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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT

ITA No.617/Bang/2021
Assessment Year : 2019-20

M/s. Volantis Technologies Private Limited, 940, 2nd Floor, 16th Main, BTM 2nd Stage, Bengaluru – 560 076. **PAN : AACCV 1855 F**	Vs.	DCIT, Central Processing Centre, Bengaluru.

Assessee by	:	None
Revenue by	:	Shri. Ganesh R. Ghale, Standing Counsel for the Department

Date of hearing	:	21.12.2021
Date of Pronouncement	:	21.12.2021

O R D E R

This is an appeal filed by the assessee against order dated 02.08.2021 of CIT(A) National Faceless Appeal Centre (NFAC), Delhi, relating to Assessment Year 2019-20.

2. The assessee is a Private Limited Company. The assessee filed return of income for AY 2019-20 declaring total income of Rs.36,25,384/-. In an intimation dated 16.06.2021 issued u/s.143(1) of the Act, the Centralized Processing Centre (CPC) added a sum of Rs.9,11,370/- representing employees' share of contribution to 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.

3. It was the case of the assessee that employees' share of ESI has been paid before the due date for filing of return u/s.139(1) of the Act (this fact is not in dispute) 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).

4. 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.

5. 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., CIT v. Gujarat State

Road Transport Corpn. [2014] 41 taxmann.com 100/ 366 ITR 170/223 Taxman 398 (Guj.), Popular Vehicles & Services Pvt Ltd v. CIT [2018] 96 taxmann.com 13/257 Taxman 120/406 ITR (Ker), CIT Vs. Bharat Hotels 410 ITR 417 (Delhi).

6. 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) upheld the addition made by the AO.

7. We find that identical issue has been considered 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

8. 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. In this case there is no dispute that the assessee made payment of the Employees share of PF/ESI on or before the due date for filing return of income for AY 2017-18 u/s.139(1) of the Act. 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, deserves to be deleted.

9. The learned DR submitted that in the event of Hon'ble Supreme Court taking a view as taken by the Hon'ble Gujarat High Court in the case of Gujarat State Road Transport Corporation, the Revenue shall be at liberty to seek rectification. The prayer so made is accepted, subject to statutory limitations, if any.

10. In the result, appeal of the assessee is allowed.

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

Sd/-

(N. V. VASUDEVAN)
Vice President

Bangalore.
Dated: 21.12.2021.
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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.