

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C" BENCH: BANGALORE**

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

ITA. No. 398/Bang/2021

Assessment Year: 2017-18

M/s. Sony India Software Centre Pvt. Ltd., 2 nd Floor, South Wing, Tower 2, Hibiscus Embassy Tech Village (Vrindavan Tech Village)(SEZ), Outer Ring Road, Devarabesanahalli, Varthur Hobli, Bangalore – 560 103. PAN: AAQCS7006K	vs.	The Joint Commissioner of Income Tax (OSD), Circle – 6 (1)(1), Bangalore.
(Appellant)		(Respondent)

Assessee by :	Shri Narendra Kumar Jain, Advocate
Revenue by :	Smt. Priyadarshini Baseganni, JCIT (DR)

Date of Hearing :	01.11.2021
Date of Pronouncement :	05.11.2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against the order dated 28/07/2021 passed under section 250 of the Act by the Ld.CIT(A), NFAC, Delhi on following grounds of appeal:-

“1. The order of Honourable Commissioner of Income Tax (Appeals) (hereinafter referred as "CIT(A)" for brevity) to the extent prejudicial to the Appellant is bad in law.

2. The CIT(A) has erred in confirming the action of Assessing Officer ('AO') in treating delayed remittance of employee's contribution to provident fund amounting to Rs.1,58,53,554/- as income of the Appellant under section 2(24)(x) read with section 36(1)(a) of the Act.

3. The CIT(A) has erred confirming the action of the AO without appreciating the fact that:

(i) employees' contribution to provident fund remitted before due date for filing return of income under section 139(1) of the Act is allowable under section 43B of the Act and as per judicial decisions.

(ii) Remittance for the month of August 2016 of Rs.43,53,487/- out of the alleged delayed remittance of Rs.1,58,53,554/- was remitted before the due date prescribed under the Provident Fund Act

4. The CIT(A) has erred in holding that amendment brought out by Finance Act, 2021 in relation to Section 36(1)(va) and Section 43B is retrospective in nature without appreciating the fact that Memorandum to Finance Bill, 2021 clearly provides that the amendment is applicable for AY 2021-22 and subsequent assessment years.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly.”

2. Brief facts of the case are as under.

M/s. Sony India Software Centre Pvt. Ltd. is a company incorporated under the provisions of Companies Act, 1956. The assessee is engaged in providing software development services. The assessee has a unit located in SEZ. The assessee filed its return of income for the AY 2017-18 on 30.11.2017 declaring a total income of Rs. 40,11,80,350/-.

2.1 The CPC, Bangalore processed this return and made addition of Rs. 1,58,53,554/- u/s. 36(1)(va) on account of delay in payment of employees' contribution of provident fund/ESI. Further, the CPC also denied the assessee's claim of deduction u/s. 10AA of Rs. 21,62,67,542/- which was added to the total income.

Aggrieved by the order of Ld.AO, the assessee preferred appeal before the Ld.CIT(A).

2.2 The Ld.CIT(A) held that amendment brought in by *Explanation 5 to sec. 36(1)(va) by Finance Act 2021* is retrospective in effect. He thus upheld the addition made by the Ld.AO.

Aggrieved by the order of Ld.CIT(A), the assessee is in appeal before us.

3. The Ld.AR submitted that, during the year under consideration, sum of Rs.1,58,53,554/- of employee's contribution to the provident fund was remitted after the due date mentioned in the PF Act, but before filing the return of Income u/s. 139(1), the details are tabulated as follows:

Employees Contribution to PF				
SI. No	Month	Due date as per PF Act	Date of payment	Amount (Rs.)
1	May-16	15-Jun-2016	16-Jun-2016	45,45,706
2	*August -16	15-Sep-2016	09-Sep-2016	43,53,487
3	December-17	20-Jan-2017	23-Jan -2017	34,97,206
4	February-17	15-March-2017	18-March-2017	34,57,155
Sub Total				1,58,53,554

3.1 The Ld.AR submitted that the said amounts were remitted before the due date of filing the income tax return as prescribed under section 139(1) and therefore allowable as deduction. With respect to the contention of the Ld.CIT(A) that the amendment made by Finance Act, 2021 is retrospective in nature, the Ld.AR submitted that, the amendment is applicable from AY 2021-22 onwards. He relied on the following decisions in support.

- CIT v Sabari Enterprises [2008] 298 ITR 141 (KAR.)
- Essae Teraoka P Ltd v DCIT 366 ITR 408
- M/s Jana Urban Services for Transformation Pvt. Ltd v DCIT ITA No.307/Bang/2021 by order dated 11.10.2021.
- M/s.Bevel Gears (India) Pvt.Ltd v ACIT ITA No.376/Bang/2021 by order dated 11.10.2021.

On the contrary, the Ld.Sr.DR relied on the orders passed by the authorities below.

We have perused the arguments advanced by both sides in light of records placed before us.

4. Co-ordinate bench of this *Tribunal* in case of *Jana Urban Services for Transformation Pvt. Ltd. (supra)* had considered identical issue by observing as under:

“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 Essac 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 sub-para(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 paragraph-30 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 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 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 assesseees 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 ld.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/2018*
- 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 ValueMomentum 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.
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 ld.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 ld.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 ld.AR. Accordingly the appeal of the assessee is allowed."

4.1 The above decision was rendered following the decision of Hon'ble Karnataka High Court in case of *CIT Vs. Sabari Enterprises (supra)*.

4.2 Respectfully following the above view, we hold that the amendment brought in by *Finance Act, 2021* cannot be held

retrospective in nature. We also direct the Ld.AO to grant deduction in respect of employees' contribution to PF and ESI since the assessee made payment before the due date of filing of the return of Income u/s. 139(1) of the Act.

Accordingly, the grounds raised by assessee stands allowed.

In the result appeal filed by assessee stands allowed.

Order pronounced in open court on 05th November, 2021.

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

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Dated: 05th November, 2021.
/MS/

Copy to

1. The Appellant
2. The Respondent
3. CIT(A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore