IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "SMC-B", BANGALORE

Before Shri George George K, Judicial Member

ITA No.532/Bang/2021 : Asst.Year 2018-2019

M/s.Woodpeck Deco Products 114/115 Petechannappa Industrial Estate, Kamakshipalya Magadi Road Bangalore – 560 079. **PAN : AAAFW0083B.**	v.	The Deputy Commissioner of Income-tax CPC Bangalore
(Appellant)		(Respondent)

Appellant by : Smt.Suman Lunkar, CA
Respondent by : Sri.Ganesh R.Ghale, Standing Counsel

Date of Hearing : 09.11.2021		**Date of Pronouncement : 10.11.2021**

O R D E R

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 31.08.2021. The relevant assessment year is 2018-2019.

2. The grounds raised reads 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 an~ 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 precedents 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 by binding precedents allowed the appeal. On the contrary, the dismissal of appeal despite

binding judicial precedents 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, clarificatory and declaratory in nature and in thus confirming the disallowance of Rs.23,823/- 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 appellant denies the liability to pay interest as levied u/s 234A, 234B and 234C of the Act. 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 and interest levied be also deleted."

3. Brief facts of the case are as follows:

For the assessment year 2018-2019, return of income was filed on 27.09.2018 declaring income of Rs.1,20,540. The assessee was served with an intimation u/s 143(1) of the I.T.Act by assessing a sum of Rs.1,44,359. The reason for the difference between the returned income and the assessed income u/s 143(1) of the I.T.Act was on account of disallowance of sum of Rs.23,823 being late remittance of employees' contribution to PF and ESI under the respective Acts.

4. Aggrieved by the intimation u/s 143(1) of the I.T.Act, the assessee preferred an appeal before the first appellate authority. It was stated that the assessee had paid the employees' contribution to PF and ESI prior to the due date of filing of the return u/s 139(1) of the I.T.Act. Therefore, it was submitted that the assessee is entitled to deduction of employees' contribution to PF and ESI having regard to the provisions of section 43B of the I.T.Act. In this context, the assessee relied on the judgment of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT, reported in 366 ITR 408 (Kar.).* The CIT(A), however, rejected the appeal of the assessee. The CIT(A) by placing reliance on the judicial pronouncements in favour of the Revenue and the amendment to section 43B and 36(1)(va) of the I.T.Act by Finance Act, 2021, held that the amendment is clarifactory in nature and has got retrospective operation.

5. Aggrieved, assessee has filed this appeal before the Tribunal. The learned AR relied on the order of the Tribunal in the case of M/s. Shakuntala Agarbathi Company Vs. DICT in ITA No.385/Bang/2021 (order dated 21.10.2021).

6. The learned Standing Counsel submitted that the amendment by Finance Act, 2021 to section 36(1)(va) and 43B of the I.T.Act is clarificatory and has got retrospective operation. The learned Standing Counsel further submitted that as against 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 assessee's SLP before the Hon'ble Apex Court is pending. Therefore, it was prayed that the A.O. may be directed to follow the outcome of the judgment of the Hon'ble Supreme Court.

7. I have heard rival submissions and perused the material on record. On identical facts, the Bangalore Bench of the Tribunal in the case of M/s. Shakuntala Agarbathi Company Vs. DCIT (supra) by following the dictum laid down by the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT (supra)*, had held that the assessee would be entitled to deduction of employees' contribution to PF and ESI provided that the payments were made prior to the due date of filing of the return of income u/s 139(1) of the I.T.Act. It was further held by the ITAT that amendment by Finance Act, 2021, to section 36[1][va] and 43B of the Act is not clarificatory. The relevant finding of the ITAT in the case of M/s. Shakuntala Agarbathi Company Vs. DCIT (supra), reads as follows:

"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 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 Actby 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 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."

7.1 Therefore, the amended provisions of section 43B as well as 36(1)(va) of the I.T.Act are not applicable for the assessment year under consideration. By following the binding decision of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT (supra)*, the employees' contribution paid by the assessee before the due date of filing of return of income u/s 139(1) of the I.T.Act is an allowable deduction. Accordingly, I decide this issue in favour of the assessee and the disallowance made by the Assessing Officer is deleted.

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

Order pronounced on this 10th day of November, 2021.

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 10th November, 2021.
Devadas G*

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

Asst.Registrar/ITAT, Bangalore