

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

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

ITA No.426/Bang/2021 : Asst.Year 2017-2018

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| M/s.Zenpower Technologies LLP No.92/1B Electronics City Phase I Konappana Agrahara Bangalore - 560 100. PAN : AABFZ7345L. | v. | The Additional Director of Income Tax, CPC Bangalore. |
| (Appellant) | | (Respondent) |

Appellant by : Sri.B.S.Balachandran, Advocate
Respondent by : Smt.Priyadarshini Besaganni, JCIT-DR

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| Date of Hearing : 10.11.2021 | Date of Pronouncement : 11.11.2021 |
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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 30.07.2021. The relevant assessment year is 2017-2018.

2. The grounds raised reads as follows:

"1. LEGAL GROUNDS:

1. The order dated 30 July 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 learned OT(A) erred in law and on facts in dismissing the appeal of the Appellant and upholding the rectification order dated 01 June 2020 passed by the learned Assessing Officer ("Ld AO") under section 143(1) of the Income-tax Act, 1961 ("Act").

GROUND ON MERITS:

3. The Ld CIT(A) and the Ld AO erred in determining the total income of the Appellant for AY 2017-18 at Rs.1,42,05,697/- against the returned income of

Rs.1,36,56,394/-.

4. The Ld CIT(A) erred in law and on facts in upholding the addition of Rs. 5,49,303/- made by the Ld AO towards disallowance of PF and ESI contribution of employees paid beyond the due date under section 36(1)(va) read with section 43B of the Act.

5. 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 to 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 .

6. 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 Shabar Enterprises (2008) 298 ITR 141 (Kar), CIT v Spectrum Consultants India Pvt t.tc (WA No.4077/2013), Essae Teraoka Pvt Ltd v OCIT (ITA No.480/2013);

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

8. The Ld CITCA) 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 AY 2021-22 and subsequent AY.

INTEREST UNDER SECTION 234B AND 234C:

9. The Ld CITCA) has erred in upholding the order of the Ld AO levying interest under section 234B and 234C of the Act.

10. The Ld CITCA) has erred in law and on facts in not appreciating that the Ld AO had committed mistake in computation of interest under section 234B and 234C of the Act.

11. The Ld CITCA) erred in not appreciating that the Appellant commenced its business from November 2016 and accordingly, the Ld AO ought to have computed the interest under section' 234C only for two quarters and should have given credit to the amounts subsequently paid by the Appellant.

12 The Ld CITCA) erred in not appreciating that the Appellant had discharged the entire tax liability in August 2017 while the return of income was filed in October 2017. The Ld AO has erred in computing the interest under section 234B 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. Brief facts of the case are as follows:

For the assessment year 2017-2018, return of income was filed on 06.10.2017 declaring income of Rs.1,36,56,394. The assessee was served with an intimation u/s 143(1) of the I.T.Act by assessing a sum of Rs.1,42,05,697. 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.5,49,303 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) after noticing the difference between the employer's contribution and employees' contribution to PF and ESI held that only employer's contribution to the PF and ESI is entitled to deduction u/s 43B of the I.T.Act, if the payments are made prior to the due date of filing of the return u/s 139(1) of the I.T.Act. Further, by placing reliance on the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021, concluded that the amendment is clarificatory and retrospective in 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 Departmental Representative supported the orders of the Income Tax Authorities.

7. We 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 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 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, we 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 11th day of November, 2021.

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

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 11th 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