

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

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

ITA Nos.596 & 597/Bang/2021
Assessment year : 2017-18 & 2019-20

Mavinahalli Shivananjappa Vijay Kumar, No.5771, 1st Floor, Shrinidhi Nilaya, Govindappa Layout, Subhash Nagar, Nelamangala, Bengaluru. PAN: CBKPS 5775 B	Vs.	The Dy. Commissioner of Income-tax, CPC, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Prakash Hegde, C.A
Revenue by	:	Shri Srinath Sadanala, Addl.CIT (DR)

Date of hearing	:	13.12.2021
Date of Pronouncement	:	13.12.2021

ORDER

PER BENCH:-

The assessee has filed these two appeals challenging the orders passed by Ld CIT(A), National Faceless Appeals Centre and they relate to the assessment years 2017-18 and 2019-20. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the disallowance of Employees contribution of PF & ESI u/s 36(1)(va) of the Act for remitting the dues beyond the due date prescribed under the respective Statutes.

2. The assessee is carrying on business under the name and Style "C.K. Enterprises". In both the years under consideration, the assessee had remitted employees PF & ESI belatedly, i.e., beyond

the due date prescribed in the respective statutes. However, these payments were made before the due date for filing return of income prescribed u/s 139(1) of the Act and hence the assessee claimed these payments as deduction. The details of payments so remitted belatedly are tabulated below:-

Details of Payments	AY 2017-18	AY 2019-20
Employees PF	47,01,453	69,37,752
Employees ESI	27,15,844	15,91,691

3. While processing return of income u/s 143(1) of the Act, the CPC disallowed the above said payments in both the years. The assessee filed rectification applications u/s 154 of the Act for both the years and they were rejected. Hence the assessee filed appeals before Ld CIT(A). However, the Ld CIT(A) also upheld the additions by following the amendment made by the Finance Act, 2021 to sec.36(1)(va) of the Act. Aggrieved, the assessee has filed these appeals before the Tribunal.

4. We heard the parties and perused the record. We notice that an identical issue has been examined by the co-ordinate bench in the case of Shri Gopalakrishna Aswini Kumar vs. ACIT (ITA No.359/Bang/2021 dated 13-10-2021), wherein the co-ordinate bench has expressed the view that the amendment made to sec.36(1)(va) of the Act will have prospective application and hence the decision rendered by Hon'ble jurisdictional Karnataka High Court in the case of M/s Essae Teraoka (P.) [Ltd vs DCIT - \[2014\] 43 taxmann.com 33 \(Karnataka\)](#). The relevant portion of the order

passed by the Tribunal, in the case of Shri Gopalakrishna Aswini Kumar (supra), are extracted below:-

“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 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 sub clause (x) of clause (24) of [section 2](#) applies.

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 Road ITA No.359/Bang/2021](#) Transport Corpn. [2014] 41 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 submissionis. 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 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 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] dated 19.05.2021

Mohan Ram Chaudhary vs. ITO ITA No. 51&54-55/J0odh/2021 [Assessment Year: 2018-19] dated 28.09.2021 ITA No.359/Bang/2021

7. 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.”

5. Since the facts prevailing in the present appeals and issue contested are identical with the facts and issue available in the case

of Shri Gopalakrishna Aswini Kumar (supra), the decision rendered by the co-ordinate bench is required to be followed. Accordingly, following the above said decision, we hold that the additions made in both the years are liable to be deleted. Accordingly, we set aside the orders passed by Ld CIT(A) in both the years under consideration and direct the AO to delete the impugned additions in both the years.

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

Order pronounced in the open court on 13th December 2021.

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(B.R Baskaran)
Accountant Member

Bangalore,
Dated, 13th December 2021

/ vms /

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

1. Date of Dictation
2. Date on which the typed draft is placed
before the dictating Member
Date on which the approved draft comes to Sr.P.S
3.
4. Date on which the fair order is placed
before the dictating Member
5. Date on which the fair order comes back to the Sr.
P.S.
6. Date of uploading the order on
website.....
7. If not uploaded, furnish the reason for doing so
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8. Date on which the file goes to the Bench Clerk
.....
9. Date on which order goes for Xerox &
endorsement.....
10. Date on which the file goes to the Head Clerk
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11. The date on which the file goes to the Assistant
Registrar for signature on the order
.....
12. The date on which the file goes to dispatch section for
dispatch of the Tribunal Order
13. Date of Despatch of Order.
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