आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B" JAIPUR

डॉ. एस.सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 257/JP/2022
निर्धारण वर्ष/Assessment Years : 2020-21

Danish Private Limited F-680, Sitapura Industrial Area, Jaipur.	बनाम Vs.	ITO, Ward-6(1), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCD0834B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Rohan Sogani (C.A.)
राजस्व की ओर से/ Revenue by : Ms. Runi Pal (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 27/07/2022
उदघोषणा की तारीख/Date of Pronouncement : 16/08/2022

आदेश/ ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

The appeal is filed by the assessee arising out of order of National Faceless Appeal Centre, Delhi [hereinafter referred to as (NFAC)] dated 26.05.2022 for the assessment year 2020-21.

2. The assessee has raised the following grounds:-

"1. In the facts and circumstances of the case and in law, ld. CIT(A), has erred in confirming the action of the ld. AO, in making adjustments jin the intimation under Section 143(1) which are outside the purview of section 143(1)(a). The action of the ld. CIT(A) is illegal, unjustified,

arbitrary and against the facts of the case. Relief may please be granted by deleting the entire disallowance of Rs. 1,71,480/-

2. In the facts and circumstances of the case and in law, ld. CIT(A), has erred in confirming the action of the ld. AO, in making disallowance of Rs. 1,71,480/- in respect of ESIC and PF u/s 36(1)(1)(v) of Income Tax Act, 1961. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the disallowance of Rs. 1,71,480/-.

3. The assessee company craves its rights to add, amend or alter any of the grounds on or before the hearing."

3. Briefly the facts of the case are that the assessee filed its return of income on 11.02.2021 declaring total income of Rs. 2,44,03,370/- which was processed U/s 143(1) of the IT Act and in terms of intimation dated 15.09.2021 issued by CPC, it made disallowance of Rs. 1,71,480/- towards employee's contribution towards ESI and PF. On appeal, the ld. CIT(A), NFAC has confirmed the disallowance made U/s 143(1) on account of assessee's failure to pay the employee's contribution of PF/ESI within the prescribed due dates as per Section 36(1)(va) of the Act.

4. Now the assessee is in appeal.

5. The contention of the Ld. Counsel for the assessee was that the issue under consideration is squarely covered vide common order dated 27/09/2021 passed by the ITAT, Jodhpur Bench in ITA No. 59/Jodh/2021 for the assessment years 2015-16 in the case of Mohangarh Engineers and Construction Company Vs. DCIT and in the case of Bikaner Ceramics Private Limited, Bikaner Vs. ADIT, CPC, Bangaluru, in ITA No. 60/Jodh/2021 for the

A.Y. 2019-20 and in the case of Pratap Technocrats Pvt. Ltd. vs. ADIT in ITA No. 18/JP/2022 dated 22.02.2022 for the assessment year 2018-19.

6. On the other hand, the ld. CIT-DR only relied on the order of ld. CIT(A) and stated that ld. CIT(A) has passed exhaustive order explaining the provisions of the Act.

7. We have considered the rival contention and perused the orders of the authorities and the material available on record. Admitted facts of the present case are that the payments of PF & ESI contribution relating employee's contribution are before the due date of filing of return of income U/s 139(1) of the Act. We have noted that the issue under consideration is covered by the decision of the Coordinate Bench in case of Pratap Technocrats Pvt. Ltd. vs. ADIT in ITA No. 18/JP/2022 order dated 22.02.2022 (Supra) wherein it is held as under:-

> *"13. We have considered the rival contention and perused the orders of the authorities and the material available on record. Admitted facts of the present case are that the payments of PF & ESI contribution relating employee's contribution are before the due date of filing of return of income U/s 139(1) of the Act. We have noted that the issue under consideration is covered by the decision of the Coordinate Bench in case of M/s Mohanlal Khatri vs. ACIT in ITA No. 144/JP/2021 order dated 29.11.2021 (Supra) wherein it is held as under:-*
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> *"7. I have considered the submissions of both the parties and perused the material available on record. In the present cases, it is noticed that an identical issue having similar facts has already been adjudicated by the ITAT, Jodhpur Bench in the aforesaid*

referred to cases, wherein one of us is author of the order dated 27/09/2021. In the said order it has been held vide paras 7 to 11 in ITA No. 59/Jodh/2021 for the assessment years 2015-16 in the case of Mohangarh Engineers and Construction Company Vs. DCIT and in the case of Bikaner Ceramics Private Limited, Bikaner Vs. ADIT, CPC, Bangaluru, in ITA No. 60/Jodh/2021 for the A.Y. 2019-20 as under:-

7. We have considered the submission of both the parties and perused the material available on record.

8. In the present cases, it is not in dispute that the assessees deposited the contribution of PF & ESI belated in terms of section 36(1)(va) of the Act, however, the said deposits were made prior to filing of return of income u/s 139(1) of the Act.

8.1 Identical issue with the similar facts have already been adjudicated by the various Benches of the ITAT.

8.2 In the case of Harendra Nath Biswas vs DCIT Koltaka, ITA No. 186/Kol/2021 for the A.Y. 2019-20, similar issue has been decided vide order dated 16.7.2021 by the ITAT 'B' Bench, Kolkata. The Relevant findings have been given in para 4 of the said order, which read as under;-

> *"4. We have heard both the parties and perused the record. First of all we do not countenance this action of the Ld. CIT(A) for the simple reason that the Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and relevant assessment year before us is AY 2019-20. Therefore the law laid down by the Jurisdictional Hon'ble High Court will apply and since this Explanation-5 has not been made retrospectively. So we are inclined to follow the same and we reproduce the order of Hon'ble Calcutta High*

Court in the case of Vijayshree Ltd. supra wherein the Hon'ble Calcutta High Court has taken note of the Hon'ble Supreme Court decision in CIT vs. Alom Extrusion Ltd. reported in 390 ITR 306. The Hon'ble Calcutta High Court's decision in Vijayshree Ltd. supra is reproduced as under:

"This appeal is at the instance of the Revenue and is directed against an order dated 28th April, 2011 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA No.1091/Kol/2010 relating to assessment year 2006-07 by which the Tribunal dismissed the appeal preferred by the Revenue against the order of CIT(A).

The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of Employees Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.

It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.

Being dissatisfied, the Revenue has come up with the present appeal.

After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd.,

we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.

Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities."

In the light of the aforesaid discussion we do not accept the Ld. CIT(A)'s stand denying the claim of assessee since assessee delayed the employees contribution of EPF & ESI fund and as per the binding decision of the Hon'ble High Court in Vijayshree Ltd. (supra) u/s 36(1)(va) of the Act since assessee had deposited the employees contribution before filing of Return of Income. Therefore, the assessee succeeds and we allow the appeal of the assessee."

9. Similar view has been taken by the ITAT Hyderabad 'SMC" Bench in ITA No. 644/Hyd./2020 for the AY 2019-20 in the case of Salzgitter Hydraulics Private Ltd, Hyderabad

vs ITO vide order dt 15.6.2021. The relevant findings given in para 2 of the said order read as under:-

> *"2. Coming to the sole substantive issue of ESI/PF disallowance of Rs.1,09,343/- and Rs.3,52,622/-, the assessee's and revenue's stand is that the same has been paid before the due date of filing sec. 139(1) return and after the due date prescribed in the corresponding statutes; respectively. I notice in this factual backdrop that the legislature has not only incorporated necessary amendments in Sections 36(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 1.4.2021 only. It is further not an issue that the forergoing legislative amendments have proposed employers contributions; disallowances u/s 43B as against employee u/s 36 (va) of the Act; respectively. However, keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1.4.2021, I hold that the impugned disallowance is not sustainable in view of all these latest developments even if the Revenue's case is supported by the following case law.*
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> *(i) CIT vs. Merchem Ltd, [2015] 378 ITR 443(Ker)*
> *(ii) CIT vs. Gujarat State Road Transport Corporation (2014) 366 ITR 170 (Guj.)*
> *(iii) CIT vs. South India Corporation Ltd. (2000) 242 ITR 114 (Ker)*
> *(iv) CIT vs. GTN Textiles Ltd. (2004) 269 ITR 282 (Ker)*
> *(v) CIT vs. Jairam & Sons [2004] 269 ITR 285 (Ker)*
> *The impugned ESI/PF disallowance is directed to be deleted therefore."*

10. On an identical issue, this Bench of the Tribunal vide order dated 12.8.2021 in the case of Mohangarh Engineers and Construction Company, Jodhpur & Others vs CPC, Banglore in ITA No. 5/Jodh/2021 and others held vide para 13 to 18 as under:-

> *"13. We have heard the rival contentions and perused the material available on record. On perusal of the details submitted by the assessee as part of its return of income, it is noted that the assessee has deposited the employees's contribution towards ESI and PF well before the due date of filing of return of income u/s 139(1) and the last of such deposits were made on 16.04.2019 whereas due date of filing the return for the impugned assessment year 2019-20 was 31.10.2019 and the return of income was also filed on the said date. Admittedly and undisputedly, the employees's contribution to ESI and PF which have been collected by the assessee from its employees have thus been deposited well before the due date of filing of return of income u/s 139(1) of the Act.*
>
> *14. The issue is no more res integra in light of series of decisions rendered by the Hon'ble Rajasthan High Court starting from CIT vs. State Bank of Bikaner & Jaipur (supra) and subsequent decisions.*
>
> *15. In this regard, we may refer to the initial decision of Hon'ble Rajasthan High Court in case of CIT vs. State Bank of Bikaner & Jaipur wherein the Hon'ble High Court after extensively examining*
> *the matter and considering the various decisions of the Hon'ble Supreme Court and various other High*

Courts has decided the matter in favour of the assessee. In the said decision, the Hon'ble High Court was pleased to held as under:

"20. On perusal of Sec.36(1)(va) and Sec.43(B)(b) and analyzing the judgments rendered, in our view as well, it is clear that the legislature brought in the statute Section 43(B)(b) to curb the activities of such tax payers who did not discharge their statutory liability of payment of dues, as aforesaid; and rightly so as on the one hand claim was being made under Section 36 for allowing the deduction of GPF, CPF, ESI etc. as per the system followed by the assessees in claiming the deduction i.e. accrual basis and the same was being allowed, as the liability did exist but the said amount though claimed as a deduction was not being deposited even after lapse of several years. Therefore, to put a check on the said claims/deductions having been made, the said provision was brought in to curb the said activities and which was approved by the Hon'ble Apex Court in the case of Allied Motors (P) Ltd. (supra).

21. A conjoint reading of the proviso to Section 43-B which was inserted by the Finance Act, 1987 made effective from 01/04/1988, the words numbered as clause (a), (c), (d), (e) and (f), are omitted from the above proviso and, furthermore second proviso was removed by Finance Act, 2003 therefore, the deduction towards the employer's contribution, if paid, prior to due date of filing of return can be claimed by the assessee. In our view, the explanation appended to Section 36(1)(va) of the Act further envisage that the amount actually paid by the assessee

on or before the due date admissible at the time of submitting return of the income under Section 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income. It is also clear that Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1) (va) and if read in isolation Sec. 43B would become obsolete. Accordingly, contention of counsel for the revenue is not tenable for the reason aforesaid that deductions out of the gross income for payment of tax at the time of submission of return under Section 139 is permissible only if the statutory liability of payment of PF or other contribution referred to in Clause (b) are paid within the due date under the respective enactments by the assessees and not under the due date of filing of return.

22. We have already observed that till this provision was brought in as the due amounts on one pretext or the other were not being deposited by the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said amounts were not deposited. It is pertinent to note that the respective Act such as PF etc. also provides that the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income under sub-section (1) of Section 139 of the IT Act.

23. Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under

respective Act but before filing of the return of income under Section 139(1), cannot be disallowed under Section 43B or under Section 36(1)(va) of the IT Act."

16. The said decision has subsequently been followed in CIT vs. Jaipur Vidyut Vitran Nigam Ltd. (supra), CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. (supra), and CIT vs Rajasthan State Beverages Corporation Limited (supra). In all these decisions, it has been consistently held that where the PF and ESI dues are paid after the due date under the respective statues but before filing of the return of income under section 139(1), the same cannot be disallowed under section 43B read with section 36(1)(va) of the Act.

17. We further note that though the ld. CIT(A) has not disputed the various decisions of Hon'ble Rajasthan High Court but has decided to follow the decisions rendered by the Hon'ble Delhi, Madras, Gujarat and Kerala High Courts. Given the divergent views taken by the various High Courts and in the instant case, the fact that the jurisdiction over the Assessing officer lies with the Hon'ble Rajasthan High Court, in our considered view, the ld CIT(A) ought to have considered and followed the decision of the jurisdictional Rajasthan High Court, as evident from series of decisions referred supra, as the same is binding on all the appellate authorities as well as the Assessing officer under its jurisdiction in the State of Rajasthan.

18. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, the addition by

way of adjustment while processing the return of income u/s 143(1) amounting to Rs 4,38,530/- so made by the CPC towards the delayed deposit of the employees's contribution towards ESI and PF though paid well before the due date of filing of return of income u/s 139(1) of the Act is hereby directed to be deleted as the same cannot be disallowed under section 43B read with section 36(1)(va) of the Act in view of the binding decisions of the Hon'ble Rajasthan High Court. "

11. Since the facts of the present cases are identical to the facts involved in the aforesaid referred to cases, therefore respectfully following the earlier orders as referred to herein above of the different Benches of the ITAT, the impugned additions made by the Assessing Officer and sustained by the Ld. CIT(A) on account of deposits of employees contribution of ESI & PF prior to filing of the return of income u/s 139(1) of the Act, in both the years under consideration prior to the amendment made by the Finance Act, 2021 w.e.f. 1.4.2021 vide Explanation 5, are deleted.

8. Since the facts involved in the present case are identical to the facts involved in the case of Mohangarh Engineers and Construction Company Vs. DCIT (supra) and in the case of Bikaner Ceramics Private Limited, Bikaner Vs. ADIT, CPC, Bangaluru (supra). So respectfully following the aforesaid referred to order, the disallowances sustained by the Ld. CIT(A) are deleted."

14.A similar issue has been decided by the Hon'ble Delhi High Court in the case of CIT vs. AIMIL Ltd., (2010) 321 ITR 508 wherein it has been held as under:-

"The deletion with effect from April 1, 2004 by the Finance Act, 2003 of the second proviso to section 43B of the Income-tax Act,

1961, which stipulates that contributions to the provided fund and Employees State Insurance Fund should be made within the time mentioned in section 36(1)(va), that is, the time allowed under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, as well as the Employees' State Insurance Act, 1948, it treated as retrospective in nature. If the employees' contribution is not deposited thereafter, the employer not only pays interest and delayed payment but can incur penalties also, for which specific provisions are made in the those Acts. In so far as Income-tax Act, 1961, is concerned, the assessee can get the benefit of deduction of the payments, if the actual payment is made before the return is filed.

Where for the assessment year 2002-03 the assessee had deposited employer's contribution as well as employees' contribution towards provident fund and ESI after the due date, as prescribed under the relevant Act/Rules but before the due date for filing the return under the Income-tax Act:

Held accordingly, that no disallowance could be made in view of the provisions of Section 43B as amended by the Finance Act, 2003."

15. From the above discussion, it is clear that there are series of decisions of various Hon'ble High Courts on this issue and even Hon'ble Jurisdictional High Court in the case of M/s. Industrial Security & Intelligence India P Ltd., (supra) 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 of the Act.

Now, the question arises, whether by the Finance Act, 2021, the provisions of Section 36(1)(va) by inserting the Explanation 2 r.w.s. 43B of the Act have been amended, whereby it is clarified

that the provisions of Section 43B of the Act shall not apply and shall be deemed ought to have been applied for the purpose of determining the due date under this clause. In our opinion, this amendment has been brought in the statute book to provide certainty about the applicability of provisions of Section 43B of the Act inspite of belated payment of employee's contribution. We also noted from the memorandum explaining the provisions to Finance Act, 2021, wherein relevant Clauses to said memorandum clearly intended that the amendment shall take effect from 01.04.2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years. The relevant Clauses 8 & 9 of the memorandum explaining the provisions are reproduced as under:-

"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 40 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."

16. The present appeal is filed by the assessee against disallowance of Rs.5,61,32,750/- pertaining to employees contribution made towards ESI & PF which was paid by the appellant company after the "due date" under respective statute of ESIC/PF. This disallowance was made by the AO under section 143(1) of the Act on the basis of remarks in the relevant column of Form no. 3CD report attached with the return of income. In the appeal petition, the appellant has stated that total income returned at Rs.24,87,27,450/- has been processed at Rs.30,48,60,200/- after making adjustment u/s. 143(1)(a)(ii) for Rs.5,61,32,750/- by disallowing PF and other contribution paid after due date prescribed by respective labour laws, out of sum collected from employees contribution to PF/ESIC etc. The assessee has stated that disallowance of Rs.5,61,32,750/- was not in accordance with the provision of Section 43B of the Act as the

said amount were duly remitted before the due date of filling of return of income. The appellant has referred to the decisions of various High Courts including the decision of jurisdictional Rajasthan High Court in the case of Rajasthan State Beverages Corporation Ltd 392 ITR 2 and similar other decisions on this issue.

17. In the present case, we have gone through the observation of ld. CIT(A), recorded in para 5 page-24 to 27of the impugned order which reads as under:-

"After considering the appellant's submission, I find that the provision of section 43B of the Act is not applicable to the expenses in the nature of employees contribution towards EPF/ESIC which were not paid within the "due date" as specified under Section 36(1)(va) of the Act. The provision of Section 43B being a non- obstante clause starting with the wording "Notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act…….. ", the deduction which is otherwise not allowable as per provision of section 36(1)(va) will not get any support from provision of Section 43B. I have gone through the various decisions of High Courts and Hon. Supreme Court on the issue of deduction pertaining to delayed payments of employees' contribution towards PF/ESIC. Most of the court decisions such as the decision of Hon'ble Delhi High Court in the case of CIT vs AIMIL Ltd. 321 ITR 508 a.s well as the decision of Hon'ble Supreme Court in the case of CIT vs Alom Extrusions Ltd. 319 ITR 306 dealt with the issue of deduction u/s 43B(b) of the Act which was pertaining to employers contribution PF/ESIC. Hon'ble Gujarat High Court has observed in the case of Gujarat State Road Transport Corporation (366

ITR 170) decision on the issue of delayed payment of employees contribution to PF/ESIC that there was no occasion before the Hon'ble Apex Court even in the case of Alom Extrusions Limited to consider deduction u/s 36(1)(va) of the Act with respect, to employees contribution towards EPF/ESIC. After going through the decision in the case of M/s AIMIL Ltd., it is noted that the said decision is based on the decision of Hon'ble Supreme Court in the case of M/s Vinay Cement Ltd. I find that the decision in the case of Vinay Cements Ltd. by the Hon'ble Gauhati High Court was on the issue of section 43B(b) i.e. pertaining to employers contribution and not the employee's contribution toward PF/ESIC. The Hon'ble Gauhati High Court has also taken note of the deletion of second Proviso to section 43B of the Act brought by finance Act 2003 with effect from 01/04/2004. Prior to this Amendment by Finance Act 2003, even the employers contribution as per clause (b) of section 43B was to be allowed only if the payments were made within the "due date" as specified in the explanation below section 36(1)(va) of the Act. It was in the context of this amendment that the Hon'ble Gauhati High Court has held that the said second proviso could be considered to be never in existence and accordingly the decision in favour of appellant was given for the issues pertaining to deduction u/s 43B(b) i.e. employers contribution. As the Hon'ble Supreme Court dismissed the SLP of the Revenue, the decision of the Hon'ble Gauhati High Court got approved by the Hon'ble Apex Court pertaining to only employers contribution as contemplated by section 43B(b) of the Act. The last para of decision of Hon'ble Delhi high Court in the case of M/s AIM IL Ltd. is reproduced hereunder:

"17. 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)."

The above findings clearly indicate that the Hon'be Delhi High Court had decided the issue of deduction of employees contribution to PF/ESIC on the basis of Hon'ble Apex Court in the case of M/s Vinay Cements Ltd. whereas M/s Vinay Cement Ltd. decision dealt with only the issue of Section 43B(b) deduction pertaining to employers contribution. Even the whole text of judgment in the case of M/s AIMIL Ltd. discussed the issue of Section 43B(b) deduction pertaining to employers contribution and on no occasion, the Hon'ble Court dealt with the provision of 36(1)(va) r.w.s. 2(24)(x) of the Act before the decision on delayed payments of employees contribution to PF/ESIC deduction. Thus, the Hon'ble Gujarat High Court decision in the case of Gujarat State Road Transport Ltd. took into account such issues and held that the decisions in the case of M/s Alom Extrusions Ltd. did not had occasion to deal with the issue of employee's contribution as per section 36(1)(va) of the Act. It is relevant here to refer to the decision of Hon'ble Supreme Court in the case of CIT vs Sun Engineering Works Pt. Ltd. (198 ITR 297) wherein the Hon'ble Court held that while applying the decision to a later case, the court must carefully try to ascertain the true principle laid down by the decision and not to pick out words or sentences from the ^judgments divorced from the context of question under consideration by the Court to support their reasoning. In the current discussion herein above, it is noted that most of the later decisions applying the Apex Court's decision in the case of Vinay Cements Ltd. or Alom Extrusions Ltd. fall in the category of sub- silentio which have no binding force as held in the case of A-One granite vs. State of

UP (2001 AIR SCW 848). Even the provision of Section 36(1)(va) was amended vide Finance Act, 2021 by inserting Explanation 2, which reads as under :-

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 purposes of determining the "due date" under this clause.

The above explanation sets to rest the controversy pertaining to allowability of deduction in respect of employees' contribution to PF/ESIC under section 43B of the Act. The Explanation 2 inserted by Finance Act, 2021 emphasizes that section 43B was never deemed to have applied for the purposes of due dates as under section 36(1)(va) of the Act. On the issue of clarificatory amendments, the Honble Supreme Court had occasion to analyse the issue in detail in the case of CIT vs Goldcoin Helath Foods Pvt Ltd 304 ITR 308 92008) and it was held that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended by the legislature. In the same decision the Hon'ble Bench refer to the principles of statutory interpretation by justice G.P. Singh wherein the language "shall be deemed always to have meant" or "shall be deemed never to have included" was found as declaratory and in plain terms, retrospective. In the current case of appellant, reliance was placed on the decision of Honble Rajasthan High Court in the case of Rajasthan Beverages Corporation Ltd 392 ITR 2. This decision of Honble Rajasthan High Court is based on an earlier decision of the same High Court in the case of CIT vs State Bank Of Bikaner and Jaipur 363 ITR 70.After going through the texts of judgment in the case of State Bank of Bikaner and Jaipur, I find that this decision of Honble Rajasthan High Court was based on the decision of Hon ble Apex Court in the case of Vinay Cements Ltd(supra). As already discussed in the foregoing paras as to how the decisions of various high courts based on the

Honble Apex Court decision in the case Vinay Cements Ltd fall in the category of sub-silentio decision as the issue in the case of Vinay Cemnts Ltd was pertaining to s.43B(b) deduction on delayed payments of Employers contribution to PF/ESIC and not the Employees contributions. Thus, such sub-silentio decisions loose binding precedence . In view of these discussions, I hold that the appellant is not eligible for deduction of Rs.5,61,32,750/- pertaining to employees contribution. Also, the AO was well within his jurisdiction u/s 143(1)(a)(ii) of the Act to disallow an incorrect claim of Rs.5,61,32,750/- apparent from the information in Form no. 3CD attached with the return of income. Therefore, grounds of appeal no. 1 to 2 are hereby dismissed.

Accordingly, the addition of Rs. 5,61,32,750/- by way of disallowance u/s 36(1)(va) is hereby confirmed. In the result, grounds of appeal raised by the appellant are hereby dismissed."

18. After considering the above findings of CIT(A), now we have gone through ratio laid down by the Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd. (2014) 367 ITR 466, wherein the Hon'ble Supreme Court held that unless contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. The law passed today cannot be applied to the events of the past. The Hon'ble Supreme Court held that if somebody does something today, he do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. According to Hon'ble Apex court every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively

upset. This principle of law is known as lex prospicit non respicit, which means law looks forward not backward. In the case of Vatika Township Pvt. Ltd., (Supra), the issue under challenge before Hon'ble Supreme Court was the insertion of proviso to section 113 of the Act by the Finance Act 2002 for charging of surcharge. Hon'ble Supreme Court noted that though provision for surcharge under the Finance Acts have been in existence since 1995, the charge of surcharge with respect to block assessments, having been created for the first time by the insertion of proviso to Section 113 of the Act, by Finance Act, 2002, it is clearly a substantive provision and is to be construed as prospective in operation. The Hon'ble Supreme Court held that the amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by parliament.

The Hon'ble Supreme Court finally held that the proviso to Section113 of the Act is prospective and not retrospective. For this proposition their lordships of the Hon'ble Supreme Court observed at page 495 as under:-

"Notes on Clauses" appended to Finance Bill, 2002 while proposing insertion of proviso categorically states that "this amendment will take effect from 1st June, 2002". These become epigraphic words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that few other amendments in the Income Tax Act were made by the same Finance Act specifically making those amendments retrospectively. For example, clause 40 seeks to amend S.92F. Clause iii (a) of S.92F is amended "so as to clarify

that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract." This amendment takes effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of 3 concepts:

(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.

Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the proviso, that the amendment is to operate prospectively. Learned counsel appearing for the assessees sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. In so far as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1st June, 2002.

(e) There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt, viz. understanding of CBDT itself regarding this provision. It is contained in CBDT circular No.8 of 2002 dated 27th August, 2002, with the subject "Finance Act, 2002 – Explanatory Notes on provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are

prospective. For example, explanation to Section 158BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158BE, would be prospective i.e. it will take effect from 1st June, 2002.

(f) Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in second proviso to sub-section (3) of Section 2 of Finance Act, 2003. This proviso reads as under:

"Provided further that the amount of income-tax computed in accordance with the provisions of section 113 shall be increased by a surcharge for purposes of the Union as provided in Paragraph A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under section 132 or requisition is made under section 132A of the income-tax Act."

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue

hardship and for that reason Parliament specifically chose to make the proviso effective from June 1, 2002."

19. As per ratio laid down by the judgment of Hon'ble Supreme Court in Vatika Township P. Ltd. (Supra), there cannot be imposition of any tax without the authority of law and such law has to be unambiguous and should prescribe the liability to pay taxes in clear terms.

20. By considering the totality of the facts and the various judicial pronouncements, we are of the view that the amendment brought in the statue 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 under consideration i.e. 2018-19 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue raised in assessee's appeal is allowed.

21. In other appeal also the facts are identical to the facts involved, in ITA No. 18/JP/2022 for the assessment year 2018-19, the only difference is in the amount of disallowance made by the A.O. and sustained by the ld. CIT(A). Therefore my findings given in the former part of this order shall apply mutatis and mutandis for other appeal also.

In the result, all these appeals of the assessees are allowed."

8. By considering the totality of the facts and the various judicial pronouncements, we are of the view that the amendment brought in the statue 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 under consideration i.e. 2020-21 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue raised in assessee's appeal is allowed.

In the result, the appeal of the assessees is allowed.

Order pronounced in the open Court on 16/08/2022.

Sd/-	Sd/-
(राठोड कमलेश जयन्तभाई)	(एस.सीतालक्ष्मी)
(RATHOD KAMLESH JAYANTBHAI)	(Dr. S. Seethalashmi)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 16/08/2022.
*Santosh
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Danish Private Limited, Jaipur.
2. प्रत्यर्थी / The Respondent- ITO, Ward-6(1), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 257/JP/2022}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar