

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

**Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.458/Bang/2021 : Asst.Year 2018-2019

ITA No.459/Bang/2021 : Asst.Year 2019-2020

M/s.Amicorp Management India Private Limited, Unit 701 & 702, 7 <sup>th</sup> Floor, Campus 6B, RMZ Eco World, Sarjapur Outer Ring Road Bangalore -560 103. <b>PAN : AAFCA1468C.</b>	v.	The Deputy Commissioner of Income-tax, CPC, Bangalore
(Appellant)		(Respondent)

Appellant by : Sri.Pranav Krishna, Advocate  
Respondent by : Smt.Priyadarshini Besaganni, JCIT-DR

<b>Date of Hearing : 17.11.2021</b>	<b>Date of Pronouncement : .11.2021</b>
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**ORDER**

**Per George George K, JM:**

These appeals at the instance of the assessee are directed against two orders of the CIT(A), both dated 23.07.2021. The relevant assessment years are 2018-2019 and 2019-2020.

2. Since common grounds are raised in these appeals, except variance in figures, grounds raised for assessment year 2018-2019 are reproduced :-

*“1. The order of the learned authorities below in so far as it is against the appellant is opposed to law, equity, facts, weight of evidence, probabilities and circumstances of the case.*

*2. The appellant denies itself to be assessed to an income over and above the returned income of Rs.13,99,90,463/- on the facts and circumstances of the case.*

3. *The learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (in short CIT(A)), is not justified in confirming the additions of Rs. 25,29,431/- mechanically made by the Centralised Processing Centre (CPC) under the provisions of section 36(1) (va) of the Income Tax Act, 1961 (in short the Act) by holding that the Appellant had deposited the Employees' Contribution to Provident Fund after the due date is bad in law under the facts and circumstances of the case.*

4. *The learned Authorities below erred in mechanically disallowing the Employees Contribution to Provident Fund u/s 36(1) (va) of the Act, without appreciating the fact that the same is remitted before the due date for filing the Return of Income u/s 139(1) of the Act.*

5. *The learned authorities below erred in ignoring the fact that as long as the contribution is made to the PF authorities before the due date for filing of the Income Tax Returns the same is required to be allowed. This view has been taken by jurisdictional High Court of Karnataka.*

6. *There is plethora of decisions by the honorable Jurisdictional High Court. The NFAC is bound by the decision of Jurisdictional Karnataka High Court as the Assessee is situated within the territorial jurisdiction of Karnataka, the learned authorities below erred in not following the Judgement relied on by the appellant from the facts and circumstances of the case is against the set law.*

7. *The learned CIT(A) for the reasons best known to him has ignored the judgements relied on by the appellant, the learned Authorities below erred in not considering the fact that the Apex Court and the High Courts have given relief in the similar matters.*

8. *The learned Commissioner of Income Tax (Appeals), National Faceless Appeals Centre has failed in appreciating the fact that the Amendment to Section 36(1) (va) of the Act shall be prospective in nature and shall not retrospective effect. The authorities below without application of mind has mechanically dismissed the appeal stating the recent ament made in Finance Act 2021, the action of the authorities below is bad in law.*

9. *The learned authorities below failed to appreciate the fact that the Amendment is having only prospective effect and cannot be applied retrospectively, it is amply clarified in the Memorandum in para 6.2.2 of the Finance Act 2021 to Amendment to section 36(1) (va) of the Act, which is explicitly mentioned in the clear words that, the above amendment*

*takes effect from 1st April 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. Hence the contention taken by the learned CIT(A) is bad in law.*

*10. The appellant relies on the ratio of recent decision of Honorable Income Tax Appellate Tribunal in the case of Salzgitter Hydraulics (P.) Ltd. v. Income- Tax Officer, Ward 3(1), Hyderabad [2021] 128 taxmann.com 192 (Hyderabad Trib.), where for the assessment year 2019-20 employee's contribution ESI/PF has been deposited by assessee employer before due date of filing section 139(1) return but after due date prescribed in corresponding statutes and Assessing Officer added said amount to income of assessee per provisions of section 36(1) (va), it was held that, since amendments section 36(1)(va) as well as 438 vide Finance Act, 2021 to this effect applies w.e.f 1-4-2021 only, impugned disallowance for assessment year 2019-20 was not sustainable.*

*11. Appellant denies itself liable to be charged interest u/s 234 of the Act from the facts and circumstances of the case.*

*12. The appellant craves leave to add, alter, amend, substitute, change and dele any of the grounds of appeal.*

*13. For the above and other grounds that may be urged at the time of hearing of the appeal, the appellant prays that the appeals may be allowed and justice rendered.”*

3. Brief facts of the case are as follows:

For the assessment years 2018-2019 and 2019-2020, returns of income were filed on 06.02.2019 and 29.11.2019, declaring income of Rs.13,99,90,463 and Rs.11,95,09,250, respectively. The assessee was served with an intimation u/s 143(1) of the I.T.Act by assessing a sum of Rs.14,25,19,894 for assessment year 2018-2019 and Rs.12,16,44,172 for assessment year 2019-2020. 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.25,29,431 ( for A.Y.2018-2019) and Rs.21,34,922 (for A.Y.

2019-2020) 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) noticed the judicial pronouncements for and against the assessee and held that the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory and has got retrospective operation.

5. Aggrieved, assessee has filed this appeal before the Tribunal. The learned AR submitted that an identical issue was decided in favour of the assessee by 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 the 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 appelland-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 years 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 appeals filed by the assessee are allowed.

Order pronounced on this 17<sup>th</sup> day of November, 2021.

**Sd/-**  
**(Chandra Poojari)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(George George K)**  
**JUDICIAL MEMBER**

Bangalore; Dated : 17<sup>th</sup> 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