

ITA Nos.231&365/Kol/2021
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 ITA No. 371/Kol/2021
 Lumino Industries Ltd. & Ors,
 AYs 2015-16, 2017-18, 2018-19, 2019-20

आयकर अपीलिय अधीकरण, न्यायपीठ –“B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 [Before Shri P. M. Jagtap, Vice President (KZ) & Shri A. T. Varkey, Judicial Member]

I.T.A. Nos. 231 & 365/Kol/2021
Assessment Years: 2015-16 & 2017-2018

Lumino Industries Ltd. (PAN: AABCL 0720 E)	Vs.	ACIT, Circle-5(1), Kolkata
Appellant		Respondent

I.T.A. No. 366/Kol/2021
Assessment Year: 2018-19

Navayug Labour Contractors Pvt. Ltd. (PAN: AAECN 0950 D)	Vs.	CPC, Bangalore
Appellant		Respondent

I.T.A. Nos. 369 & 367/Kol/2021
Assessment Years: 2018-19 & 2019-20

Jagannath Concrete Poles (PAN: AALFJ 4876 A)	Vs.	CPC, Bangalore
Appellant		Respondent

I.T.A. No. 368/Kol/2021
Assessment Year: 2018-19

Sandeep Mech. Engineers Ltd. (PAN: AAJCS 7946 N)	Vs.	CPC, Bangalore
Appellant		Respondent

I.T.A. No. 371/Kol/2021
Assessment Year: 2019-20

Jaimatadi Castings Pvt. Ltd. (PAN: AABCJ 5385 K)	Vs.	CPC, Bangalore
Appellant		Respondent

Date of Hearing (Virtual)	12.11.2021
Date of Pronouncement	17.11.2021
For the Appellant	Shri Miraj D Shah, A.R
For the Respondent	Shri Jayanta Khanra, JCIT

ORDER

Per Bench:

All these appeals are preferred by the different assessee's which are against the separate orders of the Ld. CIT(A)-National Faceless Appeal Centre(NFAC) dated 01.06.2021, 26.07.2021, 26.08.2021, 07.09.2021, 16.08.2021 & 25.08.2021 for AYs 2015-2016, 2017-18, 2018-19 & 2019-20 respectively.

2. First we will consider the appeal in ITA No. 365/Kol/2021 for AY 2015-16 as the lead case.

3. The grounds of appeal raised by the assessee which reads as under:

1. That on the facts and in the circumstances of the case, the Ld. CIT(A) (NFAC) has erred in law as well as on facts in passing an order u/s 250 by dismissing appeal against disallowance of sum of Rs. 10,947/- being contribution of employees' share towards ESI, PF, Superannuation Fund or any other fund set up for the welfare of the employee u/s 36(1)(va) read with Section 2(24)(x) of the Income Tax Act, 1961 when the payments were made within the due dates of filing of return u/s 139 of the Income Tax Act, 1961 and hence are allowable.

2. For that on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law as well as on facts in dismissing appeal against the disallowance of expenses for earning exempt income under Section 14A of the Income Tax Act, 1961 amounting to Rs. 4,20,475/- when no dividend has been earned during the year and the investments have been made in order to gain control over the companies.

3. For that on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law as well as on facts in dismissing the appeal against the disallowance of expenditure incurred on educational sponsorship of Mr. Jay Goel amounting to Rs. 48,54,000/- when the same was incurred for his educational qualification abroad on the pretext that he would be joining the assessee company as an employee after completion of his study abroad and is thus allowable.

4. For the facts and in the circumstances of the case and in view of the fact that the assessee follows the mercantile system of accounting, the Ld.

CIT(A) was not correct in dismissing the appeal with respect to the retention money aggregating to Rs. 1,55,74,066/- retained by the debtors, during the relevant previous year (AY 2015-16), which should be deducted from income from profits and gains from business and profession in the computation of income.

5. *For that on the facts and circumstances of the case, the Ld. CIT(A) erred in law as well as on facts in dismissing appeal made under ground no. 3 & 4, which was allowed in the case of the appellant in AY 2016-17 and onwards, leading to change in opinion of the revenue.*

6. *For that on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law as well as on facts in not admitting the claim of deduction of retention money in ground number 4, on the pretext that the assessee appellant had submitted revised return of income before the Ld. AO during assessment proceedings.*

7. *For that the appellant craves leave to supplement, cancel or otherwise modify any of the above grounds before or at the time of hearing.*

4. Ground no. 1 is preferred by the assessee against the action of Ld. CIT(A) (NFAC) [hereinafter referred to Ld. CIT(A)] confirming the action of AO disallowing the sum of Rs. 10,946/- being contribution of employees' share towards ESI, PF, Superannuation Fund or any other fund set up for the welfare of the employee u/s 36(1)(va) read with Section 2(24)(x) of the Income Tax Act, 1961 [hereinafter referred to as the Act] when the payments were made within the due dates of filing of return u/s 139 of the Act.

5. Brief facts of the case as noted by the AO is that from the Tax Audit Report submitted by the assessee, he noted that the assessee company has made delayed payment amounting to Rs. 10,946/- in respect of employees contribution towards provident fund as per the Provident Fund (hereinafter referred to as the PF Act). According to AO, in view of Section 2(24)(x) rws 36(1)(va) of the Act, the employees contribution is to be paid within the due date of payment as prescribed in the respective Acts (PF/ESI Act) to claim deduction. The AO took note of the decision of the Hon'ble Gujrat High Court in the case of CIT vs. Gujrat State Road Transport Corporation [265 CTR 64] and the case of LKP Securities Ltd. passed by

the ITAT Mumbai wherein it was held that employees' contribution can be allowed only if the same is deposited within the due date prescribed under the respective Act's and not within the due date of filing return of income. And the AO cited the CBDT Circular No. 22/2015 dated 17.12.2015 for disallowing Rs. 10,946/- which was added back to the total income of the assessee.

6. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who confirmed the appeal by holding as under:

“5.c) Findings:-

The addition in this case involves a disallowance on account of delayed payment in respect of Employees' contribution to EPF as per the provisions of Section 36(1)(va) of the Act. The appellant has stated that the same should have been allowed as the payments were made before the due date of the filing of the ITR. The appellant has quoted a number of judgments in his favour. However it is seen that the Hon'ble Gujrat High Court in CIT vs. Gujarat State Road Transport Corporation (2014) 366 ITR 170 (Guj) and the Hon'ble Kerala High Court in CIT vs. Merchant (2015) 280 CTR 381 (Ker) have clearly held that the scope of section 43B and Section 36(1)(va) are different and thus, there is no question of reading both the provisions together to consider whether the assessee is entitled to deduction in respect of the sum belated by paid towards such contribution, especially, when such sums are received by the assessee (employer) from his employee.

The explanation to Section 36(1)(va) of the IT Act, 1961 clearly defines that the 'due date means the date by which the assessee is required as an employer to credit as employees' contribution into the employees' account'. This fact has been further clarified in the amended provisions of the Section 36(1)(va) in the Finance Act, 2021 wherein it has been stated that the provisions of Section 43B does not apply to Section 36(1)(va) and is 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 of the IT Act, applies. The clarificatory amendment is, by its very definition, retrospective in nature and, therefore, the disallowance as made by the AO is perfectly in order, and therefore, the addition is confirmed.

This ground of appeal is dismissed.”

7. Aggrieved by the action of Ld. CIT(A) the assessee is before us.

8. We have heard both the parties and perused the records. We find that the assessee had remitted the payment which are in the nature of contribution of employees' share towards PF to the fund set up for the welfare of the employees within the due date of filing of return of income u/s 139(1) of the Act. In the present

case the AO have disallowed the payment made towards these funds by relying on CBDT Circular No. 22/2015 dated 17.12.2015 and by taking note of the decision of Hon'ble Gujrat High Court in the case of M/s Gujrat State Road Transport (supra) and ITAT (Mumbai) decision in the case of M/s LKP Securities(supra) that the employees contribution to PF/ESI can be allowed only if the same has been deposited within the due date prescribed under the respective Act (PF and ESI Act) and not before the due date of filing of return of income. On appeal, the Ld. CIT(A) has taken note of the amendment brought in by Finance Act, 2021, by virtue of it has been clarified that Section 43B does not apply to Section 36(1)(va) of the Act and it is deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of Section 2(24)(x) applies. And thus according to Ld. CIT(A), it is a clarificatory amendment and so is retrospective in operation and therefore he upheld the action of AO which action of Ld. CIT(A) has been challenged before us.

9. Assailing the action of Ld. CIT(A) the Ld. A.R. Shri Miraj D Shah submitted that the amendment brought in by the Finance Act 2021 is prospective in nature and for buttressing this submission he drew our attention to the decision of Hon'ble Supreme Court in the case of M/s M.M. Aqua Technologies Ltd. vs. CIT, Delhi and drew our attention to Para 22 wherein the Hon'ble Supreme Court has held that if the retrospectivity of a taxing statute is urged due to the expression used in the Statute is "*for the removal of doubts*" cannot be presumed to be retrospective, if it alters or changes the law as it earlier stood and has relied on several decisions of the Hon'ble Supreme Court which reads as under:

"22. Second a retrospective 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. This was stated in Sedco Forex International Drill. Inc. vs. CIT (2005) 12 SCC 717 as follows:

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by

necessary implication. (See also *Reliance Jute and Industries Ltd. v. CIT* [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See *Sonia Bhatia v. State of U.P.*, (1981) 2 SCC 585, 598]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See *Shyam Sunder v. Ram Kumar*, (2001) 8 SCC 24 (para 44); *Brij Mohan Das Laxman Das v. CIT*, (1997) 1 SCC 352, 354; *CIT v. Podar Cement (P) Ltd.*, (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are “it is declared” or “for the removal of doubts”.

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word “earned” had been judicially defined in *S.G. Pgnatale* [(1980) 124ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income “arising or accruing in India”. The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, “income payable for service rendered in India”.

19. When the Explanation seeks to give an artificial meaning to “earned in India” and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively.

23. This being the case, Explanation 3C is clarificatory - it explains Section 43B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held by the High Court.

24. Third, any ambiguity in the language of Explanation 3C shall be resolved in favour of the assessee as per *Cape Brandy Syndicate v. Inland Revenue Commissioner* (supra) as followed by judgments of this Court - See *Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613 at paras 60 to 70 per Kapadia, C.J. and para 333, 334 per Radhakrishnan, J.”

10. And according to Ld. A.R. the Ld. CIT(A) erred in holding the later amendment brought in by Finance Act, 2021 to be retrospective and for that proposition he cited the Constitution Bench decision of the Hon’ble Supreme Court in the case of *CIT vs. Vatika Township Pvt. Ltd.* 2015 (1) SCC 1 which decision has been taken note of by the Hon’ble Supreme Court in the case of *M/s Snowtex Investment Ltd. vs. PCIT* dated 30.04.2019 [Civil Appeal No(s). 4483 of 2019, Special Leave to appeal (c) No. 20017/2017] wherein the Hon’ble Supreme Court has explained the test to be applied to find out whether the intent of the

legislature/Parliament is to give retrospective operation of law by taking note of the decision in the case of Vatika Township (supra) and held as under:

The Test to be applied is essentially one of the intent of the legislature.

28. In a more recent decision in Commissioner of Income Tax vs. Vatika Township Pvt. Ltd. (2015) 1 SCC 1, a Constitution Bench of this Court held thus:

42.1. “Notes on Clauses” appended to the Finance Bill, 2002 while proposing insertion of proviso categorically states that ‘this amendment will take effect from 1.6.2002.’ 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 a few other amendments in the Income tax Act made by the same Finance Act specifically making those amendments retrospective. For example, clause 40 seeks to amend S. 92-F. Clause (iii-a) of S. 92-F 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”. (emphasis supplied). 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 three concepts:

- 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.”

29. In M/s. Vijay Industries (supra), decided on 1 March 2019, a three judge Bench of this Court held that the provisions of Section 80AB which were introduced by the Finance (No. 2) Act, 1980 with effect from 1 April 1981 could not be regarded as clarificatory in nature. The Court held that the provision was made with prospective effect and the amendment would not apply to assessment year 1979-1980 and 1980-1981 because the amended provision was brought on the statute book after the assessment years in question.

30. In conclusion, we therefore, hold that the amendment which was brought by Parliament to the Explanation to Section 73 by the Finance (No 2) Act 2014 was with effect from 1 April 2015. In its legislative wisdom, the Parliament amended Section 43(5) with effect from 1 April 2006 in relation to the business of trading in derivatives, Parliament brought about a specific amendment in the Explanation to Section 73, insofar as trading in shares is concerned, with effect from 1 April 2015. The latter amendment was intended to take effect from the date stipulated by Parliament and we see no reason to hold either that it was clarificatory or that the intent of Parliament was to give it retrospective effect.

31. The consequence is that in A.Y. 2008-2009, the loss which occurred to the assessee as a result of its activity of trading in shares (a loss arising from the business of speculation) was not capable of being set off against the profits which it had earned against the business of futures and options since the latter did not constitute profits and gains of a speculative business.(Emphasis given by us)

11. Citing the aforesaid case law, Shri Miraj D Shah contended that in order to find out the legislative intent as to whether the Parliament/legislature intended the amendment/explanation brought in later to be retrospective in operation or not, then one may take the assistance of “Notes on Clauses” which are appended to the Finance Bill concerned. Shri Miraj Shah drawing our attention to the Constitution Bench decision of Hon’be Supreme Court in Vatika Township Ltd. (supra) pointed out that Parliament/Legislature is aware of the 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.

12. So according to the Ld. A.R. in order to understand whether the amendment brought in by Finance Act, 2021, is retrospective or prospective in operation in respect of the present case, he drew our attention to the memorandum explaining the Notes on Clauses of Finance Act, 2021. According to him, the clause 8 & 9 of the memorandum is relevant which are reproduced hereunder:

"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 subsection (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 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. [Clauses 8 and 9]”[Emphasis given by us]

13. Therefore, taking us through the relevant clauses of Notes of Clauses of Finance Act, 2021, he pointed out to us that it is explicitly made clear that amendment will take effect from 1st April, 2021 and therefore will accordingly apply to the assessment year 2021-11 and subsequent years. Therefore according to

Shri Miraj Shah the amended provision of Section 43B as well as Section 36(1)(va) are not applicable in the assessment year under consideration for the present case as it is for AY 2017-18 and therefore according to him, the decision of the Hon'ble Jurisdictional Calcutta High Court is binding on this issue as held in the case of CIT vs. M/s Vijayshree Ltd. in ITAT No.243 of 2011 & GA No. 26607 of 2011, CIT vs. Philips Carbon Black Ltd. in GA No. 1382 of 2014 & ITAT 31 of 2014, CIT vs. M/s Coal India Ltd. in ITA 12 of 2015, M/s Akzo Nobel India Ltd. vs. CIT in ITA No. 110 of 2011 and therefore the claim of the assessee should be allowed. According to him, the jurisdictional High Court's decision on this issue is therefore binding on this Tribunal ; and since the employees' contribution was remitted by the assessee before the due date of filing of return of income u/s 139(1) of the Act it is an allowable deduction. Therefore he wants us to overturn the decisions of the lower authorities and uphold the claim of deduction on this issue.

14. Per contra, the Ld. D.R. Shri Jayanta Khanra supporting the decision of authorities below has contended that the Hon'ble Delhi High Court in the case of CIT vs. Bharat Hotel Ltd. in 410 ITR 417 has decided this issue in favour of the revenue and the Delhi Tribunal has followed the order of the Hon'ble Delhi High Court in Bharat Hotel (supra) and upheld the action of the Department disallowing the amount deposited by the assessee company in respect of the employees' contribution since it was not deposited within the due date as prescribed by PF Fund and ESI Act. So therefore the Ld. D.R. does not want us to interfere in the impugned order passed by the authorities below.

15. In his rejoinder, the Ld. A.R. Shri Miraj D Shah contended that even though the Delhi High Court in the case of Bharat Hotels Ltd. (supra) had held in favor of the revenue, however the Hon'ble High Court in that case (Bharat Hotels Ltd.) had not considered the earlier Division Bench judgment of the Delhi High Court which was binding on a Division Bench in the case of CIT vs. Aimil Ltd. & Ors. Reported in 321 ITR 508 (Delhi) wherein the head notes reads as under:

“Late deposit of PF and ESI - During the assessment proceedings, the Assessing Officer (AO) found that the assessee had deposited employers’ contribution as well as employees’ contribution towards provident fund and ESI after the due date, as prescribed under the relevant Act/Rules. Accordingly, he made addition of Rs. 42,58,574/- being employees’ contribution under Section 36(1)(va) of the Act and Rs. 30,68,583/- being employers’ contribution under Section 43B of the Act. CIT(A) deleted the addition by holding that the assessee had made the payment before the due date” of filing of the return, which was a fact apparent from the record - 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 - Decided in favor of assessee.”[Emphasis given by us]

16. Thus it was pointed out by the Ld. A.R. that the Hon’ble High Court Division Bench had earlier held in M/s Aimil Ltd. (supra) that the PF/ESI Act permits the employer to make deposit with some delays, subject to the consequents as per the respective PF/ESI Acts, however insofar as the Income Tax Act is concerned, the assessee can get the benefit of deduction if the actual payment is made before the return is filed as per the principle laid down by the Hon’ble Supreme Court in Vinay Cements reported in 213 CTR 268 (SC). Therefore, according to Ld. A.R., since the later judgment of the Division Bench of Hon’ble Delhi High Court in Bharat Hotels Ltd.(supra) did not consider the Co-ordinate Bench decision as the case of CIT vs. Aimil Ltd. (supra) it cannot be a stare-decise. And moreover it is settled position of law that when there is conflict between two decisions of the High Court of equal strength [(DB) in this case], it cannot be said that later judgment need to be followed, unless a Full Bench of the High Court settled the issue either wise. However, when it comes to fiscal statutes, according to Shri Miraj D Shah, in such circumstance [i.e, conflict of decisions/views of Benches of same strength and when there is no decision on the issue of jurisdictional High Court] then, the decision in favour of assessee should be followed as held by the Hon’ble Supreme Court in the Vegetable Products Ltd. 82 ITR 192 (SC) wherein it is settled when two views/interpretations are possible on an issue, then the view which is in favour of the assessee need to be

followed. Taking note of this aspect, it was brought to our notice that the latest Delhi Tribunal order and Hyderabad Tribunal Orders have held in favour of the assessee in NCC Ltd. vs. ACIT dated 27.09.2021 and also Hyderabad Bench decision in ACIT vs. Nava Bharat Ventures Ltd. (2021) 10 TMI 403 wherein Tribunal was pleased to direct deletion of the disallowance made by the AO in respect of the payment of employees contribution to ESI/PF. Therefore he prayed that the disallowance made by authorities below be deleted on this score.

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.

19. Ground No. 2 is against the action of Ld. CIT(A) in confirming the disallowance made by the AO u/s 14A of the Act.

20. At the outset, the Ld. A.R. pointed out that the assessee is not in receipt of any exempt income and therefore according to him Section 14A disallowance was not warranted in this case and cited the decision of Hon'ble Delhi High Court in the case of Chem Investments in 378 ITR 38 (Del).

21. Per contra the Ld. D.R could not controvert the fact that the assessee is not in receipt of any exempt income and we note that the AO has acknowledged that the assessee is not in receipt of exempt income. Therefore since there is no dispute that assessee did not earn any exempt income, we are of the view that no

disallowance u/s 14A of the Act was warranted. For taking such a view, we rely on the decision of the Hon'ble Delhi High Court in Chem Investments (supra). Therefore we direct the deletion of the addition /disallowance made by the AO in this regard.

22. Ground No. 3 is against the action of the Ld. CIT(A) in confirming the action of the AO in disallowing expenditure incurred on educational sponsorship of Mr. Jay Goel amounting to Rs.48,54,000/-.

23. Brief facts of the case as noted by the AO are as under:

"5. During the course of proceedings it is observed that the assessee has debited an amount of Rs. 48,54,000/- under the head "Education Sponsorship".

5.1. Pursuant to specific query in this regard the assessee submitted that a "sum of Rs. 6,38,574/- has been paid to Mr. Joy Gael directly for meeting his day to day requirement. Further, payments have also been made to the Bentley University towards college fees and to tour and travel agencies towards travelling expenses". The assessee in is connection has also filed the relevant ledger copies and a copy of agreement for educational sponsorship with Sri Joy Goel.

5.2. From the details of ledger submitted by the assessee, it is seen that the expenditures were made only for the purpose of education of Mr. Joy Goel, son of one of the Director Sri Devendra Goel at Bentley University, which includes travelling expenses, fees paid to the University etc. The agreement made with Mr. Joy Goel, has been perused wherein it is stated that on completion of his education in USA, join his duties in the business or similar business of the assessee company.

5.3. The submission made by the assessee has been considered. But the same is not treated as convincing because of the following:

a) Mr Joy Goel is not an employee of the company or related to the company in any other capacity. He is only the son of one Director of the assessee company.

b) The education persued by Mr Joy Goel in foreign university has no connection with the activities of the assessee company.

c) While sponsoring the education in foreign land, the assessee has not selected Mr. Joy Goel from open competition. There was no scope for any other meritorious candidate for availing such sponsorship.

d) It is also pertinent to note that the agreement furnished, made between the assessee and Mr. Joy Goel, is neither registered nor even notarized. The same has no value before the eye of law.

Thus it is amply clear that such expenditure was made in the form of a colourable device so that the expenditure can be given a shape of business expenditure though the same is actually an expenditure of personal nature. The assessee has also failed to establish how the said expenditure may be treated as wholly, necessarily and exclusively for business expediency, and under which provision of the I.T Act, 1961 the said expenditure has been claimed as a deduction. In a similar issue, the ITAT, Mumbai Bench, in the case of Intersil India Limited vs Additional Commissioner of Income Tax in 101 ITD 85 Mum, has held that "The expenses incurred on the foreign education of Shri Rishavidehra, whose only connection with the assessee company at the relevant point of time was that he was son of the Managing Director of the company, cannot be allowed as deduction in computing business income of the assessee company.

5.4. In view of the discussion made as above, the amount of Rs. 48,54,000/- is disallowed and added with business income."

24. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to confirm the same by holding as under:

"4.(c) Findings:

The issue in this ground relates to an addition of Rs.48,54,000/- being educational sponsorship of Jay Goel, one of the directors of the company. The AO has clearly, in para 5 of the assessment order, brought on record how it cannot be considered to be a business expenditure and that it is merely a colourable device to give the shape of business expenditure when actually it was a personal expenses.

The appellant has not been able to rebut the said findings in relation to the said assessment year of the AO. Hence, the addition is confirmed."

25. Aggrieved, the assessee is in appeal before us.

26. Assailing the action of the Ld. CIT(A)/AO the Ld. AR of the assessee contended that Mr. Jay Goel is the son of one of the Director Shri Debendra Goel and he has signed an agreement with the assessee company to the effect that after completion of his education at Bentley University, USA he would join duties in the business of the assessee company and since his services could be utilized by the assessee company for the betterment/future prospect of the business of the assessee company, the expenditure incurred is a business expenditure. Further, according to Ld. AR, the study undertaken by Mr. Jay Goel has nexus with the business of the assessee company and as per the agreement since he has agreed to work in the company on completion of his course, the expenditure for the educational

sponsorship of Shri Jay Goel should be allowed as held in the case of J. B. Advani & Company Ltd. Vs. JCIT (2005) 92 TTJ 175 and Hon'ble Karnataka High court decision in the case of CIT Vs. Ras Information Technologies (P) Ltd. (2011) 50 DTR 93 wherein in that case, son of the Managing Director of that assessee was sent for higher studies and expenses incurred in connection therewith was allowed by the Hon'ble High Court after taking note that the study undertaken by the son of the director had nexus with the business and where the son agreed to work for the company on the completion of his course. Therefore, according to Ld. AR similar expenditure of assessee should be allowed since it has got nexus with the business of the assessee. Per contra, the Ld. DR contended that Shri Jay Goel is the son of employee of the company and his education at the Bentley University has no connection with the activities of the assessee company and the agreement has not been registered or even notarized. Therefore, according to Ld. DR, it is a colorable device and should not be allowed and, therefore, no deduction should be allowed.

27. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee company's Director's son Shri Jay Goel had signed an agreement (*refer page 69-72 of PB*) with the assessee company that after completion of his education in business management at Bentley University, USA he would join duties in the business of the assessee and thus serve the company. Further it has been brought to our notice that from 1st June, 2018 he was appointed as CEO of the assessee company. [*Copy of the agreement letter dated 01.06.2018 is found placed at page 75 to 79 of PB*]. The Ld. A.R. submitted that in the subsequent assessment year on this issue the AO has allowed the educational expenses for the AY 2017-18 which order we find placed at page 169 to 172 of PB wherein we note that AO has not made any disallowance in respect of educational expenses. Moreover, we note that the facts of the case is similar to the case decided by the Hon'ble Karnataka High Court in CIT vs. Raj Information Technology Ltd. (*supra*) and since in the present case there is a nexus with expenses incurred for the

higher education of Shri Jay Goel with the business of the assessee company and the recipient of sponsorship has later joined the services of assessee company and is discharging the duties as CEO of the assessee company, the expenditure incurred should be allowed since it has nexus with the business of the assessee. This ground of the assessee stands allowed.

28. Ground no. 4 is against the action of the Ld. CIT(A) in upholding the action of the AO that the retention money retained by the debtors during the relevant previous year should be taken into account while computing the profits and gains of the assessee's business for the assessment year under consideration and thereby treating Rs.1,55,74,066/- as income of the assessee.

29. Brief facts of the case as noted by the AO are as under:

“6. The assessee filed its original return of income on 17.09.2015, showing a total income of Rs. 8,80,29,520/-. The assessee vide its letter dated 29.06.2017, submitted that the retention money of Rs 1,55,,74,066/- deducted and/or retained by the state electricity board is receivable subject to fulfillment of defect liabilities and therefore the right to receive the retention money is contingent In nature. Hence, the same shall not be taken into consideration as income for the year.

6.1. The submission of the assessee has been gone through. Following the decision of the Supreme Court in the case of Goetz India Ltd., the same cannot be entertained as the claim of the assessee was not made through filing the revised return of income. There is no provision in I T Act, to make amendment in the return of income by modifying an application at the assessment stage without revising the return of income.”

30. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to confirm the action of the AO by holding as under:

“6(c) Finding:

The issue of not entertaining the right of the assessee to reverse its claim of reducing its income by Rs.1,55,74,066/- being retention money deducted/retained by the Electricity Board has been rightly disallowed as the said claim should have been made only by filing a revised return of income (Goetz India Ltd. Vs. CIT (2006) 284 ITR 323 (SC). The case laws cited by the appellant do not carry much weight in view of the Hon'ble Supreme Court decision Goetz (India) Ltd. Hence, this ground of appeal is dismissed.”

31. Aggrieved, the assessee is in appeal before us.

32. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee had filed its original return of income on 17.09.2015 showing a total income of Rs.8,80,29,520/-. Later the assessee filed a letter dated 29.06.2017 wherein it was submitted that the retention money deducted and/or retained by the State Electricity Board is receivable subject to fulfillment of no-defect/ liabilities and is contingent in nature and therefore, the right to receive the retention money is not absolute in nature and, therefore, should not be taken into consideration as income for the year under consideration. And the assessee undertook to offer to tax the same on receipt or when it is accrued. However, the AO did not agree on the reason that the Hon'ble Supreme court in the case of M/s Goetz India Ltd. (2006) 284 ITR 323 (SC) has held that since the claim of the assessee has not been made through filing of return of income/revised return of income, there is no provision in the Act to make amendment in the return of income by modifying an application at the assessment stage without revising return of income and, therefore, he disallowed the same. The Ld. CIT(A) has towed the same line and has taken reliance on the Hon'ble Supreme Court decision in Goetz India Ltd. (supra) and has not considered the contention of the assessee at all. We find that the Ld. CIT(A) erred in doing so. The Hon'ble Supreme Court in Goetz India Ltd. (supra) while agreeing to the stand of the AO in that case to have disallowed the claim of deduction by way of letter (without filing revised return of income) since there was no provision in the Act for allowing an amendment in the return without a revised return, however, the Hon'ble Supreme Court has made it very clear in the very same order (M/s Goetz India) had clarified "However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income Tax Appellate Tribunal (ITAT) u/s. 254 of the Act". Therefore, we find that even though the assessee has not filed before the AO any revised return claiming the deduction in respect of the retention money kept by the State Electricity Board, however we note that retention money is kept by the State Election Board which will be returned back to the

assessee only after the fulfillment of certain obligation/conditions/lock in period as per the terms of the contract between them. However, when it comes to the issue of taxability in respect of the retention money is concerned, we note that issue is no longer res integra as held by the Hon'ble jurisdictional High Court in the case of CIT Vs. Simplex Concrete Piles (India) on 05.12.1988 wherein the Hon'ble Calcutta High Court has held as under:

“Only after the assessee fulfils the obligation under the contract that the retention money would be released and the assessee would acquire the right to receive such retention money. Therefore, on the date when the bills were submitted having regard to the nature of the contract, no enforceable liability has accrued or arisen and, accordingly, it cannot be said that the assessee had any right to receive the entire amount on the completion of the work or on the submission of bills the assessee had no right to claim any part of the retention money till the verification of satisfactory execution of the contract.

16. For the reasons aforesaid, we answer this question in this reference in the affirmative and in favour of the assessee.”

33. Since we note that the retention money kept with the Electricity Board which would be released latter only once the assessee fulfils all the obligations under the contract then only the assessee would acquire the right to receive such retention money so this is contingent in nature, so the amount in question cannot be held to have been accrued to the assessee and since on facts the assessee has not received the same, even by applying the concept of real income theory, the money retained by the Electricity Board cannot be brought to tax. Thus, we note that in this year under consideration, since no enforceable liability has accrued or arisen, so, it cannot be said that the assessee had any vested right to receive the retention money in question. We further note that the assessee had no right to claim any part of the retention money till the verification of the satisfactory execution of the contract is over. Therefore, in this assessment year the retention money retained by the electricity Board to the tune of Rs.1,55,74,066/- cannot be treated as income of the assessee and even though the assessee due to mistake of fact has offered the same as income this year in its Return of Income, deduction of the same should be given and since the decision of the Hon'ble Supreme Court in M/s Goetz India does not

come in the way of the Tribunal as held by the Hon'ble Supreme Court as noted (supra), so we set aside the impugned order of Ld CIT(A) and direct the AO to give relief to the assessee on this issue. However, it is clarified that when the assessee receives or when this amount accrues to the assessee, then it should be taxed in that assessment year and not in this assessment year. Therefore the appeal of the assessee/M/s Lumino Industries Ltd ITA No 365/Kol/2021 for AY 2015-16 stands allowed.

34. In all the other captioned appeals (ITA No. 366/Kol/2021 for AY 2018-19, ITA Nos. 369 & 367/Kol/2021 for AYs 2018-19 & 2019-20, ITA No. 368/Kol/2021 for AY 2018-19 and ITA No. 371/Kol/2021 for AY 2019-20) the sole issue is against the action of Ld. CIT(A) in confirming the action of AO disallowing the employees' contribution in ESI/PF with the aid of the amendment brought in by Finance Act, 2021 holding it to be retrospective in operation.

35. Since we have already decided this issue while adjudicating ground no. 1 in ITA No. 365/Kol/2021 which decision of our will apply mutatis-mutandis and following the ratio we direct the AO to allow the employees' contribution made in PF/ESI since the assessee has deposited the same before the due date of filing return u/s 139(1) of the Act.

36. In the result, all the appeals of the different assessee's are allowed.

Order is pronounced in the open court on 17th November, 2021.

Sd/-

(P. M. Jagtap)
Vice President

Sd/-

(A. T. Varkey)
Judicial Member

Dated: 17th November, 2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- i) Lumino Industries Ltd.
(ii) Navayug Labour Contractors Pvt. Ltd.
(iii) Jagannath Concrete Poles
(iv) Sandeep Mech. Engineers Ltd.
(v) Jaimatadi Castings Pvt. Ltd.

All their offices at C/O, SDP & Associates, 46C, Chowringhee Road, Flat 14G, Kolkata-700071

2. Respondent – (i) ACIT, Circle-5(1), Kolkata
(ii) CPC, Bangalore
3. CIT(A)- National Faceless Appeal Centre (NFAC)
4. CIT, Kolkata.
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Senior Private Secretary/DDO
ITAT, Kolkata Benches, Kolkata