IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR

BEFORE SHRI SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER &
SHRI MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER

I.T.A. No. 22/JAB/2021
(Asst. Year: 2019-20)

Jabalpur Motors Ltd., Nagpur Road, Tripuri Chowk, Garha, Jabalpur (MP) [PAN : AAACJ 9784 B]	vs.	Asstt. DCIT, CPC, Bangalore.
(Appellant)		(Respondent)

Appellant by : Shri G.N. Purohit, Sr. Advocate
Respondent by : Shri Ravi Mehrotra, Sr.DR

Date of hearing : 16/09/2022
Date of pronouncement : 30/09/2022

O R D E R

Per Bench:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi ('CIT(A)' for short) dated 22/06/2021, partly allowing the assessee's appeal contesting the processing of its' return of income under section 143(1) of the Income Tax Act, 1961 ('the Act' hereinafter) for the Assessment Year (AY) 2019-20 vide Intimation dated 07/07/2020.

The Arguments

2. At the very outset, it was submitted by the ld. counsel for the assessee, Sh. Purohit, that the only issue arising in the instant appeal is the addition of the employee's contribution to the employee welfare funds for the reason of the same having been deposited beyond the due date specified in its respect u/s. 36(1)(va), even as the same stand deposited by the due date of filing the return of income u/s.

139(1) of the Act for the relevant year, being 31/10/2019, for which he would refer to the Auditor's Report, forming part of the annual accounts for fy 2018-19 (copy on record). The addition, being debatable, could not have been made under section 143(1), a proposition that is well-settled, and even as clarified by the Tribunal in *Nikhil Mohine v. Dy. CIT* (in ITA Nos. 37 & 38/Jab/2021, dated 18.11.2021), a decision which is squarely on the point, and on which the assessee places total reliance. He, on being inquired by the Bench, stated of there being no decision by the Hon'ble jurisdictional High Court to the contrary, i.e., opining that the employee's contribution to the employee welfare funds is to be, as required u/s. 2(24)(x) r/w s. 36(1)(va), deposited by the assessee-employer by the due date of deposit under the relevant Act for the same not to be added to his total income under the Act. The ld. Sr. DR, Sh. Mehrotra, even as he relied on the impugned order, could not rebut the said contentions by Sh. Purohit and, further, on asking, could not state of any decision by the Hon'ble jurisdictional High Court directly on the point.

3. We have heard the parties before us, and perused the material on record.

The Tribunals' decision in Nikhil Mohine

3.1 The Revenue has, invoking section 2(24)(x) r/w s. 36(1)(va), added the Employees' contribution to the Employee Provident Fund and Employee State Insurance Fund, at a total of rs. 7,46,962 to the assessee's returned income u/s. 143(1)(a), as the same stood deposited beyond the due date specified u/s. 36(1)(va), even as, admittedly, prior to the due date of filing the return of income u/s. 139(1) for the relevant year. Reliance stands placed by it on the decisions in *Popular Vehicles & Services (P.) Ltd.* [2018] 96 taxman.com 13 (Ker); *CIT v. Gujarat State Road Transport Corporation* [2014] 366 ITR 170 (Guj), *CIT v. Merchem Ltd*. [2015] 378 ITR 443 (Kerala); and *Unifac Management Services (India) P. Ltd. v. Asst. CIT* [2018] 409 ITR 225 (Mad). The matter stands examined at length by the Tribunal in *Nikhil Mohine* (supra), wherein, noticing,

inter alia, the cited decisions, it held that in view of the cleavage of judicial opinion in the matter and the limited scope of an adjustment u/s. 143(1)(a), the same could not be decided on merits. The decisions by the Hon'ble High Courts holding the employee's contribution as being covered by s. 43B(b), implying, in context, u/s. 37(1) r/w s. 43B(b), which were aplenty (see pgs. 17-18 of the impugned orders), it opined, could be validated only by disregarding the clear language of the relevant provisions, upheld constitutionally and not read down. The said decisions must nevertheless be respected, and no adjustment contrary thereto could be made u/s. 143(1); there being no decision by the Hon'ble jurisdictional High Court in the matter. The only manner, therefore, available for the Revenue to effect an adjustment u/s. 143(1)/154, is where the *Explanations* to section 36(1)(va) and s. 43B(b), inserted by Finance Act, 2021, which attempt to resolve the issue of the employee's contribution to the employee welfare funds being governed by section 43B(b), i.e., to the exclusion of s. 36(1)(va), are held as retrospective. Legislative intent being the cornerstone and the sole determinant of any interpretative exercise, both the language of the provisions, as well as of the recently inserted *Explanations* thereto, introduced with a view to, as stated therein, remove any doubt in the matter, are unambiguously clear, so that s.36(1)(va) and s. 43B are applicable on different sums. Further, the stated date of the coming into effect (of the *Explanations*), i.e., 01/4/2021, it explained, would though be of no moment in view of the express language deeming the stated position as applicable since inception; that being the reason for bringing the *Explanations* on the statute, as the amendments could otherwise have been effected through prospective clause/s to the relevant provisions. Rather, the tenor of the language employed, clearly giving the stated position a retrospective effect, necessarily requires the *Explanations* to be read as inserted in the statute from a later date. That is, the fact of insertion of the said *Explanations* w.e.f. a later date is consistent with the language giving it a retrospective effect and, thus, does not impinge adversely on it being regarded as so. Reference here may be made to the decision in *Union of*

India vs. S. Muthyam Reddy [1999] 240 ITR 341 (SC), wherein the words 'shall not include and shall be deemed never to have included' in the *Explanation* to s. 2(1A) by the Finance Act, 1989 were read by the Hon'ble Apex Court to be a declaratory amendment having a retrospective effect, and even as the said amendment was effected during the pendency of the appeal against the assessment. Further still, noticing the settled legal position *qua* the test for determining retrospectivity, i.e., if the provision could be construed, without the aid of the subsequent amendment thereto, to take within its ambit the said amendment, the issue was also examined by the Tribunal on merits, i.e., for the said limited purpose, to find that the view canvassed by or on the assessee's behalf could be sustained only by ignoring the existence of s. 36(1)(va) – which governs the deductibility of the employees' contribution to the employee welfare funds, on the statute-book – clearly, an impermissibility. Another fundamental infirmity in the assessee's argument is in regarding the employee's contribution, deemed by the legal fiction of s. 2(24)(x) as the assessee-employer's income, as an expense deductible u/s. 37(1), which could be so only where it is not recoverable – an impossibility, as s. 2(24)(x) applied only on receipt thereof, again bringing s. 36(1)(va) into play for its deduction, and which would therefore have to be given effect to. This would be so even if the same was regarded, for the sake of argument, as covered by s. 43B, a *non-obstante* provision, inasmuch as s. 43B applied only *qua* deductions 'otherwise allowable', i.e., under any provision of the Act, rendering the question of law posed before the Hon'ble Courts, i.e., if the employee's contribution to the employee welfare funds is exclusively covered u/s. 43B, itself, with respect, misplaced, if not irrelevant. The view being canvassed was, thus, it opined, viewed from any angle, wholly untenable. The view expressed by the Tribunal is in fact in agreement with that projected by the Board per its Circular (No. 22/2015, dated 17/12/2015), as also that canvassed per the impugned order with reference to the cited decisions, both explaining, as did the Explanatory Notes on the insertion of s. 36(1)(va) on the statute, the object of the said

provision. It is this view, which in fact, as also noticed by the Tribunal, represented the uniform view across all the Hon'ble Courts prior to the deletion of the second *proviso* to s. 43B by Finance Act, 2003, w.e.f. 01/4/2004, which the *Explanations* to ss. 36(1)(va) and 43B by Finance Act, 2021 seek to statutorily clarify in view of the conflict of judicial opinion, passing thus the test of retrospectivity, even as unequivocally expressed per the unambiguous language thereof. The *Explanations* under reference were therefore clarificatory and, thus, retrospective.

3.2 The said *Explanations*, the Tribunal continued, had however been, as clear from a reference to the Notes on the Clauses to, and the Memorandum explaining the Provisions of, the Finance Bill, 2021, reproducing the same, proposed as prospective amendments. The amendments by way of *Explanation 5* to s. 43B and *Explanation 2* to s. 36(1)(va), it concluded, are to therefore take effect only from AY 2021-22, and which view is unmistakable on a plain reading of the said documents.

Decision

4.1 The view recorded in the impugned order on the merits of the additions – even as the same agrees with that expressed by the Tribunal in *Nikhil Mohine* (supra)(see para 3.1 of this order), is of little consequence in view of the limited scope of an adjustment u/s. 143(1)(a), law on which is well-settled, as by the decisions in *CIT v. GEI Engineering Ltd.* [2009] 310 ITR 112 (MP); *CIT v. Shikarchand Jain* [2003] 263 ITR 221 (MP). We are conscious that there has been an amendment in law, so that with effect from 01/4/2017 an adjustment u/s. 143(1)(a) could be made on the basis of the audit report. So, however, our decision in the instant case, as would be apparent from the foregoing, is based on the conflict of judicial opinion in the matter, duly noted in the Explanatory Notes to the Provisions of the Finance Bill, 2021, explaining that to be the reason for effecting the amendments per the said *Explanations*. The auditor does not express any judicial opinion per his audit report and, clearly, reference thereto in s.

143(1)(a)(iv) is for the facts stated therein. Why, the processing of a return of income u/s. 143(1)(a) is not an 'assessment' inasmuch as there is no provision for hearing the assessee, precluding debatable issues (see: *CIT (Asst.) v. Rajesh Jhaveri Stock Brokers (P.) Ltd*. [2007] 291 ITR 500 (SC)).

The only circumstance, therefore, justifying the impugned additions is a decision/s by the Hon'ble jurisdictional High Court (also see para 4.2). No such decision, however, despite asking, stands brought to our notice by the parties, or otherwise found. As regards the aspect of the retrospective nature of the *Explanations* under reference, we again find no difference in the view expressed therein with that by the Tribunal in *Nikhil Mohine* (supra), i.e., *per se*. So, however, as afore-noted, the said *Explanations* themselves have been proposed as prospective amendments, as stated in the Notes on the Clauses to, and the Memorandum explaining the Provisions of, the Finance Bill, 2021, with a view to, as explained, settle the controversy arising due to the contrary view expressed by some High Courts, for which reference may be made to para 5.4 of the Tribunal's order (also refer paras 3.1 & 3.2 above). There is, accordingly, no question of the same being given a retrospective effect.

4.2 There is, in view of the foregoing, no question of the said *Explanations* being read as retrospective, so as to apply for the relevant year, sustaining the impugned addition, which therefore fail. This is, however, subject to any decision/s by the Hon'ble jurisdictional High Court, which would, where so, hold, even justifying a rectification u/s. 154/254(2), even where rendered after the date of the order sought to be rectified (*Asst. CIT v. Saurashtra Kutch Stock Exchange Ltd.* [2008] 305 ITR 227 (SC); *CIT v. Aruna Luthra* [2001] 252 ITR 76 (P&H)(FB)). No such decision has been found, or otherwise pointed out by the parties, as was the case before the Tribunal in *Nikhil Mohine* (supra). Any such decision, even if discovered later, may operate to amend this order, or the order giving appeal effect thereto, to bring it in conformity or agreement with the said decision/s, of course, after allowing a fair opportunity of hearing to the assessee.

4.3 The impugned addition, therefore, could not have been made under the given facts and circumstances of the case and the law in the matter, and is directed for deletion. We decide accordingly.

5. In the result, the assessee's appeal is allowed.

Order pronounced in open Court on September 30, 2022

Sd/-	Sd/-
(Sanjay Arora)	(Manomohan Das)
Accountant Member	Judicial Member

Dated: 30/09/2022
(Direct)

Copy to:

1. The Appellant: Jabalpur Motors Ltd., Nagpur Road, Tripuri Chowk, Garha, Jabalpur (MP)
2. The Respondent: Asstt. DCIT, CPC, Bangalore.
3. CIT(A)-NFAC, Delhi
4. The Sr.D.R., ITAT, Jabalpur.
5. Guard File.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Jabalpur.