

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCHES “B”, BANGALORE**

**Before Shri George George K, JM and Shri B.R.Baskaran, AM**

ITA No.387/Bang/2021 : Asst.Year 2019-2020

M/s.EF Site Technologies Private Limited, 136 Khaji Sonenahalli Kanamangala Post Whitefield-Hoskote Road Bengaluru – 560 067. <b>PAN : AADCE9822A.</b>	v.	The Asst.Commissioner of Income-tax, CPC Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Siva Prasad Reddy, ITP  
Respondent by : Sri.Amrit Raj Singh, JCIT-DR

<b>Date of Hearing : 21.10.2021</b>	<b>Date of Pronouncement : 21.10.2021</b>
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**ORDER**

**Per George George K, JM**

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 14.06.2020. The relevant assessment year is 2019-2020.

2. The grounds raised read as follows:-

“LEGAL GROUNDS:

*1.The order dated 14 June 2021 passed by the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre is bad and erroneous and against the facts and circumstances of the case in so far as it is against the Appellant.*

*2.The Ld CIT(A) and the Ld AO erred in determining the total income of the Appellant for AY 2019-20 at Rs.53,59,239/- against the returned income of Rs.45,77,140/-.*

GROUND ON MERITS:

*3.The Ld CIT(A) erred in upholding the addition of*

*Rs.7,82,009/- made by the Ld AO towards disallowance of PF and ESI contribution of employees paid beyond the due date under section 36(l)(va) read with section 43B of the Act.*

*4.The Ld CIT(A) and the Ld AO have erred in making the addition despite the fact that the Appellant had made the remittances towards PF and ESI contribution of employees before the due date of filing return under section 139(1) of the Act, which fact has not been disputed by the Ld CIT(A) or Ld AO.*

*5.The Ld CIT(A) and the Ld AO erred in not appreciating that the issue was covered by the decisions of the Hon'ble Karnataka High Court in the case of CIT v Shabari Enterprises (2008) 298 ITR 141 (Kar), CIT v Spectrum Consultants India Pvt Ltd ."" (WA No.4077/2013), Essae Teraoka Pvt Ltd v DCIT (ITA No.480/2013).*

*6.The Ld CIT(A) erred in holding that the employees contribution to PF and ESI were covered by section 436 of the Act relying on the Explanation 5 to section 43B inserted by the Finance Act, 2021 with effect from 01 April 2021.*

*7.The Ld CIT(A) erred in giving a retrospective effect to Explanation 5 to section 43B without appreciating that the Legislature in the Memorandum to the Finance Bill, 2021 has expressed its intention that the same would be applicable to Y 2021-22 and subsequent AY.*

*INTEREST UNDER SECTION 234A, 234B AND 234C:*

*8.The Ld. AO erred in levying interest under section 234A, 234B and 234C of the Act.*

*Each one of the above grounds is without prejudice to the other and without prejudice to the grounds of appeal taken earlier. The Appellant reserves the right to further add, alter or amend each one of the above grounds of appeal."*

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

The assessee is a private limited company engaged in the business of providing onsite fabrication services. For the assessment year 2019-2020, the return of income was filed on 31.10.2019 declaring total income of Rs.45,77,140. The

return was processed u/s 143(1) of the I.T.Act. In the intimation issued u/s 143(1) of the I.T.Act, the CPC disallowed the employees' contribution to PF and ESI to the tune of Rs.7,82,009. The reason for making the disallowance was that the assessee has not remitted the employees' contribution to PF and ESI within the due date specified under the respective Acts.

4. Aggrieved, the assessee preferred an appeal to the first appellate authority. Before the first appellate authority, it was submitted that the assessee has remitted the employees contribution to PF and ESI before the due date of filing of the return u/s 139(1) of the I.T.Act and in view of the judgment of the Hon'ble jurisdictional High Court *Essae Teraoka (P.) Ltd. v. DCIT* reported in 366 ITR 408 (Kar.), the assessee is entitled to deduction of the same. The CIT(A), however, dismissed the appeal of the assessee. The CIT(A) noticed the difference between the employees' contribution and the employer's contribution and held insofar as the employees' contribution to ESI and PF, the same need to be remitted within the due date as mentioned in the respective Acts. The CIT(A) also relied on the amendment brought about to section 36(1)(va) and 43B of the I.T.Act.

5. Aggrieved, the assessee has filed this appeal before the Tribunal. The learned AR submitted that an identical issue was decided in favour of the assessee by the Tribunal in the case of *M/s.The Continental Restaurant & Café Co. v. ITO* in ITA No.388/Bang/2021 (order dated 11.10.2021).

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

7. We have heard rival submissions and perused the material on record. An identical issue was considered by the Tribunal in the case of The Continental Restaurant & Café Co. v. ITO (supra). The relevant finding of the Tribunal reads as follows:-

*“7. I have heard rival submissions and perused the material on record. Admittedly, the assessee has not remitted the employees’ contribution of PF of Rs.1,06,190 and ESI of Rs.16,055 totaling to Rs.1,22,245 before the due date specified under the respective Act. However, the assessee had paid the same before the due date of filing of the 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 PF and 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.). In holding so, 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 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. 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 11<sup>th</sup> October, 2021)*

7.3 *In view of the aforesaid reasoning and the judicial pronouncements cited supra, the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 will not have application for the relevant assessment year, namely A.Y. 2019-2020. Accordingly, I direct the A.O. to grant deduction in respect of employees' contribution to PF and 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."*

7.1 In view of the judicial pronouncements cited supra, we hold that the amendment to section 36(1)(va) and 43B of the I.T.Act will not have application for the relevant assessment year, namely assessment year 2019-2020. Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to PF and ESI since the assessee has made the payment before the due date of filing of return 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 21<sup>st</sup> day of October, 2021.

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

**Sd/-**  
**(George George K)**  
**JUDICIAL MEMBER**

Bangalore; Dated : 21<sup>st</sup> 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