

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

**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.423/Bang/2021
AssessmentYear: 2019-20

Dentspro India Private Limited No.3355/1, K.R. Road Banashankari 2 <sup>nd</sup> Stage Bangalore 560 070  <b>PAN NO :AAECD2677H</b>	<b>Vs.</b>	ACIT Circle-2(1)(2) Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Raghavendra Chakraborty, A.R.
<b>Respondent by</b>	:	Smt. Priyadarshini Besagani, D.R.

<b>Date of Hearing</b>	:	09.11.2021
<b>Date of Pronouncement</b>	:	12.11.2021

**O R D E R**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

The assessee has filed this appeal challenging the order passed by Ld. CIT(A), National Faceless Appeal Centre and it relates to assessment year 2019-20. The assessee is aggrieved by the decision of Ld. CIT(A) in confirming the disallowance of Rs.2,59,643/- made u/s 36(1)(va) of the Income-tax Act,1961 [‘the Act’ for short] by CPC while processing the return of income filed by the assessee u/s 143(1) of the Act.

2. We heard the parties and perused the record. The assessee is engaged in the business of marketing and providing services of

dental and medical equipments and accessories. The return of income filed by the assessee was processed u/s 143(1) of the Act, wherein the Centralised Processing Centre (CPC) disallowed the employees contribution of provident fund aggregating to Rs.2,59,643/-, apparently on the reasoning that the same was not paid within the due date prescribed under the PF Act. The assessee filed the appeal before Ld. CIT(A) contending that the payments have been made before the due date for filing the return of income and hence disallowance u/s 36(1)(va) r.w.s. 43B of the Act is not called for. The Ld. CIT(A) noticed that the Finance Act, 2021 has inserted explanation (5) in section 43B of the Act and Explanation (2) in section 36(1)(va) of the Act, which read as under:-

*“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”.*

***Explanation 2 to section 36(1)(va) reads as under:***

*“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.”*

3. Accordingly, the Ld. CIT(A) took the view that the above said explanation shall apply to the year under consideration also and hence the impugned deduction is not allowable to the assessee since they have been paid beyond the date prescribed under the PF Act. Accordingly, he confirmed the disallowance made by the CPC. Aggrieved, the assessee has filed this appeal before us.

4. We notice that an identical issue has been examined by the coordinate bench in the case of Shri Gopal Krishna Ashwini Kumar Vs. ADIT (ITA No.359/Bang/2021 dated 13.10.2021 and it was

decided in favour of the assessee. We notice that the assessee has furnished the details of belated payment of PF as under:-

Sl.No.	Particulars of Expenses	Due date as per Income tax	Paid date	Amount (Rs.)
1	PF payment May 2018	31-10-19	01-03-19	22,044
2	PF Payment June 2018	31-10-19	01-03-19	23,844
3	PF Payment July 2018	31-10-19	01-03-19	23,844
4	PF Payment Aug 2018	31-10-19	01-03-19	23,844
5	PF Payment Sept 2018	31-10-19	01-03-19	23,844
6	PF Payment Oct 2018	31-10-19	01-03-19	23,844
7	PF Payment Nov 2018	31-10-19	01-03-19	23,844
8	PF Payment Dec 2018	31-10-19	01-03-19	23,844
9	PF payment Jan 2019	31-10-19	01-03-19	34,884
10	PF payment Mar 2019	31-10-19	16-04-19	35,807
	<b>Total</b>			<b>2,59,643</b>

A perusal of the above said table would show that the entire amount of Rs.2,59,643/- has been paid by the assessee before the due date prescribed for filing return of income for the year under consideration.

5. On identical set of facts, the coordinate bench has decided this issue in favour of the assessee in the case of Shri Gopal Krishna Ashwini Kumar (supra) with the following observations:-

*“3. Aggrieved by the aforesaid addition made to the total income of the assessee, the assessee preferred appeal before the CIT(A). 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*

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*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.*

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4. *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. The CIT(A) in this regard referred to the decision of the Hon'ble Gujarat High Court in CIT v. Gujarat State RoadTransport Corpn. [2014] 41 [taxmann.com](http://taxmann.com) 100/ 366 ITR 170/223 Taxman 398 (Guj.) wherein the aforesaid distinction has been accepted*

5. *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. The CIT(A) finally dismissed the appeal of the Assessee.*

6. *Aggrieved by the order of the CIT(A), the Assessee is in appeal before the Tribunal. We have heard the rival submissions. We find that the issue raised in this appeal whether there could be disallowance of Employees share of ESI/PF paid belatedly as per the due dates laid down in the law relating to contribution of ESI/PF, if the same has nevertheless been paid on or before the*

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*due date for filing return of income u/s.139(1) of the Act, has been decided in favour of the Assessee in the following decisions, holding that there cannot be any such disallowance:*

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

*M/s EssaeTeraoka (P.) Ltd vs DCIT - /20141 43 [taxmann.com](http://taxmann.com) 33 (Karnataka)*

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

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

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

7. *The Honourable 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*

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*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.”*

6. Consistent with the view taken by the coordinate bench, we hold that the explanations inserted by the Finance Act, 2021 will not apply to the year under consideration and accordingly the impugned payment is allowable as deduction since it has been paid before the due date prescribed u/s 139(1) for filing return of income, as held in the case of Essae Teraoka Pvt. Ltd., (supra), by Hon'ble Karnataka High Court. Accordingly, we set aside the order passed by Ld. CIT(A) and direct the A.O. to delete the impugned disallowance.

7. In the result, the appeal filed by the assessee is allowed.  
Order pronounced in the open court on 12<sup>th</sup> Nov, 2021

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 12<sup>th</sup> Nov, 2021.  
VG/SPS

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Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,  
ITAT, Bangalore.**