

IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI GAGAN GOYAL, AM

आयकर अपील सं/ I.T.A. No.238/Mum/2022

(निर्धारण वर्ष / Assessment Years: 2019-20)

Khilari Infrastructure Pvt. Ltd. 101, Prabhat Centre Annex, Sector-1A, CBD Belapur, Navi Mumbai-400614.	बनाम/ Vs.	Asst. Director of Income Tax, CPC, Bangaluru- 560500.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAFCA9143A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri H. S. Raheja (Adv.)
Revenue by:	Shri Vijay Kumar Soni (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 12/05/2022

घोषणा की तारीख /Date of Pronouncement: 30/05/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals) in National Faceless Appeal [NFAC], Delhi dated 27.12.2021 for the assessment year 2019-20.

2. The only grievance of the assessee is against the action of the Ld. CIT(A) confirming the action of the AO(CPC) making disallowance under the head of PF/ ESI for delayed payment u/s 36(1)(va) r.w.s. 2(24)(x) and Section 43B of the Income Tax Act, 1961 (hereinafter “the Act”). At the outset, the Ld. AR of the assessee brought to our notice that the issue involved in this appeal is no longer res-integra and drew our attention to the decision of Co-ordinate Bench of this Tribunal on this issue in the case of **Rajesh Kumar**



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Mundhra, Kolkata Vs. DCIT, CPC, Bangalore on 6th April, 2022

wherein on similar identical issue the Tribunal held as under: -

“10. After hearing the rival submissions and perusing the material available on record, we find that the issue in hand is covered in favour of assessee by the said order of Hon'ble Jurisdictional High Court, Calcutta in the case of Vijay Shree Ltd, ITA No. 245 of 2011(G.A No.2607 of 2011), dt. 12.8.2015 and order dt. 17-11-021 of this Tribunal in the case of Lumino Industries (supra). Relevant findings of the said order of the Co-ordinate Bench is reproduced herein below for the sake of clarity:-

"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 Shri Miraj D Shah it 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 as to 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 Shri Vijayshree 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'



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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 was 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 produce the Explanation-2 to Section 36(1)(va) as under:

"Section 36(1)(va) Explan-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



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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 as to whether the view of Ld CIT(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 favour 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 was 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 Shri Vijayshree 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



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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 favor of assessee.”

3. Respectfully following the ratio laid down in the aforesaid decision of this Tribunal on the similar issue, we are inclined to follow it, however we direct the AO to verify as to whether the assessee in this case has remitted the PF/ESI before filling of the return u/s 139(1) of the Act and if it is found that assessee had remitted it before filling of the return of income u/s 139(1) of the Act, then no disallowance on this score is warranted.

4. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 30/05/2022

Sd/-

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 30/05/2022
Vijay Pal Singh, (Sr. PS)

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai