

आयकर अपीलीय अधिकरण, अमृतसर न्यायपीठ, अमृतसर

**IN THE INCOME TAX APPELLATE TRIBUNAL AMRITSAR BENCH, AMRITSAR
(THROUGH VIDEO CONFERENCING AT CHANDIGARH)**

श्री एन.के.सैनी, उपाध्यक्ष एवं श्री एन.के.चौधरी न्यायिक सदस्य के समक्ष ।

BEFORE SHRI N. K. SAINI, VICE PRESIDENT

&

SHRI N. K. CHOUDHRY, JUDICIAL MEMBER

आयकर अपील सं./ITA Nos.63 & 64/ASR/2021

(निर्धारण वर्ष / Assessment Years: 2018-2019 & 2019-2020)

Vinko Auto Industries Limited, Village Raowali, PO.Nurpur, Jalandhar-144012	Vs	DCIT, CPC, Bangalore
PAN No. : AAACV 5325 Q		

(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
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निर्धारिती की ओर से /Assessee by	:	Shri Sandeep Vijh, CA
राजस्व की ओर से /Revenue by	:	Shri S.M.Surendranath, Sr.DR

सुनवाई की तारीख / Date of Hearing	:	08/11/2021
घोषणा की तारीख/ Date of Pronouncement	:	08/11/2021

आदेश / O R D E R

Per N. K. Choudhry, JM

The assessee has preferred these appeals against the separate orders dated 28.06.2021 impugned herein passed by the CIT(A), National Faceless Appeal Centre (NFAC), Delhi, for the assessment years 2018-2019 & 2019-2020, u/s.250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The issue involved in the instant appeals relates to the deposit of employees' contributions *qua* ESI & PF after the due date as prescribed in the relevant Acts, however, before the due date of filing of return of income u/s.139(1) of the Act, resulting into disallowance of Rs.5,88,203/- for A.Y.2018-2019 and Rs.60,540/- for A.Y.2019-2020 made by the A.O.

3. Against the above order of AO, the assessee preferred first appeals before the CIT(A), however, the CIT(A) sustained the additions made by the AO for the respective assessment years under consideration while dismissing both the appeals of the assessee.

4. Further feeling aggrieved, the assessee is in appeals before us.

5. Having heard the parties and perused the material available on record. The assessee raised the arguments against the impugned order, whereas the Ld. DR vehemently supported the same.

The CIT(A) while upholding the disallowance/addition *qua* employees contributions towards PF & ESI mainly focused on two aspects/determinations- (i) non-applicability of the provisions of Section 43B of the Act to the employee's share

qua PF & ESI and (ii) applicability of the amended provisions of Section 36(1)(va) and 43B of the Act wherein Explanations have been inserted by Finance Act, 2021. For better clarification and ready reference the Explanations 2 and 5 inserted in sections 36(1)(va) and Section 43B of the Act respectively, are reproduced herein, which reads 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 purposes of determining the "due date" under this clause."*

Section 43B- "Explanation 5.—*For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies."*

5.1 We may observe that the Id. CIT(A) in its order at para no. 7.15 itself has observed that the issue has been highly contentious and different High Courts have taken divergent views on the same issue, out of which some are in favour of the assessee and some are against the assessee. The Id. CIT(A) further observed that the judgments and orders relied upon by the assessee have been rendered before the clarificatory amendments made in the Finance Act, 2021 and the Finance Act, 2021 has put an end to this controversy.

5.2 Admittedly there is plethora of judgments in favour of the Assessee's contention and of the Revenue. The controversy with regard to divergent views of different High Courts, has been settled by the Hon'ble Apex Court in the case of *CIT Vs. M/s. Vegetables Products Ltd.* (88 ITR 192) by laying the dictum that **if two reasonable constructions of a taxing provision are possible that construction which favours the Assessee must be adopted.**

The Hon'ble jurisdictional High Court in the case of *CIT Vs. M/s Hemla Embroidery Mills (P) Ltd.* (366 ITR 167) (P&H HC) and in the case of *CIT Vs. M/s Mark Auto Industries Ltd.* (358 ITR 43) (P&H HC) clearly held that the assessee is entitled to claim deduction of employee's share of ESI & PF u/s.43B of the Act, if the same has been deposited prior to the filing of return of income u/s.139(1) of the Act. From the above judgments of the Hon'ble jurisdictional High Court, it is clear that the Hon'ble Court has not drawn any distinction between the employee's and employer's share *qua* PF & ESI contributions. Admittedly there are no contrary judgements of the jurisdictional High Court against the assessee on the aspect under consideration hence, first determination of the Ld. CIT(A) qua non-applicability of the provisions of Section

43B of the Act to the employee's share qua PF & ESI, is unsustainable.

5.3 Now, coming to the second aspect/determination made by the CIT(A) to the effect that the amendment made in Section 36(1)(va) and 43B of the Act by Finance Act 2021 has to be considered as clarificatory in nature and having retrospective effects, therefore would be applicable to the previous assessment years as well.

We may observe that various benches of the ITAT including Hyderabad Bench in the case of Value Momentum Software Services Pvt. Ltd. (ITA No.2197/Hyd/2017 decided on 19.05.2021), have taken into consideration the identical issue *qua* applicability of the amendment to Section 36(1)(va) and Section 43B of the Act, by inserting Explanations by the Finance Act, 2021 and clearly held that the amendment shall be applicable from 1st April, 2021 onwards . It is also relevant to note that the CBDT has also issued Memorandum of Explanation *qua* applicability of the amended provisions of Section 36(1)(va) & 43B of the Act w.e.f. 1st April, 2021, and Assessment Year 2021-21 onwards, hence there is no doubt *qua* applicability of the amended provisions referred above, prospectively.

On the aforesaid discussion, the second aspect as considered/determined by the Id. CIT(A) *qua* retrospective application of the amended provisions of Section 36(1)(va) and 43B of the Act wherein Explanations have been inserted by Finance Act, 2021 *qua* employees' share in respect of PF & ESI Act, is also unsustainable .

5.4 In view of the above discussions, the disallowances of Rs.5,88,203/- for A.Y.2018-2019 and Rs.60,540/- for A.Y.2019-2020 made by the A.O. and confirmed by the CIT(A) are not sustainable and, hence, the same stands deleted.

6. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 08/11/ 2021.

Sd/-
(एन. के. सैनी)
(N. K. SAINI)

उपाध्यक्ष / VICE PRESIDENT

Sd/-
(एन.के.चौधरी)
(N.K.CHOUDHRY)

न्यायिक सदस्य / JUDICIAL MEMBER

दिनांक Dated 08/11/2021

Prakash Kumar Mishra, Sr.PS(on tour)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
Vinko Auto Industries Limited,
Village Raowali, PO.Nurpur,Jalandhar-144012
2. प्रत्यर्थी / The Respondent-
DCIT, CPC, Bangalore
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अमृतसर / DR, ITAT,
Amritsar
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

