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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENTAND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA Nos.340, 341/Bang/2021
Assessment Years : 2018-19, 2019-20

M/s. Aspiration Advertising Private Limited, No.301, No.16, Golden Bell Apartments, 8th A Cross, Kodihalli, Bengaluru. **PAN : AAECA 7711 M**	Vs.	DCIT, Central Processing Centre, Bengaluru.

Assessee by	:	None
Revenue by	:	Smt. Shilpa N. C, Additional CIT(DR)(ITAT), Bengaluru

Date of hearing	:	11.10.2021
Date of Pronouncement	:	12.10.2021

O R D E R

Per N. V. Vasudevan, Vice President

Theseare appeals filed by the assessee against 2 orders both dated 24.04.2021 of CIT(A) National Faceless Appeal Centre (NFAC), Delhi, relating to Assessment Years 2018-19, 2019-20.

2. The Assessee is a Private Limited Company. The Assesse filed return of income for AY 2018-19 declaring loss of Rs.12,87,596. In an intimation dated 15.11.2019 issued u/s.143(1) of the Act, the Centralized Processing Centre (CPC) assessed the Assessee on a Loss of Rs.9,19,580/- as against the returned loss of Rs.12,87,596/-. The following addition having made to the income returned: (a) A sum of Rs. 3,50,823/- was added as income representing contribution to

PF/ESI to the extent not paid on or before the due date as mentioned in Sec 36(1)(va) of the Income Tax Act 1961. (b) A sum of Rs. 17,193/- was added as income representing Inconsistency in Total Amount of disallowance u/s 37 relating to Club Expenses.

3. The Appellant received communication of proposed adjustment u/s 143(1)(a) of Income Tax Act 1961 dated 10/05/2019 proposing to adjust Rs.7,84,069/- representing contribution to PF/ESI to the extent not paid on or before the due date as mention in Sec 36(1)(va) of income tax 1961 to the tune of Rs.7,66,876/- and Rs. 17,193/-relating to inconsistency in total disallowance u/s 37 on account of club expenses. The Assessee submitted a response to the same by disagreeing the proposal for adjustment stating that Out of Rs.7,66,876/, Rs.4,16,053/- belongs to employer share of ESI and PF which is allowable u/s 43B if paid before the due date of filing u/s 139(1) and balance Rs.3,50,823 belongs to employee share of PF and ESI, .Employee ESI and PF contribution has been paid before the due date for filing of return u/s.139(1) of the Act and hence has been considered allowable on the basis of decision of Supreme Court in CIT vs. Alom Extrusions Ltd (2009) 319 ITR 306 (SC) and other cases such as CIT Vs Magus Customers Dialog (P) Ltd (Kar), CIT Vs Sabri Enterprises (2008) 298 ITR 141 (Kar), Consultants India P Ltd Vs CIT Bangalore III (2013) 597/34 Taxman.com 20 (Kar). With regard to inconsistency in total disallowance u/s 37, the sum of Rs.17,193/- incurred as Club Expenses is for the purposes of Customers and the same is allowable on the basis of decision of Supreme Court in United Glass Manufacturing Company.

4. However the CPC by its order dated 15.11.2019, while processing the return electronically added back Rs.3,28,940/- of Employees contribution towards PF and Rs.21,883/- towards Employees contribution toward ESI and difference in club expenses was also been disallowed.

5. Aggrieved by the aforesaid order of the Central Processing Centre (CPC), assessee filed appeal before the CIT(A). In so far as the disallowance of employee share of PF and ESI, the CIT(A) firstly referred to the tax audit report in Form 3CD dated 24.09.2018 wherein in clause 20(b), the auditor had clearly quantified that the employee share of PF and ESI had been paid beyond the due date specified in the respective law relating to contribution of ESI and PF. The CIT(A) thereafter referred to the provisions of section 143(1)(a)(iv) of the Income Tax Act, 1961 (hereinafter called 'the Act') which provides that disallowance of any expenditure indicated in the audit report but not taken into account in computing the total income in the return can be added while processing the return of income under section 143(1) of the Act. Similarly, even for club expenses, the tax auditor in the reported form 3CE in clause 21(a) quantified as expenditure of a personal nature and therefore the same was added to the total income while processing the return under section 143(1) of the Act.

6. 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 been applied for the purposes of determining the "due date" under this clause;'."

The finance Act, 2021 also amended section 43B by inserting Explantion-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 asum received by the assessee from any of his employees to which the provisions of subclause (x) of clause (24) of section 2 applies.

7. 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 following judicial pronouncement wherein the aforesaid distinction has been accepted viz., Hi-tech India Pvt. Ltd., Vs. UoI 227 ITR 446 (AP), CIT Vs. Madras Radiators and Pressings Ltd., (2003) 129 Taxmann 709 (Madras)Unifac Management Services (India) (P.) Ltd. v. Dy. CIT [2018] 100 taxmann.com 244 42019] 260 Taxman 60/[2018] 409 ITR 225 (Mad.), CIT v. Gujarat State Road Transport Corpn. [2014] 41 taxmann.com 100/ 366 ITR 170/223 Taxman 398 (Guj.), CIT v. Merchem Ltd. [2015] 61 taxmann.com 119/235 Taxman 291/378 ITR 443 (Ker.). (iv) B.S. Patel v. Dy. CIT [2010] 326 ITR 45742008] 171 Taxman 304 (MP), Popular Vehicles & Services Pvt Ltd v. CIT [2018] 96 taxmann.com 13/257 Taxman 120/406 ITR (Ker).

8. 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 concluded as follows:

"6. In view of the facts of the case and the legal position as discussed above, it is held that the disallowance made u/s.143(1) by DCIT, CPC, Bangalore denying the claim of deduction u/s.36(1)(va) on account of appellant's failure to pay the employee's contribution of PF/ESI within the prescribed due dates as per section 36(1)(va) is strictly in accordance with law and clearly comes under the prima facie adjustments as envisaged u/s.143(1)(a)(iv). Therefore. the adjustment made to this effect by CPC vide intimation u/s.143(1) is confirmed fully,- Appellant's G e nd No:4-and 2 on the issue fails.

7. On the issue of Club House expenses, it is seen that the total expenses as reported in Tax Audit Report in Form No.3CD at clause 21(a) is Rs.30,601/- out of which the appellant itself had disallowed Rs.13,408/- in the Return of Income filed. There is no basis as to why the entire sum was not considered for disallowance when the Tax Audit Report has duly identified the payment as such. Now, the claim of the appellant that the entire sum should be allowed in view of the decision of the Hon'ble Supreme Court in the case of United Glass Manufacturing Company on the ground that the same was incurred for guests is not borne on facts on record. Not only is the claim of the appellant contrary to the audited results as reported by the Tax Auditor but also it requires detailed verification of facts with reference to its books of accounts and other records which is beyond the scope of prima facie adjustments as envisaged u/s.143(1).

7.1 On the other hand, the Tax Audit Report has not reported any such amount as being in the nature of expenditure incurred for guests to such extent as claimed by the appellant. The issue involved is a question of fact and the fact as per records as made available to the DCIT. CPC, Bangalore in the form of Income Tax Return in ITR-6 and the Tax Audit Report in Form No.3CD. both filed by the appellant itself, do not mention any such claim or reveal any such facts. Therefore. there is no reasons to interfere with the adjustments carried out by CPC u/s.143(1)(va) on the basis of Tax Audit Report submitted by appellant itself. Appellant's Ground No.3 on the issue of club expenses fails.

8. In the result, appellant's Grounds fail on both issues. Accordingly. additions are fully confirmed. Appeal is dismissed."

9. In Assessment Year 2019-2020, the facts are identical except that the facts in that year, the only disputed addition is employee's share of contribution to PF and

ESI and the addition made in this regard is a sum of Rs.1,92,932/0. Otherwise, the discussion on the issue in the intimation under section 143(1) as well as the appellate order is identical. None appeared for the assessee. We however heard the learned DR and proceeded to decide the issue on the basis of judicial decisions on identical issue in the following decisions:

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

M/s Essae Teraoka (P.) Ltd vs DCIT - [2014] 43 taxmann.com 33 (Karnataka)

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

ValueMomentum Software Services Private Limited vs. DCIT I.T.A. No. 2197/HYD/2017 [Assessment Year: 2013-14] dated19.05.2021

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

10. The Hon'ble 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 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.

11. With regard to disallowance of club expenses in Assessment Year 2018-19, we find under the 2nd proviso to section 143(1)(a) of the Act, the CPC has to take into consideration the response received from the assessee before processing the return under section 143(1)(a) of the Act. The assessee in his response to the CPC before making the impugned addition has clearly submitted that in the light of the decision of the Hon'ble Supreme Court in the case of United Glass Manufacturing Co., Civil Appeal Nos. 6447 to 6449 of 2012, dated 12-9-2012 held that club expenses have to be regarded as having been incurred for the purpose of business of an assessee. The CPC while processing the return under section 143(1)(a) of the Act has not taken note of this aspect and has gone by the observations in the tax audit report. We are therefore of the view that the said disallowance cannot be sustained in a processing by the CPC under section 143(1)(a) of the Act as the issue is debatable. We therefore direct the said addition also deserves to be deleted.

12. In the result, both the appeals of the assessee are allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(CHANDRA POOJARI)	**(N. V. VASUDEVAN)**
Accountant Member	**Vice President**

Bangalore.
Dated: 12.10.2021.
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Copy to:

1.	Appellants	2.	Respondent
3.	CIT	4.	CIT(A)
5.	DR	6.	Guard file

By order

Assistant Registrar,
ITAT, Bangalore.