

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA
[PHYSICAL COURT HEARING]**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Manish Borad, Accountant Member**

**I.T.A. No. 172/KOL/2022
Assessment Year: 2018-2019**

**Shyamal Kundu,.....Appellant
100/72A, jessore Road,
Kolkata-700074
[PAN: AFTPK0421P]**

-Vs.-

**Deputy Commissioner of Income Tax,.....Respondent
CPC, Bangalore
Centralized Processing Centre,
Income Tax Department, Bangalore-560500**

Appearances by:

*Shri K.M. Roy, C.A, appeared on behalf of the assessee
Shri Biswanath Das, Addl. CIT, appeared on behalf of the Revenue*

Date of concluding the hearing : July 08, 2022
Date of pronouncing the order : July 08, 2022

I N T E R I M O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee has filed an application for grant of out of turn hearing. The Id. Counsel for the assessee submitted that the only issue involved in the appeal relates to confirmation of addition of Rs.1,22,41,788/-, which was added by the Id. Assessing Officer with the aid of section 36(1)(va) read with section 2(24)(x) on the ground that employees' contribution towards PF & ESI was not deposited by the assessee within the due date provided under these two Acts. Ld. Counsel for the assessee submitted that these payments have been made before the due date of filing of the return and, therefore, the issue is covered by the decision of the Hon'ble Jurisdictional High Court in the case of (i) CIT

-vs.- Vijayshree Ltd. in ITAT No. 243 of 2011 & GA No. 26607 of 2011;(ii) CIT -vs.- Philips Carbon Black Ltd. in GA No. 1382 of 2014 & ITAT 31 of 2014; (iii) CIT -vs.- M/s. Coal India Ltd. in ITA 12 of 2015 and (iv) M/s. Akzo Nobel India Ltd. -vs.- CIT in ITA No. 110 of 2011. This aspect has been considered by the Coordinate Bench in the case of Lumino Industries Ltd. -vs.- ACIT (ITA No. 231 & 365/KOL/2021).

2. On the other hand, ld. Sr. D.R. contended that since it is only an early hearing application, he is not possessing the file. But after considering the smallness of the issue involved in the appeal, more so, being covered by the Hon'ble Jurisdictional High Court, we allow this prayer of the assessee for grant of out of turn hearing and take up the appeal for hearing today itself i.e. 8th July, 2022.

3. We proceed to decide the appeal on merit also. We have recently decided a large number of appeals on this issue. Recently we have considered this aspect in ITA Nos. 531 & 532/KOL/2021, wherein we took note of the earlier order of ITAT, Kolkata dated 09.03.2022 whereby the Tribunal considered the impact of amendment brought into section 36(1) as well as 43B by Finance Act, 2021. The discussion made in that order read as under:

"3. On due consideration of the above facts and circumstances, we find that ITAT, Kolkata has duly examined the amendment brought in by virtue of Finance Act, 2021. On the proposition and the discussion made by the ITAT in the case of Lumino Industries Limited & Others read 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 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 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 favor of assessee".

4. A perusal of the above would reveal that the ITAT, Kolkata has specifically propounded that if employees' contribution received by an assessee and paid to ESI and PF accounts before the due date of filing of the return, then the assessee will be eligible to claim the deduction of such amounts. With the assistance of ld. representatives, we have specifically gone through the record and find that payments have been made within the due dates of filing of the return. With the above observation, these appeals of the assessee are treated as allowed. The disallowances stand deleted in both the appeals".

4. Respectfully following the order of the Coordinate Bench, we allow this appeal of the assessee and delete the disallowance.

5. **In the result, the appeal of the assessee is allowed.**

**Sd/-
(Manish Borad)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President (KZ)**

Kolkata, the 8th day of July, 2022

- Copies to :
- (1) **Shyamal Kundu,
100/72A, jessore Road,
Kolkata-700074**
 - (2) **Deputy Commissioner of Income Tax,
CPC, Bangalore
Centralized Processing Centre,
Income Tax Department, Bangalore-560500**
 - (3) **Commissioner of Income Tax (Appeals), National Faceless
Appeal Centre (NFAC)- Delhi,**
 - (4) **The Departmental Representative**
 - (5) **Guard File**
- TRUE COPY

**By order
Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata**

Laha/Sr. P.S.