

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
KOLKATA BENCH "B(SMC)", KOLKATA**

**BEFORE SHRI MANISH BORAD, HON'BLE ACCOUNTANT MEMBER  
AND SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER**

**ITA No.156/Kol/2022  
Assessment Year: 2019-20**

ONLINE COMPUTER & SERVICES		ITO, WARD-1(1), DURGAPUR
B-212, Bengal Shristi Complex, City Centre, Durgapur – 713 216.	Vs.	
<b>PAN: AADFO 0585 B</b>		
(Appellant)		(Respondent)

**Present for:**

Appellant by : NONE  
Respondent by : Shri Kausik K. Das, SR. DR

Date of Hearing : 09.06.2022  
Date of Pronouncement : 10.06.2022

**ORDER**

**PER SONJOY SARMA, JM:**

The present appeal has been preferred by the assessee against the order dated 10.08.2021 of the National Faceless Appeal Centre [hereinafter referred to as 'CIT'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act'). The assessee in this appeal has taken the following grounds of appeal:

- "1. For that on the facts of the case the CIT(A) was not justified in sustaining the addition of Rs. 1,27,428/- on account of late payment of PF & ESI when the same was paid within time allowed u/s 139(1) of the Act and the same may be please be allowed.*
- 2. For that the AO may please be directed to allow credit of TDS of Rs. 18,591/- relevant to the year under appeal."*

2. The registry has informed that the present appeal is time barred by 173 days. The assessee had filed an application prayed for condoning the delay which is placed on record. We after perusing the same find that the delay was due to ill health of the appellant representative and pandemic situation remained that point of time. Accordingly, the delay in filing the appeal, there is sufficient reason and technicality

should not be allowed to prevail over substantial justice. In view of this facts and circumstances, we are inclined to condone the delay in filing the appeal and admit the appeal for adjudication.

3. At the time of hearing, none appeared on behalf of the assessee, in such situation we have no other option but to decide the appeal with the assistance of Id. DR. The core issue in this appeal is disallowance of sum of Rs. 1,27,428/- being contribution of employees' share towards ESI and PF set up for the welfare of the employee u/s 36(1)(va) read with section 2(24)(x) of the Income Tax Act, 1961 when the payments were made within the due dates of filing of return u/s 139 of the Income Tax Act, 1961.

4. While going through the material available on record it is find that there was a delay in depositing employee's as well as employer's contribution to the Employee's Provident Fund/ESI fund. However, the amount was deposited before the due date of the filing of the return. The instant this issue is squarely covered by the decision of the Hon'ble Jurisdictional Calcutta High Court in the case of CIT, Kolkata vs. M/s Vijay Shree Limited 43 taxman.com 396(Cal) which has been further followed by the Coordinate Calcutta Bench of this Tribunal in the case of Harendra Nath Biswas vs. DCIT in ITA No.186/Kol/2021 by the order dated 16.07.2021. The Id. DR fairly submitted there is no contrary to the case law cited above.

5. We find that the issue is covered in favour of the assessee as the assessment year involved is AY 2019-20 and the Explanation-5 inserted by Finance Act, 2021 to section 43B w.e.f. 01.04.2021 is not applicable to the assessment year under consideration. The relevant portion of the Coordinate Bench decision of the Tribunal in the case of Harendra Nath Biswas vs. DCIT (supra) for the sake of reference is reproduced as under:

*" 2. The sole grounds of appeal raised by the assessee is against the Ld. CIT(A) in confirming the action of AO who disallowed/added back a sum of Rs. 1,10,62,263/- on account of delayed deposit of employees contribution to PF and ESI u/s 36(1)(va) read with Section 2(24)(x) of the Income Tax Act, 1961 ( hereinafter referred to as the Act) despite the assessee contributing/depositing the same before the due date of filing of return of income u/s 139(1) of the Act.*

3. *Brief facts of the case is that the CPC while processing the return disallowed/added Rs. 1,10,62,263/- on the ground that employees contribution to employees provident fund (EPF) and ESI fund has been deposited beyond the due date applicable under the provision of ESI Act, 1948 and EPF Act by invoking the provision of Section 36(1)(va) of the Act. Aggrieved by this disallowance, the assessee filed the appeal before the national Faceless Appeal Centre (NFAC), Delhi where the Ld. CIT(A) has taken note of the assessee's submission that no disallowance was warranted in respect of delayed deposit of employees contribution to EPF /ESI fund since the assessee has deposited the employees contribution in respect of both these Acts (EPF & ESI Act) before filing the return of income and relied on the various judicial decision including that of the jurisdictional Hon'ble High Court of Calcutta in the case of CIT vs. Vijayshree Ltd. in [2014] 43 taxman.com 396(Cal). However the Ld. CIT(A) did not accept the contentions of the assessee in this regard and by relying on the Explanation-5 below section 43B which was brought in by Finance Act, 2021 to deny the claim of assessee. Therefore, the assessee is before us by preferring this appeal.*

4. *We have heard both the parties and perused the record. First of all we do not countenance this action of the Ld. CIT(A) for the simple reason that the Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and relevant assessment year before us is AY 2019-20. Therefore the law laid down by the Jurisdictional Hon'ble High Court will apply and since this Explanation-5 has not been made retrospectively. So we are inclined to follow the same and we reproduce the order of Hon'ble Calcutta High Court in the case of Vijayshree Ltd. supra wherein the Hon'ble Calcutta High Court has taken note of the Hon'ble Supreme Court decision in CIT vs. Alom Extrusion Ltd. reported in 390 ITR 306. The Hon'ble Calcutta High Court's decision in Vijayshree Ltd. supra is reproduced as under:*

*"This appeal is at the instance of the Revenue and is directed against an order dated 28<sup>th</sup> April, 2011 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA No. 1091/Kol/2010 relating to assessment year 2006-07 by which the Tribunal dismissed the appeal preferred by the Revenue against the order of CIT(A).*

*The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of Employees 'Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.*

*It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.*

*Being dissatisfied, the Revenue has come up with the present appeal.*

*After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by*

*Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.*

*Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.*

*We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal.*

*Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities."*

*In the light of the aforesaid discussion we do not accept the Ld. CIT(A)'s stand denying the claim of assessee since assessee delayed the employees contribution of EPF & ESI fund and as per the binding decision of the Hon'ble High Court in Vijayshree Ltd. (supra) u/s 36(1)(va) of the Act since assessee had deposited the employees contribution before filing of Return of Income. Therefore, the assessee succeeds and we allow the appeal of the assessee."*

6. In view of the above proposition of law and the issue being squarely covered in favour of the assessee, the impugned order of the ld. CIT(A) is set aside in this issue.

7. However, in respect of issue no. 2, credit of TDS of Rs. 18,591/- there is no material available on record. Therefore, ends of justice, this issue is remand back to the file of AO for deciding the same by way of speaking order. We also directed the assessee to remain vigilant in receiving notices of hearing from AO and should not request for any adjournment unless otherwise required for reasonable cause and should file all necessary documents so as to facilitate the AO for passing speaking order. Needless to mention that the assessee should be given proper opportunity of being heard.

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

**Order pronounced in the open court on 10.06.2022.**

**Sd/-  
(MANISH BORAD)  
ACCOUNTANT MEMBER**

**Sd/-  
(SONJOY SARMA)  
JUDICIAL MEMBER**

Kolkata, Dated: 10.06.2022.  
Biswajit, Sr. P.S.

Copy to:

1. The Appellant: Online Computer & Services.
2. The Respondent: ITO, Ward-1(1), Durgapur.
3. The CIT, Concerned, Kolkata
4. The CIT (A) Concerned, Kolkata
5. The DR Concerned Bench

//True Copy//

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata