IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं/.I.T.A No.1711/Del/2020
निर्धारणवर्ष/Assessment Year: 2017-18

OC Sweaters LLP, **F-8, Okhla South East Delhi,** **New Delhi.**	**बनाम** **Vs.**	**DCIT CPC** **Bangalore.**
PAN No. AAEFO8261B		
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे **/Assessee by**	**Sh. Salil Agarwal, Sr. Adv.** **Sh. Sailesh Gupta, Adv.**
राजस्वकीओरसे **/Revenue by**	**Shri Om Prakash, Sr. DR**

सुनवाईकीतारीख/ Date of hearing:	20.04.2022
उद्घोषणाकीतारीख/Pronouncement on	25.05.2022

आदेश /O R D E R

This appeal is filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-10, New Delhi dated 23.07.2020 for the AY 2017-18. The assessee in its appeal raised the following grounds: -

1. *"That the Ld. Commissioner of Income Tax (Appeals) has grossly erred in law and on facts in sustaining the order of intimation so passed by Ld. Assessing Officer under section 143(1) of the Act and the additions made thereafter, which additions were beyond the scope and jurisdiction of intimation order so passed under section 143(1) of the Act.*

2. *That the Ld. Commissioner of Income Tax (Appeals) has further erred in law and on facts by sustaining a disallowance of a*

sum of Rs.17,64,116/- on account of payment of employee contribution with regards to PF/ESI/superannuation fund and while sustaining the said disallowance, the Ld. CIT(A) has failed to appreciate the fact that the payments of the same were made prior to filing of return of income and as such, said expenditure was an allowable expenditure.

2.1 *That in doing so, the Ld.CIT(A) has failed to appreciate the fact that the requisite documents/evidences along with explanations were tendered by assessee, but Ld.CIT(A) based its decision on preconceived notions and misconceived facts and as such, the disallowance so sustained should be deleted.*

3. *That the Ld.CIT(A) has further erred in law and on facts by sustaining an addition of a sum of Rs.7,44,540/- on account of difference in foreign exchange on fixed assets, which was claimed as exempt by the assessee-appellant being on capital account.*

3.1 *That in doing so, the Ld.CIT(A) has failed to appreciate the fact that the requisite documents/evidences along with explanations were tendered by assessee, but Ld.CIT(A) based its decision on preconceived notions and misconceived facts and as such, the disallowance so sustained should be deleted.*

4. *That the Ld.CIT(A) has relied on judgments totally inapplicable to the facts of assessee – appellant and has also based her findings on mere suspicion and surmises which are contrary to material available on record and as such, the addition so sustained needs to be deleted.*

5. *That the Ld.CIT(A) has erred in law and on facts in sustaining addition in the hands of assessee-appellant without giving any fair and proper opportunity of being heard to*

the assessee, thereby, violating the principles of natural justice.

2. The Ld. Counsel for the assessee submits that the CPC Bangalore while passing the intimation u/s 143(1) of the Act disallowed employees contribution to PF & ESI amounting to Rs.17,64,116/-. Ld. Counsel also submits that CPC Bangalore while passing the intimation disallowed exempt income being gain on difference in foreign exchange on fixed assets amounting to Rs.7,44,540/- without any justification. It is submitted that on appeal the Ld.CIT(A) sustained the disallowances. Ld. Counsel submits that as per AS-11, exchange difference arising from long term monetary items should be capitalized if it pertains to acquisition of capital assets and the difference in transaction of foreign currency transactions (excluding the long term foreign currency monetary items) should be accounted in line with Accounting Standard 11 notified by Government of India on March 31, 2009 (as amended on 29th December 2011) and realized gains and losses are recognized in the Statement of Profit and Loss. Accordingly, assessee has shown Rs.7,44,540/- as exchange difference (excluding long term gain) on Reinstatement of liability as on Reporting Date i.e. 31st March 2017 for acquisition of capital assets. The gain is reflected under the Head-Other Income.

Section 43A of Income Tax Act, 1961 deals with the provision of exchange fluctuation on Capital account transactions. Section 43A applies when following conditions are fulfilled: -

i) The asset must be acquired from outside India (Same is applied here).
ii) The asset must be acquired for the purpose of Business and Profession.

It is submitted that in such cases, the amount of exchange gain/loss arisen on such assets shall be added/deducted to the actual cost of assets on Realization basis. Basis on above, assessee has deducted Rs.7,44,540/- from the computation of income as the same will be dealt under section 43A of Income Tax Act and has been accounted on the basis of Realization of difference in exchange.

2.1 Ld. Counsel submits that in so far as the disallowance made towards PF & ESI is concerned the Ld.CIT(A) relied on the decisions of the Delhi High Court in the case of CIT Vs. Bharat Hotels Limited [410 ITR 417]. In so far as the exchange gain is concerned the Counsel submits that Ld.CIT(Appeals) sustained the disallowance observing that the assessee has not filed corroborative documentary evidence to show that this gain was earned on fixed assets. The Ld. Counsel for the assessee submits that in any case the additions/disallowances made while passing the intimation u/s

143(1) are debatable in nature and they are beyond the scope of provisions u/s 143(1) of the Act.

3. The Ld. DR strongly placed reliance on the orders of the authorities below.

4. Heard rival contentions, perused the orders of the authorities below and the case laws relied on. While processing the return under Section 143(1) of the Act, no disallowance towards contribution to employees' PF and ESI is warranted as this issue is highly debatable in nature. Even otherwise I find that the issue in appeal is squarely covered by the decision of the jurisdictional High Court in the case of CIT Vs. AIMIL Ltd. 321 ITR 508. Ratio of this decision squarely applies to the facts of the assessee's case.

5. Further I also observe that recently this Tribunal in a batch of appeals in the cases of Raj Kumar Vs. ITO CPC Bangaluru in ITA. No. 1392/Del/2021 and other appeals by order dated 28.02.2022 considering various decisions rendered by various High Courts and the Tribunals held that the amendment brought in by Finance Act, 2021 is effective from 1.04.2021 and no disallowance is called for, on belated payment of employees' contribution to ESI and PF in case the assessee deposited the said contribution before due date

for filing of return of income under Income Tax Act. While holding so the Tribunal observed as under:-

> "21. In this background, the various decisions of the Hon'ble Jurisdictional High Courts have been perused.
>
> 22. In the case of CIT Vs. Bharat Hotels Ltd. 410 ITR 417, the question of law at serial no. 2 framed by the Hon'ble High Court reads as under: (order dated 06.09.2018)
>
> "2. Whether the payment of provident fund and employees state insurance dues deposited by the assessee within the grace period would qualify for deduction under Section 43B of the Income Tax Act, 1961?"
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> 23. The said question was dealt at para 7 & 8 of the order, it has been held that the assessee undoubtedly was entitled to claim the benefit and properly treat such amounts as having been duly deposited, which were infact deposited within the period prescribed (i.e. 15+5 days in the case of EPF and 21 days + any other grace period in terms of extent notification).
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> 24. Thus, the Hon'ble Court has held that the employers contribution is an allowable deduction, if paid before the due date answering the question of law framed. The Hon'ble Court went further and held that as far as the amounts constituting deductions from employee's salaries towards their contributions, which were made beyond such stipulated period, obviously the assessee was not entitled to claim the deduction from its returns.
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> 25. We have perused the order of the Hon'ble Jurisdictional High Court in the case of CIT Vs. AIMIL Ltd. 321 ITR 508 vide order dated 23.12.2009 held that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed,

as per the principle laid down by the Hon'ble Supreme Court in the case of Vinay Cement Ltd.

26. The brief facts of such case are as under:

"2. The case relates to the assessment year 2002-03. The respondent assessee had filed its return on 30-10-2002 declaring income at Rs. 7,95,430. During the assessment proceedings, the Assessing Officer (AO) found that the assessee had deposited employers' contribution as well as employees' contribution towards provident fund and ESI after the due date, as prescribed under the relevant Act/Rules. Accordingly, he made addition of Rs. 42,58,574 being employees' contribution under section 36(1)(*va*) of the Act and Rs. 30,68,583 being employers' contribution under section 43B of the Act. Felt aggrieved by this assessment order, the assessee preferred appeal before the CIT(A) who decided the same *vide* orders dated 15-7-2005. Though the CIT(A) accepted the contention of the assessee that if the payment is made before the due date of filing of return, no disallowance could be made in view of the provisions of section 43B, as amended *vide* Finance Act, 2003, he still confirmed the addition made by the Assessing Officer on the ground that no documentary proof was given to support that payment was in fact made by the assessee. The assessee filed an application under section 154 of the Act before the CIT(A) for rectification of the mistake. After having satisfied that payment had, in fact, been made, the CIT(A) rectified the mistake and deleted the addition by holding that the assessee had made the payment before the due date of filing of the return, which was a fact apparent from the record."

The decision of ITAT:

27. The Co-ordinate Bench of ITAT relied on the judgment of Hon'ble Supreme Court in the case of CIT Vs. Vinay Cements Ltd. 213 CTR 268 to support its decision to the effect that if the employers' as well as employees' contribution towards provident fund and ESI is paid before the due date of filing of return, no disallowance can be made by the Assessing Officer.

28. The relevant part of the order of the ITAT relying on the CIT Vs. Vinay Cements Ltd. (supra) is as under:

"*11. We have carefully considered the rival submissions in the light of material placed before us. In the assessment order ld. Assessing Officer has categorically stated that what the amount due was for which month*

in respect of EPF, Family Pension, PF inspection charges and ESI deposits and what were the due dates for these deposits and on which date these deposits were made. The dates of deposits are mentioned between 23rd May, 2001 to 23rd April, 2002. The latest payment is made on 23rd April, 2002 and assessee being limited company had filed its return on 20th October, 2002 which is a date not beyond the due date of filing of the return. Thus, it is clear beyond doubt that all the payments which have been disallowed were made much earlier to the due date of filing of the return. The disallowance is not made by the Assessing Officer on the ground that there is no proof of making such payment but disallowance is made only on the ground that these payments have been made beyond the due dates of making these payments under the respective statute. Thus, it was not an issue that the payments were not made by the assessee on the dates which have been stated to be the dates of deposits in the assessment order. If such is a factual aspect then according to latest position of law clarified by Hon'ble Supreme Court in the case of CIT v. Vinay Cement Ltd. that no disallowance could be made if the payments are made before the due date of filing the return of income. This issue came before Hon'ble Supreme Court in the case of CIT v. Vinay Cement Ltd. which was a special leave petition filed by the department against the High Court Order of 26th June, 2006 in ITA No. 2/05 and ITA No. 56/03 and ITA No. 80/03 of the High Court of Guwahati, Assam and it is order dated 7th March, 2007. A copy of the said order is placed on record. The observations of their Lordships on the issue are as under :—

'In the present case we are concerned with the law as it stood prior to the amendment of section 43B. In the circumstances the assessee was entitled to claim the benefit in section 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return.

The special leave petition is dismissed."

29. Thus, we find that the Co-ordinate bench of ITAT and the Hon'ble Jurisdictional high Court of Delhi have relied on the judgment of Vinay Cements Ltd. (supra).

30. Further, the Hon'ble Jurisdictional High Court of Delhi in the case of PCIT Vs. Pro Interactive Services (India) Pvt. Ltd. in ITA 983/2018 dated 10.09.2018 while dismissing the appeal of the Revenue held that "the legislative intent was/is to ensure that the amount paid

is allowed as an 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 (EPD) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act."

31. Further, this issue has been examined in the Finance Act, 2021 which are as under:

"Section 2 (24) (x) of the Income Tax Act, 1961 reads: "any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees."

FINANCE ACT, 2021

[13 OF 2021]

An Act to give effect to the financial proposals of the Central Government for the financial year 2021-2022.*BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows*:—

CHAPTER I

PRELIMINARY

Short title and commencement.

1. (1) This Act may be called the Finance Act, 2021.

(2) Save as otherwise provided in this Act,—

(*a*) sections 2 to 88 shall come into force on the 1st day of April, 2021;

(*b*) sections 108 to 123 shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Amendment of section 36.

9. In section 36 of the Income-tax Act, in sub-section (1), in clause (*va*), the *Explanation* shall be numbered as *Explanation 1* thereof and after *Explanation 1* as so numbered, the following *Explanation* shall be inserted, namely:—

'*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 purposes of determining the "due date" under this clause;'.

Amendment of section 43B.

11. In section 43B of the Income-tax Act, after *Explanation4*, the following *Explanation* shall be inserted, namely:—

"*Explanation5*.—For the removal of doubts, it is hereby clarified that the provisions of this section 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.".

32. We have also perused the Memorandum Explaining the Provisions in the Finance Bill, 2021. Under the head "Provision relating to Direct Taxes" with to rationalization of various provisions, the issue of clause (24) of Section 2 sub-clause (x), Section 36(1) clause (va), Section 43B with regard to provisions of sub-Section (1) of Section 139 have been dealt at length. The gist is as under:

"Rationalization of various Provisions

Payment by employer of employee contribution to a fund on or before due date

Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.

Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head Profits and gains of business or profession'.

Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, 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.

Explanation to the said clause provides that, for the purposes of this clause, "due date to mean the date by

which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.

Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

Though section 43B of the Act covers only employer‘s contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer contribution and employee‘s contribution towards welfare fund. It may be noted that employee‘s contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer‘s contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee‘s contribution towards welfare funds. Employee‘s contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee‘s contributions.

Accordingly, in order to provide certainty, it is proposed to –

(i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for

the purposes of determining the —due date under this clause; and

(ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years."

[Clauses 8 and 9]

33. Thus, the matter has been finally decided and the controversy has been put to rest.

34. Having gone through the Orders of the Co-ordinate Bench of Tribunal allowing the delayed payment pertaining to employees contribution, Orders of the Co-ordinate Bench of Tribunal disallowing the delayed payment pertaining to employees contribution, Judgments of various Hon'ble Courts disallowing the delayed payment, Judgments of various Hon'ble Courts disallowing the delayed payment, provisions of Section 2(24)(x), Section 36(1)(va), Section 43B, Section 139(1) of the Income Tax Act, 1961, provisions of Finance Act 2021, Memorandum explaining the provisions in Finance Bill, 2021 and the specific amendments which will take effect from 01.04.2021, we hereby hold that no disallowance is called for belated payment of the employee's contribution to the respective ESI and EPF fund in the case of assessee who have deposited the same before the due date of filing of Income Tax Return. "

Following the said decisions, I direct the Assessing Officer / CPC to delete the disallowance made to employees' contribution to EPF and ESI as the same were remitted before the due date of filing of return of income.

6. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of CIT Vs. M/s. Alom Extrusions Limited (2009) 319 ITR 306 (SC). Grounds raised by the assessee are allowed.

7. Coming to disallowance of Rs.7,44,540/- in respect of exchange gain on fixed assets it is the submission of the Ld. Counsel that the exchange gain difference arising from long term monetary items were capitalized as per Accounting Standard-11 and the gain arising out of such long term monetary items i.e. fixed assets has shown as exchange difference on reinstatement of liability as on 31.03.2017 for acquisition of capital assets. It is the contention of the Ld. Counsel that the amount of exchange gain/loss arisen on such long term asset shall be added/deducted to the actual cost of assets on realization basis. Therefore, it is submitted that assessee has deducted this exchange difference gain of Rs.7,44,540/- from the computation of income as the same has been accounted on the basis of realization of difference in exchange which has to be dealt under the provisions of section 43A of the Act. On perusal of the order of the Ld.CIT(A) it is observed that the claim of the disallowance made by the CPC was sustained observing that there were no cogent reasons and evidences. In any case, the issue is debatable and the same is outside the scope of the provisions of

section 143(1) of the Act. Thus, the disallowance made towards exchange gain of Rs.7,44,540/- is directed to be deleted while processing the return u/s 143(1) of the Act.

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

Order pronounced in the open court on 25/05/2022

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 25.05.2022

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi