

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "S.M.C." NEW DELHI]

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER, S.M.C.

आ.अ.सं./I.T.A No.1564/Del/2021

निर्धारणवर्ष/Assessment Year: 2018-19

Bhagwati Security Services, 1 st Floor, Kamal Market, Paper Mill Road, Brijesh Nagar, Saharanpur - 247 001 [U. P.]	बनाम Vs.	Income Tax Officer, Ward : 3 (3)(3), Saharanpur.
PAN No. AADFB5048A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारितीकीओरसे /Assessee by :	N o n e;
राजस्वकीओरसे /Revenue by :	Shri Om Parkash, Sr. D. R.;

सुनवाईकीतारीख/ Date of hearing:	18/05/2022
उद्घोषणाकीतारीख/Pronouncement on :	25/05/2022

आदेश / O R D E R

PER C. N. PRASAD, J.M. :

1. This appeal is filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (hereinafter referred to NFAC) dated 1.09.2021 for assessment year 2018-19 in sustaining the disallowance of Rs.41,43,856/- under Section 36(1)(va) of the Income Tax Act, 1961 (the Act) in respect of employees' contribution to ESI and PF

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deposited after the due date under the relevant Acts, but before the due date for filing return of income under Section 143(1) of the Act.

2. The assessee has raised the following grounds of appeal:-

“1. That the order of Ld. CIT(A) is illegal, invalid and against the law.

2. That the Ld. CIT(A) has erred on the facts and in law while dismissing the appeal of the assessee without appreciating the fact that the intimation under Section 143(1) was merged with the assessment order passed under Section 143(3) and no demand was outstanding after order under section 143(3) of the I.T. Act, 1961.

3. That the Ld. CIT(A) has erred on the facts and in law while dismissing the appeal of the assessee on the basis of amendment to Section 36(1)(va) and Section 43B of the I.T. Act, 1961 without appreciating the fact that such amendments would apply to the assessment year 2021-22 and subsequent assessment years as clearly mentioned in the memorandum explaining the provisions of the Finance Bill, 2021.

4. That the Ld. CIT(A) has erred on the facts and in law while dismissing the appeal of the assessee in complete disregard to the settled legal position based on various judicial precedents from different courts.

5. That the grounds of appeal are without prejudice to each other. “

3. In spite of issue of notice, none appeared on behalf of the assessee or any adjournment was sought. As the issue in the appeal has been decided in a number of appeals by various benches of the Tribunal, I proceed to dispose of this appeal on hearing the ld. DR.

4. The ld. DR submits that while processing the return under Section 143(1) on 1.09.2021 of the Act, the Centralized Processing Centre (CPC) Bangalore, sustained the employees' contribution to

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ESI and PF and the Id. CIT (Appeals) also sustaining the disallowance relying on various case laws referred to in the order of the Id. CIT (Appeals). The Id. DR submits that the amendment brought in by the Finance Act, 2021 in Sections 36(1)(va) and 43B of the Act by way of inserting Explanation 2 and Explanation 5 respectively are clarificatory in nature and, therefore, have retrospective applicability. The Id. DR strongly supported the orders of the Id. CIT (Appeals) in sustaining the disallowance made under Section 36(1)(va) of the Act in respect of employees' contribution made to ESI and PF.

5. I have heard the submissions of the Id. DR, perused the orders of the authorities below. 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.

6. Reliance is 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. The Hon'ble Supreme Court in the case of M.M. Aqua Technologies Ltd. Vs. CIT (supra) held that retrospective provision in a Tax Act which is for the removal of doubts cannot be presumed to be retrospective even where such language is used if it alters or changes the law as it earlier stood. The Hon'ble Supreme Court also observed that this was the position as held by the apex court in the case of Sedco Forex International Drill. Inc Vs. CIT (2005) 12

SCC 717. The Amendments made to Section 36 and Section 43B by insertion of Explanations 2 and 5 respectively. In these Sections it is clarified that for the removal of doubts the provisions of these Sections were amended. Therefore, the ratio of the decision of the Hon'ble Supreme Court in the case of M.M. Aqua Technologies Ltd. Vs. CIT (supra) squarely applies.

8. 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?”

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).

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.

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 Id. 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 (EPF) 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 *Explanation 4*, the following *Explanation* shall be inserted, namely:—

"Explanation 5.—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

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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,

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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.

9. 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.

MEHTA

Copy forwarded to

1. Appellant;
2. Respondent;
3. CIT

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4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	18.05.2022
Date on which the typed draft is placed before the dictating member	19.05.2022
Date on which the typed draft is placed before the other member	25.05.2022
Date on which the approved draft comes to the Sr. PS/ PS	25.05.2022
Date on which the fair order is placed before the dictating member for pronouncement	25.05.2022
Date on which the fair order comes back to the Sr. PS/ PS	25.05.2022
Date on which the final order is uploaded on the website of ITAT	25.05.2022
Date on which the file goes to the Bench Clerk	25.05.2022
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	