

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
'A' BENCH, KOLKATA**

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

**I.T.A. No. 232/KOL/2022  
Assessment Year: 2017-2018**

***Altabur Rahaman Mollah,.....Appellant  
Flat 302, 3<sup>rd</sup> Floor, 266, Hirok Apartment,  
Parnasree Pally, Kolkata-700060  
[PAN: AFDPM0534M]  
-Vs.-***

***Assistant Commissioner of Income Tax,.....Respondent  
Circle-26(1), Kolkata,  
Aayakar Bhawan Dakshin,  
2, Gariahat Road, Kolkata-700031***

**Appearances by:**

*N o n e, appeared on behalf of the assessee*

*Md. Ghayasuddin, CIT (DR), appeared on behalf of the Revenue*

**Date of concluding the hearing : August 31, 2022**

**Date of pronouncing the order : September 05, 2022**

**O R D E R**

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

The assessee is in appeal before the Tribunal against the order of Id. Principal Commissioner of Income Tax, Kolkata-9 dated 17.03.2022 passed for the assessment year 2017-18.

2. The assessee has taken seven grounds of appeal, however, his grievance revolves around a single issue, namely Id. Pr. CIT has erred in taking cognizance under section 263 of the Income Tax Act.

3. In response to the notice of hearing, no one has come present on behalf of the assessee. With the assistance of Id. CIT(DR), we have gone through the record carefully. A perusal of the ground would indicate that

the assessee was required to make employees' contribution of Rs.5,70,002/- to P.F. & ESI Accounts. According to the assessee, except Rs.1,56,346/- the whole amounts were paid before the due date provided in PF & ESI Acts. The balance amount has been paid before the due date of filing of the return.

4. The Id. CIT(DR), on the other hand, submitted that this fact is not ascertainable from the assessment order and, therefore, Id. Commissioner has rightly undertaken the exercise under section 263 of the Income Tax Act.

5. We find that the pleadings made in the grounds of appeal have been taken before the Id. CIT also. This fact is discernable from the submissions dated 14.03.2022 reproduced by the Id. CIT in paragraph no. 4 of the impugned order.

6. The issue regarding allowance and disallowance of PF & ESI contribution has been settled by the Hon'ble Jurisdictional High Court and if such contribution has been made before the due date of filing of the return, then no disallowance has to be made.

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

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

*"17. Have heard both the parties. We note that the Finance Bill, 2021 has brought in an amendment which disallows the employees' contribution made in PF and ESI if not made within the due date as prescribed by the respective*

statutes (PF and ESI Act). So after the amendment has been inserted according to Shri Miraj D Shah takes effect from 1<sup>st</sup> 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 1<sup>st</sup> April, 2021 and therefore will accordingly apply to Assessment Year 2021-22 and subsequent years. So since the legislative intent is clear,

*the amendment brought in by Finance Act, 2021 on this issue as discussed is prospective and Ld. CIT(A) erred in holding otherwise. So till AY 2021-22, the Jurisdictional High Court's view in favor of assessee will hold good and is binding on us. As discussed the decision of the Hon'ble Delhi High Court in Bharat Hotels Ltd. (supra) which was in favor of revenue has not considered the decision of the Co-ordinate Division Bench decision in M/s Aimil Ltd.(supra) which is in favour of assessee. So we note that later decision of the Delhi/Hyderabad Tribunal have followed the decision favouring assessee in the light of the Hon'ble Supreme Court decision in M/s Vegetable Products (supra). In the light of the aforesaid decision and relying on the ratio of the Hon'ble Supreme Court in the case of Vatika Township Pvt. Ltd. (supra) and M/s Snowtex Investment Ltd. (supra) and also taking note of the binding decision of the Hon'ble Jurisdictional Calcutta High Court on this issue before us in Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra), we set aside the impugned order of Ld CIT(A) and direct the AO to allow the claim of deduction in respect of employees contribution shares towards ESI, PF, by the assessee before the due date of filing of return u/s 139(1) of the Act. Therefore the appeal of assessee succeeds and so, it is allowed in favor of assessee".*

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

8. To our mind, once a fact was brought to the notice to the ld. CIT, he should have got it verified from the ld. Assessing Officer before recording a finding that assessment order is erroneous as much as prejudicial to the interest of revenue. The order of the ld. CIT is totally silent on this aspect. Therefore, we allow this appeal for statistical purposes and remit this issue to the ld. CIT with a direction that a remand report be called from the ld. Assessing Officer and if it is proved that all these payments have been made before the due date of filing of the return, then proceedings under section 263 will be dropped. The impugned order passed under section 263 is quashed. With the above direction, the issue is relegated to the file of ld. CIT for fresh consideration.

**9. In the result, the appeal of the assessee is allowed for statistical purposes.**

Order pronounced in the open Court on September 5, 2022.

Sd/-

Sd/-

**(Dr. Manish Borad)**  
**Accountant Member**

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

*Kolkata, the 5<sup>th</sup> day of September, 2022*

- Copies to :
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  - (2) **Assistant Commissioner of Income Tax,**  
**Circle-26(1), Kolkata,**  
**Aayakar Bhawan Dakshin,**  
**2, Gariahat Road, Kolkata-700031**
  - (3) *Pr. Commissioner of Income Tax, Kolkata-9;*
  - (4) *The Departmental Representative*
  - (5) *Guard File*

**TRUE COPY**

*By order*

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

**Laha/Sr. P.S.**