

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'H' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 1255/DEL/2021 [A.Y 2018-19]
ITA No. 1256/DEL/2021 [A.Y 2019-20]

Chitra Exports
513, Mohakampur Industrial Area
Phase - 2, Delhi

Vs.

The D.C.I.T
CPC
New Delhi

PAN: AAFC 7614 G
(Applicant)

(Respondent)

Assessee By : Shri Rohit Aggarwal, CA
Shri Ravindra Aggarwal, CA

Department By : Shri M. Baranwal, CIT-DR

Date of Hearing : 24.08.2022
Date of Pronouncement : 24.08.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

These two appeals by the assessee are preferred against two separate orders dated 28.07.2021 & 30.07.2021 framed u/s 250 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] by the CIT(A), National Faceless Appeal Centre, New Delhi.

2. Since common grievances are involved in both the appeals, they were heard together and are disposed of by this common order for the sake convenience and brevity.

3. The grievances of the assessee in Assessment Year 2018-19 read as under:

"1. "That the Ld. CIT(A), NFAC, has erred in law as well as on the facts of the case by confirming the adjustment/ disallowance u/s 143(1)(a)(iv) of Rs.6,78,168/- u/s 36(1)(va) of the Income tax Act, 1961, being the amount of employees share of ESI and EPF Contributions, which were deposited beyond due dates prescribed under the relevant Acts but were duly deposited before due date for filing of ROI of the appellant, wrongly ignoring the submissions made and the judgments relied upon by the appellant.

2. That the Ld. CIT(A) has erred in law in holding that the Explanation 2 to section 36(1)(va) and Explanation 5 to section 43B inserted by Finance Act, 2021 are having retrospective effect, ignoring the legal provision that the said two Explanations haVe been introduced w.e.f. 1st April 2021, and will accordingly apply in relation to AY-2021-22 onwards.

3. That the Ld. CIT(A) has erred in law and as well as on the facts of the case by holding that the adjustment made by CPC on late payment of employees contribution to ESIC & EPF was covered within the preview of sec. 143(1)(a), ignoring its debatable nature."

4. The grievances of the assessee in Assessment Year 2019-20 read as under:

“1. That the Ld. CIT(A), NFAC, has erred in law as well as on the facts of the case by confirming the adjustment/ disallowance u/s 143(1)(a)(iv) of Rs. 3,69,074/- u/s 36(1)(va) of the Income tax Act, 1961, being the amount of employees share of ESI and EPF Contributions, which were deposited beyond due dates prescribed under the relevant Acts but were duly deposited before due date for filing of ROI of the appellant, wrongly ignoring the submissions made and the judgments relied upon by the appellant.

2. That the Ld. CIT(A) has erred in law in holding that the Explanation 2 to section 36(1)(va) and Explanation 5 to section 43B inserted by Finance Act, 2021 are having retrospective effect, ignoring the legal provision that the said two Explanations have been introduced w.e.f. 1st April 2021, and will accordingly apply in relation to AY-2021-22 onwards.

3. That the Ld. CIT(A) has erred in law and as well as on the facts of the case by holding that the adjustment made by CPC on late payment of employees contribution to ESIC & EPF was covered within the preview of section 143(1)(a), ignoring its debatable nature.”

3. A perusal of the afore-stated substantive grounds of the appeals in both the Assessment Years shows that the quarrel is in respect of deposit of employee's contribution of provident fund and ESI after the due date under the respective Act but before the due date of filing of return of income under the Income tax Act being 13.09.2018 in Assessment Year 2018-19 and 19.09.2019 in Assessment Year 2019-20, which is clear from the following charts of both the Assessment Years:

2018-19

<i>S. No</i>	<i>Nature of fund</i>	<i>Sum received from employees</i>	<i>Due date for payment</i>	<i>The actual amount paid</i>	<i>The actual date of payment to the concerned authorities</i>
1	<i>Employees State Insurance</i>	6660	21/05/2017	6660	20/05/2017
2	<i>Employees State Insurance</i>	5842	15/06/2017	5842.	16/06/2017
3	<i>Employees State Insurance</i>	6971	15/07/2017	6971	24/07/2017
4	<i>Employees State Insurance</i>	6924	15/08/2017	6924	23/08/2017
5	<i>Employees State Insurance</i>	6955	15/09/2017	6955	18/09/2017

6	<i>Employees Insurance</i>	<i>State</i>	6990	15/10/2017	6990	18/10/2017
7	<i>Employees Insurance</i>	<i>State</i>	6880	15/11/2017	6880	20/11/2017
8	<i>Employees Insurance</i>	<i>State</i>	6128	15/12/2017	6128	25/12/2017
9	<i>Employees Insurance</i>	<i>State</i>	6292	15/01/2018	6292	20/01/2018
10	<i>Employees Insurance</i>	<i>State</i>	6305	15/02/2018	6305	17/02/2018
11	<i>Employees Insurance</i>	<i>State</i>	6215	15/03/2018	6215	15/03/2018
12	<i>Employees Insurance</i>	<i>State</i>	6386	15/04/2018	6386	17/04/2018
13	<i>Provident Fund</i>		59416	15/05/2017	59416	20/05/2017
14	<i>Provident Fund</i>		60424	15/06/2017	60424	16/06/2017
15	<i>Provident Fund</i>		62639	15/07/2017	62639	24/07/2017
16	<i>Provident Fund</i>		59414	15/08/2017	59414	23/08/2017
17	<i>Provident Fund</i>		60820	15/09/2017	60820	20/09/2017
18	<i>Provident Fund</i>		60637	15/10/2017	60637	18/10/2017
19	<i>Provident Fund</i>		60046	15/11/2017	60046	21/11/2017
20	<i>Provident Fund</i>		62174	15/12/2017	62174	25/12/2017

21	<i>Provident Fund</i>	63214	15/01/2018	63214	02/01/2018
22	<i>Provident Fund</i>	63229	15/02/2018	63229	19/02/2018
23	<i>Provident Fund</i>	61942	15/03/2018	61942	15/03/2018
24	<i>Provident Fund</i>	63694	15/04/2018	63694	17/04/2018

2019-20

<i>S. No</i>	<i>Nature of fund</i>	<i>Sum received from employees</i>	<i>Due date for payment</i>	<i>The actual amount paid</i>	<i>The actual date of payment to the concerned authorities</i>
1	<i>Employees State Insurance</i>	6660	21/05/2017	6660	20/05/2017
2	<i>Employees State Insurance</i>	5842	15/06/2017	5842.	16/06/2017
3	<i>Employees State Insurance</i>	6971	15/07/2017	6971	24/07/2017
4	<i>Employees State Insurance</i>	6924	15/08/2017	6924	23/08/2017
5	<i>Employees State Insurance</i>	6955	15/09/2017	6955	18/09/2017
6	<i>Employees State Insurance</i>	6990	15/10/2017	6990	18/10/2017

7	<i>Employees Insurance</i>	<i>State</i>	<i>6880</i>	<i>15/11/2017</i>	<i>6880</i>	<i>20/11/2017</i>
8	<i>Employees Insurance</i>	<i>State</i>	<i>6128</i>	<i>15/12/2017</i>	<i>6128</i>	<i>25/12/2017</i>
9	<i>Employees Insurance</i>	<i>State</i>	<i>6292</i>	<i>15/01/2018</i>	<i>6292</i>	<i>20/01/2018</i>
10	<i>Employees Insurance</i>	<i>State</i>	<i>6305</i>	<i>15/02/2018</i>	<i>6305</i>	<i>17/02/2018</i>
11	<i>Employees Insurance</i>	<i>State</i>	<i>6215</i>	<i>15/03/2018</i>	<i>6215</i>	<i>15/03/2018</i>
12	<i>Employees Insurance</i>	<i>State</i>	<i>6386</i>	<i>15/04/2018</i>	<i>6386</i>	<i>17/04/2018</i>
13	<i>Provident Fund</i>		<i>59416</i>	<i>15/05/2017</i>	<i>59416</i>	<i>20/05/2017</i>
14	<i>Provident Fund</i>		<i>60424</i>	<i>15/06/2017</i>	<i>60424</i>	<i>16/06/2017</i>
15	<i>Provident Fund</i>		<i>62639</i>	<i>15/07/2017</i>	<i>62639</i>	<i>24/07/2017</i>
16	<i>Provident Fund</i>		<i>59414</i>	<i>15/08/2017</i>	<i>59414</i>	<i>23/08/2017</i>
17	<i>Provident Fund</i>		<i>60820</i>	<i>15/09/2017</i>	<i>60820</i>	<i>20/09/2017</i>
18	<i>Provident Fund</i>		<i>60637</i>	<i>15/10/2017</i>	<i>60637</i>	<i>18/10/2017</i>
19	<i>Provident Fund</i>		<i>60046</i>	<i>15/11/2017</i>	<i>60046</i>	<i>21/11/2017</i>
20	<i>Provident Fund</i>		<i>62174</i>	<i>15/12/2017</i>	<i>62174</i>	<i>25/12/2017</i>
21	<i>Provident Fund</i>		<i>63214</i>	<i>15/01/2018</i>	<i>63214</i>	<i>02/01/2018</i>
22	<i>Provident Fund</i>		<i>63229</i>	<i>15/02/2018</i>	<i>63229</i>	<i>19/02/2018</i>

23	<i>Provident Fund</i>	61942	15/03/2018	61942	15/03/2018
24	<i>Provident Fund</i>	63694	15/04/2018	63694	17/04/2018

4. The quarrel is now well settled in favour of the assessee and against the Revenue by the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of CIT Vs. AIMIL Limited 321 ITR 508 vide order dated 23.12.2009. The Hon'ble High Court held as under:

"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."

5. The Id. DR placed heavy reliance on the decision of the Hon'ble High Court of Delhi in the case of CIT Vs. Bharat Hotels 410 ITR 417 followed by this Tribunal in the case of Vedvan Consultants Pvt Ltd.

6. We find that this Tribunal in ITA No. 1392/DEL/2021 & Others has duly considered the decision of the Hon'ble Delhi High Court in the case of Bharat Hotels [supra] and has further relied upon the decision of the Hon'ble Jurisdictional High Court in the case of PCIT Vs. Pro Interactive Services (India) Pvt. Ltd. in ITA 983/2018 dated 10.09.2018.

7. Further, this issue has been examined by the Finance Act, 2021 as under:

"Section 2 (24) (x) of the Income Tax Act, 1961 reads: "any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees."

FINANCE ACT, 2021 [13 OF 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

Short title and commencement .

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

(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.

Amendment of section 36.

9. In section 36 of the Income-tax Act, in sub-section (1), in clause (va), the Explanation shall be numbered as Explanation 1 thereof and after Explanation 1 as so numbered, the following Explanation shall be inserted, namely:—

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

Amendment of section 43B.

11. In section 43B of the Income-tax Act, after Explanation4, the following Explanation shall be inserted, namely:—

"Explanation 5.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies." .

32. We have also perused the Memorandum Explaining the Provisions in the Finance Bill, 2021. Under the head "Provision relating to Direct Taxes" with to rationalization of various provisions, the issue of clause (24) of Section 2 sub-clause (x), Section 36(1) clause (va), Section 43B with regard to provisions of sub-Section (1) of Section 139 have been dealt at length. The gist is as under:

"Rationalization 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. Subsection (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) o f sub-section (1) of section 36 o f 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 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 o f 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 o f the employee in fiduciary capacity. By late deposit o f employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) o f sub-section (1) o f Section 36 o f 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] 33.

33. Thus, the matter has been finally decided and the controversy has been put to rest."

8. After considering the facts of the case in totality, in light of judicial decisions discussed hereinabove, and considering the decisions relied upon by the Id. DR, we are of the considered opinion that no disallowance is called for belated payment of employee's contribution to the respective PF and ESI in the case of the assessee who has deposited the same before the due date of filing of Income tax return. The Assessing Officer is directed to delete the impugned additions.

9. In the result, both the appeals of the assessee in ITA Nos. 1255/DEL/2021 and 1256/DEL/2021 are allowed.

The order is pronounced in the open court on 24.08.2022.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 24th August, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	