EMPLOYEE'S CONTRIBUTION IN S 36(1)(va).EXPLANATION 2.NO RETROSPECTIVITY?

1.A spate of Tribunal decisions seem to challenge the becoming increasingly unpopular view about retrospectivity of Explanation 2.Here is a listing of such orders I was able to find:

a. Harendra Nath Biswas, Kolkata vs Dcit, Cir. 29, Kolkata ITA No.186/Kol/2021 A.Y. 2019-20 on 16 .7. 2021

b.Dhabriya Polywood Ltd., Jaipur vs Acit-C-6, Jaipur ITA. No. 53/JP/2021 Assessment Years : 2019-20 on 15.9.21

c.Mohan Ram Chaudhary,Jodhpur Vs. The ITO, Ward 3(2),Jodhpur ITA No. 51/Jodh/2021 Assessment Year : 2018-19 on 28.9.21 and other cases

d.M/S. The Continental Restaurant & Café Co BANGALOREvs Centralized Processing Center, ... ITA No.388/Bang/2021 : Asst.Year 2019-2020 on 11.10.2021

e.Shri. Gopalakrishna Aswini Kumar,Bengaluru Vs. The Assistant Director of Income Tax, CPC,Bengaluru. ITA No.359/Bang/2021 Assessment Year : 2019-20 on 13.10.2021

1.1This should apparently settle the matter since so many Tribunals have spoken,rulings are in favour of assessee .That should be it,What else is left?But as a tax professional and a student of law we need to deliberate on law as interpreted to better ourselves,irrespective of the good fortune that has befallen us ,due to some daft drafting by legal cell of CBDT and a memorandum that unfortunately conflicts the provision it is supposed to explain.

2.We need to know that canons of interpretation are well codified,sanctified and time tested principles.If memorandum had such a sanctimonious place in interpretation of law then how come retrospectivity was read where provisions were inserted prospectively and prospectivity where provisions were inserted retrospectively?Illustrations in point are in an article I wrote on same subject few weeks back on this site.

a.Gold Coin Health Food (P.) Ltd. **(. [2008] 304 ITR 308/172 Taxman 386 (SC))**

b.Kanji Shivji & Co. **([2000] 242 ITR 124/108 Taxman 531 (SC))**

1.1 The article can be accessed at:

https://itatonline.org/digest/articles/retrospectivity-of-explanation-2-inserted-below-s-36-1va/

2. If we consider such reading in favour of assessee we need look no further than **CIT .v. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC).Even while ruling retrospectivity to s 43B SECOND PROVISO when** Finance Act, 2003, the second proviso stood deleted w.e.f April 1, 2004. giving relief to the employer-assessee, **it was held that** When a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, **it could be read retrospective in operation, particularly to give effect to the section as a whole.**

So a different construction is possible regardless of what is stated in memorandum or Finance Act.

3.Let us have a brief look as to these rulings and the reason behind them as stated in the orders.

a.Harendra Nath Biswas, Kolkata

> *"**Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021** and relevant assessment year before us is AY 2019-20. Therefore the law laid down by the Jurisdictional Hon'ble High Court will apply and since this Explanation-5 has not been made retrospectively."*

b.Dhabriya Polywood Ltd., Jaipur

''simply failed to consider the express wordings in the said memorandum which says "these amendments will take effect from 1st April, 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years". The impugned assessment year is assessment year 2019-20 and therefore, the said amendment cannot be applied in the instant case."

c.Mohan Ram Chaudhary,Jodhpur

Simply followed Harendra(supra)and ors.

d.M/S. The Continental Restaurant & Café Co BANGALORE

*''**The further question is whether the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory and declaratory in nature**. The Hon'ble Supreme Court in the recent judgment in the case of **M.M.Aqua Technologies Limited v. CIT reported in (2021) 436 ITR 582 (SC) had held that retrospective provision in a taxing Act which is "for the removal of doubts" cannot be presumed to***

be retrospective, if it alters or changes the law as it earlier stood (page 597). *In this case, in view of the judgment of the Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT (supra) the assessee would have been entitled to deduction of employees' contribution of PF and ESI if the payment was made prior to due date of filing of the return of income u/s 139(1) of the I.T.Act. Therefore, the amendment brought about by the Finance Act, 2021 to section 36(1)(va) and 43B of the I.T.Act,* ***alters the position of law*** *adversely to the assessee. Therefore, such amendment cannot be held to be retrospective in nature. Even otherwise, the amendment has been mentioned to be effective from 01.04.2021 and will apply for and from assessment year 2021-2022 onwards."*

e.Shri. Gopalakrishna Aswini Kumar,Bengaluru

"The next aspect to be considered is whether the amendment to the provisions to section 43B and 36(1)(va) of the Act by the Finance Act, 2021, has to be construed as retrospective and applicable for the period prior to 01.04.2021 also. On this aspect, we find that the explanatory memorandum to the Finance Act, 2021 proposing amendment in section 36(1)(va) as well as section 43B is applicable only from 01.04.2021.
These provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect *unless the legislature specifically says so."*

4.All these orders follow a similar pattern ,save Continental one which gives an additional twist.What all these orders,respectfully ,missed out on is as under:

A.The key phrase occurring in the Explanation:" ***provisions of this section shall not apply and shall be deemed never to have been applied***".By their interpretation this phrase simply becomes otiose and superfluous.What legislature has expressly stated has no meaning if interpretation is to be construed in the way it has.Else what meaning is to be ascribed to this phrase?

B.Only part of the Memorandum is read and utilized in the orders. **The part of the Explanatory Memorandum** [pages 39-40] which stands unconsidered 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**."

This needs to be read with **Finance Act, 1987 - Circular No. 495, Dated 22-9-1987** :

''Measures of penalising employers who misutilise contributions to the provident fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948, or any other fund for welfare of employees

12.1 The existing provisions provide for a deduction in respect of any payment by way of contribution to a provident fund or superannuation fund or any other fund for welfare of employees in the year in which the liability is actually discharged [section 43B]. The effect of the amendment brought about by the Finance Act, is that no deduction will be allowed in the assessment of the employer(s) unless such contribution is paid to the fund on or before the "due date". Due date means the date by which an employer is required to credit the "contribution" to the employee's account in the relevant fund under the provisions of any law or term of contract of service or otherwise.

[Explanation to section 36(1)(va) of the Finance Act]

12.2 In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries or wages of the employees will be taxed as income [insertion of new sub-clause (x) in clause (24) of section 2] of the employer, if such contribution is not credited by employer in the account of the employee in the relevant fund by the "due date". Where such income is not chargeable to tax under the head "Profits and gains of business or profession", it will be assessed under the head "Income from other sources".

12.3 Payment by way of tax on duty, liability for which has accrued in the previous year, will be allowed as a deduction if it is made by

the due date of furnishing the return under section 139(1) in respect of the assessment year to which the aforementioned previous year relates.

12.4 These amendments will take effect from 1-4-1988 and will, accordingly, apply from the assessment year 1988-89 and subsequent years.

[Sections 3(b), 9, 10, 26 and 27 of the Finance Act]''

5. Thus we need to apply **the Mischief Rule and the Purpose Rule** to see how the insertion of Explanation is to be read.The insertion was meant to prevent the mischief and unintended consequence which it has cured; and we also need to see the purpose of the provision and its amendment..In **GOODYEAR INDIA LTD. & ORS. vs. STATE OF HARYANA & ANR. & STATE OF MAHARASHTRA & ANR. (1991) 188 ITR 0402(SC)** the mischief rule was explained thus *''16. .....It has always been said to be important to consider the mischief which the Act was apparently intended to remedy. The word 'mischief' is traditional. I would expand it in this way. In addition to reading the Act, you look at the facts presumed to be known to Parliament when the Bill which became the Act in question was before it, and you* ***consider whether there is disclosed some unsatisfactory state of affairs which Parliament can properly be supposed to have intended to remedy by the Act*** *. ....."*

5.1 Let us delve further into some interesting legislative history.A proviso added from 01-04-1988 to Section 43B of the Act from 01-04-1984 came up for consideration in Allied Motors Private Limited v. CIT (1997) 91 taxman 205(SC) before Hon'ble Supreme Court **and it was given retrospective effect from the inception of the section on the reasoning that the**

proviso was added to remedy unintended consequences and supply an obvious omission so that the section may be given a reasonable interpretation and that in fact the amendment to insert the proviso would not serve its object unless it is construed as retrospective **.** In **CIT v. Podar Cement Pvt. Limited (1997) 92 Taxman 541(SC)** , the Hon'ble Supreme Court held that amendment introduced by the Finance Act,1987 in so far the related to Section 27(iii) ,(iiia) and (iiib) which redefined the expression 'owner of house property', in respect of which there was a sharp divergence of opinion amongst the High Courts, was clarificatory and declaratory in nature and consequently retrospective. Similarly , in **Brij Mohan Das Laxman Das v. CIT (1997) 90 Taxman 41(SC)**, explanation 2 added to section 40 of the Act was held to be declaratory in nature and , therefore , retrospective.

5.2 It has been settled in a catena of decisions that a settled rule of construction is that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. Ordinarily the courts are required to gather the intention of the legislature from the overt language of the provision as to whether it has been made prospective or retrospective, and if retrospective, then from which date. **However, some times what happens is that the substantive provision, as originally enacted or later amended, fails to clarify the intention of the legislature.** In such a situation if subsequently some amendment is carried out to clarify the real intent, such amendment has to be considered as retrospective from the date when the earlier provision was made effective. Such clarificatory or explanatory amendment is declaratory. As the later amendment clarifies the real intent and declares the position as was originally intended, it takes retroactive effect from the date when

the original provision was made effective. Normally such clarificatory amendment is made retrospectively effective from the earlier date. **It may also happen that the clarificatory or explanatory provision introduced later to depict the real intention of the legislature is not specifically made retrospective by the statute. Notwithstanding the fact that such amendment to the substantive provision has been given prospective effect, the judicial or quasi judicial authorities, on a challenge made to it, can justifiably hold such amendment to be retrospective.** The justification behind giving retrospective effect to such amendment is to apply the real intention of the legislature from the date such provision was initially introduced.

6.There is an argument that **these provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect** unless the legislature specifically says so." I am afraid such a view ,most respectfully is unjustifiably restrictive and does not consider some sterling judicial history.We need to re-quote the facts of CIT Vs. Gold Coin Health Food (P.) Ltd. (2008) 304 ITR 308 (SC)in some detail: **The Finance Act, 2002 amended Explanation 4 to section 271(1)(c) with effect from 01.04.2003** providing that the penalty would be imposed even if the returned income is loss. In the case of Virtual Soft Systems Ltd. Vs. CIT (2007) 289 ITR 83 (SC) (a Bench comprising of two Hon'ble Judges) it was held that prior to the amendment with effect from 1st April, 2003 penalty for concealment of income could not be levied in the absence of any positive income. Doubt was expressed over the correctness of this view by a subsequent Bench. **Thereafter in the case of Gold Coin Health Food P. Ltd. (supra), a bench of three Hon'ble Judges overruled the judgment in the case of Virtual Soft Systems Ltd. (supra)** by holding

that Explanation 4 to section 271(1)(c)(iii) regarding the imposition of penalty, even if there is a loss, is clarificatory and not substantive. **It was held to be applying even to the assessment years prior to 1st April, 2003, being the date from which it was brought into force.** Thus, it can be easily noticed that the retrospective effect to the amendment to Explanation 4 by the Finance Act, 2002 has been given by holding that the position even anterior to such amendment was the same inasmuch as the penalty was imposable even in the case of loss. **The intention of the legislature was found to be imposing penalty in all such cases even prior to the amendment and that is how this amendment was held to be clarificatory and therefore, retrospective.**

6.1 In Sony Ericsson Mobile communications India Pvt. Limited .v. CIT (2015) 374 ITR 118 (Delhi) Relevant AYs were 2006-07, 2007-08 & 2008-09. It was argued by the assessee that the AO had made no specific reference of the international transaction relating to AMP expenses nor seek the previous approval of the Commissioner, and therefore, the valuation of the contract price and computation of the arm's length price, consequent assessments, etc. are without jurisdiction and authority of law.HC held that -The insertion of sub-section (2B) by the FA 2012 was squarely applicable to this case and amendment was applied retrospectively.Liability was imposed on assessee here as well.

7.SO THERE CANNOT BE A GENERAL PROPOSITION THAT if a liability is imposed on assessee the amendment has to be explicitly retrospective ,much less so in our case where the revenue has consistently held on to its stated position expressed in plain letter of the statute.Even prior to explanation ,revenue favouring decisions have also come on the issue in the shape of in **Vidras India Ceramics (P.) Ltd *v.*DCIT[2021] 129 taxmann.com 320**

(Ahmedabad - Trib.9th July 2021 AY 14-15)wherein it has been held that ''8.1 There is no ambiguity to the fact that the assessee failed to deposit Employees Contribution to PF/ESI within the due date specified under the relevant Act *i.e.* PF/Employees State Insurance. Thus the assessee is not entitled for the deduction for such amount of contribution to PF/ESI as discussed above in view of the judgment of Hon'ble Gujarat High Court*. In view of the above we do not find any merit in the ground of appeal raised by the assessee. Hence the ground of appeal of the assessee is hereby dismissed."

***[CIT v. Gujarat-State Road Transport Corpn. [2014] 366 ITR 170.]**

Morakhia Copper and Alloys (P.) Ltd. [2020] 119 taxmann.com 214 (Ahd - Trib.) holds likewise even prior to insertion of explanation.

8.One final issue remains ,that given in **The Continental Restaurant ruling** citing **M.M.Aqua Technologies Limited v. CIT reported in (2021) 436 ITR 582 (SC)**.I am afraid the citing has been incomplete and selective respectfully.

8.1 It has been held by **Hon'ble Supreme Court in Mumbai Kamgar Sabha vs. Abdulbahi Faizullbhai AIR 1976 SC 1455** that "It is trite, going by anglophonic principles that a ruling of a superior Court is binding law. It is not of scriptural sanctity but of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decisions, exalting the precedents into a prison house of bigotry, regardless of the varying circumstances and myriad developments. **Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting the matters which may lurk in the dark".**

8.1.1 What were ''the facts directly presented for consideration in M.M.Aqua? The question culled was whether s 43B ***Explanation* 3C, which**

was introduced with retrospective effect would have ANY application in the facts of this case as interest had not been converted into any loan or borrowing. *[Explanation 3*C, was inserted by the Finance Act, 2006 retrospectively w.e.f. 1-4-1989.]So it was concerning an amendment already made retrospective in an explicit manner.**Further ,RETROSPECTIVITY OF AMENDMENT OR ITS VALIDITY was not in dispute** in the said case at all. The hon'ble SC goes on to say in para 10 that"**.....** ***Now, this provision was inserted with retrospective effect and clearly operated for the period in question. The assessee does not dispute that.....***"

The issue was that *Explanation 3*C, did not apply to assessee,retrospective or not. The hon'ble Court went on to analyse the history of s 43B to specifically adjudicate on the issue as to whether as per a rehabilitation plan agreed to between the lender and the borrower, debentures were accepted by the financial institution in discharge of the debt on account of outstanding interest would amount to actual payment and consequent deduction unders 43B(d) or be hit by Explanation 3C?It was held that "***Explanation 3*C, which was introduced for the "removal of doubts", only made it clear that interest that remained unpaid and has been converted into a loan or borrowing shall not be deemed to have been actually paid**."In para 27 thereafter the question posed to itself by the Court was: "**The question in the present case is only whether interest can be said to have been actually paid by the mode of issuing debentures.**" The question was answered in affirmative and Explanation 3C was found inapplicable.In course of its discussion the hon'ble Court analysed the concept of retrospectivity in paras 21 to 24.It was in this context that the para cited in ITAT ORDER was used.In the same para the hon'ble S.C. ALSO cites ***Sedco Forex International Drill. Inc.* v. *CIT***

[2005] 149 Taxman 352/279 ITR 310 (SC): *'' 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".***

8.1.2 It is nobody's case that law was changed by the amendment in case of s 36 Explanation.This is exposition of law ,is fully accepted and in fact goes on to support reasoning given by this author.The additional phrase in our case ''**deemed to never have been applied** '' has not even been referred in MM AQUA judgment.The citation is out of context most respectfully.

8.2 I can do no better than to cite a 3 judge bench of hon'ble SC itself on the issue .The case in question is **Haryana Financial Corporation & Anr vs M/S Jagdamba Oil Mills & Anr AIR 2002 SC 834 :**

''Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. **Observations of Courts are not to be read as Euclid's**

theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. **To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define.** Judges interpret statues, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. ''

9.In SUBHLAKSHMI VANIJYA (P) LTD. & ORS. vs. CIT(2015) 172 TTJ 721/155 ITD 171(KOL.) the conceptual position was well clarified : ''Any amendment to the substantive provision which is **aimed at clarifying the existing position or removing unintended consequences** to make the provision workable has to be treated as retrospective **notwithstanding the fact that the amendment has been given effect prospectively.** In our considered opinion the border line between a substantive provision having retrospective or prospective effect, is quite prominent. One needs to appreciate the nature of the original provision in conjunction with the amendment. Once a provision has been given retrospective effect by the legislature, it shall continue to be retrospective. ***If on the other hand, if the statute does not amend it retrospectively, then one has to dig out the intention of the Parliament at the time when the original provision was incorporated and also the new amendment. If the later amendment simply clarifies the intention of the original provision, then it will always be considered as retrospective.***''

9.1 The intent of legislature is crystal clear: penalising employers who misutilise contributions resulting in **unjust enrichment by**

misuse of fiduciary capacity in which funds stand entrusted to the employer.

10..The pride of place in this must vest with **the commentary of Justice G.P. Singh-Principles of Statutory Interpretation [13th edition, pages 567-568], in the context of retrospective applicability of law, it is stated that:**

"The usual reason for passing a ***declaratory Act*** *is to set aside what Parliament deems to have been a* ***judicial error****, whether in the statement of the common law or in the interpretation of the statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'. But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective.* ***In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form.*** *If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective.* ***An explanatory Act is generally passed to supply an obvious omission or to clear up doubts*** *as to the meaning of the previous Act. It is well settled that* ***if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' or 'shall be deemed never to have included' is declaratory and is in plain terms retrospective."***

The debate may rage on.But this is where the final word rests.