

**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. 1271/DEL/2021 [A.Y 2019-20]

Suraj Bhan Sunil Kumar & Co.  
1490, Gali Pipalwali Nai Sarak  
Delhi

Vs. The Asstt. Director  
of Income Tax  
Bengaluru

PAN: AAXFS 9006 M

(Applicant)

(Respondent)

Assessee By : Shri V.D. 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:-**

This appeal by the assessee is preferred against the order dated 25.08.2021 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. The grievances of the assessee read as under:

"1. Ld.CIT {Appeal is not justified in law and facts and circumstances of the case in dismissing the appeal and confirming the addition of Rs. 5,76,792/- on the ground that clarificatory amendment made by Finance Act, 2021 in sec. 36(1) in clause (va) and also by inserting explanation (v) in sec. 43 B have the effect of retrospective hence the claim of appellant is dismissed.

2. Ld. CIT(A) is erred in interpreting the amendment as applicable with retrospective effect. The Hon'ble ITAT Hyderabad "B" Bench vide order dated 1\* July,2021 in ITA No. 1952/Hyd/2016 has allowed the claim of the appellant and stated that this amendment is in prospective and not retrospective effect."

3. A perusal of the afore-stated substantive grounds of the appeal 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 12.10.2019 which is clear from the following chart:

S.No	Nature of fund	Sum received from employee	Employer contribution	Due date of payment	Amount paid	Date of payment	Date of filing return
1	Provident Fund	37367/-	40948/-	15.05.18	78315/-	29.05.18	12.10.2019
2	Provident Fund	10727/-	11621/-	15.06.18	22348/-	15.08.19	-do-
3	Provident Fund	623/-	52/-	15.07.18	675/-	14.01.19	-do-
4	Provident Fund	4574/-	4956/-	15.07.18	9530/-	15.08.19	-do-
5	Provident Fund	72771/-	34364/-	15.08.18	107135/-	17.08.18	-do-
6	Provident Fund	1073/-	90/-	15.08.18	1163/-	14.01.19	-do-
7	Provident Fund	1130/-	94/-	15.09.18	1224/-	14.01.19	-do-
8	Provident Fund	78825/-	43135/-	15.10.18	121960/-	06.11.18	-do-
9	Provident Fund	1006/-	84/-	15.10.18	1090	14.01.19	-do-
10	Provident Fund	1034/-	86/-	15.11.18	1120/-	14.01.19	-do-
11	Provident Fund	90970/-	47287/-	15.12.18	138257/-	21.12.18	-do-
12	Provident Fund	1202/-	1302/-	15.12.18	2504/-	15.08.19	-do-
13	Provident Fund	1308/-	110/-	15.12.18	1418/-	14.01.19	-do-
14	Provident Fund	88685/-	39188/-	15.01.19	127873	16.01.19	-do-
15	Provident Fund	1235/-	1337/-	15.01.19	2572/-	15.08.19	-do-
16	Provident Fund	93178/-	52980/-	15.02.19	146158/-	27.02.19	-do-
17	Provident Fund	1235/-	1337/-	15.02.19	2572/-	15.03.19	-do-
18	Provident Fund	1274/-	1380/-	15.03.19	2654/-	15.08.19	-do-
19	Any fund	16571/-	44869/-	15.05.18	61440/-	29.05.18	-do-
20	Any Fund	15652/-	42367/-	15.06.18	58019/-	18.06.18	-do-
21	Any Fund	19553/-	52965/-	15.11.18	72518/-	22.11.18	-do-

22	Any Fund	18605/-	50387/-	15.12.18	68992/-	22.12.18	-do-
23	Any Fund	18194/-	49249/-	15.02.19	67443/-	27.02.19	-do-
	Total :	5,76,792					

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 Explanation 4, 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) 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 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] 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 addition.

9. In the result, the appeal of the assessee in ITA No. 1271/DEL/2021 is 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: 24<sup>th</sup> 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	