

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
श्री जार्ज माथन, न्यायिक सदस्य एवं श्री अरुण खोड़पिया लेखा सदस्य के समक्ष ।

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER**

ITA No.141/CTK/2021

(निर्धारण वर्ष / Assessment Year :2016-2017)

Jaksons Agencies,
Pratap Nagari,
Cuttack-753011

PAN No.AACFJ 6961 B

..... Assessee

Versus

ITO, Ward-2(3), Cuttack

.....Revenue

Shri Mahavir Prasad Mundhra, & Mr. Amit Kumar Sharma, FCAs for the
assessee

Shri S.C.Mohanty. Sr.DR for the Revenue

Date of Hearing : 11/07/2022
Date of Pronouncement : 11/07/2022

आदेश / O R D E R

Per Bench :

This is an appeal filed by the assessee against the order passed by the Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, dated 28.10.2021 in DIN & Order No.ITBA/NFAC/S/250/2021-22/1036623452(1) for the assessment year 2016-2017.

2. It was the submission of the Id. AR that the issue involved in the present appeal is against the action of Id. CIT(A) in confirming the disallowance made by the AO in respect of employees' contribution to PF, which was paid beyond the time prescribed under the relevant Act but before the due date of filing of the return. It was the submission that the

issue was squarely covered by the decision of the coordinate bench of the Tribunal in the case of Jambeswar Jena in ITA No.102/CTK/2021, order dated 06.04.2022, in which one of us is the author.

3. In reply Id. Sr. DR vehemently supported the order of the CIT(A) and submitted that the issue was squarely covered by the decision of the Delhi Bench of the Tribunal in the case of Vedvan Consultants Pvt. Ltd. in ITA No.1312/Del/2020, order dated 26.08.2021, wherein the Tribunal in para 12 at page 7 of its order has categorically held that the language of newly proposed explanation 2 to section 36(1)(va) and explanation 5 to section 43B makes it clear that the amendment is retrospective. It was the submission that the amendment specifically mentioned that the provision of Section 43B shall not apply and shall be deemed never to have applied to a sum received by the assessee from any of his employees to which the provisions of sub-section (x) of clause (24) of Section 2 shall apply. It was the submission that in view of the decision of the Delhi Bench of the Tribunal in the case of Vedvan Consultants Pvt. Ltd. (supra), the order of the Id. CIT(A) is liable to be upheld. He also placed reliance on the various decision as quoted in the order of the Id. CIT(A).

4. We have considered rival submissions.

5. At the outset, it is noticed that the decision in the case of Vedvan Consultants Pvt. Ltd. (supra), the Delhi Bench of the Tribunal has held that the Explanation 2 to Section 36(1)(va) of the Act and the explanation 5 to 43B of the Act as retrospective. It must also be mentioned here that subsequently in the case of Vedvan Consultants Pvt. Ltd. in ITA

NJo.1312/Del/2020, order dated 29.04.2022, the order passed by the Tribunal vide dated 26.08.2021 seems to have been recalled and in the said order dated 29.04.2022, the issue has been held in favour of the assessee. The observations made by the Tribunal in the order dated 26.08.2021 are extracted hereinbelow :-

5. We have gone through the provisions of the Section 36(1)(va) and Section 43B, cases cited and also the judgments on this issue .

To mention a few , MADRAS HIGH COURT : October 23 , 2018 M/S. UNIFAC MANAGEMENT SERVICES (INDIA) PRIVATE LTD. VERSUS THE DEPUTY COMMISSIONER OF INCOME TAX, CORPORATION CIRCLE 3 (2) , CHENNAI

The scope of Section 43B and Section 36(1)(va) are dif ferent and thus, there is no question of reading both provisions together to consider as to whether the assessee is entitled to deduction in respect of the sum belatedly paid towards such contribution, especially when such sum is, admittedly, a sum received by the assessee/employer from his employee. Therefore , for considering such question, application of Section 36(1)(va) r .w .s. 2(24)(x) alone is the proper course and any other interpretation would only defeat the object and scope of both the provisions viz., 43B and 36(1)(va).

Accordingly, the writ petition fails and the same is dismissed.

KERALA HIGH COURT : [2015] 378 ITR 443 : September 8, 2015 THE COMMISSIONER OF INCOME TAX, COCHIN VERSUS M/S MERCHEM LIMITED

The distinction drawn to credit the amount of the employer and the employee was with a clear ob jective and there is no illegality or other legal infirmity in classifying the contributions of employees and employer in the matter of crediting the same to the appropriate statutory authorities.

Considering section 36(1)(va) o f the Income Tax Act as it stands, with respect to any sum received by the assessee from any of his employees to which the provisions of clause (x) of sub-section (24) of section 2 applies, assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28 if such sum is not credited by the assessee to the employees' account in the relevant fund or funds on or be fore the due date as per explanation to section 36(1)(va) o f the Act.

BOMBAY HIGH COURT: [2014] 368 ITR 749 (Bom): October 14, 2014

THE COMMISSIONER OF INCOME TAX VERSUS GHATGE PATIL TRANSPORTS LTD.

The employer assessee would be entitled to deduction only if the contribution to the employee's welfare fund stood credited on or before the due date and not otherwise – following the decision in Commissioner of Income Tax V/s. Alom Extrusions Ltd. [SUPREME COURT] – both employees' and employer's contributions are covered under the amendment to Section 43B of I.T. Act – the Tribunal was right in holding that payments are subject to bene fits of Section 43B

6. *Decision of the Hon'ble Supreme Court relied upon by the assessee cited as CIT vs. Alom Extrusions Ltd. (supra) is not applicable to the facts and circumstances of the case because Hon'ble Supreme Court has decided the issue in Alom Extrusions Ltd. case qua employers contribution as per section 43B(b) of the Act and not qua employees contribution u/s 36(1)(va) o f the Act.*

7. *Clause (24) of section 2 of the Income Tax Act, 1961 (The Act) provides an inclusive definition o f 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. Section 36 of the Act pertains to the other deductions. Sub-section (1) o f the said section provides for various deductions allowed while computing the income under the head 'Profits and gains of business or profession.' Clause (va) o f the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions o f sub-clause (x) o f 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 o f this clause, "due date to 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 under any Act, rule, order or notification issued there-under or under any standing order , award, contract o f service or otherwise .*

8. *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. According 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 contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

9. Section 36(1)(va) and section 43B(b) operate in different fields, i.e., former takes care of employee's contribution and later the employer's contribution. Therefore, an assessee is entitled to get benefit of deduction under section 43B as provided under the proviso thereto only with regard to portion of amount paid by the employer to contributory fund. So far as the employee's contribution is concerned, the assessee is entitled to get deduction of amounts as provided under section 36(1)(va) only if amounts so received from the employee is credited in specified account within due date as provided under relevant statute (CIT v. Merchem Ltd. 61 taxmann.com 119).

10. The section 43B of the Act covers only employer's contribution and does not cover employees' contribution, sometimes they have been applied to the provision of section 43B on employees' contribution as well and allowed the deduction to employer even if the employees' contribution is deposited by the due date of filing Income Tax Return (ITR) as mentioned under section 139(1).

11. To provide clarity and certainty on non applicability of section 43B on employees' contribution to specified funds, the Budget 2021 has proposed to amend the provisions of section 36(1)(va) and section 43B as under:

(a) amend section 36(1)(va) of the Act by inserting another explanation 2 to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the due date under this clause; and

(b) amend 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.

12. The language of newly proposed explanation 2 to section 36(1)(va) and explanation 5 to section 43B makes it clear that the amendment is retrospective.

13. The rationale of the amendment was explained by the Memorandum to the Finance Bill, 2021 as below:

“There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare law s

. Hence , it needs to be stressed that the employer' s contribution towards welfare funds such as ES I and PF needs to be clearly distinguished from the employee' s contribution towards welfare fund s . Employee' s contribution i s employee 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 be longing to the employees . Clause (va) of sub-section (1) o f Section 36 o f the A ct was in ser ted to the A ct vide Finance Act 1987 as a measures o f penalizing employer s who mis-utilize employee' s contributions .

14. From the above, it can be said that the law is now made clear that employees' contribution to specified fund will not be allowed as deduction if there is delay in deposits as per the due dates mentioned in the respective legislation.

15. Decision of the Hon'ble Supreme Court relied upon by the assessee cited as CIT vs. Alom Extrusions Ltd. (supra) is not applicable to the facts and circumstances of the case because Hon'ble Supreme Court has decided the issue in Alom Extrusions Ltd. case qua employers contribution as per section 43B(b) of the Act and not qua employees contribution u/s 36(1)(va) o f the Act.

16. We have also gone through the orders o f the Co-ordinate Bench of ITAT in the case of Eagle Trans Shipping & Logistics (India) (P.) Ltd. Vs ACIT in ITA No. 324/Del/2017 order dated 25.07.2019 which was relied on the judgment of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Bharat Hotels Ltd. 410 ITR 417, it held,

“9. When we examine the issue in controversy in the light o f the provisions contained u/s 36(1)(va) of the Act, it is apparently clear that the assessee would be entitled for deductions qua the sum received from any of fice employee to which provisions under sub-section (x) o f clause (24) of section 2 is applied only, if such sum is credited by the assessee to the employees account in the relevant fund or funds on or before the due date . Due date is further defined in the Explanation, which means, the date by which the assessee is required as an employer to credit employees contribution to the employees account in the relevant fund under any Act or rule or order or notification issued thereunder or any standing order or award or service or otherwise. Meaning thereby, in case, employer fails to deposit the entire amount towards employees contribution on account o f PF & ESI with concerned department on or before the due date under PF & ESI, the assessee shall not be entitled for deduction to that extent.

10. Decision of the Hon'ble Supreme Court relied upon by the assessee cited as CIT vs. Alom Extrusions Ltd. (supra) is not applicable to the facts and circumstances of the case because Hon'ble Supreme Court has decided the issue in Alom Extrusions

Ltd. case qua employers contribution as per section 43B(b) of the Act and not qua employees contribution u/s 36(1)(va) o f the Act.

11. Hon'ble jurisdictional High Court in case of CIT vs. Bharat Hotels Ltd. (2019) 410 ITR 417 (Delhi) (supra) decided the identical issue qua delayed deposit of employees contribution on account of PF & ESI against the assessee by holding that assessee would be entitled to deduction in terms o f section 36(1)(va) of the Act to the extent if the employees contribution on account of PF & ESI is deposited on or before the due date , and the employees contribution on account of PF & ESI deposited beyond the stipulated period would not make the assessee company entitled to claim deduction from its return. For ready perusal, operative part o f the judgment of CIT vs. Bharat Hotels Ltd. (supra) is extracted as under:-

"7. The issue here concerns the interplay of Section 2(24)(x) of the Act read with Section 36(1)(va) o f the Act alongside provisions o f the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (especially Regulation 38 of the Employees' Provident Funds Scheme , 1952) and the provisions o f the Employees' State Insurance Act, 1948. The AO had brought to tax amounts which were deducted by the employer/assessee from the salaries and wages payable to its employees, as part of their contributions. It is not in dispute that the employer's right to claim deductions under the main part of Section 43-B of the Act is not an issue . The question the AO had to then decide was whether the amounts deducted from the salaries of the employees which had to be deposited within the stipulated time (in terms of notification/circular dated 19.03 .1964 which was modified on 24.10.1973), as far as the EPF contribution went and the period o f three weeks as far as the ESI contributions went. The AO made a tabular analysis with respect to the contributions deducted and actually deposited. The cumulative effect of notifications under the Employees' Provident Funds Act, 1952 and the Employees State Insurance Act, 1948 was that in respect o f the EPF Scheme contributions the deductions were to be deposited within 15 days o f the succeeding wage period with a grace period o f 5 days; for ESI contributions the deposit with the concerned statutory authority had to be made within three weeks of the succeeding wage month/period. The CIT in this case confirmed the additions - made by the AO based on the entire amounts that were disallowed. The ITAT however granted complete relief.

8. Having regard to the specific provisions of the Employees' Provident Funds Act and ESI Act as well as the concerned notifications which granted a grace period o f 5 days (which appears to have been late withdrawn recently on 08.01.2016), we are of the opinion that the ITAT's decision in this case was not correct. The assessee undoubtedly was entitled to claim the benefit and properly treat such amounts as having been duly deposited,

which were in fact deposited within the period prescribed (i.e. 15 + 5 days in the case of EPF and 21 days + any other grace, period in terms of the extent notification). As far as the amounts constituting deductions from employees' salaries towards their contributions, which were made beyond such stipulated period, obviously the assessee was not entitled to claim the deduction from its returns.

9. In view of this discussion, the Revenue's appeal is partly allowed. The AO is directed to examine the contributions made with reference to the dates when they were actually made and grant relief to such of them which qualified for such relief in terms of the prevailing provisions and notifications. We also clarify that the assessee would be entitled to deduction in terms of Section 36(1)(va) of the Act."

12. In view of what has been discussed above and following the decision rendered by the Hon'ble jurisdictional High Court in case of CIT vs. Bharat Hotels Ltd. (supra), we are of the considered view that the assessee company is not entitled for deduction of Rs.4,29,110/- u/s 36(1)(va) of the Act claimed on account of depositing the employees contribution towards ESI & PF as per provisions contained u/s 2(24)(x) read with section 36(1)(va) after due date which is evident from table extracted in preceding para no .5 . So, the case laws relied upon by the Id. AR for the assessee is not applicable to the facts and circumstances of the case . Consequently, finding no illegality or perversity in the impugned order passed by the Id. CIT (A), appeal filed by the assessee is hereby dismissed."

17. Hence , keeping in view the order of the Co-ordinate Bench of the Tribunal and the order of the Hon'ble Jurisdictional High Court of Delhi, we hereby affirm the order of the Id. CIT (A).

6. Further in the order dated 29.04.2022, the Tribunal has observed as under :-

3. Heard the parties and perused the material available on record. The Assessee raised the arguments against the impugned order, whereas the Ld. DR vehemently supported the same.

3.1 The Assessee before the Authorities below has claimed that as the Assessee has deposited the employee's contributions towards ESI & PF before the due date of filing of the return of income u/s 139 of the Act, hence no disallowance is warranted. In support of its contention the Assessee also relied upon various judgments as it appears from the impugned order.

3.2 The Ld. Commissioner though considered the claim of the Assessee, however uphold the disallowance/addition qua

employee's contributions towards PF & ESI, mainly on two aspects/determinations-

(i) Judgment of the Hon'ble Delhi High Court in the case of CIT Vs. M/s. Bharat Hotels Ltd., [2019] 410 ITR 417 (Del)

(ii) Non-applicability of the provisions of Section 43B of the Act to the employee's share qua ESI & PF.

3.3 Admittedly there is plethora of judgments in favour of the Assessee's contention and of the Revenue, however the controversy with regard to divergent views of different High Courts, has been settled by the Hon'ble Apex Court in the case of CIT Vs. M/s. Vegetables Products Ltd. (88 ITR 192) by laying down the dictum 'if two reasonable constructions of a taxing provision are possible that construction which favours the Assessee must be adopted.' Meaning thereby when two different views of the Courts are available on an issue, then the view which favors the Assessee or the judgment which favors the Assessee may be followed, hence for brevity we are referring the judgments of the jurisdictional High Court, which covered the issue.

3.4 The Hon'ble Jurisdictional high Court in the case of CIT Vs. AIMIL Ltd {(2010) 321 ITR 508 (Del)} affirmed the action of the ITAT in deleting the addition relating to employees' contribution deposited before the due date of filing of return, in respect of Provident Fund and ESI made by the Assessing Officer under Section 36(1)(va) of the Income Tax Act, 1961.

3.5. Again the Hon'ble Jurisdictional High Court in the case of PCIT vs., Pro Interactive Service (India) Pvt. Ltd., vide ITA.No.983/2018 order dated 10.09.2018 while following the aforesaid decision in the case of CIT Versus AIMIL Ltd., (supra), has held that legislative intent was/is to ensure that the amount paid is allowed as expenditure only when payment is actually made. It was further held that it was not the legislative intent and objective to treat belated payment of Employees' Provident Fund & Employees' State Insurance Scheme as deemed income of the employer under section 2(24)(x) of the I.T. Act, 1961.

3.6 From the aforesaid Judgments of the Hon'ble High Courts, it is clear that the Hon'ble High Court have not drawn any distinction between the employee's and employer's share qua PF & ESI contributions, hence respectfully following the judgment of the jurisdictional High Court in the case of CIT Vs. AIMIL Ltd 321 ITR 508, we are of the considered view that determination of the Ld. CIT(A) qua non-applicability of the provisions of Section 43B of the Act to the employee's share qua PF and ESI is un-sustainable. Consequently the disallowances to the tune of Rs. 94,33,788/- made by the AO and confirmed by the CIT(A) stands deleted.

