

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH "C" KOLKATA**

**Before: Shri Manish Borad, Accountant Member, and
Shri Sonjoy Sarma, Judicial Member**

आयकर अपील सं.य/ ITA No.219/Kol/2022 Assessment Year:2014-15

DCM Vigilance & Maintenance Services P.Ltd 1 Kaikhali Chiriamore, P.O Dumdum Airport, Kolkata-700 052.	<u>बनाम</u> V/s.	DCIT, Cir-7(1), Kolkata Aaykar Bhawan, P-7 Chowringhee Square, Kolkata-700 069
PAN: AADCD1262H		
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

Hearing through video Conferencing

अपीलार्थी की ओर से/By Appellant	Shri Sunil Surana, FCA.Ld.AR
प्रत्यर्थी की ओर से/By Respondent	Shri Jayanta Khanra, JCIT/Ld.DR
सुनवाई की तारीख/Date of Hearing	18-05-2022
घोषणा की तारीख/Date of Pronouncement	16 -06 -2022

आदेश /O R D E R

Per Sonjoy Sarma, JM :

The present appeal has been preferred by the assessee against the order dated 19-04-2022 passed u/s. 250 of the Income-tax Act, 1961 by the of Id. Commissioner of Income-tax (Appeals), [in short, the Id. CIT(A)] National Faceless Appeal Centre (NFAC), Delhi, which in turn arises out of processing of return of income u/s. 143(3) of the Income-tax Act, 1961 (in short, the 'Act') by DCIT, Circle-7(1), Kolkata on 27-12-2016 for the A.Y under consideration, whereby a sum of Rs. 1,79,53,513/- was

disallowed/added back on account of failure of the assessee-appellant on account of deposit of employees contribution to PF / ESI.

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

1 For that the Ld. CIT(A) erred in confirming the action of AO in disallowing delayed deposit of employees contribution towards PF and ESI amounting to Rs. 1,79,53,513/- by invoking the provisions of section 36(1) when the same was paid within the due date of filing the return of income and was therefore dully allowable under the law.

2. For that the Ld. CIT(A) erred in confirming the adjustments made by AO in the intimation u/s 143 (1) when adjustment on debatable issue with regard to the payment of ESI and pF were outside the scope of section 143(1).

3. For that the action of Ld. CIT(A) disallowing the amount of employees contribution to PF & ESI is not accordance with law.

3. On perusal of above grounds of appeal it reveals that the assessee has contested before us the issue of disallowance of Rs. 1,79,53,513/- under the head of PF/ESI for delayed payment under section 36(1)(va) of the Act. Since this ground goes to the root of the case, hence, we proceed to dispose of the ground no.1 at first.

4. Brief facts of the case are that the assessee engaged in the business of providing securities agencies to various entities. It filed its return of income on 04-11-2014 for the A.Y under consideration declaring total income at Rs.96,73,740/-. The case was selected scrutiny following service of statutory notices issued u/s. 143(2) and 142(1) on 28-08-2015 and 27.06.2016 respectively along with questionnaire. In response to which, the assessee filed various documents/evidences in support of said return. On perusal of various documents/evidences and books of accounts, the Id. AO found that the assessee company deposited the employees' contribution belatedly towards PF/ESI amounting to Rs.1,79.53.513/- after the due date.

Admittedly, it was not paid on or before the prescribed due date u/s. 36(1)(va) of the Act. Therefore, the amount of PF/ESI of Rs. 1,79,53,513/- was disallowed/added back on such failure of the appellant/assessee to deposit the employees contribution to PF/ESI beyond the due date by relying on various case laws available in the assessment order. Aggrieved by the order of the Ld.AO, the appellant assessee preferred an appeal before the Id. Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, The Id. CIT(A) considering the various case laws available in his order dismissed the appeal of assessee by upholding/confirming the said disallowance as made by the Id.AO.

5. Aggrieved by the above order of the Id. CIT(A), now the assessee is in appeal before us by raising the aforementioned grounds of appeal..

6. At the outset before us Shri Sunil Surana, FCA,Ld. Counsel for the assessee submitted before us that the issue raised in the instant appeal regarding disallowance of employees' contribution towards Provident Fund and ESI belatedly payment without following the provisions of section 2(24)9x) read with section 36(1)(va) of the Act is squarely covered in favour of the assessee by the judgment of the Hon'ble Jurisdictional High Court, Kolkata in the case of Vijay Shree Ltd, ITA No. 245 of 2011(G.A No.2607 of 2011) dt. 12.8.2015. He also invited our attention that the issue in hand is covered in favour of assessee appellant by the latest order dt. 17-11-2021 of the co-ordinate bench of this tribunal (ITAT, 'B 'Bench, Kolkata) in ITA Nos. 231,365,366,369,367,368 & 371/Kol/2021 for the AYs. 2015-16, '17-18, '18-19 & '19-20 in respect of Lumino Industries & Ors. Copy of which is available on record. Thus, he prayed before us that the disallowance so made by the Id.AO and confirmed by the Id. CIT(A) kindly be deleted in view of said order of this Tribunal/Hon'ble Jurisdictional High Court.

7. On the other hand, Shri Jayanta Khanra, JCIT, Ld. Departmental Representative (in short, the Ld.DR) has not objected to the factual position of the case. However, he submitted that the Id. AO has rightly disallowed the said disallowance and therefore, the Id. CIT(A) was fully correct/justified in dismissing the appeal of assessee by upholding the said disallowance.

8. After hearing the rival submissions and perusing the material available on record, we find that the issue in hand is fully covered in favour of assessee by the said order dt. 17-11-021 of this tribunal (supra). Relevant findings of the said order 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 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 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' 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 is 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 date under this clause. For ready reference, we produce the Explanation-2 to Section 36(1)(va) as under:

“Section 36(1)(va)

Explnation-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 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 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 is 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 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. “

9. Respectfully following the above, the disallowance made by the Id.AO and confirmed by the Id. CIT(A) is hereby deleted. Ground No. 1 raised by the assessee is allowed.

10. Other grounds as raised by the assessee are same and identical to ground no.1, which we already discussed above. Hence, they are not adjudicated.

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

The order pronounced in the open Court on 16 -06-2022

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

दनांक /Dated : 16 -06-2022

**PP/SPS

Sd/-

(SANJOY SARMA)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

- 1.अपीलार्थी/Appellant/Assessee: DCM Vigilance & Maintenance Services P.Ltd, 1 Kaikhali Chiriamore, P.O Dumdum Airport, Kolkata-700 052.
2. प्रत्यर्थी/Respondent/Revenue: The DCIT, Cir-7(1), Kolkata, Aaykar Bhawan, P-7 Chowringhee Square, Kolkata-700 069.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy By order/आदेश से,

Assistant Registrar /
Senior Private Secretary
ITAT, Kolkata