आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'B' BENCH, CHENNAI
श्री वी दुर्गा राव न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
Before Shri V. Durga Rao, Judicial Member &
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./**I.T.A. No.664/Chny/2022**
निर्धारण वर्ष/Assessment Year: 2019-20

Kalpanadevi, 34, Koil Mania Street, Dharmapuri, Pondicherry 605 009.	Vs.	The Assistant Director of Income Tax, CPC, Bengaluru 560 500.

[PAN:CSJPK5198N]

(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)
अपीलार्थी की ओर से / Appellant by	:	Ms. T.V. Muthu Abirami, Advocate
प्रत्यर्थी की ओर से/Respondent by	:	Shri K. N. Dhandapani, Addl. CIT
सुनवाई की तारीख/ Date of hearing	:	26.09.2022
घोषणा की तारीख /Date of Pronouncement	:	26.09.2022

आदेश /O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

This appeal filed by the assessee is directed against the order of the ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), New Delhi dated 10.06.2022 relevant to the assessment year 2019-20.

2. Brief facts of the case are that the assessee filed its return of income for the assessment year 2019-20 declaring the total income at ₹.14,89,000/-. The return filed by the assessee was processed under

section 143(1) of the Income Tax Act, 1961 ["Act" in short] and the total income was assessed at ₹.33,89,100/- after making an adjustment of ₹.18,99,100/- on the ground that the contribution of EPF/ESI of employees contribution was deposited beyond the due date of respective Acts. On appeal, after considering the submissions of the assessee, the ld. CIT(A)-NFAC confirmed the disallowance.

3. On being aggrieved, the assessee is in appeal before the Tribunal. By filing summary of payments made as per PF Act and ESI Act as well as Form No. 3CB and 3CD, the ld. Counsel for the assessee has submitted that the assessee company has deposited the amount towards employee's contribution of EPF and ESI before the due date of filing of return and also submitted that the issue is squarely covered in favour of the assessee and relied on the decision of the Tribunal in assessee's own case for the assessment year 2018-19 in I.T.A. No. 460/Chny/2021.

4. On the other hand, the ld. DR dutifully supported the orders of authorities below.

5. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, the CPC, Bengaluru disallowed the delayed remittance of employees' contribution towards PF/ESI. On appeal before the ld. CIT(A) NFAC, the assessee has submitted that the employee's contribution to PF & ESI has been remitted on or before the due date of furnishing of return of income under section 139(1) of the Act. However, the ld. CIT(A) NFAC has upheld the assessment order passed by the Assessing Officer by confirming the disallowance.

6. Similar issue on identical facts was subject matter in appeal before the Tribunal in the case of Adyar Ananda Bhavan Sweets India P. Ltd. v. ACIT I.T.A. Nos. 402 & 403/Chny/2021 for the assessment years 2018-19 & 2019-20 dated 08.12.2021, wherein, the Coordinate Benches of the Tribunal has observed and held as under:

> *"6. We have heard rival contentions and perused the relevant material on record. Admitted facts are that the payment of ESI & PF contribution regarding employees' contribution is made within the due date of filing of return of income. The Revenue has disputed that the employees' contribution received by the assessee would be treated as income of the assessee because the same has not been deposited in the Government account within the due date as prescribed under the respective acts. We noted that this issue is covered by the decision of Hon'ble High Court of Madras in the case of M/s. Industrial Security and Intelligence India P Ltd., supra, wherein it is held as under:-*
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> > *"5. We find that the Tribunal has rightly relied on the decision of the Supreme Court in the case of CIT V. Alom Extrusions Ltd. reported in 319 ITR 306, whereby, the Supreme Court held that omission of second proviso to Section 43B and amendment to first proviso by Finance Act, 2003 are curative in nature and*

are effective retrospectively, i.e., with effect from 1.4.1988 i.e., the date of insertion of first proviso. The Delhi High Court in the case of CIT V. Amil Ltd. reported in 321 ITR 508 held that if the assessee had deposited employee's contribution towards Provident Fund and ESI after due date as prescribed under the relevant Act, but before the due date of filing of return under the Income Tax Act, no disallowance could be made in view of the provisions of Section 43B as amended by Finance Act, 2003.

6. In the present case, the assessee had remitted the employees contribution beyond the due date for payment, but within the due date for filing the return of income. Hence, following the abovesaid decisions, we find no reason to differ with the findings of the Tribunal. Accordingly, we find no question of law much less any substantial question of law arises for consideration in these appeals. Accordingly, both the Tax Case (Appeals) stand dismissed. No costs. Consequently, M.P.No.1 of 2015 is also dismissed."

6.1 Further, we noted that a similar case law of Hon'ble Delhi High Court in the case of CIT vs. Aimil Ltd., (2009) 321 ITR 508 has considered this issue and held in Para 14 to 19 as under:-

14. When we keep that proposition in mind and also take into consideration various judgments where Vinay Cement (supra) is applied and followed, it will not be possible to accept the contention of the Revenue.

15. In CIT v. Dharmendra Sharma, 297 ITR 320, this Court specifically dealt with this issue and relying upon the aforesaid judgment of the Guwahati High Court, as affirmed by the Supreme Court in Vinay Cement (supra), the appeal of the Revenue was dismissed. More detailed discussion is contained in another judgment of this Court in CIT v. P.M. Electronics Ltd. (ITA No. 475/2007 decided on 3.11.2008). Specific questions of law which were proposed by the Revenue in that case were as under :-

"(a) Whether amounts paid on account of PF/ESI after due date are allowable in view of Section 43B, read with Section 36(1)(va) of the Act?

(b) Whether the deletion of the 2nd proviso to Section 43B by way of amendment by the Finance Act, 2003 is retrospective in nature?"

16. These questions were answered by the Division Bench in the following manner :-

"7. Having heard the learned counsel for the Revenue, as well as, the assessee, we are of the view that the view taken by the Tribunal deserves to be sustained as it is no longer res integra in view of the decision of the Supreme Court in the case of CIT v Vinay Cement Ltd: 213 ITR 268 which has been followed by a Division Bench of this Court in the case of CIT v. Dharmendra Sharma: 297 ITR 320.

8. Despite the aforesaid judgments, the learned counsel for the Tribunal has contended that in view of the judgment of the Division Bench

of the Madras High Court in the case of CIT v. Synergy Financial Exchange Ltd: (2007)288 ITR 366 and that of the Division Bench of the Bombay High Court in the case of CIT v. M/s Pamwi Tissues Ltd: (2008) Taxindiaonline.com 104 (TIOL) the issue requires consideration. According to us, in view of the dismissal of the Special Leave Petition in the case of Vinay Cement (supra) by the Supreme Court by a speaking order, the submission of the learned counsel for the Revenue has to be rejected at the very threshold. The reason for the same is as follows:-

9. The Gauhati High Court in the case of CIT v. George Williamson (Assam) Ltd: (2006) 284 ITR 619 (Gauhati) dealt with the very same issue. In the said judgment the Division Bench of the Gauhati High Court noted a contrary view taken by the Kerala High Court in the case of CIT v. South India Corporation Ltd: (2000) 242 ITR 114. After noting the said judgment the fact that the amendments had been made to the provisions of Section 43B of the Act by virtue of Finance Act, 2003 w.e.f 1.4.2004 it agreed with the submission of the learned counsel for the assessee that by virtue of the omission of the second proviso and the omission of Clauses (a), (c), (d), (e) and (f) without any saving clause would mean that the provisions were never in existence. For this purpose, in the said case the assessee had placed reliance on the judgment of a Constitution Bench of the Supreme Court in the case of Kolhapur Canesugar Works Ltd v. Union of India: (2000) 2 SCC 536 and Rayala Corporation P. Ltd v. Director of Enforcement (1969) 2 SCC 412 and General Finance Co. v. Asst. CIT: (2002) 257 ITR 338 (SC). The said submissions found favour with the Division Bench of the Guahati High Court and relying on earlier decisions of its own Court in CIT v. Assam Tribune: (2002) 253 ITR 93 and CIT v. Bharat Bamboo and Tiber Suppliers: (1996) 219 ITR 212 the Division Bench dismissed the appeal of the Revenue. It transpires that the aforesaid matter was taken up in appeal alongwith other matters including Vinay Cement (supra). The order in Vinay Cement (supra) was passed by the Supreme Court on 7.3.2007 wherein it observed as follows:- "Delay condoned. In the present case we are concerned with the law as it stood prior to the amendment of Section 43-B. In the circumstances, the assessee was entitled to claim the benefit in Section 43-B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return. Special Leave Petition is dismissed."

10. In view of the above, it is quite evident that the special leave petition was dismissed by a speaking order and while doing so the Supreme Court had noticed the fact that the matter in appeal before it pertain to a period prior to the amendment brought about in Section 43B of the Act. The aforesaid position as regards the state of the law for a period prior to the amendment to Section 43B has been noticed by a Division Bench of this Court in Dharmendra Sharma (supra). Applying the ratio of the decision of the Supreme Court in Vinay Cement (supra) a Division Bench of this Court dismissed the appeals of the Revenue. In the passing we may also note that a Division Bench of the Madras High Court in the case of CIT v. Nexus Computer (P) Ltd by a judgment dated 18.8.08 passed in Tax Case (A) No. 1192/2008 discussed the impact of both the dismissal of the special leave

petition in the case of George Williamson (Assam) Ltd (supra) and Vinay Cement (supra) as well as a contrary view of the Division Bench of its own Court in Synergy Financial Exchange (supra). The Division Bench of the Madras High Court has explained the effect of the dismissal of a special leave petition by a speaking order by relying upon the judgment of the Supreme Court in the case of Kunhayammed and Others v. State of Kerala and another: 119 STC 505 at page 526 in Paragraph 40 and noted the following observations:-

"It the order refusing leave to appeal is a speaking order, ie., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country, But, this does not amount to saying that the order of the Court, Tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."

11. Upon noting the observations of the Supreme Court in Kunhayammed and Others (supra) the Division Bench of the Madras High Court in the case of Nexus Computer Pvt Ltd (supra) came to the conclusion that the view taken by the Supreme Court in Vinay Cement (supra) would bind the High Court as it was non declared by the Supreme Court under Article 141 of the Constitution.

12. We are in respectful agreement with the reasoning of the Madras High Court in Nexus Computer Pvt Ltd (supra). Judicial discipline requires us to follow the view of the Supreme Court in Vinay Cement (supra) as also the view of the Division Bench of this Court in Dharmendra Sharma (supra).

13. In these circumstances, we respectfully disagree with the approach adopted by a Division Bench of the Bombay High Court in M/s Pamwi Tissues Ltd (supra).

14. In these circumstances indicated above, we are of the opinion that no substantial question of law arises for our consideration in the present appeal. The appeal is, thus, dismissed."

It also becomes clear that deletion of the 2nd proviso is treated as retrospective in nature and would not apply at all. The case is to be governed with the application of the 1st proviso.

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).

18. We, thus, answer the question in favour of the assessee and against the Revenue. As a consequence, the appeals filed by the assessees stand allowed and those filed by the Revenue are dismissed.

6.2 From the above, it is clear that there are series of decisions of various 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

6.3 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. This amendment has brought in the statute book to provide certainty about the applicability of provisions of Section 43B of the Act inspite of belated payment of employees 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.

6.4 In this regard, we have gone through observation of CIT(A), which are recorded in Para 7.17 to 7.19 and the same reads as under:-

"7.17 From above observations of the Apex Court, it is clear that if a statute is curative in nature or merely declaratory of the previous law, retrospective

operation is generally intended. If the objective of the amendment is to clear the meaning of the principal act, which was already implicit, such amendment will necessarily have retrospective effect because it would be without object unless construed retrospectively. If the amendments in Sec. 36(1)(va) are viewed from this perspective, there will not be any room for doubt about its nature being clarificatory. This matter has been clarified in the amendment i.e. the true import of 'due date 'was very much implicit in the existing explanation 1 of Sec 36(1)(va) even prior to the amendment. More clarity has been. brought about and the existing interpretation is reconfirmed through this amendment by way of insertion of explanation 2. A harmonious construction will not emerge if these amendments were to be construed as prospective. Therefore, relying on the principles of interpretation of statutes as has been adumbrated by Hon'b1e Apex Court supra, it is to be held that the clarification brought out by Explanation 2 to Sec.36(1)(va) will equally hold good for the AYs prior to 2021-22.

7.18 The appellant has placed reliance on the decisions of Hyderabad Bench of the Income Tax Appellate in the case of M/s Crescent Roadways P Ltd in ITA No. 1952/HYD/2018 and of Delhi Bench of the Income Tax Appellate Tribunal in the case of Indian Geotechnical Services in ITA No. 622/DEL/2018 to advance its plea that the above amendment is prospective. However, it apposite to refer to the latest decision of the Hon'b1e ITAT Delhi in ITA NO.1312/Del/2020 :Asstt. Year : 2018-19 in the case of Vedvan Consultants Pvt. Ltd., Vs DCIT, CPC, Bengaluru vide order dated ***26/08/2021*** *has, after considering most of the judgments cited by the appellant including that of the decion of the Hon'ble High Court of Madras in the case of CIT Vs. Industrial Security and Intelligence India Ltd.(supra) considered the clarificatory amendment in the Finance Act 2021 and decided the issue in favour of Revenue.*

7.19 Thus, the aforesaid Explanations inserted by Finance Act, 2021 have clarified that definition of 'due date' as per Sec 43B is deemed never to have been applied for the purpose of employee's contribution. As discussed above, the said amendments are clarificatory in nature and are retrospective in operation. Hence, I am of the view that this provision is retrospective applies to the current AY under consideration as the law is now clear i.e employees' contribution to specified fund will not be allowed as deduction if there is delay in deposit even by a single day as per the due dates mentioned in the respective legislation and any adjustment to the income on the impugned count is in order. The case laws relied on by the appellant including that of the Hon'ble High Court of Madras in the case of CIT Vs. Industrial Security and Intelligence India Ltd.(supra) were rendered prior to the above amendment. Therefore, the payment of employee's contribution made after the due date, by which the appellant is required as an employer to credit an employee's contribution to the employee's account in the relevant fund as per the Employee Provident Fund Scheme/ ESI Act, is liable to be added to the income of appellant.

6.5 In view of the above findings of CIT(A), now we have gone through the decision of Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd., 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 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 was under challenge. Hon'ble Supreme Court noted though provision for surcharge under the Finance Acts have been in existence since 1995, the charge of surcharge with respect to block assessment years, 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.

6.6 The Hon'ble Supreme Court finally held that the proviso to Section 113 of the Act is prospective and not retrospective. For this Hon'ble Supreme Court held 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:*
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> *(i) prospective amendment with effect from a fixed date;*
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> *(ii) retrospective amendment with effect from a fixed anterior date; and*
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> *(iii) clarificatory amendments which are retrospective in nature.*
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> *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.*

6.7 We noted from the judgment of Hon'ble Supreme Court in Vatika Township P. Ltd., supra, that 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. In present case before us, as noted by CIT(A) that their exists divergent judgements of various High Courts. The CIT(A) has noted the case laws in favour of Revenue:

1. *Popular Vehicles & Services (P) Ltd. Vs. CIT [2018] 96 taxmann.com 13 (Kerala),*

2. CIT v. Gujarat State Road Transport Corporation [2014] 41 taxmann.com 100 (Gujarat)
3. CIT v. Merchem Ltd. [2015] 378 ITR 443 (Kerala).

The CIT(A) himself noted the ambiguity in para 7.4 of his order, which reads as under:

> *7.4 While rendering above decisions the Hon'ble High Courts had the occasion to examine and distinguish a catena of judgements which are usually relied upon by appellants to advance the proposition that the provisions of section 43B encompass within its scope the employees' Contribution as well and therefore any such contribution though not remitted by the employer within due date specified by the PF/ESI Acts, will still be permissible deduction if the same is actually paid in pursuance of Sec. 43B.*

The CIT(A) further noted the decisions in favour of assessee in para 7.7, and the same are as under:

> *1. Alom Extrusions Ltd. (supra)*
> *2. CIT v. Aimil Ltd. [2010] 321 ITR 508/188 Taxman 265 (Delhi);*
> *3. CIT v. NispoPolyfabriks Ltd. [2013] 350 ITR 327/213 Taxman 376/30 taxmann.com 90 (HP);*
> *4. CIT v. Alembic Glass Industries ltd. [2015] 279 ITR 331/149 Taxman 15 (Guj.);*
> *5. CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.);*
> *6. CIT v. Pamwi Tissues Ltd. [2009] 313 ITR 137 (Bom.);*
> *7. Spectrum Consultants India (P.) Ltd. V. CIT [2013] 215 Taxman 597/34 taxmann.com 20 (Kar.);*
> *8. CIT v. Udaipur Dugdh Utpadak Shakari Sangh Ltd. [2013] 217 Taxman 64/35 taxmann.com 616 (Raj.) and*
> *9. CIT v. Hemla Embroidery Mills (P) Ltd. [2013] 217 Taxman 207 (Mag.)/37 taxmann.com 160 (Punj. & Har.).*

6.8 In the present case also, before insertion of Explanation 2 to Section 36(1)(va) of the Act, there is ambiguity regarding due date of payment of employees' contribution on account of provident fund and ESI, whether the due date is as per the respective acts or up to the due date of filing of return of income of the assessee. As noted by Hon'ble Supreme Court an amendment made to a taxing statute can be said to be intended to remove hardship only of the assessee and not of the Department. Imposing of a retrospective levy on the assessee would be caused undue hardship and for that reason Parliament specifically chose to make the proviso affective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 01.04.2021 i.e. for and from assessment year 2021-22 of Explanation-2 to s. 36(1)(va) of the Act and not retrospectively.

6.9 Thus, from the above, it is clear that the amendment brought in the statute 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 2018-19 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue of assessee's appeal is allowed."

6.1 The ld. DR could not controvert the above decision of the Tribunal. In view of the above decision of the Coordinate Bench in the case of Adyar Ananda Bhavan Sweets India P. Ltd. v. ACIT (supra), we hold that the issues involved in this appeal is squarely covered in favour of the assessee. However, in this case, the scrutiny assessment under section 143(3) of the Act was not carried out and therefore, the Assessing Officer has no occasion to examine as to whether the assessee has remitted the employee's contribution of PF and ESI before the due date of filing of return. Accordingly, we remit the matter back to the file of the Assessing Officer to verify the details and decide the issue afresh in accordance with law. In case, the Assessing Officer observe that the assessee has remitted the employee's contribution of PF and ESI before the due date of filing of return, then, the Assessing Officer should allow the claim of the assessee in view of the decision referred hereinabove. The assessee is also directed to furnish the details before the Assessing Officer. The total disallowance towards belated remittance of PF/ESI are different in the ld. CIT(A)'s order page Nos. 2 (₹.18,99,100/-) & 3 (₹.19,01,297/-) and not tallying with the

summary of payments (₹.19,03,373/-) furnished by the assessee. This needs verification by the Assessing Officer.

7. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 26th September, 2022 at Chennai.

Sd/-	Sd/-
(G. MANJUNATHA)	(V. DURGA RAO)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, 26.09.2022

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2.प्रत्यर्थी/ Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.