7. Further, it is noticed from the decision of ITAT Cuttack Bench of the Tribunal in the case of Jambeswar Jena, ITA No.102/CTK2021, order dated 06.04.2022, has considered the decisions which have been relied upon by the assessee and has held as follows :-

3. *In the instant appeal, on perusal of the assessment record, we found that the assessee has filed his return of income electronically on 28.10.2018 declaring total income at Rs.76,30,890/-. The AO made addition on account of delay in depositing employees contribution to PF & ESI, which has also been confirmed by the CIT(A). In this regard, Id. AR of the assessee drew our attention to the written submissions placed in the paper book from pages 1 to 11, wherein it has been mentioned by the assessee that the assessee has deposited the employees contribution though after due date stipulated under the relevant statute but within the due date and prior to filing of the income tax return u/s.139(1) of the Act. This submission of the assessee has also been incorporated by the CIT(A) in its appellate order. Therefore, payment of employees contribution to PF & ESI, has been not disputed by the CIT(A) in the appellate proceedings nor by the Id. Sr.DR during the course of hearing before us. This issue has also been settled by the coordinate bench of the Tribunal in the case of Rukmani Infra Projects Ltd., ITA No.358/CTK/2017, order dated 30.03.2022, wherein the Tribunal has deleted the addition made on account of delay in deposit of employees contribution to PF and ESI after observing as under:-*

7.9 *To decide the above ground, it is prudent to refer to the amendment in Finance Bill 2021, the amendments are made in section 36 & 43B vide clause 8 & 9. In this regard attention is invited towards section 1(2)(a) of Finance Act, 2021 wherein it has specifically mentioned "(2) Save as otherwise provided in this Act- (a) section 2 to 88 shall come into force on the first day of April 2021". Relating to the amendment by Finance Act 2021, Memorandum Explaining the Provisions of Finance Bill, 2021 says regarding amendment in section 43B and 36 that "These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. For the sake of clarity, we would like to reproduce the extracts of the memorandum Explaining the Provisions in Finance Bill, 2021, which read as under :-*

"Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the 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 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 (1) 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.

Accordingly, in order to provide certainty, it is proposed to –

(i) amend clause (va) of sub-section (1) of 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 purposes of determining the —due date under this clause; and

(ii) amend 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.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.

[Clauses 8 and 9]

7.10 After this amendment, several decisions by the coordinate benches of ITAT at various locations are pronounced on this issue, brief synopsis and finding on the issue are as under:

i) Jagmohan Singh Vs DCIT (ITAT Chandigarh), Appeal Number: ITA Nos. 185 & 193/Chd/2021, Date of Judgement/Order: 15/12/2021

HELD THAT:- It is not in dispute that employees' contribution to ESI and PF collected by the assessee from its employees had been deposited well before the due date of filing of return of income u/s 139 (1) of the Act. We find that the issue is squarely covered by the decisions of the Hon'ble Rajasthan High Court, Hon'ble Himachal Pradesh High Court as well as Hon'ble Punjab & Haryana High Court. We further note that though the Id. CIT(A) has not disputed the various decisions of Hon'ble High Courts including the decision of the jurisdictional Himachal Pradesh High Court but has referred to the amendment brought in by the Finance Act, 2021. It is a consistent position across various Benches of the Tribunal including Chandigarh Benches that the amendment which has been brought in by the Finance Act, 2021 shall apply w. e. f. assessment year 2021 – 22 and subsequent assessment years and the impugned assessment year being assessment year 2018-19, the said amendment cannot be applied in the instant case. Therefore the addition made by way of adjustment while processing the return of income u/s 143 (1) of the Act, amounting to ₹ 11,99,710/- so made by the CPC towards the deposit of employees' contribution towards ESI and PF paid before the due date of filing of the return of income u/s

139 (1) of the Act, is hereby directed to be deleted. –
Decided in favour of assessee.

ii) Stirred Creative Advertising Pvt. Ltd. Vs DCIT (ITAT Bangalore), Appeal Number : ITA No. 594 & 595/Bang/2021, Date of Judgement/Order : 12/12/2021

HELD THAT:- We find no merit in the argument of the Id.DR since the explanation as provided in Finance Act 2021 prescribes that the amendment in both sec.36(va) as well as 43B by inserting corresponding explanation that although impugned PF comes in the form of provision and the same is applicable from 1/4/2021 onwards only. In the present case we are concerned with the asst. year 2017-18 and the amended provision could not be applied retrospectively as it is only applicable w.e.f 1/4/2021. Being so no disallowance could be made by the AO in respect of PF/ESI paid within the due date of filing return of income. Though, it was beyond the date mentioned in the respective Act. This view of ours is supported by various judgment relied on by the Id.AR. Accordingly the appeal of the assessee is allowed.

iii) Adyar Ananda Bhavan Sweets India P Ltd Vs ACIT (ITAT Chennai), Appeal Number : ITA [2015 – 5/23 402 & 403/CHNY/2021, Date of Judgement/Order : 08/12/2021

HELD THAT:- There are series of decisions of various High Courts on this issue and even Hon'ble Jurisdictional High Court in the case of M/s. Industrial Security & Intelligence India P Ltd. [2015 - MADRAS HIGH COURT] held that the payment of employees contribution in regard to PF & ESI if made before the due date of filing of return of income u/s.139(1) of the Act, the same is allowable as deduction as per the provisions of Section 2(24)(x) r.w.s. 36(1)(va) r.w.s. 43B. As before insertion of Explanation 2 to Section 36(1)(va) of the Act, there is ambiguity regarding due date of payment of employees' contribution on account of provident fund and ESI, whether the due date is as per the respective acts or up to the due date of filing of return of income of the assessee. As noted by Hon'ble Supreme Court an amendment made to a taxing statute can be said to be intended to remove hardship only of the assessee and not of the Department. Imposing of a retrospective levy on the assessee would be caused undue hardship and for that reason Parliament specifically chose to make the proviso affective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 01.04.2021 i.e. for and from assessment year 2021-22 of Explanation-2 to s. 36(1)(va) of the Act and not retrospectively. Thus, from the above, it is clear that the amendment brought in the statute i.e., by Finance Act, 2021, the provisions of Section 36(1)(va) r.w.s. 43B of the Act amended by inserting Explanation 2 is prospective and not retrospective. Hence, the amended provisions of Section 43B r.w.s. 36(1)(va) of the Act are not applicable for the assessment year 2018-19 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue of assessee's appeal is allowed

iv) Pachouli Wellness Clinic LLP Vs ITO (ITAT Delhi), Appeal Number : ITA No: 999/Del/2021, Date of Judgement/Order : 25/11/2021

HELD THAT:- As decided in PLANMAN HR (P) LTD., 48, COMMUNITY CENTRE, NARAINA INDUSTRIAL AREA, PHASE-I, NEW DELHI. [2021 – ITAT DELHI] Delayed payments of employee's contribution to Provident Fund/ESIC is allowable if it is deposited before the return is filed u/s 139(1). In view of the legal position on the issue and the order of the Hon'ble ITAT, Delhi in the appellant's own case [2017 – ITAT DELHI] the company is eligible for deduction made by the AO by invoking provisions of Section 36(1)(va) read with 2(24) (x) and 43B of the Act. The AO is, therefore, directed to delete the addition. – Decided in favour of assessee.

v) Star Facilities Management Limited VS ITO (ITAT Delhi), Appeal Number : ITA No. 1755/Del/2020, Date of Judgement/Order : 01/11/2021

HELD THAT:- Admittedly, the assessee, in the instant case, has deposited the employees' contribution to PF and ESI after the relevant date prescribed under the PF and ESI Act, but, before the due date of filing the return of income. In the case of PCIT vs. Pro Interactive Service (India) Pvt. Ltd. [2018 – DELHI HIGH COURT] has held that 'the legislative intent was/is to ensure that the amount paid is allowed as an expenditure only when payment is actually made. The Hon'ble High Court has further held that legislative intent and objective is not to treat belated payment of Employee's Provident Fund (EPF) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under the Act. Tribunal in the case of CIT v. Dee Development Engineers Ltd. [2021 – ITAT DELHI] has decided the issue in favour of the assessee holding that no disallowance u/s. 36(1)(v) r.w.s. Section 2(24)(x) can be made if the employees' contribution to PF and ESI are deposited after the due date prescribed under the relevant Acts, but, paid before the due date of filing of return. Since the assessee, in the instant case has, admittedly, deposited the employees' contribution to PF and ESI before the due date of filing of the return of income, therefore we hold that no disallowance u/s. 36(1)(v) r.w.s. Section 2(24)(x) can be made in the instant case – Decided in favour of assessee.

vi) Lumino Industries Ltd. Vs. ACIT, ITA Nos.231&365/Kol/2021, order dated 17/11/2021;

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.

7.11 Few more orders by the coordinate benches of the ITAT having same finding on this issue are as under:-

- i) *Mavinahalli Shivananjappa Vijay Kumar Vs. DCIT, ITA Nos.596&597/Bang/2021, order dated 13/12/2021;*
- ii) *Shri Prakash Pai Kochikar Vs. ADIT, ITA No.479/Bang/2021, order dated 09/12/2021;*
- iii) *Eskay heat Transfers Pvt. Ltd. Vs. ADIT, ITA No.534/Bang/2021, order dated 07/12/2021;*
- iv) *Anand Sweets and Savouries Vs. DCIT, ITA No.530/Bang/2021, order dated 06/12/2021;*
- v) *Transzone Logistics (India) Pvt. Ltd. Vs. DCIT, ITA No.1740/Del/2020, order dated 29/10/2021;*
- vi) *Jai Enterprises Vs. DCIT, ITA No.248/JP/2021, order dated 25/11/2021;*
- vii) *Nayrathan Jewellers Pvt. Ltd. Vs. ADIT, ITA No.470/Bang/2021, order dated 23/11/2021;*
- viii) *Abhimanyu Sharma Vs. ITO, ITA No.175/JP/2021, order dated 23/11/2021;*
- ix) *Nikhil Mohine Vs. DCIT, ITA No.37&38/Jab/2021, order dated 18/11/2021;*
- x) *DCIT Vs. Kesoram Industries Ltd., ITA No.1777/Kol/2019, order dated 28/10/2021;*
- xi) *Suba Singh Vs. ITO, ITA No.85/ASR/2021, order dated 10/11/2021;*
- xii) *Citi Centre Developers Vs. CPC, ITA No.126/Chd/2021, order dated 28/11/2021;*
- xiii) *Pee Tee Turners Vs. ADCPC, ITA No.105/JP/2021, order dated 28/11/2021;*
- xiv) *Amandeep Singh Khurana Vs. ITO, ITA No.1822/Del/2020, order dated 27/10/2021;*
- xv) *Aroon Facilitation Management Services Pvt. Vs. DCIT, ITA No.1824/Del/2020, order dated 13/10/2021;*
- xvi) *Worldwide Facility Management Services Pvt. Ltd.Vs. DCIT, ITA No.1823/Del/2020, order dated 13/10/2021;*
- xvii) *Rukmini Polytubes Pvt. Ltd. Vs. DCIT, ITA No.1855/Del/2020, order dated 13/10/2021;*
- xviii) *Adama Solution P. Ltd. Vs. ADIT, ITA No.1800/Del/2020, order dated 13/10/2021;*
- xix) *Vansh Jain Vs. DCIT, ITA No.1853/Del/2020, order dated 13/10/2021;*
- xx) *Express Roadway P. Ltd. Vs. ACIT, ITA No.5570/Del/2017, order dated 11/10/2021;*
- xxi) *Ridhi Sidhi Mills (India) Pvt. Ltd. Vs. DCIT, ITA Nos.71&72/Jodh/2021, order dated 28/09/2021;*
- xxii) *Chodavaram Vs. ADIT, ITA No.25&28/VIZ/2021, order dated 23/09/2021;*
- xxiii) *S.V.Engineering Constructions India (P) Ltd. Vs. DCIT, ITA No.130/VIZ/2021, order dated 23/09/2021.*

7.12 Moreover, it would be significant to refer to the SLP by the revenue filed before the Hon'ble Apex Court in the case of M/s Rajasthan State Beverages Corporation Ltd., reported on 84 Taxman.com 185 [04.07.2017] wherein the SLP of revenue arising out of the order passed by the Hon'ble Rajasthan High Court in the case of M/s Rajasthan State Beverages Corporation Ltd., in ITA No.150/2016, order dated 04.08.2016, is dismissed by the Hon'ble Apex Court. Held That : Amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(1)(va); SLP dismissed.

7.13 On perusal of the above judgments in favour of the assessee and other quoted by the Ld DR in contrast. Having two opposite opinions on the same issue, it is a moot question that which view should be appreciated. To reach on a judgment on the controversy under this ground in absence of a direct finding of the Apex Court after amendment in the provisions by Finance Bill 2021 or a judgment by the jurisdictional High Court, nonetheless having several judgments of non-jurisdictional High Courts and Benches of ITAT decided both against as well as in favour of the assessee, to decide the issue judiciously, this would be appropriate and it is well settled law originated from case laws mentioned in ensuing paras that if two views are possible in interpreting the provisions of law in taxation, the one favourable to the assessee has to be preferred.

7.14 In Sun Export Corporation, Bombay vs Collector of Customs (1997) 6 SCC 564 it was observed that "even assuming that there are two views possible, it is well settled that one favourable to the assessee in matters of taxation has to be preferred."

7.14 In CIT vs. Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 196 ITR 149 (SC) it has held that provisions for deduction, exemption and relief should be interpreted liberally, reasonably and in favour of the assessee.

7.15 In CIT vs. Vegetable Products Ltd., 88 ITR 192 (SC): "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted".

7.16 The Hon'ble Supreme Court in the case of CIT Vs. Vatika Township Private Limited, (2014) 367 ITR 466 (SC) has held that the intention of the legislature regarding amendment in the Finance Act, was to make it prospective in nature, which cannot be treated as declaratory/statutory or curative in nature. The relevant observations of the Hon'ble Apex Court in this regard in para 38 are as under :-

"38. When we examine the insertion of proviso in Section 113 of the Act, keeping in view the aforesaid principles, our irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This proviso cannot be treated as declaratory/statutory or curative in nature."

7.17 Keeping in sight of the above discussion, in the present case which is for the asst. year 2013-14, it is an undisputed fact that the Employees contribution for EPF was duly deposited by the Assessee Company before the due date of filing of return u/s 139(1) of The Income Tax Act. The year under consideration is also before the effective date (01.04.2021, AY 2021-22 onwards) of the amended provision by Finance Bill 2021. Accordingly, in view of various judgments in the favour of assessee, disallowance could not be made in respect of PF/ESI paid within the due date of filing return of income. Therefore, it is directed to delete the disallowance made for delayed remittance of employee's contribution to EPF for Rs.59,30,423/-, consequently, the appeal of the assessee is allowed to this extent.

4. In addition to the observation of the coordinate bench in the above matter, reliance can also be placed on the following decisions :-

1. **[2022] 136 taxmann.com 244 (Delhi - Trib.), IN THE ITAT DELHI BENCH 'G', Raj Kumar v. ITD, CPC, Bengaluru, IT APPEAL NOS. 1392, 1383 & 1384(DELHI) OF 2021 & ORS. [ASSESSMENT YEAR 2019-20], FEBRUARY 28, 2022 , wherein it is held that:-**

INCOME TAX : FA2021 amendments regarding due date of deposit of employee's contribution to PF/ESI, are prospective w.e.f. AY 2021-22

- For AYs prior to 2021-22, deduction of employee's contribution to PF/ESI is to be allowed if same is paid on or before due date of filing ITR
- For assessment years prior to Assessment Year 2021-22, where PF and ESI dues are paid after due date under respective statutes but before due date of filing of return of income under section 139(1), same cannot be disallowed under section 36(1)(va)

2. **[2022] 136 taxmann.com 154 (Delhi - Trib.)[14-02-2022], IN THE ITAT DELHI BENCH 'F', Rakesh Janghu v. CPC, Bangalore, wherein it is held that :-**

5. On perusal of the records, we observe that the Assessing Officer has made the impugned addition on the ground that the assessee has deposited employee's contribution towards Provident Fund and ESI amounting to Rs.2,32,41,551/- after due date as prescribed under the relevant Act/ Rules in breach of Explanation 5 to section 43B of the Act. The Assessing Officer accordingly resorted to the additions under section 36(1)(va) read with section 2(24)(x) of the Act.

6. It is the case of the assessee before lower authorities that it has deposited the employee's contribution in EPF and ESI before the due date of filing of return of income stipulated under section 139(1) of the Act.

7. We find that the identical issue has been decided in favour of the assessee by the Hon'ble Delhi High Court in the case

of *Pro Interactive Service (India) (P.) Ltd.* (supra). The extract of the judgment is reproduced as under :

"In view of the judgment of the Division Bench of Delhi High Court in *Commissioner of Income-Tax versus Aimil Limited*, (2010) 321 ITR 508 (Del) the issue is covered against the Revenue and, therefore, no substantial question of law arises for consideration in this appeal.

The legislative intent was /is to ensure that the amount paid is allowed as expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPF) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act. "

8. Respectfully following the binding precedents of Hon'ble Delhi High Court, we direct the Assessing Officer to allow the claim of the assessee and delete the addition. Hence, the grounds of appeal raised by the assessee are allowed.

9. While concluding so, we also take note of the plea of the assessee that delayed payment of employee's contribution to PF/ESIC is not disallowable as the amendments to section 36(1)(va) and Section 43B effected by Finance Act, 2021 were applicable prospectively in relation to Assessment Year 2021-22 and subsequent years. Therefore, the claim of deduction of contribution to Employee's State Insurance Scheme (ESI) and Provident Fund u/s. 36(1)(va) could not be denied to the assessee in Assessment Year 2017-18 in question on the basis of amendments made by Finance Act, 2021. For this proposition, we find support from the decision of the Co-ordinate Bench of Tribunal in the case of *The Continental Restaurant and Café Company v. ITO* [2021] 91 ITR (Trib.)(S.N.) 60 (Bang.) and *Adyar Ananda Bhavan Sweets India (P.) Ltd. v. ACIT* [2022] 134 taxmann.com 56 (Chennai - Trib.). Consequently, the action of revenue on this score is set aside and cancelled.

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

3. [2022] 136 taxmann.com 147 (Jabalpur-Trib) IN THE ITAT, JABALPUR BENCH *Haylide Chemicals (P.) Ltd. v. Deputy Commissioner of Income-tax IT APPEAL NO. 51 (JAB) OF 2021 [ASSESSMENT YEAR 2017-18] JANUARY 13, 2022, wherein it is held that :-**

Section [43B](#), read with sections [36\(1\)\(va\)](#) and [139](#), of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed only on actual payment (PF and ESI contribution) - Assessment year 2017-18 - Revenue, invoking section 2(24)(x) read with section 36(1)(va), added Employees' contribution to Employee Provident Fund and Employee State Insurance Fund, to assessee's returned income as same stood deposited beyond due date specified under section 36(1)(va), even as, admittedly, prior to due date of filing return of income under section 139(1) for relevant year - Whether amendments by way of Explanation 5 to section

43B and Explanation 2 to section 36(1)(va) are to take effect only from assessment year 2021-22, hence there would be no question of same being given a retrospective effect so as to apply for relevant year, sustaining impugned additions - Held, yes - Whether therefore, impugned additions, were to be deleted - Held, yes [Paras 4.2 and 4.3] [In favour of assessee]

4. **[2022] 136 taxmann.com 86 (Chandigarh - Trib.) [11-01-2022]**, wherein it is held that :-

INCOME TAX : Where for assessment year 2019-20, employee's contribution to ESI/PF was deposited by assessee - employer before due date of filing return under section 139(1) but after due date prescribed in amended section 36(1)(va), no disallowance could be made for said assessment year as per amendment to section 36(1)(va) brought by Finance Act, 2021 which came into effect from 1-4-2021 as same has no retrospective applicability

INCOME TAX : Where it was manifest from return of income along with computation of income so filed by assessee that provision for gratuity which had been debited in profit/loss account had been disallowed by assessee itself and no claim for provision for gratuity had been made by assessee while filing its return of income, addition made towards provision for gratuity was to be deleted

5. **[2022] 136 taxmann.com 86 (Chandigarh - Trib.) IN THE ITAT CHANDIGARH BENCH 'B' Shakti Apifoods (P.) Ltd. v. Assessing Officer * IT APPEAL NO. 272 (CHD.) OF 2021, [ASSESSMENT YEAR 2019-20], JANUARY 11, 2022**, wherein it is held that :-

Section [36\(1\)\(va\)](#), read with section [43B](#), of the Income-tax Act, 1961 - Employee's contributions (Finance Act, 2021 amendment) - Assessment year 2019-20 - Assessee-employer filed income-tax return - Assessing Officer disallowed expenditure with respect to employee's contribution towards PF/ESI on ground that there was delay in deposition of same by assessee as per Explanation to section 36(1)(va) - Whether no disallowance could be made for assessment years prior to assessment year 2021-22 as per amendment to section 36(1)(va) brought by Finance Act, 2021 which came into effect from 1-4-2021 as same has no retrospective applicability - Held, yes - Whether therefore, addition made by way of adjustment towards deposit of employees' contribution towards ESI and PF paid before due date of filing of return of income under section 139(1) was to be deleted - Held, yes [Para 6] [In favour of assessee]

5. We have also gone through the observation of the Agra Bench of the Tribunal in a recent case in the case of Agra Karam Udhog, Agra vs J.A.O., Dy. CIT, dated 22 March, 2022 ITA No. 62/Agr/2021 AND OTHERS. In all the above case a similar view has been taken by distinguished benches of the Tribunal that

disallowance on account of delayed payment of ESI and PF under relevant statute, but remitted before due date of filing of return of income under section 139(1) can not be made, hence decided in favour of assessee.

6. Now, to decide the applicability of the amendment in section 36(i)(a) and 43B, whether an amendment will be applicable retrospectively or prospectively, it is well settled principal that first the provisions of the act shall be followed but in case there is no mention in the Act about this, the amended provision in the Finance Act will be referred to which shall further be read in light of the Memorandum Explaining the provisions in the finance bill. To check the amendment under discussion on this test following information is gathered and extracted below:-

Relevant portion of the Finance Act 2021:-

रजिस्ट्री सं० डी० एल०—(एन)04/0007/2003—21 REGISTERED NO. DL—(N)04/0007/2003—21



सी.जी.-डी.एल.-अ.-28032021-226208
CG-DL-E-28032021-226208

असाधारण
EXTRAORDINARY
भाग II — खण्ड 1
PART II — Section 1
प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

सं० 15] नई दिल्ली, रविवार, मार्च 28, 2021/चैत्र 7, 1943 (शक)
No. 15] NEW DELHI, SUNDAY, MARCH 28, 2021/CHAITRA 7, 1943 (SAKA)

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

**MINISTRY OF LAW AND JUSTICE
(Legislative Department)**

New Delhi, the 28th March, 2021/Chaitra 7, 1943 (Saka)

The following Act of Parliament received the assent of the President on the 28th March, 2021, and is hereby published for general information:—

THE FINANCE ACT, 2021

No. 13 OF 2021

[28th March, 2021.]

An Act to give effect to the financial proposals of the Central Government for the financial year 2021-2022.

BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows:—

**CHAPTER I
PRELIMINARY**

1. (1) This Act may be called the Finance Act, 2021.

Short title and commencement.

(2) Save as otherwise provided in this Act,—

(a) sections 2 to 88 shall come into force on the 1st day of April, 2021;

(b) sections 108 to 123 shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

7. *Pertinent extract of Clause 8 and 9 of the Memorandum Explaining the provisions in the finance bill 2021:-*

Rationalisation of various Provisions

Payment by employer of employee contribution to a fund on or before due date Clause (24) of section 2 of the Act provides an

inclusive definition of the income. Sub-clause (x) to the said clause provide 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.

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 Profits 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" to 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 under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.

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. According 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 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 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 the 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 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 (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measure of penalizing employers who mis-utilize employee's contributions.

Accordingly, in order to provide certainty, it is proposed to –

(i) amend clause (va) of sub-section (1) of 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 purposes of determining the —due date under this clause; and

(ii) amend 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.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.

[Clauses 8 and 9]

8. On perusal of the above take out from Finance bill 2021 and explanatory Memorandum on the same issued by the Ministry of Finance, it is apparent as per Chapter 1 section 1(2)(a) of Finance Act, 2021 wherein it has specifically mentioned that “Save as otherwise provided in this Act- (a) Section 2 to 88 shall come into force on the first day of April 2021”, hence section 36 and 43 shall governed by this direction of the finance Act. Further, the clarification rendered in clause 8 and 9 of the Memorandum Explaining the provisions in the finance bill 2021 regarding amendment in section 43B and 36 that “These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. On perusal of the above amendment in the act and explanation, it is explicitly clear that these changes will be effective from 01.04.2021 and are prospective. Therefore, respectfully following the judgment in the case of M/s Rajasthan State Beverages Corporation Ltd., reported on 84 Taxman.com 185 [04.07.2017] wherein the SLP of revenue arising out of the order passed by the Hon’ble Rajasthan High Court in the case of M/s Rajasthan State Beverages Corporation Ltd., in ITA No.150/2016, order dated 04.08.2016, is dismissed by the Hon’ble Apex Court. Held That : Amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(1)(va); SLP dismissed.

9. The disputed controversy in the present case has been answered accordingly and the dispute which is for the assessment year 2020-21 and before is decided in favour of the assessee. The AO is directed accordingly to delete the additions made for delayed remittance of employee’s contribution to PF / ESI after the due date under respective statutes but paid before the due date of filing of return of income u/s 139(1) of the income tax act.

10. Looking to the similar facts and circumstances in the present appeal for A.Y.2018-2019, wherein it is not disputed that the payment of employees contribution to PF and ESI was made before filing of the return u/s.139(1) of the Act, therefore, following the decision of the coordinate bench of the Tribunal in the case of Rukmani Infra Projects Ltd. (supra) as well as the decisions discussed above, we set aside the orders of lower authorities and delete the addition of Rs.27,01,990/- made by the AO and confirmed by the CIT(A) on account of delay in depositing the employees contribution to PF & ESI.

8. As it is noticed that in the decision of the coordinate bench of the Tribunal in the case of Jambeswar Jena (supra), wherein one of us is the author to the order, has already held the decision in favour of the assessee and has also held that the amendment to Section 36(1)(va) and Section 43B of the Act have also been held to be prospective in nature, in view of the above, we are of the opinion that the payments of the employees contribution to PF & ESI having been made before the due date of filing of the return though admittedly after the due date as prescribed under the relevant statute, the same is liable to be allowed. Consequently, the order of the CIT(A) is set aside and the AO is directed to grant the assessee the benefit of the deduction of employees contribution to PF & ESI. We order accordingly.

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

Order dictated and pronounced in the open court on 11/07/2022.

Sd/-

(अरुण खोड़पिया)

(ARUN KHODPIA)

लेखा सदस्य/ ACCOUNTANT MEMBER

Sd/-

(जार्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 11/07/2022

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR,
ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack