

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

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

ITA No. 504/Bang/2021
Assessment Year : 2019-20

M/s. Vijay Samraj Hotels P. Ltd., No. 18, 3 rd Main Road, Gandhinagar, Bangalore – 560 009. PAN: AABCV4731B	Vs.	The Assistant Commissioner of Income Tax, CPC, Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri S.V. Ravishankar, Advocate & Ms. Sunaina Bhatia, CA
Revenue by	:	Shri Raghavendra Rao, Addl. CIT (DR)

Date of Hearing	:	01-12-2021
Date of Pronouncement	:	28-12-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal by the assessee has been filed by assessee against the order dated 30.07.2021 passed by the National Faceless Appeal Centre (NFAC), Delhi relating to Assessment Year 2019-20 on following grounds of appeal:

“1. The impugned order of the learned Commissioner of Income-tax (Appeals) National Faceless Appeal Centre, Bengaluru Karnataka passed under Section 250 of the Income Tax Act, 1961 is opposed to law, weight of evidence, probabilities, facts and circumstances of the Appellant's case.

2. The appellant denies himself liable to be assessed on a total loss of Rs. 2,48,03,123/- as against the returned loss a sum of Rs.2,54,13,861/-under the facts and circumstance of the case.

3. The learned Commissioner of Income Tax (Appeals) is not justified in upholding the addition made by the learned Assessing Officer of Rs. 6,10,738/- under section 36(1)(va) on the facts and circumstances of the case.

4. The learned Commissioner of Income Tax (Appeals) failed to appreciate that the no addition under section 36(1)(va) of the Act could be made in an intimation under Section 143(1) of the Act and the same is without jurisdiction on facts and circumstances of the case of the appellant.

5. The learned Commissioner of Income Tax (Appeals) failed to appreciate that the Explanation 2 to Section 36(1)(va) of the Act, inserted by the Finance Act, 2021 is applicable prospectively and consequently cannot be invoked for the impugned assessment year.

6. The learned Commissioner of Income Tax (Appeals) failed to appreciate that the Explanation 5 to Section 43B of the Act, inserted by the Finance Act, 2021 is applicable prospectively and consequently cannot be invoked for the impugned assessment year.

7. The learned Commissioner of Income Tax (Appeals) failed to appreciate that the appellant has remitted all the amounts before the due date of filing the return of income under Section 139(1) of the Act and consequently no disallowance can be made under section 36(1)(va) of the Act on the facts and circumstances of the case.

8. The learned Commissioner of Income Tax (Appeals) failed to follow the decisions of the Hon'ble Apex Court and the Jurisdictional High Court in respect of employees contribution to provident fund before due date of filing the return under section 139(1) of the Act is required to be allowed on the facts and circumstances of the case.

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

10. 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.”

2. At the outset, the Ld.AR submitted that there is a delay of 6 days in filing the present appeal. He submitted that extension of limitation period due to COVID-19 second wave was withdrawn

by *Hon'ble Supreme Court* vide order dated 23.09.2021, with effect from 03.10.2021. The Ld.AR submitted that limitation period starts from 03.10.2021 in filing the present appeal.

The Ld.DR could not controvert the above submissions.

We have perused the submissions advanced by both sides.

Hon'ble Supreme Court vide order dated 23.09.2021 has excluded limitation period expiring between 15.03.2021 till 02.10.2021.

Accordingly, the present appeal cannot be treated to have been filed belatedly.

3. The brief facts of the case are as follows:

The assessee is a private limited company engaged in the business of lodging and boarding. For the assessment year 2019-20, return of income was filed on 30.10.2019 declaring total loss of Rs. 2,54,13,861/-. 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. 6,10,738/-. 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.

3.1 Aggrieved by the order of Ld.AO, the assessee preferred an appeal before the Ld.CIT(A).

4. 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 to section 36(1)(va) by *Finance Act, 2021* and 43B of the I.T.Act.

5. Aggrieved by the order of Ld.CIT(A), the assessee filed appeal before the *Tribunal*.

5.1 The Ld.AR submitted that identical issue is decided by the *coordinate Bench* of this *Tribunal* in following cases wherein the amendment has been held to be prospective in nature.

- *M/s.The Continental Restaurant & Café Co. v. ITO* in *ITA No.388/Bang/2021 (order dated 11.10.2021)*
- *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)*

6. The Ld.DR on the other hand supported the orders of the Income Tax Authorities.

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

7.1 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 2019-2020. Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to PF and ESI since the assessee made the payment before the due date of filing of return u/s 139(1) on 30.10.2019 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 28th December, 2021.

Sd/-
(B.R. BASKARAN)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 28th 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