

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

Before

SRI MANISH BORAD, ACCOUNTANT MEMBER

I.T.A. Nos.: 411 & 412/Kol/2022

Assessment Years: 2017-18 & 2018-19

Robin Agro Products P. Ltd.....Appellant
[PAN: AACCR 1778 D]

Vs.

ITO, Ward-1(1), Kolkata.....Respondent

Appearances by:

Sh. Somnath Ghosh, Adv., appeared on behalf of the Assessee.

Sh. Biswanath Das, CIT (D/R), appeared on behalf of the Revenue.

Date of concluding the hearing : August 23rd, 2022

Date of pronouncing the order : August 25th, 2022

ORDER

Per Manish Borad, Accountant Member:

The captioned appeals preferred by the assessee are against separate orders of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi for AYs 2017-18 & 2018-19.

2. The sole ground involved in these appeals of assessee is against the action of the ld. CIT(A) in confirming the disallowance made in respect of PF & ESI in respect of employees' contribution u/s. 36(1)(va) r.w.s. 2(24)(x) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") of Rs. 37,212/- for AY 2017-18 and Rs. 1,60,653/- for AY 2018-19. At the outset, the ld. Counsel for the assessee submitted that under the given facts, issue raised is covered in favour of the assessee by the decision of

this Tribunal in the case of *Lumino Industries Ltd. vs. ACIT, Circle-5(1), Kolkata* in I.T.A. No.365/Kol/2021 for AY 2015-16 order dated 17.11.2021.

3. Per contra, ld. D/R supported the orders of both the lower authorities.

4. I have heard rival contentions and perused the records placed before us. According to the authorities below, since the assessee has not remitted the employees' contribution on the due date as prescribed by the PF & ESI Act, the contribution made belatedly cannot be allowed. However, according to the ld. Counsel for the assessee since the assessee has undisputedly made the remittance in respect of employer's/employees' contribution of PF as well as ESI before the due date of filing of the return of income u/s 139(1) of the Act, no disallowance is warranted. According to the ld. A/R, the CIT(A) erred in referring to the Amendment brought in by Finance Act 2021 w.e.f. 01.04.2021 which inserted an Explanation to section 36(1)(va) and section 43B of the Act and erred in holding it as clarificatory and so, retrospective in nature. Whereas according to ld. A/R, it is only prospective in nature and cannot disturb the binding judicial precedents in favour of assessee. According to the ld. A/R, any way this issue is no longer *res-integra* as held by this Tribunal in the case of *Lumino Industries Ltd. vs. ACIT, Circle-5(1), Kolkata* in I.T.A. No.365/Kol/2021 for AY 2015-16 order dated 17.11.2021, wherein a view was taken in favour of the assessee by the Tribunal after holding that the amendment brought in by Finance Act, 2021 w.e.f 01.04.2021, is prospective in operation and so will be in force from AY 2021-22 onwards and

not retrospective. The relevant portions of the decision reads 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 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."

5. Recently, the Hon'ble Delhi High Court in the case of *Pr. CIT vs. TV Today Network Ltd.* in ITA 227/2022 dated 27.07.2022 has decided the similar issue under identical facts observing as follows:

"41. The Memorandum acknowledges that courts have taken a view that the 'due date' to be considered for the purposes of Section 36(1)(va) of the Act is under Section 43B and it is in that background that the Explanation has been inserted to alter this position. Further,

the Memorandum explicitly stipulates that the said amendment will take effect from 1st April 2021 and it cannot therefore cannot apply to assessment year 2012-13 under consideration. The legislature is therefore conscious that the Explanation seeks to change the law as it stands on date and is therefore intended to apply to subsequent assessment years. The contention of the revenue therefore that the said amendment is retrospective cannot be accepted.

42. The Supreme court in Sedco Forex International Drill. Inc. Vs. CIT reported in (2005) 12 SCC 717 and M.M. Aqua Technologies Ltd. vs. Commissioner of Income Tax, Delhi-III reported in 2021 SCC OnLine SC 575 has held that a provision in a Tax Act which is “for the removal of doubts” cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. The Supreme Court further held that a cardinal principal of tax law is that for the law to be applied it has to be in force during the relevant assessment years unless otherwise provided expressly or by necessary implication. In that view it was held by the Supreme Court that the amendment was not retrospective.

43. As noted above, this court has as early as in the case of AIMIL Ltd. (supra) dated 23rd December, 2009 held that the due date for the purpose of Section 36(1)(va) of the Act would be the due date as provided under Section 43B of the Act and not the relevant Labour statute. This law as noted above has held the field till date, followed by this Court consistently and the appellate authorities below have determined the matter in accordance with the said law.

44. Consequently, this Court is of the view that the amendment to Section 36(1)(va), which is ‘for removal of doubts’, cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.

45. It is also noted that in the facts of the case, the due date for depositing the Employees’ contribution to the Provident Fund was 20th April, 2012 and the assessee had deposited the same on 25th April, 2012. There is no dispute that the amount stands deposited before the filing of the return. We, therefore, find that there is no ground for taking a view different from the view consistently held by this court since AIMIL Ltd.(supra).

46. In view of the aforesaid, we find that no substantial question of law arises in this matter and there is no infirmity in the impugned order dated 29th July, 2021 passed by the ITAT in the ITA No.

5204/DEL/2017 for the assessment year 2012-13 and accordingly, the present appeal is dismissed.”

6. The ld. A/R brought to my notice the contents of the impugned order of ld. CIT(A) wherein it is noticed that the ld. CIT(A) has acknowledged that the assessee had made the remittance/payment of employees' contribution towards PF & ESI before the due date of filing of return of income. Therefore, in the light of the above judicial precedents (*supra*), which is squarely applicable on the issue raised before me in the instant appeal, I am inclined to hold that the Amendment brought in Finance Act 2021 w.e.f. 01.04.2021 by inserting an Explanation to section 36(1)(va) and section 43B of the Act is prospective in nature and would apply from AY 2021-22 onwards and, therefore, the Amendment is not applicable to the assessment years under consideration and allow both the appeals of the assessee and direct the A.O. to delete the addition. Substantive grounds raised by the assessee on the issue of disallowance of employees' contribution towards PF & ESI are allowed.

6. In the result, both the appeals filed by the assessee are allowed.

Kolkata, the 25th August, 2022.

Sd/-
[Manish Borad]
Accountant Member

Dated: 25.08.2022

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Robin Agro Products P. Ltd., C/o. S.N. Ghosh & Associates, Advocates, 2, Garstin Place, 2nd Floor, Suite No. 203, Off Hare Street, Kolkata-700 001.**
- 2. ITO, Ward-1(1), Kolkata.**
3. CIT(A)- NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata