

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-B” BENCH : BANGALORE**

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT

ITA Nos.379 and 380/Bang/2021
Assessment Years : 2018-19 and 2019-20

SP Nos.84 and 85/Bang/2021 (in ITA Nos.379 and 380/Bang/2021)
Assessment Years : 2018-19 and 2019-20

Shri Bhagawanji Harish, No.12, 2 nd Cross, Gandhinagar, Bengaluru – 560 009. PAN : AACPH 9005 L	Vs.	DCIT, Central Processing Centre, Bengaluru.

Assessee by	:	Shri. Karan Ganna, CA
Revenue by	:	Shri. Ganesh R. Ghale, Standing Counsel for the Department

Date of hearing	:	11.11.2021
Date of Pronouncement	:	.11.2021

ORDER

Per N. V. Vasudevan, Vice President

These are appeals and stay petitions (SPs) filed by the assessee against 2 orders both dated 10.06.2021 of CIT(A) National Faceless Appeal Centre (NFAC), Delhi, relating to Assessment Years 2018-19, 2019-20.

2. The assessee is an individual Private Limited Company. The assessee filed return of income for AY 2018-19 declaring total income of Rs.29,98,560/-. In an intimation dated 21.05.2019 issued u/s.143(1) of the Act, the Centralized

Processing Centre (CPC) added a sum of Rs.12.24.205 as income representing Employees share of contribution to Provident Fund/ Employees State Insurance (PF/ESI) to the extent not paid on or before the due date as mentioned in Sec 36(1)(va) of the Income Tax Act 1961.

3. Against the addition so made, the assessee preferred appeal before the CIT(A). It was contended by the assessee before CIT(A) that Employees share of ESI and PF contribution has been paid before the due date for filing of return u/s.139(1) of the Act and hence has been considered allowable on the basis of decision of Supreme Court in CIT vs. Alom Extrusions Ltd (2009) 319 ITR 306 (SC) and other cases such as CIT Vs Magus Customers Dialog (P) Ltd (Kar), CIT Vs Sabri Enterprises (2008) 298 ITR 141 (Kar), Consultants India P Ltd Vs CIT Bangalore III (2013) 597/34 Taxman.com 20 (Kar) Essae Teraija (P) Ltd. Vs. DCIT (2014) 43 taxmann.com 33 (Karnataka).

4. The CIT(A) however upheld the order of the AO. With regard to employee's share of contribution to PF and ESI, the CIT(A) referred to the amendment made to section 36(1)(va) and 43B of the Act by the Finance Act, 2021. The Finance Act, 2021 has amended section 36, sub-section (1), in clause (va), by inserting Explanation-2 which reads thus:

“Explanation 2.—For the removal of doubts, 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;”

The finance Act, 2021 also amended section 43B by inserting Explanation-5 thereto which reads thus:

"Explanation 5.—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."

According to the CIT(A), by virtue of newly inserted Explanation 2 to clause (va) of sub-section (1) of the said section, 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 the said clause. The CIT(A) also held that Section 43B of the Income-tax Act relates to allowing certain deductions only on actual payments. Clause (b) of the said section provides that any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year, in which such sum is actually paid by him. Proviso to the said section provides that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return. By virtue of insertion of Explanation 5 to this section, the provisions of the said 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 subclause (x) of clause (24) of section 2 applies.

5. The CIT(A) was of the view that Section 36(1)(va) and section 43B(b) operate on totally different footings and have different parameters for due dates, i.e., employee's contribution is linked to payment before the due dates specified in the respective Acts or Funds and employer's contribution is linked to the payment before the prescribed due date for filing of return u/s.139(1) Income Tax Act, 1961. The result of any failure to pay within the prescribed dates also leads to different results. In the case of employee's contribution, any failure to pay within the prescribed due date under the respective PF Act or Scheme will result in negating employer's claim for deduction permanently forever u/s.36(1)(va). On the other hand, delay in payment of employer's contribution is visited with deferment of deduction on payment basis u/s.43B and is therefore not lost totally. This legal distinction between employees' contribution and employer's contribution under the Act was duly recognised by the Courts also.

6. The CIT(A), thereafter held that the amendment to section 36(1)(va) by insertion of explanation 2 and the amendment to section 43B by insertion to explanation 5 by the Finance Bill 2021 was only declaratory / clarificatory in nature and there therefore was applicable with retrospective effect by necessary intendment of deeming nature expressly stated therein.

7. In Assessment Year 2019-2020, the facts are identical except that the facts in that year, the only disputed addition is employee's share of contribution to PF and ESI and the addition made in this regard is a sum of Rs.10,86,120. Otherwise, the discussion on the issue in the intimation under section 143(1) as well as the appellate order is identical.

8. Aggrieved by the orders of the CIT(A), the Assessee is in appeals before the Tribunal. I have heard the rival submissions. I find that identical issue has been dealt with in the following decisions in which it has been held that the amendment to the provisions of Sec.36(1)(va) and Sec.43B of the Act, by the Finance Act, 2021 is prospective.

M/s Mahadev Cold Storage vs Jurisdictional AO - ITA.No.41 & 42/Agra/2021

M/s Essae Teraoka (P.) Ltd vs DCIT - [2014] 43 taxmann.com 33 (Karnataka)

Anand Kumar Jain vs ITO - ITA NO 4192/MUM/2012

ValueMomentum Software Services Private Limited vs. DCIT I.T.A. No. 2197/HYD/2017 [Assessment Year: 2013-14] dated 19.05.2021

Mohan Ram Chaudhary vs. ITO ITA No. 51&54-55/Jodh/2021 [Assessment Year: 2018-19] dated 28.09.2021

9. The Hon'ble Karnataka High Court in the case of Essae Teraoka Pvt. Ltd., (supra) has taken the view that employee's contribution under section 36(1)(va) of the Act would also be covered under section 43B of the Act and therefore if the share of the employee's share of contribution is made on or before due date for furnishing the return of income under section 139(1) of the Act, then the assessee would be entitled to claim deduction. Therefore, the issue is covered by the decision of the Hon'ble Karnataka High Court. 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. In the decisions

referred to by us in the earlier paragraph of this order on identical issue the tribunal has taken a view that the aforesaid amendment is applicable only prospectively i.e., from 1.4.2021. We are therefore of the view that the impugned additions made under section 36(1)(va) of the Act in both the Assessment Years deserves to be deleted.

10. The learned DR however submitted that if ultimately the Hon'ble Supreme Court takes a view that even prior to amendment to Sec.43B and Sec.36(1)(va) of the Act, employees share of contribution which is beyond the due date prescribed under the respective law relating to PF and ESI contribution, cannot be allowed as deduction even if paid on or before due date for filing return of income u/s.139(1) of the Act, the same should be disallowed then the revenue should be at liberty to pray for recall of this order. The prayer so made is accepted, subject to statutory limitations, if any.

11. In the result, both the appeals of the assessee are allowed. In view of the decision in the appeals, the stay petitions do not require any consideration and are therefore dismissed as infructuous.

Pronounced in the open court on the date mentioned on the caption page.

(N. V. VASUDEVAN)
Vice President

Bangalore.
Dated: 11.11.2021.
/NS/*

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.