

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER**

ITA.NO. 159/MUM/2022 (A.Y: 2019-20)

M/s. Axis Carriers & Logistics Ltd., 803B Kukreja palace Vallabh Baug Lane Ghatkopar (E), Mumbai - 400075 PAN: AADCA9585A	v.	DCIT Centralised Processing Centre Income-tax Department Bengaluru
(Appellant)		(Respondent)

Assessee by	:	Shri Rakesh K. Milwani
Department by	:	Shri Mehul Jain
Date of Hearing	:	19.05.2022
Date of Pronouncement	:	24.05.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter for short "Ld. CIT(A)] dated 14.12.2021 for the A.Y.2019-20.

2. Assessee has raised following grounds in its appeal: -

"1. Considering the facts and circumstances of the case, the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre 1961 (hereinafter, for the sake of brevity, referred to as 'CIT(A)) erred on facts and in law in dismissing the appeal of the appellant on the ground that the amendment to section 36(1)(va) of the Income Tax Act, 1961 (hereinafter, for the sake of brevity, referred to as 'the Act') is retrospective in nature.

2. Considering the facts and circumstances of the case, the Learned CIT(A) erred on facts and in law in not allowing deduction of Employees Contribution of Provident Fund and ESIC amounting to Rs. 464733 which has been paid after due date defined under the respective Act but before the due date of filing Return of income as specified u/s 139(1) of the Act.

3. Considering the facts and circumstances of the case, the Learned CIT(A) erred on facts and in law in not appreciating that the Assessing Officer ought not to have disallowed the sum of Rs. 464733 on a date prior to the amendment made in Finance Act, 2021.

4. Considering the facts and circumstances of the case, the Learned CIT(A) erred on facts and in law in not considering argument that section 36(1)(va) speaks only of allowance and not of disallowance and that if the amount is not allowable u/s 36(v)(a) of the Act, the same ought to have been allowed u/s 37 of the Act

With due permission of the bench, the appellant, humbly submits the following as an additional ground of appeal being ground of appeal not pushed before the Learned CIT(A) and which is based on legal position and not based on any additional facts

5. Considering the facts and circumstances of the case and in law, surcharge ought not to be levied on tax levied under section 115JB of the Act since total income under normal provisions is less than Rs. 100 lakhs though deemed income u/s 115JB is more than Rs. 100 lakhs.

6. The appellant craves leave to add and / or alter and / or amend any ground(s) of appeal.

7. The appellant prays that such other and further relief be granted to the appellant as the appellant may deserve."

3. At the time of hearing, Ld. AR of the assessee submitted that payment of employee's contribution fee has been made before the due

date for filing of return of income u/s. 139(1) of the Act, then same is allowable deduction. Ld. AR of the assessee further submitted that the amendment to section 36(1)(va) and 43B of the I.T. Act by Finance Act, 2021 is only prospective in nature i.e. w.e.f. 01.04.2021 and not retrospective. For the above contentions, Ld. AR relied on following judicial pronouncements: -

- a. *Goetze (India) Ltd., v. CIT [2006] 284 ITR 323 (SC)]*
- b. *CIT v. Hindusthan Organic Chemicals Ltd., dated 11.07.2014 Hon'ble Bombay High Court.*
- c. *Salzgitter Hydraulics Pvt. Ltd., v. ITO dated 15.06.2021 [ITAT Hyderabad Bench]*
- d. *Atul G. Puranic v. Income Tax Officer dated 13.05.2011 [ITAT Mumbai Bench]*

4. Ld. DR vehemently supported the orders of the authorities below.

5. Considered the rival submissions and material placed on record, we observed that the assessee for the various reasons could not deposit the employees contribution to provident fund within the time allowed under prescribed Act. Whereas, the assessee has deposited the amount before filing of the return of income u/s. 139(1) of the Act and there is a delay in depositing the employees contribution to provident fund. The assessee has complied with the provisions of Law and deposited the contributions before the due date of filling the Return of income u/s.139(1) of the Act which cannot be disputed. The Ld.DR submitted that the amendment is

retrospective applicable but the assessee submissions are that the amendment has come w.e.f 01.04.2021 and the same is applicable prospectively. The fact remains that the provisions/explanation was introduced in the Finance Act, 2021 which is effective from 01.04.2021.

6. Considering the rival submissions and overall facts, circumstances, the judicial precedents filed on the similar issue, the Bangalore Bench in the case of M/s. BI Worldwide India Pvt Ltd. v. DCIT in ITA No. 433/Bang/2021 dated 04.01.2022, A.Y.2018-19 has considered the facts and provisions of law has observed at Page No. 3, Para No. 9 & 10 of the order which is read as under and allowed the appeal:

"9. We have heard rival submissions and perused the material on record. An identical issue was considered by the Tribunal in the case of The Continental Restaurant & Café Co. v. ITO (supra). The relevant finding of the Tribunal reads as follows:-

"7. I have heard rival submissions and perused the material on record. Admittedly, the assessee has not remitted the employees' contribution of PF of Rs.1,06,190/- and ESI of Rs.16,055/- totaling to Rs.1,22,245/- before the due date specified under the respective Act. However, the assessee had paid the same before the due date of filing of the return u/s 139(1) of the I.T. Act. The Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT reported in 366 ITR 408 (Kar.) has categorically held that the assessee would be entitled to deduction of employees' contribution to PF and ESI provided the payment was made prior to the due date of filing of return of income u/s 139(1) of the I.T.Act. The Hon'ble jurisdictional High Court differed with the judgment of the Hon'ble Gujarat High Court in the case of CIT v. Gujarat State Road Transport Corporation reported in 366 ITR 170 (Guj.). In holding so, the Hon'ble High Court was considering following substantial question of law:-

"Whether in law, the Tribunal was justified in affirming the finding of Assessing Officer in denying the appellant's claim of deductions of the employees contribution to PF/ESI alleging that the payment was not made by the appellant in accordance with the provisions u/s 36(1)(va) of the I.T.Act?"

7.1 In deciding the above substantial question of law, the Hon'ble High Court rendered the following findings:-

"20. Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provided in sub para (1), the employer shall, before paying the member, his wages, deduct his contribution from his wages and deposit the same together with his own contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word "contribution" used in Clause (b) of Section 43B of the IT Act means the contribution of the employer and the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income under sub-section (1) of Section 139 of the IT Act is made, the employer is entitled for deduction.

21. The submission of Mr.Aravind, learned counsel for the revenue that if the employer fails to deduct the employees' contribution on or before the due date, contemplated under the provisions of the PF Act and the PF Scheme, that would have to be treated as income within the meaning of Section 2(24)(x) of the IT Act and in which case, the assessee is liable to pay tax on the said amount treating that as his income, deserves to be rejected.

22. With respect, we find it difficult to endorse the view taken by the Gujarat High Court. WE agree with the view taken by this Court in W.A.No.4077/2013.

23. In the result, the appeal is allowed and the substantial question of law framed by us is answered in favour of the appellant-assessee and against the respondent-revenue. There shall be no order as to costs."

7.2 The further question is whether the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory and declaratory in nature. The Hon'ble Supreme Court in the recent judgment in the case of M.M.Aqua Technologies Limited v. CIT reported in (2021) 436 ITR 582 (SC) had held that retrospective provision in a taxing Act which is "for the removal of doubts" cannot be presumed to

be retrospective, if it alters or changes the law as it earlier stood (page 597). In this case, in view of the judgment of the Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT (supra) the assessee would have been entitled to deduction of employees' contribution of PF and ESI if the payment was made prior to due date of filing of the return of income u/s 139(1) of the I.T.Act. Therefore, the amendment brought about by the Finance Act, 2021 to section 36(1)(va) and 43B of the I.T.Act, alters the position of law adversely to the assessee. Therefore, such amendment cannot be held to be retrospective in nature. Even otherwise, the amendment has been mentioned to be effective from 01.04.2021 and will apply for and from assessment year 2021-2022 onwards. The following orders of the Tribunal had categorically held that the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is only prospective in nature and not retrospective.

- (i) Dhabriya Polywood Limited v. ACIT reported in (2021) 63 CCH 0030 Jaipur Trib.*
- ii) NCC Limited v. ACIT reported in (2021) 63 CCH 0060 Hyd Tribunal.*
- (iii) Indian Geotechnical Services v. ACIT in ITA No.622/Del/2018 (order dated 27.08.2021).*
- (iv) M/s.Jana Urban Services for Transformation Private Limited v. DCIT in ITA No.307/Bang/2021 (order dated 11th October, 2021)*

7.3 In view of the aforesaid reasoning and the judicial pronouncements cited supra, the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 will not have application for the relevant assessment year, namely A.Y. 2019-2020. Accordingly, I direct the A.O. to grant deduction in respect of employees' contribution to PF and ESI since the assessee has made payment before the due date of filing of the return of income u/s 139(1) of the I.T.Act, It is ordered accordingly.

8. In the result, the appeal filed by the assessee is allowed."

10. In view of the judicial pronouncements cited supra, we hold that the amendment to section 36(1)(va) and 43B of the Act will not have application for the relevant assessment year, namely assessment year 2018-2019. Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to PF and ESI since the

assessee made the payment before the due date of filing of return u/s 139(1) on 30.11.2018 of the Act. Accordingly, grounds raised by assessee stands allowed."

7. Similarly, in the case of Shri Satish Kumar Sinha v. ITO in ITA No. 293/Hyd/2021, A.Y 2019-20 order dated 23.08.2021, the Hyderabad Bench has observed at Para 3.5 as under: -

"3.5. We have heard both the parties through video conference and gone through the material placed on record. In the instant case, there is no dispute that the amounts-in-question with regard to EPF and ESI were remitted to the concerned accounts before the due date of filing the return of income u/sn139(1). This, the Tribunal has consistently taken a view that if the PF and ESI are remitted to the respective accounts, the same are required to be allowed as deduction. In the case of KLR Industries Ltd., Vs. DCIT (2017) [83 taxmann.com 322] (Hyd), the Tribunal held as under:

"34. The A.O. disallowed the expenditure claimed by observing that the assessee has not remitted the employees contribution to PF and ESI within the prescribed date as mentioned in section 36(1)(va). Though, the assessee did not challenge the disallowance before learned CIT(A) but he raised an additional ground before us challenging the said disallowance. It is the contention of the assessee that the employees contribution to ESI and PF though, was not paid within the due date as prescribed under section 36(1)(va) but such dues having been paid before the due date of filing of return of the income as prescribed under section 139(1), the amount is allowable as a deduction as per the provisions of section 43B. We find merit in the aforesaid submissions of the assessee. There are a number of judicial precedents on this issue wherein it is held that if the employees contribution to PF and ESI is paid within the due date of filing of return of income under section 139(1), then, the amount is allowable as a deduction in view of the provision of section 43B. In view of the afore said, we delete the addition of Rs.2,07,209".

3.5.1. Similarly, Hon'ble Punjab & Haryana High Court in the case of Pr.CIT Vs. Rajasthan Beverages Corporation Ltd., (2017) [84 taxmann.com 173] held that no disallowance can be made in respect of PF and ESI u/s.36(1)(va) of the Act, if the same are deposited on or before the due date of filing the return of income. For the sake

clarity and convenience we extract relevant part of the order of the Hon'ble Rajasthan High as under:

"5. So far as the question relating to privilege fees amounting to Rs.26.00 Crores in the instant year as well as the deduction of claim of Rs.17,80,765/- on account of Provident Fund (PF) and ESI is concerned, this Court has extensively considered the aforesaid two questions in assessee's own case vide judgment and order dt.26.05.2016 referred to (supra) and has held that the privilege fees being a revenue expenditure, is required to be allowed as a revenue expenditure. This court in the aforesaid case has also allowed the claim of the assessee, in so far as payment of PF & ESI etc. is concerned, on the finding of fact that the amounts in question were deposited on or before the due date of furnishing of the return of income and taking in consideration judgment of this Court in CIT v. State Bank of Bikaner & Jaipur [2014] 363 ITR 70/43 taxmann.com 411/225 Taxman 6 (Mag.) (Raj.) and CIT v. Jaipur Vidhut Vitaran Nigam Ltd. [2014] 363 ITR 307/49 taxmann.com 540/[2015] 228 Taxman 214 (Mag.) (Raj.) and accordingly both the questions are covered by the aforesaid judgment and against the revenue". Against which the revenue has filed SLP before the Hon'ble Supreme Court, which was dismissed by the Hon'ble Apex Court in (2017) [85 taxmann.com 185]. Therefore, taking the consistent view and respectfully following the view taken by the Co-ordinate Bench of the ITAT in the case of KLR Industries Ltd., Vs. DCIT (supra), we hold that no disallowance could be made in respect of employees contribution of PF and ESI if the same are deposited before the due date of filing the return of income. Accordingly, we set aside the order of Ld.CIT(A) and delete the addition made by the AO. The appeal of the assessee on this ground is allowed".

