

**IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'C' AT KOLKATA
[BEFORE SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER &
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER]**

I.T.A. No. 235/Kol/2021
Assessment Year: 2018-19

PBN Constructions (P) Ltd.....Appellant
C/o. Subash Agarwal & Associates, Advocates,
Siddha Gibson, 1, Gibson Lane, Suite 213, 2nd Floor,
Kolkata - 700 069.
[PAN: AAACP 4743 L]

Vs

ACIT, Circle-3(1), SiliguriRespondent

Appearances by:

Shri Siddarth Agarwal, Advocate appearing on behalf of the Assessee
Shri Surendra Kumar Mishra, ACIT appearing on behalf of the Revenue:

Date of concluding the hearing : May 11, 2022

Date of pronouncing the order : May 24, 2022

ORDER

PER SONJOY SARMA, JM:

This is an appeal filed by the assessee against the order of National Faceless Appeal Centre, Delhi [hereinafter referred to as the 'NFAC'] dated 01.04.2021 for A.Y. 2018-19.

2. At the outset, it is noted that there is a delay of 57 days on the part of the assessee in filing this appeal before the Tribunal. In this regard, the assessee has filed an application seeking condonation of the said delay and keeping in view the reasons given therein, we are satisfied that there is a sufficient cause for the delay of 57 days on the part of the assessee in filing this appeal before the Tribunal and delay in filing the instant appeal is accordingly condoned.

3. The assessee has raised the following grounds of appeal:

"i. For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the adjustment in

the intimation issued u/s 143(1) made by the AO (CPC) on account of employees' contribution towards provident fund which was deposited before the due date of filing of return u/s 139(1).

ii. For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the adjustment in the intimation issued u/s 143(1) made by the AO (CPC) on account of GST of Rs. 6,71,420/- for alleged non-payment of the same within the due date u/s 139(1) even though the assessee had not claimed the same in the profit and loss account.

iii. For that the Ld. AO (CPC) lacked jurisdiction to make the aforesaid adjustment/additions to the returned income. As such, the same are liable to be deleted.

iv. For that the appellant craves leave to add, alter or delete all or any of the grounds of appeal".

4. The brief facts of the case is that the appellant has filed its return of income for A.Y. 2018-19. The order has been passed by DCIT, CPC, Bangalore u/s 143(1) on 16.10.2019 where the AO has disallowed a sum of Rs. 1,42,610/- being the employees' contribution towards provident fund which had been deposited within the time allowed u/s 43B before filing the return u/s 139(1) of the Income Tax Act. Besides that the AO had added back a sum of Rs. 6,71,420/- u/s 43B of the Act towards payment of GST and which was not paid within the due date as per section 139(1) of the Act. The assessee dissatisfied with the above order preferred an

appeal before the National Faceless Appeal Centre, Delhi. The Ld. CIT(A) dismissed the appeal of the assessee.

5. Aggrieved by the said order dated 01.04.2021, the assessee is in appeal before us.

6. At the time of hearing the ld. counsel for the assessee submitted that the issue no. 1 is in respect of employees' contribution towards provident fund which was deposited before the due date of filing of return u/s 139(1) is covered by the decision of the coordinate bench.

7. He further 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 towards PF & ESI 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.

8. 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. 1 is allowed.

9. In respect of issue no. 2 i.e. addition of Rs. 6,71,420/- for non-payment of GST within due date of u/s 139(1), the ld. counsel submitted that since the assessee did not get any opportunity to appear before the AO to show the necessary document and its submission since the assessment order was passed by the CPC, Bangalore u/s 143(1) of the Act and the assessee did not get any opportunity to submit their reply. Therefore, one more opportunity may be given to the assessee so as to submit their reply before the AO in respect of the said issue.

10. We after hearing the rival submission and under the given facts and circumstances of the case are of the considered view that since the assessment order is an ex-parte and no discussion has been made on merits of the case in respect of instant issue. Therefore, interest of justice, we set aside the impugned issue of non-payment of GST of Rs. 6,71,420/- within due date prescribed under the Income Tax

Act by the assessee u/s 139(1) and remitted back to the file of the Ld. AO for deciding the issue raised before us by way of a speaking order.

11. We also direct the assessee to remain vigilant in receiving the notices of hearing from the AO and should not request for any adjournment unless otherwise required for reasonable cause and should file all necessary documents at the time of hearing. Needless to mention that the assessee should be given proper opportunity of being heard. The other grounds of appeal are general and consequential in nature and need not to be adjudicated.

12. In the result, the appeal of the assessee is allowed for statistical purpose.

Order Pronounced in the Open Court on 24th May, 2022.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(SONJOY SARMA)
JUDICIAL MEMBER

Dated: 24/05/2022

Biswajit, Sr. PS

Copy of order forwarded to:

1. Appellant: PBN Constructions Pvt. Ltd.
2. Respondent: ACIT, CIR-3(1), Siliguri.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar
ITAT Kolkata Benches, Kolkata