

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

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 356/KOL/2022
Assessment Year: 2019-2020**

***Ripley And Company Stevedoring & Handling (P) Limited,.....Appellant
1st Floor, C Block, Bhagyakul Mansion,
22, Lee Road, Bhowanipore,
Kolkata-700020
[PAN: AACCR4027R]
-Vs.-***

***Deputy Commissioner of Income Tax,.....Respondent
Circle-7(1), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069***

Appearances by:

*Shri Dhiman Mandal (on behalf of Prashant Kumar Jaiswal), A.R., appeared on behalf of the assessee
Shri P.P. Barman, Addl. CIT, appeared on behalf of the Revenue*

**Date of concluding the hearing: September 28, 2022
Date of pronouncing the order: September 29, 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. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi 30.03.2022 passed under section 250 of the Income Tax Act, 1961 in Assessment Year 2019-20.

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2. The Registry has pointed out that appeal is time barred by 19 days. However, considering the COVID period and other circumstances, we condone this small delay of 19 days.

3. In Ground No. 1, the grievance of assessee is that the Id. CIT(Appeals) has erred in confirming the disallowance of Rs.36,15,511/-, which was added by the Id. Assessing Officer on the ground that the assessee failed to make the payments of employees' contribution to ESI & PF account within the due date of the limitation provided under those Acts. The Id. Counsel for the assessee submitted that these payments were made before the due date of filing of the return.

4. We have dealt with similar issue in a large number of decisions and the order of the Tribunal, authored by Vice-President (KZ), in one of the cases reads as under:-

*"IN THE INCOME TAX APPELLATE TRIBUNAL,
'B' BENCH, KOLKATA*

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

*I.T.A. No. 337/KOL/2022
Assessment Year: 2018-2019*

*Rydak Syndicate Limited,.....Appellant
4, Jardines, Dr. Rajendra Prasad Sarani,
Kolkata-700001
[PAN: AABCR2656P]
-Vs.-*

*Assistant Commissioner of Income Tax,.....Respondent
CPC, Bengaluru*

*Appearances by:
Shri Anil Kochar, Advocate, appeared on behalf of the assessee
Shri Biswanath Das, Addl. CIT, appeared on behalf of the Revenue*

*Date of concluding the hearing : September, 27, 2022
Date of pronouncing the order : September 28, 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. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi dated 19.05.2022 passed under section 250 of the Income Tax Act, 1961 for assessment year 2018-19. Though the assessee has raised 7 (seven) grounds of appeal, but its grievances revolve around the single issue namely Id. CIT(Appeals) has erred in confirming the disallowance of Rs.2,69,12,710/-, which was added by the Assessing Officer with the aid of section 36(1)(va) on the ground that the assessee failed to make the payments of employees' contribution to PF & ESI account within the due date provided under the PF & ESI Act.

2. *We find that the issue in dispute is squarely covered by the judgment of the Hon'ble Jurisdictional High Court in the case of (i) CIT -vs.- Vijayshree Ltd. in ITAT No. 243 of 2011 & GA No. 26607 of 2011;(ii) CIT -vs.- Philips Carbon Black Ltd. in GA No. 1382 of 2014 & ITAT 31 of 2014; (iii) CIT -vs.- M/s. Coal India Ltd. in ITA 12 of 2015 and (iv) M/s. Akzo Nobel India Ltd. -vs.- CIT in ITA No. 110 of 2011. This aspect has been considered by the Coordinate Bench in the case of Lumino Industries Ltd. -vs.- ACIT (ITA No. 231 & 365/KOL/2021).*

3. *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 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

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(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".*

4. *Respectfully following the order of the Coordinate Bench, we allow the appeal of the assessee and delete the disallowance.*

5. *In the result, the appeal of the assessee is allowed.
Order pronounced in the open Court on September 28, 2022.*

<i>Sd/- (Manish Borad) Accountant Member Kolkata, the 28th day of September, 2022"</i>	<i>Sd/- (Rajpal Yadav) Vice-President (KZ)</i>
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5. *Respectfully following the above order, we delete the disallowance because payments were made before the due date of filing of the return. Ground No. 1 is allowed.*

6. *In Ground No. 2, grievance of the assessee is that the ld. CIT(Appeals) has erred in confirming the disallowance of Rs.4,38,062/-, which was added by the ld. Assessing Officer with the aid of section 40(a)(ia) of the Income Tax Act. The disallowance of the above amount was made by the Computer Processing Unit under section 143(1) of the*

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Income Tax Act. The assessee contended before the Id. CIT(Appeals) that the CPC has misread the Audit Report because in the Audit Report, it has been specifically mentioned that TDS is being deducted wherever such TDS was required to be deducted on payments made by the assessee. This aspect was not examined, i.e. what is the nature of payment, whether TDS is to be deducted or not? The disallowance cannot be made in a mechanical manner. The Id. CIT(Appeals) failed to consider this aspect and did not make an analytical observation, rather simply observed that it is seen from the details mentioned in Form 3CD Report submitted by the assessee, it has not deducted the TDS on the expenses paid. Hence, AO, CPC has correctly added a sum of 30%. The Id. CIT(Appeals) ought to have examined the nature of payment and to verify whether TDS was required to be deducted or not, only thereafter such disallowance could be confirmed.

7. Considering the above facts, we remit this issue to the file of the Id. Assessing Officer for re-verification and re-adjudication. The Id. Assessing Officer shall provide an opportunity of hearing to the assessee and thereafter decided.

8. In the result, the appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open Court on September 29, 2022.

Sd/-

(Rajesh Kumar)
Accountant Member

Sd/-

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 29th day of September, 2022

*Copies to : (1) Ripley And Company Stevedoring & Handling (P) Limited,
1st Floor, C Block, Bhagyakul Mansion,
22, Lee Road, Bhowanipore, Kolkata-700020*

*(2) Deputy Commissioner of Income Tax,
Circle-7(1), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700069*

ITA No. 356/KOL/2022

Assessment Year: 2019-2020

Ripley And Company Stevedoring & Handling (P) Limited

(3) *Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi;*

(4) *Commissioner of Income Tax- , Kolkata;*

(5) *The Departmental Representative*

(6) *Guard File*

TRUE COPY

By order

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

Laha/Sr. P.S.