v. Nispo Polyfabriks Ltd. [2013] 350 ITR 327/213 Taxman 376/30 taxmann.com 90 (HP);*
4. *CIT v. Alembic Glass Industries ltd. [2015] 279 ITR 331/149 Taxman 15 (Guj.);*
5. *CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.);*
6. *CIT v. Pamwi Tissues Ltd. [2009] 313 ITR 137 (Bom.);*

7. *Spectrum Consultants India (P.) Ltd. V. CIT [2013] 34 taxman.com 20/215 Taxman 597 (Kar.);*
8. *CIT v. Udaipur Dugdh Utpadak Shakari Sangh Ltd. [2013] 35 taxmann.com 616/217 Taxman 64 (Mag)/(2014) 366 ITR 163 (Raj) and*
9. *CIT v. Hemla Embroidery Mills (P) Ltd. [2013] 37 taxmann.com 160/217 Taxman 207 (Mag) [2014] 366 ITR 167 (Punj. & Har.).*

6.8 In the present case also, before insertion of Explanation 2 to Section 36(1)(va) of the Act, there is ambiguity regarding due date of payment of employees' contribution on account of provident fund and ESI, whether the due date is as per the respective acts or up to the due date of filing of return of income of the assessee. As noted by Hon'ble Supreme Court an amendment made to a taxing statute can be said to be intended to remove hardship only of the assessee and not of the Department. Imposing of a retrospective levy on the assessee would be caused undue hardship and for that reason Parliament specifically chose to make the proviso affective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 01.04.2021 i.e. for and from assessment year 2021-22 of Explanation-2 to s. 36(1)(va) of the Act and not retrospectively."

In the case of the assessee, it had remitted the employee's contribution towards PF/ESIC beyond the due date for payment as specified in PF/ESIC Act, but within the due date for filing the return of income, therefore, following the aforesaid decisions, and the decision of ITAT Mumbai in the case of Empower Activity Camps Pvt. Ltd. (ITA No.1624 and 1625/Mum/2019 dated 29th March, 2022), we consider that Ld. CIT(A) is not justified in disallowing the impugned claim of deduction of the assessee. Accordingly, we decide this issue in favour of the assessee and disallowance made by the Assessing Officer is deleted. Therefore, this ground of appeal of the assessee is allowed.

ITA No.2457/Mum/2021

5. The fact in brief is that the A.O made adjustment in the intimation passed u/s 143(1) of the Act by way of disallowance of delayed remittance of employee's contribution to PF & ESI to the amount of Rs.71,45,980/- on the ground that the same were paid beyond due date. As the facts and the issue involved in this appeal is similar as in ITA No.

2456/Mum/2021, therefore by applying the same as mutatis mutandis the appeal of the assessee is allowed.

5. In the result, the appeals filed by the assessee are allowed.

Order pronounced in the open court on 12.05.2022

Sd/-	Sd/-
(VIKAS AWASTHY)	(AMARJIT SINGH)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated 12.05.2022
PS: Rohit

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,
सत्यापित प्रति //True Copy//

(Asst. Registrar)
ITAT, Mumbai