Respectfully following the same, I set aside the order of the CIT (A) and delete the addition made by the Assessing Officer on this issue".

2. Respectfully following the same, I hold that since the assessee has deposited the Employees Contribution to the PF and ESI before the date of filing the return of income, as per the ITA No. 293 of 2021 Satish Kumar Sinha Hyderabad amended provision applicable to the to the relevant A.Y, the same is not to be disallowed. Assessee's appeal is accordingly allowed.

3. In the result, assessee's appeal is allowed."

8. Respectfully following the above ratio of judicial decisions and the facts emanated in the course of hearing we find that the amendment was brought in Finance Act, 2021 w.e.f 01.04.2021. The law was not framed/amended in the relevant Assessment year and any legal proposition which cast additional burden/liability on the assessee cannot be implemented retrospectively. We considering the overall facts, circumstances, judicial decisions, are of the reasoned view that the amendment to section 36(1)(va) of the Act will not be applicable to Assessment Year 2019-2020. The assessee has deposited the employees contribution of provident fund before the due date u/s. 139(1) of the Act. Accordingly, we set-aside the order of the Ld.CIT(A) and direct the assessing officer to delete the disallowance and allow the grounds of appeal in favour of the assessee.

9. With regard to Ground No. 5, Ld. AR submitted that assessee declared the total income under normal provisions at ₹.90,04,080/- (Refer 143(3) order at Page No. 25 of the Appeal Memo) and the profit declared u/s. 115JB of the Act at ₹.1,84,61,143/-. He submitted that the surcharge is charged by Centralized Processing Centre due to the fact that the income

declared u/s. 115JB of the Act is above ₹. 1 Crore. Whereas the income declared by the assessee under normal provisions is less than ₹.1 Crore. He prayed that the surcharge is applicable only on the income declared under normal provisions not on the income determined u/s. 115JB of the Act.

10. On the other hand, Ld.DR objected to the above submissions and submitted that the Finance Act, Chapter II itself clearly indicate that the surcharge is applicable to the income computed u/s. 115JB of the Act.

11. Considered the rival submissions and material placed on record. We observe that the rates indicated in Chapter II of the Finance Act, 2020 clearly as under: -

"Provided that the amount of income-tax computed in accordance with the provisions of section 111A or section 112 or section 112A of the Income-tax Act shall be increased by a surcharge, for the purposes of the Union, as provided in Paragraph A, B, C, D or E, as the case may be, of Part I of the First Schedule:

*Provided further that in respect of any income chargeable to tax under section 115A, 115AB, 115AC, 115ACA, 115AD, 115B, 115BA, 115BB, 115BBA, 115BBC, 115BBD, 115BBDA, 115BBF, 115BBG, 115E, 115JB or 115JC of the Income-tax Act, the amount of income-tax computed under this sub-section shall be **increased by a surcharge**, for the purposes of the Union, calculated"*

12. Therefore, the issue under consideration is clear that the surcharge is applicable to any income which crosses the limit specified by the respective Finance Act, in this case it is fixed at ₹.1 Crore. Therefore, any income declared or as determined under normal provisions or as determined based on the special provisions like section 115JB of the Act, the surcharge will automatically applicable. Therefore, the ground raised by the assessee is accordingly dismissed.

13. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 24th May, 2022

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Mumbai / Dated 24/05/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER
(Asstt. Registrar)
ITAT, Mum