IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri George George K, JM & Shri B.R.Baskaran, AM

ITA No.385/Bang/2021 : Asst.Year 2019-2020

M/s.Shakuntala Agarbathi Company, 123, I Main Road 7th Cross Chamrajpet Bengaluru – 560 018. **PAN : AAOFS8230J.**	v.	The Dy.Commissioner of Income-tax (CPC) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Smt.Suman Lunkar, CA
Respondent by : Smt.Nishi Padma, JCIT-DR

Date of Hearing : 20.10.2021		**Date of Pronouncement : 21.10.2021**

O R D E R

Per George George K, JM

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 02.08.2021. The relevant assessment year is 2019-2020.

2. The grounds raised read as follows:-

"1. The learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre has erred in passing the appellate order in the manner passed. The appellate order as passed is void-ab-initio and bad in law and is liable to be quashed.

2. The learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre has erred in dismissing the appeal filed by the appellant without following the binding decision of jurisdictional High Court and honourable Apex court. The order passed without following the legal precedence is bad in law and therefore liable to be quashed.

3. The learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre should have, by following the principles laid down for binding precedence allowed the appeal. On the contrary, the dismissal of appeal despite binding judicial precedence makes the impugned order bad in

law and liable to be quashed.

4. In any case and without prejudice, the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre has erred in confirming the adjustment u/s. 143(1)(a) as done by CPC. The adjustment done by CPC in the intimation being beyond the purview of section 143(1)(a) and the adjustment being not prima facie adjustment should have been deleted by the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre. Instead, the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre has erred in holding the adjustment to be in order.

5. In any case, the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre has erred in;

a) holding that the employee's contribution for ESI are allowable as deduction only when deposited by the employer within the due dates prescribed under relevant Act or funds.

b) holding that for the relevant year, the provisions of section 43B of the Act were not applicable to the employees share of contribution of the ESI.

c) Not appreciating that the decision of the honourable supreme court is in favour of the appellant.

d) holding that Section 43B applies only to employer's contribution.

e) Relying on various judgments of non jurisdictional High Court to confirm the disallowance despite there being contrary judgments of the jurisdictional High Court.

f) Holding that, the amendments to Section 36(1)(va) and Section 43B brought in by Finance Act, 2021 are retrospective, c1arificatory and declaratory in nature.

and in thus confirming the disallowance of Rs.71 ,677/- as made to the returned income of the appellant. The disallowance as made being bad in law and on facts should have been deleted.

6. The learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre has erred in levying interest u/s. 234B & 234C of the Act. The appellant denies his liability to pay interest as levied. The interest levied being erroneous are to be deleted.

7. In view of the above and on other grounds to be adduced at the time of hearing, it is requested that the order passed u/s 250 of the Act be quashed or at least the addition made to the income be deleted."

3. The brief facts of the case are as follows:

The assessee is a partnership firm. The return of income was filed on 30.10.2019 declaring total income of Rs.75,21,320. An intimation dated 16.04.2020 u/s 143(1) of the I.T.Act was issued wherein sum of Rs.71,677 was disallowed u/s 36(1)(va) of the I.T.Act for the reason that employees' contribution to ESI was not paid before the due date stipulated under the respective Act.

4. Aggrieved, the assessee preferred an appeal to the first appellate authority. It was contended before the first appellate authority that the employees' contribution to ESI was paid before the due date of filing of return u/s 139(1) of the I.T.Act, and hence, entitled to deduction in view of the judgment of the Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT reported in 366 ITR 408 (Kar.). The CIT(A) noted the judicial pronouncements for and against the assessee and by placing reliance on the amendment to section 43B and 36(1)(va) of the I.T.Act by the Finance Act, 2021, held that the amendment is clarificatory and has retrospective operation.

5. Aggrieved by the order of the CIT(A), the assessee has filed this appeal before the ITAT. The learned AR submitted that the issue in question is squarely covered by the order of

the ITAT in the case of M/s.Bevel Gears (India) Pvt. Ltd. v. ACIT in ITA No.376/Bang/2021 (order dated 11.10.2021).

6. The learned Departmental Representative relied on the orders of the Income Tax Authorities.

7. We have heard rival submissions and perused the material on record. Admittedly, the assessee has remitted the employees' contribution to ESI before the due date for filing of return u/s 139(1) of the I.T.Act. The Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT reported in 366 ITR 408 (Kar.) has categorically held that the assessee would be entitled to deduction of employees' contribution to ESI provided the payment was made prior to the due date of filing of return of income u/s 139(1) of the I.T.Act. The Hon'ble jurisdictional High Court differed with the judgment of the Hon'ble Gujarat High Court in the case of CIT v. Gujarat State Road Transport Corporation reported in 366 ITR 170 (Guj.). The Hon'ble High Court was considering following substantial question of law:-

> *"Whether in law, the Tribunal was justified in affirming the finding of Assessing Officer in denying the appellant's claim of deductions of the employees contribution to PF/ESI alleging that the payment was not made by the appellant in accordance with the provisions u/s 36(1)(va) of the I.T.Act?"*

7.1 In deciding the above substantial question of law, the Hon'ble High Court rendered the following findings:-

> *"20. Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provided in sub para (1), the employer shall, before paying the member, his wages, deduct his contribution from his wages and deposit the same together*

with his own contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word "contribution" used in Clause (b) of Section 43B of the IT Act means the contribution of the employer and the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income under sub-section (1) of Section 139 of the IT Act is made, the employer is entitled for deduction.

21. The submission of Mr.Aravind, learned counsel for the revenue that if the employer fails to deduct the employees' contribution on or before the due date, contemplated under the provisions of the PF Act and the PF Scheme, that would have to be treated as income within the meaning of Section 2(24)(x) of the IT Act and in which case, the assessee is liable to pay tax on the said amount treating that as his income, deserves to be rejected.

22. With respect, we find it difficult to endorse the view taken by the Gujarat High Court. WE agree with the view taken by this Court in W.A.No.4077/2013.

23. In the result, the appeal is allowed and the substantial question of law framed by us is answered in favour of the appellant-assessee and against the respondent-revenue. There shall be no order as to costs."

7.2 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 to 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. The following orders of the Tribunal had categorically held that the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is only prospective in nature and not retrospective.

(i) Dhabriya Polywood Limited v. ACIT reported in (2021) 63 CCH 0030 Jaipur Trib.

(ii) NCC Limited v. ACIT reported in (2021) 63 CCH 0060 Hyd Tribunal.

(iii) Indian Geotechnical Services v. ACIT in ITA No.622/Del/2018 (order dated 27.08.2021).

(iv) M/s.Jana Urban Services for Transformation Private Limited v. DCIT in ITA No.307/Bang/2021 (order dated 11th October, 2021)

7.3 In view of the aforesaid reasoning and the judicial pronouncements cited supra, the amendment by Finance Act, 2021 to Sec.36(1)(va) and 43B of the I.T.Act will not have application to relevant assessment year, namely A.Y. 2019-2020. Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to ESI since the assessee has made payment before the due date of filing of the return of income u/s 139(1) of the I.T.Act, It is ordered accordingly.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced on this 21st day of October, 2021.

Sd/-	**Sd/-**
(B.R.Baskaran)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 21st October, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)- NFAC, Delhi.
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore