IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. No.1049/DEL/2021
Assessment Year 2018-19

Flying Fabrication, The Tax Chambers Advocates & Legal Advisors C-177, Defence Colony, LGF, New Delhi.	v.	DCIT, CPC, Bengaluru
TAN/PAN: AADFF9825H		
(Appellant)		(Respondent)

I.T.A. No.1407/DEL/2021
Assessment Year 2019-20

Flying Fabrication, The Tax Chambers Advocates & Legal Advisors C-177, Defence Colony, LGF, New Delhi.	v.	ADIT, CPC, Bengaluru
TAN/PAN: AADFF9825H		
(Appellant)		(Respondent)

Appellant by:	Ms. Swati Talwar, Adv.		
Respondent by:	Shri Mrinal Kumar Das, Sr.D.R.		
Date of hearing:	17	11	2021
Date of pronouncement:	17	11	2021

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the assessee against the order dated 12.08.2021 passed by National Faceless Appeal Centre, Delhi for the quantum of assessment passed u/s.143(3) for the Assessment Years 2018-19 and 2019-20. In

both the appeals, the assessee has challenged the disallowance of delay in deposit of employee's contribution to PF/ESI u/s.36(1)((va) in the intimation order u/s.143(1) passed by DCIT, CPC, Bengaluru. For the sake of ready reference, the grounds raised in the appeal for the Assessment Year 2018-19 is reproduced hereunder:

> *"1. That on the basis of facts and circumstances of the case, the order passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre - CIT (A), NFAC, ("Ld. CIT(A)") dated 27.07.2021 (hereinafter referred to as 'impugned appellate order) is erroneous and bad in law.*
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> *2. That the Ld. CIT(A) has erred in law and on facts of the case in confirming the assessment made by Ld. DC1T, CPC, Bangalore ("Ld. AO'fm case of the Appellant at Rs. 2,06,89,560/- as against the returned income of Rs. 1,18,31,513/- without any proper basis and appreciation of the facts and circumstances of the case.*
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> *3. That the Ld. CIT(A) has erred in confirming the disallowance made by Ld. DC1T, CPC, Bangalore ("Ld. AO") under section 36(1)(va) of Rs. 88,58,042/- on account of delay in deposit of employee's contribution towards PF/ESI without considering the correct interpretation and application of latest law in this regard.*
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> *4. That the Ld. CIT(A) grossly erred in placing reliance on amended provisions of Section 36(1)(va) and Section 43B as per Finance Act, 2021 and applying these amended provisions retrospectively for sustaining disallowance made by Ld. DC1T, CPC, Bangalore ("Ld. AO") under section 36(1)(va) of Rs. 88,58,042/- on account of delay in deposit of employee's contribution towards PF/ESI.*

5. That the Ld. CIT(A) erred in confirming the disallowance made by Ld. DC1T, CPC, Bangalore ("Ld. AO") under section 36(1)(va) of Rs. 88,58,042/- on account of delay in deposit of employee's contribution towards PF/ESI without observing the principles of natural justice and without appreciating the facts and circumstances of the case.

6. That having regard to the facts and circumstances of the case, the Ld. CIT(A) ought to have quashed the order u/s 143(1) passed by Ld. DC1T, CPC, Bangalore ("Ld. AO ")as the jurisdiction was not validity assumed as per law.

7. That the Ld. CIT(A) erred in confirming the disallowance under section 36(1)(v) of Rs.88,58,042/- under the head income from business in the intimation issued u/s 143(1) without appreciating the fact that such addition does not constitute as prima facie adjustment under section 143(1)(a) and hence Ld. AO acted without jurisdiction and made disallowance by assuming incorrect jurisdiction in this regard.

8. That the Ld. CIT(A) erred in confirming the disallowance made by Ld. AO under section 36(1)(va) of Rs. 88,58,042/- on account of delay in deposit of employee's contribution towards PF/ESI without considering the fact that such amount was duly deposited on or before due date of filing return u/s 139(1).

9. That the Appellant prays for interest under section 244A relating to refunds as claimed in the return of income.

10. That the Appellant denies liability towards interest charged u/s 234A, u/s 234B and u/s 234C and prays for appropriate relief."

2. The facts in brief are that the assessee is engaged in the business of providing security/labour/manpower services. It has e-filed its return of income on 22.10.2018 declaring income of Rs.1,18,35,513/- for the Assessment Year 2018-19; and Rs.99,19,070/- for the Assessment Year 2019-20 which was filed on 06.10.2019. Thereafter, assessee had received notice via ITBA portal proposing certain adjustments u/s. 143(1)(a) on 21.01.2019 for the Assessment Year 2018-19; and similar adjustments u/s. 143(1)(a) 12.10.2020 for the Assessment Year 2019-20 on disallowance under section 36(1) (va) on account of delay in deposit of employee's contribution towards PF/ESI. After the notice, the assessee had filed its submission within due time as given in the notice. Thereafter, intimation order u/s. 143(1) was passed from CPC, Bengaluru wherein additions have been made and disallowing Rs88,58,042/- u/s.36(1)(va) for the Assessment Year 2018-19; and Rs.2,11,28,940/- for the Assessment Year 2019-20. The assessee's case has been that firstly, all the payments have been made within due date of filing of return of income u/s.139(1) of the Income Tax Act and as such payment has been made and deposited in the Government account within the stipulated time u/s.139(1) then no disallowance can be made in view of the decision of the Hon'ble Apex Court in the case of **CIT vs. Vinay Cement Ltd., reported in (2007) 213 ITR 268** and Hon'ble Delhi High Court in the case of **CIT vs. AIMIL Ltd. (2009) 321 ITR 508 (Del)**.

3. In the order of National Faceless, i.e., the First Appellate order, the relevant finding on this issue for the Assessment Year 2018-19 are as under:

"4.3 I have examined the issue. It is matter of fact that the appellant has not paid the employee's contribution towards PF/ESI totalling to Rs. 88,58,042/-within the due date provided under the relevant law. The provisions, the Act are very clear on the issue. Clause (24) of Section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provides that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.

4.4 Section 36 of the Act pertains to the other deductions. Sub-section(1) of the said section provides for various deductions allowed while computing the income under the head "Profit and gains of business or profession". Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause(24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, "due date" shall mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund in accordance with any Act, rule, order or notification issued there-under or under any standing order, award, contract of service of otherwise.

4.5 Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment.

Employer's contribution is covered in clause (b) of section 43B. Accordingly to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee's contribution referred to in clause (va) of sub-section (1) of section 36 of the Act, though section 43B of the Act covers only employer's contribution and does not cover employee's contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer's contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure that compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee's own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees, Clause (va) of sub-section(l) of section 36 of the Act was inserted to the act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions.

4.6 Accordingly, in other to provide certainty, the finance Act, 2021 amended clause (va) of sub-section (1) of the section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposed of determining the "due date" under that clause; and also amended section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

4.7 Keeping in view the amendments made by the Finance Act, 2021 in section 36 and section 43B of the Act and that these amendments are clarificatory in nature, the addition made by the DCIT (CPC), Bangaluru on account of delayed payment of employee's contribution of PF/ESI of Rs. 88,58,042/-is confirmed. Therefore his ground of appeal is in respect of this issue is dismissed."

3.1 Similar finding has also been given in Assessment Year 2019-20.

4. Before us, ld. counsel submitted that this issue now stands covered by catena of judgment passed by this Tribunal in the following cases:-

- M/s Adama Solution P. Ltd. v. Asst. Director of Income Tax, CPC with ITA No. 1800/Del/2020 dated 13.10.2021
- Insta Exhibitions Pvt. Ltd. v. Addl. CIT with ITA No.

6941/Del/2017 dated 03.08.2021

- M/s Express Roadway Pvt Ltd. v. ACIT with ITA No. 5570/Del/2017 dated 11.10.2021
- Yogi Ji Technoequip Pvt. Ltd. v. DCIT, CPC with ITA No. 1609/Del/2020 dated 30.07.2021
- Maksat Technologies Private Limited v. DCIT reported in [2021] 130 taxmann.com 454 ITAT Delhi
- M/s Aroon Facilitation management Services Pvt. Ltd. v. DCIT, CPC with ITA No.l824/Del/2020 dated 13.10.2021
- Pawan Kumar Janghu v. DCIT, CPC with ITA no. 1600/Del/2020 dated 30.07.2021.

5. In all these appeals, Tribunal has held that there are series of judgment of various High Courts including that of the Jurisdictional High Court wherein it has been held that the payment of employee's contribution fee if has been made before the due date for filing of return of income u/s.139(1), then same is allowable deduction. It has been further held that amendment brought by the Finance Act, 2021 in the provision of Section 36(1)(va) as well as Section 43B by insertion of Explanation-2, is prospective and cannot be held as retrospective and would apply from Assessment Year 2021-22 onwards.

6. On the other hand, ld. DR submitted that the amendment brought in the statute is very clear that it was for the removal of the doubts and secondly 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 these clauses. Thus, the statute itself has clarified that provision of Section 43B for

the purpose of due date in the case of payments mentioned in Section 36(1)(va) would never deemed to have been applied as due date for filing of return of income it has approved the due date provided under the respective Acts.

7. We have heard the rival submissions and also perused the finding given in the impugned orders. From the perusal of the intimation order, it is seen that disallowance has been made u/s.36(1)(va) and assessee has clearly explained in reply to the notice issued by CPC, Bengaluru that the claim of such payment is allowable by the decision of Hon'ble Apex Court as well as by Hon'ble Jurisdictional High Court and no disallowance should be made once the factum of the claim is based on the decision of Hon'ble Apex Court and Jurisdictional High Court. Thus, making disallowance merely by issuing an intimation cannot be made as it becomes a debatable issue. Here, in this case, intimation order has been passed on 06.06.2019 and 04.01.2021, that is, before the amendment in Section 36(1)(va) brought by the Finance Act, 2021 which was brought in the statute from the later date and was applicable w.e.f. 1st April, 2021. Thus, there was no occasion for making such a disallowance when assessee's claim at the time of filing of return of income was based on certain binding judicial precedents that if the payment of employee's contribution regarding PF and ESI have been paid before the due date of filing of return of income u/s.139(1), then it is allowable under the provision of Section 43B. This position was clear by the judgment of Hon'ble Jurisdictional High Court in the case of **CIT vs. AIMIL Ltd.** as reported in **(2009) 321 ITR 508 (Delhi)**

wherein following the ratio and principle laid down by the Hon'ble Apex Court in the case of **Vinay Cement (supra), t**heir Lordship have held as under:

> *"14. When we keep that proposition in mind and also take into consideration various judgments where Vinay Cement (supra) is applied and followed, it will not be possible to accept the contention of the Revenue.*
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> *15. In CIT v. Dharmendra Sharma, 297 ITR 320, this Court specifically dealt with this issue and relying upon the aforesaid judgment of the Guwahati High Court, as affirmed by the Supreme Court in Vinay Cement (supra), the appeal of the Revenue was dismissed. More detailed discussion is contained in another judgment of this Court in CIT v. P.M. Electronics Ltd. (ITA No. 475/2007 decided on 3.11.2008). Specific questions of law which were proposed by the Revenue in that case were as under :-*
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> *"(a) Whether amounts paid on account of PF/ESI after due date are allowable in view of Section 43B, read with Section 36(1)(va) of the Act?*
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> *(b) Whether the deletion of the 2nd proviso to Section 43B by way of amendment by the Finance Act, 2003 is retrospective in nature?"*
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> *16. These questions were answered by the Division Bench in the following manner :-*
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> *"7. Having heard the learned counsel for the Revenue, as well as, the assessee, we are of the view that the view taken by*

the Tribunal deserves to be sustained as it is no longer res integra in view of the decision of the Supreme Court in the case of CIT v Vinay Cement Ltd: 213 ITR 268 which has been followed by a Division Bench of this Court in the case of CIT v. Dharmendra Sharma: 297 ITR 320.

8. Despite the aforesaid judgments, the learned counsel for the Tribunal has contended that in view of the judgment of the Division Bench of the Madras High Court in the case of CIT v. Synergy Financial Exchange Ltd: (2007)288 ITR 366 and that of the Division Bench of the Bombay High Court in the case of CIT v. M/s Pamwi Tissues Ltd: (2008) Taxindiaonline.com 104 (TIOL) the issue requires consideration. According to us, in view of the dismissal of the Special Leave Petition in the case of Vinay Cement (supra) by the Supreme Court by a speaking order, the submission of the learned counsel for the Revenue has to be rejected at the very threshold. The reason for the same is as follows:-

9. The Gauhati High Court in the case of CIT v. George Williamson (Assam) Ltd: (2006) 284 ITR 619 (Gauhati) dealt with the very same issue. In the said judgment the Division Bench of the Gauhati High Court noted a contrary view taken by the Kerala High Court in the case of CIT v. South India Corporation Ltd: (2000) 242 ITR 114. After noting the said judgment the fact that the amendments had been made to the provisions of Section 43B of the Act by virtue of Finance Act, 2003 w.e.f 1.4.2004 it agreed with the submission of the learned counsel for the assessee that by virtue of the omission of the second proviso and the omission of Clauses (a), (c), (d), (e) and (f) without any saving clause would mean that the

