

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

**BEFORE SHRI A. T. Varkey, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA Nos.74 & 75/Kol/2022
Assessment Years: 2018-19 & 2019-20**

Dipak Kanti Mazumder (PAN: AEVPM3879E)	Vs.	Additional Commissioner of Income-tax, Circle-29, Kolkata
(Appellant)		(Respondent)

Present for:

Appellant by : N o n e

Respondent by : Smt. Ranu Biswas, Adl. CIT, DR

Date of Hearing : 07.04.2022

Date of Pronouncement : 28.06.2022

ORDER

PER Bench:

Both these appeals by the assessee are directed against the order of Id. CIT(A), National Faceless Appeal Centre (NFAC) Appeal Nos. ITBA/NFAC/S/250/2021-22/1037800905(1) & ITBA/NFAC/S/250/2021-22/ 1037800941(1) dated 15.12.2021 for A.Ys. 2018-19 & 2019-20 passed against the assessment order u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') by Jurisdictional Assessing officer, Circle-25, Kolkata, dated 22.12.2019.

2. None appeared on behalf of the assessee. Smt. Ranu Biswas, CIT, DR appeared for the revenue. The sole ground involved in both these appeals of assessee is against the action of the Ld. CIT(A) in confirming the disallowance made in respect of PF & ESI in respect employee's contribution u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act. According to the Ld. CIT, DR, since the assessee has not remitted the employees' contribution on the due date as prescribed by the PF & ESI Act, the contribution made belatedly cannot be allowed. We find that the Ld. CIT(A) erred in referring to the Amendment brought in by Finance Act

2021 w.e.f. 01.04.2021 which inserted an Explanation to section 36(1)(va) and section 43B of the Act and erred in holding it as clarificatory and so, retrospective in nature. Whereas we note that it is only prospective in nature and cannot disturb the binding judicial precedents in favour of assessee. However, we find that any way this issue is no longer *res integra* as held by this Tribunal in the case of *Lumino Industries Ltd. vs. ACIT, Circle-5(1), Kolkata in I.T.A. No.365/Kol/2021 for AY 2015-16 order dated 17.11.2021*, wherein view in favor of the assessee was taken by the Tribunal after holding that the amendment brought in by Finance Act, 2021 w.e.f 1.04.2021 is prospective in operation and so will be in force from AY 2021-22 onwards and not retrospective. The relevant portions of decision which reads as under:-

“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 due date under this clause. For ready reference, we reproduce the Explanation-2 to Section 36(1)(va) as under:

“Section 36(1)(va)

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 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 LdCIT(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 favor 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 favour of assessee.

3. We have heard the submissions of Ld. DR and gone through the facts and circumstances of the case. This is a settled position in view of the above decision that assessee is to be allowed deduction in respect of employees' contribution to PF & ESI provided these are paid before the due date of filing the return of income. On the basis of records before us, we are unable to ascertain the date of payments of these dues. Therefore, we are restoring the matter back to the file of the AO to examine and allow the same if these are paid before due date of filing the return of income. Therefore, we set aside the orders of the

authorities below and restore back the matter to the file of AO to act accordingly.

4. In the result, both the appeals of the assessee are allowed for statistical purposes.

Order is pronounced in the open court on 28th June, 2022.

Sd/-

(A.T.Varkey)
JUDICIAL MEMBER

Kolkata, Dated: 28.06.2022

JD, Sr. P.S.

Copy to:

1. The Appellant: MShri Dipak Kanti Mazumder, 43, Raja S. C. Mullkck Road, Garia, West Bengal-700084.
2. The Respondent: ADIT, Circle-29, Kolkata
3. CIT(A), NFAC, Delhi
4. The CIT- Kolkata.
5. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

Sd/-

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata