

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos. 394 & 395/Bang/2021
Assessment years : 2018-19 & 2019-20

M/s. J K Footwear, # 5, J.M. Lane, Balepet Cross, Bengaluru – 560 053. PAN: AAHFJ 5843M	Vs.	The Deputy Commissioner of Income Tax, Circle 2(2)(1) / ADIT (CPC) Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Sunaina Bhatia, Advocate
Respondent by	:	Shri Priyadarshi Mishra, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	27.10.2021
Date of Pronouncement	:	27.10.2021

ORDER

Per Chandra Poojari, Accountant Member

These appeals are by the assessee directed against the separate orders of the CIT(Appeals), National Faceless Appeal Centre [NFAC], Delhi dated 28.7.2021 & 16.03.2021 for the assessment years 2018-19 & 2019-20 respectively.

2. The assessee has raised common grounds of appeal for both the assessment years, except change in figures and the grounds in ITA No.394/Bang/2021 are as follows:-

“1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned Commissioner of Income tax [Appeals] / National Faceless Appeal Centre [NFAC for short] is not justified in upholding the determination of total income of appellant in the Intimation u/s. 154 of the Act, at Rs.75,98,460/- as against the returned income of Rs.71,60,430/-, on account of the disallowance of Rs. 4,38,030/- made u/s.36[1][va] of the Act, based upon the details in the Tax . Audit Report of the Chartered Accountant in Form 3CD, under the facts and in the circumstances of the appellant's case.

3. The learned CIT[A] / NFAC ought to have appreciated that the aforesaid disallowance of Rs. 4,38,030/- in respect of the belated payments of the Employee's share of PF and ESI was allowable having regard to the judgement of the jurisdictional High Court in the case of Essae Teroka Limited reported in 366 ITR 408 [Karl since the same has been paid before the due date for filing the return of income u/s 139(1) of the Act and hence. the disallowance made ought to have been deleted.

4. The learned CIT[A] / NFAC is not justified in holding that the amendment made by insertion of Explanation 2 to the provisions of section 36[1][va] of the Act and the insertion of Explanation 5 to section 43B of the Act by the Finance Act, 2021 with effect from 01/04/2021 was clarificatory / declaratory in the nature and therefore, these amendments were retrospective in operation under the facts and in the circumstances of the appellant's case.

4.1 The learned CIT[A] / NFAC ought to have appreciated that the aforesaid amendments by the Finance Act, 2021 cannot be regarded as retrospective in nature as they were not in the nature of a beneficial legislation to remove intended hardships cast on the assessee and therefore, the disallowance sustained on this basis is opposed to law and facts of the appellant's case.

4.2 The learned CIT[A] / NFAC is not justified in refusing to follow the binding judgement of the Hon'ble Jurisdictional High Court and several other decisions relied upon in favour of the assessee on the ground that the said judgment was rendered before the aforesaid clarificatory amendments made under the facts and in the circumstances of the appellant's case.

5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.”

3. The grievance of the assessee in these appeals is regarding disallowance towards PF & ESI contribution of employees paid beyond the due date as per relevant Act, however deposited within the due date of filing return u/s. 139(1) of the Act. This issue came up for consideration before this Tribunal in the case of *M/s. Jana Urban Services for Transformation Pvt. Ltd. v. DCIT, ITA No.308/Bang/2021*. The Tribunal vide order dated 11.10.2021 held as under:-

“6. We have heard both the parties and perused the material on record. The assessee made contribution to the PF as follows:-

20 b Details of contributions received from employees for various funds as referred to in section 36(1)(va):					
S.No.	Nature of fund	Sum received from employees	Due date for payment	The actual amount paid	The actual date of payment to the concerned authorities
1	Provident Fund	255156	15/05/2016	537842	12/05/2016
2	Provident Fund	321103	15/06/2016	667500	13/06/2016
3	Provident Fund	353043	15/07/2016	740110	12/07/2016
4	Provident Fund	388675	15/08/2016	787248	10/08/2016
5	Provident Fund	394788	15/09/2016	860409	10/09/2016
6	Provident Fund	421393	15/10/2016	870294	13/10/2016
7	Provident Fund	415294	15/11/2016	879806	11/11/2016
8	Provident Fund	447926	15/12/2016	939165	20/01/2017
9	Provident Fund	439242	15/01/2017	965535	20/01/2017
10	Provident Fund	489661	15/02/2017	1034197	15/02/2017
11	Provident Fund	509175	15/03/2017	1059604	15/03/2017
12	Provident Fund	511044	15/04/2017	1073693	11/04/2017
13	Any Fund set up under the provisions of ESI Act,1948	51715	21/05/2016	192362	12/04/2016
14	Any Fund set up under the provisions of ESI Act,1948	60792	21/06/2016	221762	16/05/2016
15	Any Fund set up under the provisions of ESI Act,1948	67366	21/07/2016	246989	13/06/2016
16	Any Fund set up under the provisions of ESI Act,1948	68498	21/08/2016	248662	12/07/2016
17	Any Fund set up under the provisions of ESI Act,1948	66623	21/09/2016	251997	10/08/2016
18	Any Fund set up under the provisions of ESI Act,1948	71697	21/10/2016	259486	10/09/2016
19	Any Fund set up under the provisions of ESI Act,1948	57694	21/11/2016	215165	14/10/2016
20	Any Fund set up under the provisions of ESI Act,1948	59987	21/12/2016	222366	10/11/2016
21	Any Fund set up under the provisions of ESI Act,1948	61304	21/01/2017	227840	26/12/2016
22	Any Fund set up under the provisions of ESI Act,1948	82436	21/02/2017	305545	17/01/2017
23	Any Fund set up under the provisions of ESI Act,1948	83676	21/03/2017	306825	17/02/2017
24	Any Fund set up under the provisions of ESI Act,1948	84691	21/04/2017	314744	11/04/2017

7. As seen from the above, the assessee made a sum of Rs.19,04,700/- beyond the time prescribed under the relevant Act. Now the claim of assessee is that the above payment has been made towards PF beyond due date prescribed under the relevant Act, however, the same was made within due date of filing the return of income u/s 139(1) of the Act for the year under consideration. As such the said amount cannot be disallowed u/s 36(1)(va) of the Act and it is not hit by

explanation 2 to sec.36(1)(va) of the Act which calls for payment within the due date prescribed under the relevant Act. For this purpose he relied on the judgment in the case of Essae Teraoka (P.) Ltd. v. Dy. CIT 366 ITR 408 (Kar.), wherein it has held as under:

“15. From bare perusal of this provision, it is clear that under the provision, for IT Act, an extension is given to the employer to make payment of contribution to provident fund or any other fund till the "due date" applicable for furnishing the return of income under sub-section(1) of section 139 of the IT Act in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with such return. In short, this provision states, notwithstanding anything contained in any other provision contained in this Act, a deduction otherwise allowable in this Act in respect of any sum payable by the assessee as an employer by way of contribution to any fund such as provident fund shall be allowed if it is paid on or before the due date as contemplated under Section 139(1) of the IT Act. This provision has nothing to do with the consequences, provided for under the PF Act/PF Scheme/ESI Act, for not depositing the "contribution" on or before the due dates therein.

16. In the present case, admittedly, though the employer did not deposit the contribution, within the stipulated time, as contemplated by paragraph-30 of the PF Scheme or before the due date under the provisions of the PF scheme/Act, he deposited the contribution to the PF/ESI fund before the due date contemplated under Section 139(1) of the Act.

17. Section 6 of the PF Act provides for contributions and matters which may be provided for in Schemes. Paragraph-29 of the PF Scheme states what is "Contribution". The expression "contribution" is also defined under the PF Act by Section 2(c) of the PF Act, which means a contribution payable in respect of a member under the Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies. If this definition is read with subpara(1) of paragraph-29 in Chapter-V of the PF Scheme, it would

mean that the contributions payable by the employer under the Scheme shall be at a particular rate and the contribution payable by the assessee shall be equal to the contribution payable by the employer.

18. Paragraph-30 of the PF Scheme provides for payment of contributions. Sub-para(1) of paragraph30 states that the employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

19. From bare perusal of sub-para(1) of paragraph-30, it is clear that the word "contribution" is used not only to mean contribution of the employer but also contribution to be made on behalf of the member employed by the employer directly.

20. Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provided in subpara(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 subsection(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.407712013.

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.”

8. Further, he relied on the judgment of Hon’ble Karnataka High Court in the case of CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.) has held as under:

“This clause is inserted by the Finance Act with effect from April 1, 1988. The Explanation to this clause is read very carefully. "Due date" has been explained stating that: means the date by which the assessee is required as an employer to credit contribution to the employees' account in the relevant fund under any Act, rule or order or notification issued thereunder or under any standing order, award, contract of service or otherwise." Prior to the above clause was inserted to section 36 giving statutory deductions of payment of tax under the provisions of the Act, section 43B(b) was inserted by the Finance Act, 1983, which came into force with effect from April 1, 1984. Therefore, again the provision of section 43B(b) clearly provides that notwithstanding anything contained in the other provisions of the Act including section 36(l) clause (Va) of the Act, even prior to the insertion of that clause the assessee is entitled to get statutory benefit of deduction of payment of tax from the Revenue. If that provision is read along with the first proviso of the said section which was inserted by the Finance Act, 1987, which came into effect from April 1, 1988, the letters numbered as clause (a), or clause (c) or clause (d) or clause (e) or clause (f) are omitted from the above proviso and therefore deduction towards the employees contribution paid can be claimed by the assessee. The Explanation to clause (va) of section 36(1) of the Income-tax Act further makes it very clear that the amount actually paid by the assessee on or before the due date applicable in this case at the time of submitting returns of income under section 139 of the Act to the Revenue in respect of the previous year can be claimed by the assessee for deduction out of their gross income. The

above said statutory provisions of the Income-tax Act abundantly makes it clear that, the contention urged on behalf of the Revenue that deduction from out of gross income for payment of tax at the time of submission of returns under section 139 is permissible only if the statutory liability of payment of provident fund or other contribution funds referred to in clause (b) are paid within the due date under the respective statutory enactments by the assesseees as contended by learned counsel for the Revenue is not tenable in law and therefore the same cannot be accepted by us.

9. The Id.AR drew our attention to the deletion of the second proviso to section 43B of the Income-tax Act by the Finance Act 2003, which provision has come into force, with effect from April 1, 2004. The reliance placed upon the decision of the apex court in Allied Motors P. Ltd. v. CIT [1997] 224 ITR 677 and also on the decision in General Finance Co. v. CIT (Asst.) [2002] 257 ITR 338 (SC) in respect of applicability of section 43B(b) and also omission of clause (a) or (c) or (d) or (e) or (B referred to above occurred in the first proviso to section 43B, supports the case of the assesseees and also relevant paragraphs extracted from Allied Motor's case [1997] 224 ITR 677 and paragraph 59 referred to supra in this judgment from the Finance Bill with all fours supports the case of the assessee/ respondents. Therefore, we have to answer the substantial question of law No. 1 framed by this court in these appeals at the instance of the Revenue against them, viz., in the negative. Accordingly, we answer the substantial question No. 1 framed in these appeals in the negative.

10. Further he relied on the following judgments:-

1. In Re-Cognizance for Extension of Limitation - Supreme Court of India in M.P No.665/2021 in SMW(C) No.3/2020 dt.19/7/2021.
2. Salzgitter Hydraulics Pvt Ltd vs ITO [2021] 128 taxman.com 192 [Hyderabad Tribunal]

3. M/s Crescent Roadways Pvt Ltd vs DyCIT - ITA.No. 1952 Hyderabad/20 18
 4. M/s Mahadev Cold Storage vs Jurisdictional AO - ITA.No.41 & 42/Agra/ 2021
 5. M/s Essae Teraoka (P.) Ltd vs DCIT - [2014] 43 taxmann.com 33 (Karnataka)
 6. Anand Kumar Jain vs ITO - ITA NO 4192/MUM/2012 Value Momentum Software Services Private Limited vs. DCIT I.T.A. No. 2 197/HYD/20 17 [Assessment Year: 2013-14] dated 19.05.2021;
 7. Mohan Ram Chaudhary vs. ITO ITA No. 51&54-55/Jodh/2021 [Assessment Year: 2018-19] dated 28.09.2021;
 8. CIT v. Aimil Ltd. [2010] 321 ITR 508
 9. CIT v. Nipso Polyfabriks Ltd. [2013] 350 ITR 326
 10. CIT vs. Merchem Ltd. 378 ITR 443 (Kerala))
 11. Sagun Foundry (P.) Ltd. vs. CIT [2017] 291 CTR 557 (Allahabad)
 12. Bata India Ltd. vs. DCIT [2020] 180 ITD 464 (Kolkata - Trib.)
 13. DCIT vs. Eastern Power Distribution Company of A.P. Ltd. [2016] 160 ITD 432 (Visakhapatnam - Trib.)
 14. Nuzivedu Swati Coastal Consortium vs. ITO [2015] 62 taxmann.com 258 (Hyderabad - Trib.)
 15. DCIT vs. Teesta Valley Tea Co. Ltd. [2017] 85 taxmann.com 301 (Kolkata - Trib.)
11. The Id.DR contention is that as per sec.43B(b) of the Income-tax Act and explanatory notes to Finance Act 1983, that Employees' Contribution was never intended to be covered by sec.43B. This has been reiterated and reinforced through

Explanation 5 to sec.43B and Explanation 2 to 36(1)(va) inserted by Finance Act 2021. If it was the intention of the legislature expressly made clear in the Finance Act 2021, through the explanatory notes, it would necessarily to be held that Explanation 5 to sec. 43B and Explanation 2 to sec.36(1)(va) would apply to all pending matters as on date.

12. We find no merit in the argument of the Id.DR since the explanation as provided in Finance Act 2021 prescribes that the amendment in both sec.36(va) as well as 43B by inserting corresponding explanation that although impugned PF comes in the form of provision and the same is applicable from 1/4/2021 onwards only. In the present case we are concerned with the asst. year 2017-18 and the amended provision could not be applied retrospectively as it is only applicable w.e.f 1/4/2021. Being so no disallowance could be made by the AO in respect of PF/ESI paid within the due date of filing return of income. Though, it was beyond the date mentioned in the respective Act. This view of ours is supported by various judgment relied on by the Id.AR. Accordingly the appeal of the assessee is allowed.

13. In the result, the appeal of the assessee is allowed.”

4. Taking a consistent view and following the above order of the Tribunal, we allow this ground taken by the assessee and there cannot be any disallowance by invoking the provisions of section 36(1)(va) r.w.s. 43B of the Act.

5. In the result, the appeals by the assessee are allowed.

Pronounced in the open court on this 27th day of October, 2021.

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 27th October, 2021.

/Desai S Murthy/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.