provisions were never in existence. For this purpose, in the said case the assessee had placed reliance on the judgment of a Constitution Bench of the Supreme Court in the case of Kolhapur Canesugar Works Ltd v. Union of India: (2000) 2 SCC 536 and Rayala Corporation P. Ltd v. Director of Enforcement (1969) 2 SCC 412 and General Finance Co. v. Asst. CIT: (2002) 257 ITR 338 (SC) . The said submissions found favour with the Division Bench of the Guahati High Court and relying on earlier decisions of its own Court in CIT v. Assam Tribune: (2002) 253 ITR 93 and CIT v. Bharat Bamboo and Tiber Suppliers: (1996) 219 ITR 212 the Division Bench dismissed the appeal of the Revenue. It transpires that the aforesaid matter was taken up in appeal alongwith other matters including Vinay Cement (supra). The order in Vinay Cement (supra) was passed by the Supreme Court on 7.3.2007 wherein it observed as follows:- "Delay condoned. In the present case we are concerned with the law as it stood prior to the amendment of Section 43-B. In the circumstances, the assessee was entitled to claim the benefit in Section 43-B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return. Special Leave Petition is dismissed."

10. In view of the above, it is quite evident that the special leave petition was dismissed by a speaking order and while doing so the Supreme Court had noticed the fact that the matter in appeal before it pertain to a period prior to the amendment brought about in Section 43B of the Act. The aforesaid position as regards the state of the law for a period prior to the amendment to Section 43B has been noticed by a

Division Bench of this Court in Dharmendra Sharma (supra). Applying the ratio of the decision of the Supreme Court in Vinay Cement (supra) a Division Bench of this Court dismissed the appeals of the Revenue. In the passing we may also note that a Division Bench of the Madras High Court in the case of CIT v. Nexus Computer (P) Ltd by a judgment dated 18.8.08 passed in Tax Case (A) No. 1192/2008 discussed the impact of both the dismissal of the special leave petition in the case of George Williamson (Assam) Ltd (supra) and Vinay Cement (supra) as well as a contrary view of the Division Bench of its own Court in Synergy Financial Exchange (supra). The Division Bench of the Madras High Court has explained the effect of the dismissal of a special leave petition by a speaking order by relying upon the judgment of the Supreme Court in the case of Kunhayammed and Others v. State of Kerala and another: 119 STC 505 at page 526 in Paragraph 40 and noted the following observations:-

"It the order refusing leave to appeal is a speaking order, ie., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country, But, this does not amount to saying that the order of the Court, Tribunal or authority below has stood merged in the

order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."

11. Upon noting the observations of the Supreme Court in Kunhayammed and Others (supra) the Division Bench of the Madras High Court in the case of Nexus Computer Pvt Ltd (supra) came to the conclusion that the view taken by the Supreme Court in Vinay Cement (supra) would bind the High Court as it was non declared by the Supreme Court under Article 141 of the Constitution. 12. We are in respectful agreement with the reasoning of the Madras High Court in Nexus Computer Pvt Ltd (supra). Judicial discipline requires us to follow the view of the Supreme Court in Vinay Cement (supra) as also the view of the Division Bench of this Court in Dharmendra Sharma (supra). 13. In these circumstances, we respectfully disagree with the approach adopted by a Division Bench of the Bombay High Court in M/s Pamwi Tissues Ltd (supra).

14. In these circumstances indicated above, we are of the opinion that no substantial question of law arises for our consideration in the present appeal. The appeal is, thus, dismissed."

17. It also becomes clear that deletion of the 2nd proviso is treated as retrospective in nature and would not apply at all. The case is to be governed with the application of the 1st proviso.

18. We may only add that if the employees" contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income Tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement (supra).

19. We, thus, answer the question in favour of the assessee and against the Revenue. As a consequence, the appeals filed by the assessees stand allowed and those filed by the Revenue are dismissed."

8. Apart from above, there are series of judgment of Hon'ble Jurisdictional High Court on the same principle, like in the case of **CIT vs. PM Electronics Ltd. 171 taxmann. com 1, CIT vs. SPL Industries Ltd. (2011) 9 taxmann.com 195, CIT vs. Dharmendra Sharma, 297 ITR 220**. Again following the decision of the Jurisdictional High Court which are based on the principle laid down in the case of **Vinay Cement (supra),** the co-ordinate Bench have passed series of judgment holding the same proposition that prior to the amendment brought in the statute w.e.f. 01.04.2021, no disallowance can be made that the payment to the employee's contribution to PF and ESI paid by the assessee before the due date of filing of return of income

u/s.139(1). Accordingly, we hold that no disallowance can be made in the assessment year prior to Assessment Year 2021-22. In the result, the disallowance confirmed by the Appeal Centre is deleted.

9. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 17th November, 2021.

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 17th **November, 2021**

Prabhat