$~21

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 227/2022

PR. COMMISSIONER OF INCOME TAX -7 ..... Appellant

Through : Mr. Puneet Rai, Senior Standing Counsel for Revenue along with Ms.Adeeba Mujahid, Junior Standing Counsel for Revenue and Mr.Karan Pandey, Advocate.

versus

TV TODAY NETWORK LTD. ..... Respondent

Through : Mr. Salil Aggarwal, Senior Advocate along with Mr. Madhur Aggarwal and Mr.Uma Shankar, Advocates.

% Date of Decision: 27th July, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (Oral):

1. The present income tax appeal filed by Revenue impugns order dated 29th July, 2021 passed by the Income Tax Appellate Tribunal ('ITAT') for the Assessment Year ('AY') 2012-13 in ITA No. 5204/Del/2017.

The facts giving rise to the present appeal are as follows:

2. The assessee i.e. the respondent herein, was incorporated on 28th December, 1999 and is engaged in the business of broadcasting, telecasting, relaying, transmitting or distributing audio, video or other programmes and

software for television, radio and other media.

3. The assessee filed its Income Tax Return ('ITR') for the relevant AY 2012-13 on 29th September, 2012 declaring an income of Rs.25,54,27,410/-.

4. The ITR of the assessee was selected for scrutiny under CASS. Accordingly, a notice under Section 143 (2) of the Income Tax Act, 1961 ('the Act') was issued on 16th August, 2013. Further, a notice under Section 142 (1) of the Act along with a questionnaire was issued on 16th April, 2014 and 7th November, 2014 and served upon the assessee to furnish the requisite details. The assessee complied with the aforesaid notice and furnished the requisite details and placed on record the documents sought by the Assessing Officer ('AO').

5. Vide the assessment order dated 16th March, 2015, the AO made additions to the extent of Rs.5,45,40,731/- and thus, determined the total income of the assessee at Rs.30,99,68,140/-. The break-up of the disallowances, leading to the additions as, made by the AO is as under :-

Income as per return filed	25,54,27,410
Add:-	
1. Interest paid to Prasar Bharti	1,03,15,922
2. Consumption Debtors	3,34,81,847
3. Unpaid Leave Encashment	54,38,500
4. Disallowance u/s 14A	9,90,264
5. Disallowance of Late Deposit of Employee Contributions to PF	43,14,198
Total Income	**30,99,68,141**

The subject matters of the present appeal are the additions made by the AO at Serial Nos. 2, 4 and 5 of this table, which have since been deleted by the

appellate authorities below.

6. Aggrieved by the assessment order passed by the AO, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) ('CIT(A)'), which appeal was partly allowed vide order dated 8th February, 2017. The CIT (A) after perusing the facts on record and following the judgments of this Court reversed the following disallowances and the corresponding additions to the income stood deleted:

(i) disallowance under the head 'consumption debtors';

(ii) disallowance on account of late deposit of employees contribution to provident fund u/s 36(1) (va) of the Act;

(iii) disallowance under the head of section 14A of the Act read with Rule 8D.

7. Aggrieved by the order of the CIT(A) to the extent it reversed the disallowances made by the AO, the Revenue filed an appeal before the ITAT. The ITAT after perusing the documents and following the judgements passed by this Court, dismissed the appeal filed by Revenue against the order of the CIT (A), vide impugned order dated 29th July, 2021.

8. The learned senior counsel for the respondent-assessee was present on advance notice.

9. We have heard the counsel for the parties.

Disallowance of consumption incentive

10. With respect to the disallowance of the expenses claimed under the head 'consumption debtors' the said addition was made by the AO on the ground that these expenses are in the nature of a provision. The same was deleted by the CIT(A) after returning a finding that the liability was clearly an ascertained one and allowable as per the mercantile system of accounting

followed by the assessee. It was noted that this was also the view taken by CIT (A) in assessee's own case for AYs 2008-09, 2009-10 and 2010-11.

11. The ITAT in the impugned order similarly observed that a coordinate bench of the Tribunal in assessee's own case for AYs 2008-09 and 2009-2010 has upheld the assessee's claim for the said expenses of 'consumption debtors'. The ITAT thus, held that since the assessee has been consistently following the mercantile system of accounting, liability brought on record is an ascertained liability. It also held that the party-wise detail of the advertisers to whom the incentive was extended has been placed on record by the assessee and perused by the CIT (A).

12. Before us, the learned counsel for the revenue stated that the ITAT while upholding the deletion of the said disallowance erred in relying on its own order in the case of assessee for the AYs 2008-09 and 2009-10. He stated that the said orders of the ITAT are under challenge before this Court. On merits of the claim, he stated that this is merely a provision and therefore could not be allowed as an expense in the relevant assessment year. He disputed that the discount is extended to the advertisers in the same financial year. He stated that ITAT was wrong in holding that it is an ascertained liability.

13. *Per contra*, the learned senior counsel for assessee stated that the claim of expenses on account of 'consumption incentive' is a discount offered by the assessee to its advertisers in the same assessment year so that they book more advertisement space. He stated that in case of the consumption incentive, the advertisers are given an offer that in case it consumes a certain amount of allotted time during the given period of broadcasting, then it will be entitled to ‘consumption incentive’ i.e. discount

on the total billing amount. In this regard, it was sought to be illustrated that for instance, if the advertiser consumes 1000 seconds during the given period, then it will be entitled to 'consumption incentive' and offered a 20% discount on the total amount of billing. In this manner, after an eligible advertiser consumes 1000 seconds, the assessee extends 'consumption incentive' of 20% of the total billing amount to such an advertiser and credits the account of the advertiser in the same assessment year.

14. It is stated that the billing time space consumed by the advertisers is booked as an income in the relevant assessment year and the ‘consumption incentive’ extended to these advertisers is booked as expense of the said assessment year, since it is set off from the total billing. In this regard, he drew our attention to the response dated 13th February, 2015 filed by the assessee before the AO providing therein the detailed list of each advertiser to whom this discount has been passed-on with the break-up of the amount in the relevant assessment year.

15. It was thus, explained that when an invoice is raised on the advertiser for the full amount, the said invoice is recorded in the books of accounts at the full amount and it is only after the advertiser consumes the 1000 seconds, the consumption incentive of 20% is credited to the advertiser's ledger account and the billed amount accordingly stands reduced.

16. With respect to the assessment year under consideration, the respondent submitted that the assessee has duly provided the detailed break-up of the advertisers to whom the consumption incentive of Rs. 33,481,847/- was duly passed-on. Therefore, he contended that assessee was entitled to claim the same as a deduction since the billed amount accordingly stood effectively reduced.

17. It was further submitted by the respondent that the said expenses have been duly allowed to the assessee for all assessment years. The respondent has placed before us a chart to demonstrate that the said expenditure has been claimed by the respondent in its Profit and Loss Account, since the assessment year 2004-05. Further, though scrutiny assessment was carried-out in each of the AYs, the said expense was duly allowed by the AO for the AYs 2004-05, 2005-06, 2006-07 and 2007-08.

18. The chart also shows that this expense was first disallowed by the AO in the AY 2008-09 followed by AYs 2009-10, 2010-11, 2011-12 and 2012-13. He however, submits that the disallowance made by the AO in each of the aforesaid four years has been deleted by the CIT(A) and said deletion has been upheld by the ITAT. He states that as a matter of fact the incentive has been duly passed on to the advertisers and income from billing was reduced to this extent.

19. He further submits that applying the rule of consistency, even in the year under consideration i.e. AY 2012-13, no error has been committed either by the CIT(A) or by the ITAT in accepting the expenditure and deleting the addition made by the AO. He states that in the grounds of appeal, though, it has been averred at ground (f) by the appellant that the appeal on the issue of consumption debtors is pending before this court for assessment year 2008-09 and 2009-10, no advance paper-book has been served on him.

20. The counsel for the appellant, in reply states that it appears that the appeals for the AYs 2008-09 and 2009-10 though have been filed but the same are in defects with the Registry and not numbered. Details of the said appeals are not readily available with the counsel.

21. As noted above, the CIT(A) after considering the documents placed on record by the assessee held that the liability of '*consumption incentive*' was clearly ascertained and since assessee is following the mercantile system of accounting consistently, this ascertained liability should be permitted to be deducted. The ITAT too has concurred with the said finding of the CIT (A). The learned senior counsel for the respondent has reiterated his submissions that the discount was in fact credited to the ledger account of the advertisers in the same financial year; there is no spill-over and assessee is therefore entitled to claim deduction in the same financial year.

22. The Revenue's challenge that it is a provision for discounts and is not an ascertained liability debited to the account of the party is not borne out. As noted above, the details of the advertisers in whose account, the discount was credited has been placed before the AO and accepted by the appellate authorities. The Revenue has not placed on record any material to rebut the assertions of the assessee.

23. It is, therefore evident from the record that the aforesaid disallowance has been deleted by the CIT(A) and ITAT, after considering the material on record and satisfying itself that it is an ascertained liability of the assessee which is liable to be allowed. This is a finding of fact returned by CIT(A) and upheld by ITAT. The chart filed by the Respondent evidencing that this expense was consistently allowed since AY 2004-05 and allowed by the AO is also not in dispute. The "consistency" rule has been enunciated in ***M/s Radhasaomi Satsang, Saomi Bagh, Agra v. Commissioner of Income Tax, (1992) 2 SCC 659***. The Supreme Court observed, in that case that:

> *"…where a fundamental aspect permeating through the different assessment years has been found as a fact*

one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

19. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter- and if there was not change it was in support of the assesses-we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-Tax in the earlier proceedings, a different and contradictory stand should have been taken."

24. We therefore find no infirmity in the order passed by ITAT upholding the decision of CIT(A) deleting the disallowance on account of 'consumption debtors'.

Disallowance under Section 14A of the Act

25. During the scrutiny proceedings, the AO observed that the assessee has made investments in its subsidiary and associate company and earned exempt income of Rs. 2,34,585/- in the relevant assessment year. The assessee had made a *suo moto* disallowance of Rs. 29,04,491/-. However, the AO proceeded to invoke the provision of Section 14A of the Act r/w Rule 8D of the Income Tax Rules, 1962; computed a disallowance of Rs. 38, 94, 755/- and made an addition of Rs. 9,90,264/-. The CIT (A) reversed the said disallowance and deleted the addition on the ground that the AO has failed to record his satisfaction before invoking the provisions of Section 14 A of the Act and relying upon the decisions of this Court.

26. The ITAT in the impugned order has upheld the finding of the CIT (A) after observing that it is a settled principle of law that disallowance u/s 14A of the Act cannot be more than the exempt income and finding that AO had mechanically invoked the provisions of Section 14A without recording its satisfaction.

27. The learned counsel for the revenue has not disputed that the exempt income earned by the assessee in this assessment year was Rs. 2,34,585/- and the assessee has already made a *suo moto* disallowance of a sum of Rs.29,04,491/- under Section 14 A in its computation.

28. As per the law settled by this court in the case of ***Cheminvest Ltd. vs. CIT) (2015) 61 taxmann.com 118 (Del.);*** and ***PCIT vs. IL & FS Energy Development Company Ltd.*** reported in ***2017 SCC OnLine Del 9893***, the disallowance to be made under Section 14A cannot be in excess of the exempt income earned by the assessee. The counsel for the revenue has placed reliance on the CBDT circular 5/2014 to contend that disallowance under Section 14A would be attracted even if corresponding exempt income is not earned during the financial year. The said circular cannot be relied upon since its contrary to the law laid down by this Court.

29. Further, there is no challenge to the finding of the CIT (A) and the ITAT that AO failed to record satisfaction before invoking the provisions of Section 14A of the Act, which is the condition precedent for making the addition. In this view of the matter the additional disallowance of Rs.9,09,264/- made by the AO is impermissible and contrary to law. The ITAT was correct in upholding the order of the CIT(A) deleting the disallowance of Rs.9,09,264/-.

Disallowance u/s 36(1)(va) of the Act on account of late deposit of

employee's contribution to PF

30. With respect to the disallowance of Rs. 43,14,198/- made by AO under Section 36(1)(va) of the Act, on the ground that the employees contribution for the month of March 2012 was deposited by assessee on 25.04.2012 as against the '*due date*' of 20.04.2012 under the Labour statute. The CIT (A) deleted the said disallowance holding that the '*due date*' is to be determined as the date of filing the return of income under Section 139 (1) of the Act. In arriving at the said finding the CIT (A) followed the judgments of this Court in ***CIT Vs. AIMIL Ltd. (2010) 321 ITR 508 (Delhi)***.

31. The ITAT in the impugned order has noted that there is no dispute that the employees contribution of PF was paid before filing the return of income and therefore held that the CIT (A) has rightly deleted the disallowance made by the AO in consonance with the law laid down.

32. Learned counsel for the revenue submits that the ITAT fell in error by placing reliance on the judgment of this court in ***AIMIL Ltd. (supra),*** wherein it was held that if the deposit of employees contribution towards provident fund is made by the assessee before the due date of filing its return, no such disallowance can be made under Section 36(1)(va) of the Act. In this regard he states that this court in ***AIMIL Ltd. (supra),*** decided the issue in favour of the assessee relying upon the judgment of the Supreme court in ***Commissioner of Income Tax vs. Vinay Cement Ltd. 213 ITR 268 (SC),*** which order of the Supreme Court relates to delay in deposit of contribution made by the employer under Section 43B of the Act. He states that in the case of ***Vinay Cement (supra)***, the Supreme Court was not

concerned with the assessee's delay in deposit of the employee's contribution and therefore Section 36(1)(va) of the Act was not under consideration. He states that there is a material distinction between the two provisions in as much as Section 36 (1)(va) of the Act deals with assessee's default in deposit of employee contribution and Section 43B deals with assessee's default in deposit of employer's contribution.

33. *Per contra*, learned counsel for the respondent states that challenge to the dicta of ***AIMIL Ltd. (supra)*** by the learned counsel for the revenue is incorrect and this issue is no more *res integra*, inasmuch as, the case of ***CIT vs. SPL Industries Limited in ITA No. 749/2010,*** in which one of us (Justice Manmohan) was a member, this Court, after taking note of similar submissions made by learned Standing Counsel for revenue rejected the same and concluded that the law laid down in ***AIMIL Ltd.(supra)*** is correct and there is no justification to differ with the same.

34. In fact, in ***CIT vs. SPL Industries Limited (supra)*** the court took note of another judgment of this court in ***CIT vs. P.M. Electronics Ltd.*** reported in ***313 ITR 161 (Del.)*** on the same proposition. This court in ***ITA No. 794/2010*** in its order dated 7th July, 2010 in ***CIT vs. SPL Industries Ltd.*** has held as under :

> *"5. Ms. Suruchi Aggarwal, learned counsel for the revenue submitted that the tribunal has fallen into error by placing reliance on the decision rendered in CIT vs. P.M. Electronics Ltd., 313 ITR 161 (Del.) wherein it has held that if the payments are made before the due date of filing the return, no such disallowance can be made under Section 43B of the Act is not applicable to the case at hand inasmuch as the said decision had placed reliance on the decision of the Apex Court in the case of CIT vs. Vinay Cement*

Ltd., 2007 (213) CTR 268 = 2009 (313) ITR (SC) which only relates to the contribution made by the employer and would not cover the contribution made by the employees. In this context, we may profitably referred to the decision in Commissioner of Income Tax vs. AIMIL Limited in ITA No. 1063/2008 whereby a Division Bench of this Court was dealing with the issue whether the tribunal was correct in law deleting the addition relating to employees' contribution towards the Provident Fund and the Employees State Insurance contribution made by the assessing officer under Section 36(1)(va) of the Act. The Division Bench, as is evident from the order, referred to the clause (v) of sub-section (1) of Section 36 and thereafter to clause (va) of the same and scanned the anatomy of 43B and referred to the decision in Vinay Cement Ltd. (supra) and relied on the decision in P.M. Electronics Ltd.(supra) wherein ***the substantial questions of law were framed,*** *inter alia, whether the 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 and proceeded to hold as follows:*

> *"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 principles laid down by the Supreme Court in Vinay Cement (supra)."*

6. Be it noted, the decision rendered by the Gauhati High Court was assailed before the Apex Court in Vinay Cement Ltd. (supra). In the said case, their Lordships have held thus:

> *"In the present case we are concerned with the law as it stood prior to the amendment of Section 43B. In the circumstances the assessee was entitled to claim the benefit in Section 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return. The special leave petition is dismissed."*

7. It is apt to note that the Division Bench has taken note of the submission advanced by the revenue that the distinction between employers" contribution on the one hand and the employees' contribution on the other. On the foundation that when employees' contribution was recovered from their salaries / wages that is the trust money in the hands of the assessee and, therefore, recourse of law providing for treating the same as income that the assessee received as the employees' contribution would only enable the assessee to claim deduction only on actual payment made by due date specified under the provisions of the Act. The Bench while dealing with the same has opined thus:

> *"11. Before we delve into this discussion, we may take note of some more provisions of the Act. Section 2(24) of the Act enumerates different components of income. It, inter alia, stipulates that income includes any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948*

(34 of 1948), or any other fund for the welfare of such employees. It is clear from the above that as soon as employees contribution towards provident fund or ESI is received by the assessee by way of deduction or otherwise from the salary / wages of the employees, it will be treated as 'income' at the hands of the assessee. It clearly follows therefrom that if the assessee does not deposit this contribution with provident fund/ESI authorities, it will be taxed as income at the hands of the assessee. However, on making deposit with the concerned authorities, the assessee becomes entitled to deduction under the provisions of Section 36(1)(va) of the Act. Section 43B(b), however, stipulates that such deduction would be permissible only on actual payment. This is the scheme of the Act for making an assessee entitled to get deduction from income insofar as employees' contribution is concerned. It is in this backdrop we have to determine as to at what point of time this payment is to be actually made."

8. Upon perusal of the aforesaid, we are of the considered opinion that the decisions rendered in P.M. Electronics Ltd.(supra) and AIMIL Limited (supra) have correctly laid down the law and there is no justification or reason to differ with the same. In the result, we do not perceive any merit in this appeal and accordingly the same stands dismissed. (Emphasis supplied)

35. Learned counsel for assessee has also drawn out attention to the order dated 10th September, 2018 passed in ***ITA No. 983/2018*** in the case of ***PR. Commissioner of Income Tax-7 vs. PRO Interactive Service (India) Pvt.***

Ltd., wherein this Court after taking note of the judgment in ***AIMIL Ltd.(supra)*** has settled this issue conclusively against the revenue held as under :

> *"In view of the judgment of the Division Bench of the Delhi High Court in Commissioner of Income-Tax v. AIMIL Limited, (2010) 321 ITR 508 (DEL) the issue is covered against the Revenue and, therefore, no substantial question of law arises for consideration in this appeal.*
> *...The legislative intent was/is to ensure that the amount paid is allowed as an expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPD) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act..."*

36. In this regard it would be relevant to note that the Division Bench of this Court in ***AIMIL Ltd.****(supra)* at paragraph 2, duly deliberated over the issue of delay by assessee in deposit of employee contribution in the context of section 36(1)(va) of the Act and concluded that if the amount is deposited by the assessee before the due date for filing the return, it shall be entitled to the disallowance. In this regard the relevant paragraphs of the judgement are as follows:

> *"2. The case relates to the assessment year 2002–03. The respondent-assessee had filed its return on October 30, 2002, declaring income at Rs. 7,95,430. During the assessment proceedings, the Assessing Officer (AO) found that the assessee had deposited the* ***employers' contribution as well as the employees' contribution towards provident fund and ESI*** *after the due date, as prescribed under the relevant Acts/Rules.*

Accordingly, he made addition of Rs. 42,58,574 being the employees' contribution under section 36(1)(va) of the Act and Rs. 30,68,583 being the employers' contribution under section 43B of the Act. Felt aggrieved by this assessment order, the assessee preferred appeal before the Commissioner of Income-tax (Appeals) who decided the same vide orders dated July 15, 2005. Though the Commissioner of Income-tax (Appeals) accepted the contention of the assessee that if the payment is made before the due date of filing of return, no disallowance could be made in view of the provisions of section 43B, as amended vide Finance Act, 2003, he still confirmed the addition made by the Assessing Officer on the ground that no documentary proof was given to support that payment was in fact made by the assessee. The assessee filed an application under section 154 of the Act before the Commissioner of Incometax (Appeals) for rectification of the mistake. After having satisfied that payment had, in fact, been made, the Commissioner of Income-tax (Appeals) rectified the mistake and 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. It was now the turn of the Revenue to feel agitated by these orders and, therefore, the Revenue approached the Income-tax Appellate Tribunal (ITAT) challenging the orders of the Commissioner of Income-tax (Appeals). The Department has, however, remained unsuccessful as the appeal preferred by the Department is dismissed by the Income-tax Appellate Tribunal vide its impugned decision dated December 31, 2007, which is the subject-matter of appeal before us.

17. It also becomes clear that deletion of the second proviso is treated as retrospective in nature and would not apply at all. The case is to be governed with the application of the first proviso. 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. In so far 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, [2009] 313 ITR (St.) 1."

37. It is therefore evident that the enunciation of law by this court on the issue of *'due date'* in case of delay by the assessee in depositing the employee contribution under section 36(1)(va) of the Act is to be reckoned as the date for filing the return under Section 139 (1) of the Act and not the due date of the relevant Labour statute. This law has been settled by this Court in ***CIT vs. P.M. Electronics Ltd (supra), AIMIL Ltd. (supra)***, ***CIT vs. SPL Industries Ltd*** and ***PR. Commissioner of Income Tax-7 vs. PRO Interactive Service (India) Pvt. Ltd. (supra)*** and consistently followed thereafter.

38. The learned counsel for the respondent has further relied upon the newly inserted 'Explanation 2' to Section 36(1)(va) of the Act and 'Explanation 5' to Section 43B of the Act, by the Finance Act, 2021 w.e.f. 1st April, 2021, to contend that the legislature has since clarified the provision and consequently, the judgements relied upon by the authorities below including ***AIMIL Ltd. (supra)*** are no more good law. The amendment to Section 36(1) (va) of the Act and Section 43B of the Act is reproduced herein below:

[Explanation 2.- <u>For the removal of doubts</u>, 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;]* (Emphasis supplied)
>
> *[Explanation5.—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.]* (Emphasis supplied)

39. He contends that with the insertion of this explanation there can be no doubt that '*due date*' for the purpose of deposit under Section 36(1)(va) of the Act is to be the *'due date*' on which the employee contribution was required to be deposited under the relevant statute and the '*due date*' referred to under Section 43B of the Act would have no application. Thus, the deposit made by assessee on 25.04.2012 has been correctly disallowed by the AO.

40. The said contention is noted to be rejected since it is contrary to the plain text of the Memorandum of the Finance Bill, 2021 proposing the said amendment. The relevant extract of Clauses 8 and 9 of the Memorandum of the Finance Bill 2021 explaining the proposed insertion reads as under :

> *"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 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.*"*
(Emphasis supplied)

41. The Memorandum acknowledges that courts have taken a view that the *'due date'* to be considered for the purposes of Section 36(1)(va) of the Act is under Section 43B and it is in that background that the Explanation

has been inserted to alter this position. Further, the Memorandum explicitly stipulates that the said amendment will take effect from 1st April 2021 and it cannot therefore cannot apply to assessment year 2012-13 under consideration. The legislature is therefore conscious that the Explanation seeks to change the law as it stands on date and is therefore intended to apply to subsequent assessment years. The contention of the revenue therefore that the said amendment is retrospective cannot be accepted.

42. The Supreme court in ***Sedco Forex International Drill. Inc. Vs. CIT*** reported in ***(2005) 12 SCC 717*** and ***M.M. Aqua Technologies Ltd. vs. Commissioner of Income Tax, Delhi-III*** reported in ***2021 SCC OnLine SC 575*** has held that a 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. The Supreme Court further held that a cardinal principal of tax law is that for the law to be applied it has to be in force during the relevant assessment years unless otherwise provided expressly or by necessary implication. In that view it was held by the Supreme Court that the amendment was not retrospective.

43. As noted above, this court has as early as in the case of ***AIMIL Ltd. (supra)*** dated 23rd December, 2009 held that the due date for the purpose of Section 36 (1) (va) of the Act would be the due date as provided under Section 43B of the Act and not the relevant Labour statute. This law as noted above has held the field till date, followed by this Court consistently and the appellate authorities below have determined the matter in accordance with the said law.

44. Consequently, this Court is of the view that the amendment to Section 36(1)(va), which is '*for 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.

45. It is also noted that in the facts of the case, the due date for depositing the Employees' contribution to the Provident Fund was 20th April, 2012 and the assessee had deposited the same on 25th April, 2012. There is no dispute that the amount stands deposited before the filing of the return. We, therefore, find that there is no ground for taking a view different from the view consistently held by this court since ***AIMIL Ltd.(supra)***.

46. In view of the aforesaid, we find that no substantial question of law arises in this matter and there is no infirmity in the impugned order dated 29th July, 2021 passed by the ITAT in the ITA No. 5204/DEL/2017 for the assessment year 2012-13 and accordingly, the present appeal is dismissed.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

JULY 27, 2022
j