

IN THE INCOME TAX APPELLATE TRIBUNAL
‘C’ BENCH : BANGALORE
BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No. 550/Bang/2021
Assessment Year : 2018-19

M/s. Fashion Matrix Clothing, No. 284, 2 nd Floor, 2 nd Cross, 4 th Main, 4 th Phase, Peenya Indl. Area, Bangalore – 560 058. PAN: AABFF6092J	Vs.	The Income tax Officer, Ward – 6 (2)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Mahesh Kumar L, Advocate
Revenue by	:	Shri Vilas V Shinde, CIT (DR)

Date of Hearing	:	09-12-2021
Date of Pronouncement	:	14-12-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal by the assessee has been filed by assessee against the order dated 25.08.2021 passed by the National Faceless Appeal Centre (NFAC), Delhi relating to Assessment Year 2018-19.

2. The grounds raised by the assessee are as under:

1. The impugned order passed by the learned Commissioner of Income-tax [Appeals] u/s 250 by upholding the Intimation order of the learned assessing officer passed under Section 143[1][a] of the Act to the extent which is against the appellant is opposed to law, weight of

evidence, probabilities, facts and circumstances of the Appellant's case.

2. The appellant denies his liability with regard the total Income confirmed by the CIT(A)-6 amounting to Rs. 1,15,15,099/- as against the income reported by the appellant of Rs 61,68,312 /- (additions of Rs 53,46,787/- on revised) on the facts and circumstances of the case.

Issue related to Explanation 5 to section 43B

3. The Learned CIT(A) applied the provisions of Finance Act 2021, being explanation 5 to section 43B inserted vide Finance Act 2021, applicable with effect from 01/04/2021 (AY 2021-22) onwards, [i.e., which is applicable prospectively], and thereby learned CIT(A) upheld by confirming the additions made by learned assessing officer -CPC for the AY 2018-19 with regard to payment made to ESI / other fund after due date under respective Act and but paid before filing return of income.

Issue related to 143(1)(a)(iv) - adjustment

4. Further the learned CIT(A) applied the provisions of Finance Act 2021, being adjustment to total income with regard to "Increase in income" indicated in audit report under section 143(1)(a), which is applicable only with effect from 01/04/ 2021 (AY 2021-22) onwards, [i.e., which is applicable prospectively]. Thereby Ld.CIT(A) upheld by confirming the additions made by learned AO-CPC without jurisdiction, by making an adjustment u/s 143(1)[a] and adding Rs. 53,46,787/-to Return of income filed by invoking the provisions of section 36(1)(va)r.w.s 2(24)(x) of the Act.

5. The addition made by the Assessing Officer by way of prima facie adjustment in the intimation issued under section 143(1)(a) was beyond the scope of section 143(1)(a) inasmuch as it did not come within the ambit of prima facie adjustment contemplated under section 143(1)(a). i.e., The adjustment in section 143(1)(a)(vi) is not justified, when there is no disallowance of Expenditure in Audit report, which is not taken in computation of total income.

6. Without prejudice, The adjustment in section 143(1)(a)(vi) is not justified, as there is only increase in income in Audit report. Hence adjustment presuming "disallowance of expenditure" is bad in law, for AY prior to AY 2021-22.

Issue related to section 2(24)(x)

7. Without prejudice, The learned CIT(A) failed to appreciate the income referred under section 2(24)(x), ought to be considered as on 31/03/ 2018(Previous year), and the disallowance has to be made only for the payments beyond due dated falling after previous year (i.e., After 15/04/2018 (Assessment year), being due date under respective labour laws), by invoking the provisions of section Explanation 5 to

section and section 143(1)(a), hence disallowance made with regard to payments made within previous year, is beyond jurisdiction.

8. The ld A.O made adjustment under assumption that there is Income u/s 2(24)(x) as on 31/03/of previous year, on contrary there is no Income under section 2(24)(x), so as to invoke provision of section 36(1)(va), except for month of march, which is also paid within due date under explanation 1 to section 36((1)(va).

9. The learned A.O erred in making adjustment arbitrarily based on report in Form 3CD, even when there is no outstanding pending amount as on last day of previous year, relating to any contribution, so as to constitute income u/s 2(24)(x).

Legal Issue - relating to Finance Act 2021, applicability.

10. Whether the provision of Explanation 5 to section 43B inserted vide Finance Act 2021 is applicable prospectively, more so when the Memorandum explaining the provision in finance bill, 2021 specifically explained that it is applicable with effect from 01/04/2021 (AY 2021-22) onwards.

11. Whether the provision of section 143[1][a] Amended vide Finance Act 2021 is applicable prospectively, more so when the Memorandum explaining the provision in finance bill, 2021 specifically explained that it is applicable with effect from 01/04/2021 (AY 2021-22) onwards.

12. Whether, due to consequence of insertion of Explanation 5 to section 43B vide Finance Act 2021, income under section 2(24) has to be computed with regard to Total income under section 2 (45) for previous year as defined in section 2(34) r/w section 3 "at the end of financial year, i.e., 31/03/FY", as against the monthly as surmised and presumed by the learned AO-CPC and learned CIT (A).

Additional Ground

13. The learned Assessing officer is not justified in disallowing Employer contribution made within due date under section 139(1), as per 1st proviso to section 43B, thereby the disallowance of Rs. 30,63,698/- ought to be deleted.

14. The learned Assessing officer is not Justified in disallowing Employee contribution deposited with in Grace period (5 days), after considering the grace period, there is no delay in any payment (except for Rs 24,026/- paid within 31 day, with regard to ESI), Hence Employee contribution of Rs 22,59,063/- (Rs. 22,83,089 less 24,026) ought to be deleted, for paying within Grace days [Circular No. E. 128(1) 60-III, dated 19-3-1964 as modified by Circular No. E 11/ 128 (Section 14B Amendment) / 73 dated 24- 1 0- 1973] .

Other Issues

15. Judicial Precedent not followed: *The learned Assessing officer failed to consider the decision of Honourable supreme court that the amount paid by way of contribution within due date of section 139(1) ought to have been allowed.*

16. Principle of Natural Justice violated: *The learned CIT(A) passed an order without providing sufficient opportunity, more specifically where the appellant was facing technical glitched on income tax portal to respond to the hearing notice, the learned CIT(A) ought to have given one more sufficient opportunity considering the technical glitches in uploading reply on income tax portal. Hence the order passed by the Learned CIT(A) is against the principles of natural justice and thus the additions confirmed needs to be deleted on the facts of the case.*

17. Interest: *Without prejudice to the right to seek waiver as per the parity of reasoning of the decision of the Hon'ble Apex Court in the case of Karanvir Singh 349 ITR 692, the Appellant denies herself liable to be charged to interest under section 234 B of the Income Tax Act on the facts and circumstances of the case. Further the levy of interest under section 234 B of the Act is also bad in law as the period, rate, quantum and method of calculation adopted on which interest is levied are all not discernible from the assessment order and are wrong on the facts of the case.*

18. *The appellant craves leave of this Hon'ble Tribunal to add, alter, modify, delete or substitute any or all of the above grounds of appeal as may be necessary at the time of hearing of the appeal.*

19. *For these and other grounds that may be urged at the time of hearing of appeal, the Appellant prays that the appeal may be allowed for the advancement of substantial cause of justice and equity.*

3. Brief facts of the case are as under:

The assessee is an individual engaged in business of Jobwork for Readymade garments. For the assessment year 2018-2019, return of income was filed on 30.10.2018 declaring total income of Rs.61,68,312/-. The return was processed u/s 143(1) of the I.T.Act. In the intimation issued u/s 143(1) of the I.T.Act, the CPC disallowed the employees' contribution to PF and ESI to the tune of Rs.53,46,787/-. The reason for making the disallowance was that the assessee did not remit the employees' contribution

to PF and ESI within the due date specified under the respective Acts.

4. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A). **4.1** Before the Ld.CIT(A), it was submitted that the assessee remitted the employees contribution to PF and ESI before the due date of filing of the return u/s 139(1) of the I.T.Act and in view of the judgment of the *Hon'ble jurisdictional High Court Pr.CIT vs. Hind Filter Ltd. in ITA No. 662 of 2015.* The assessee is entitled to deduction of the same. The Ld.CIT(A), however, dismissed the appeal of the assessee by relying on decision of *Hon'ble Gujarat High Court in case of Gujarat Road Transport Corporation* reported in *(2014) 41 taxmann.com 100.* The CIT(A) noticed the difference between the employees' contribution and the employer's contribution and held insofar as the employees' contribution to ESI and PF, the same need to be remitted within the due date as mentioned in the respective Acts. The CIT(A) also relied on the amendment brought about to section 36(1)(va) and 43B of the I.T.Act.

5. Aggrieved, the assessee has filed this appeal before the Tribunal.

5.1 The Ld.AR submitted that an identical issue is decided in favour of the assessee by the *coordinate Bench* of this *Tribunal* in following cases:

- *M/s. Nirmal Enviro Solutions Pvt. Ltd. vs. DCIT in ITA No. 315/Bang/2021 (order dated 12.10.2021)*

- *Shri Gopalkrishna Aswini Kumar vs. ACIT in ITA No. 359/Bang/2021 (order dated 13.10.2021)*

5.2 The learned Departmental Representative supported the orders of the Income Tax Authorities.

6. We have heard rival submissions and perused the material on record.

6.1 An identical issue was considered by the Tribunal in the case of *The Continental Restaurant & Café Co. v. ITO (supra)*. The relevant finding of the Tribunal reads as follows:-

"7. I have heard rival submissions and perused the material on record. Admittedly, the assessee has not remitted the employees' contribution of PF of Rs.1,06,190 and ESI of Rs.16,055 totaling to Rs.1,22,245 before the due date specified under the respective Act. However, the assessee had paid the same before the due date of filing of the 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 PF and 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.). In holding so, 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 appellant-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 I.T.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 of PF and 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 I.T.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 to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 will not have application for the relevant assessment year, namely A.Y. 2019-2020. Accordingly, I direct the A.O. to grant deduction in respect of employees' contribution to PF and 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.

8. In the result, the appeal filed by the assessee is allowed."

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

6.3 In view of the judicial pronouncements cited supra, we hold that the amendment to section 36(1)(va) and 43B of the I.T.Act will not have application for the relevant assessment year, namely assessment year 2018-2019.

6.4 Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to PF and ESI since the assessee has made the payment before the due date of filing of return u/s 139(1) of the I.T.Act.

Accordingly, grounds raised by assessee stands allowed.

In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 14th December, 2021.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 14th December, 2021.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore