

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

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

ITA No.433/Bang/2021
Assessment Year : 2018-19

M/s BI Worldwide India Pvt. Ltd., 28, Opp DBS Bank, Ulsoor Road, Bangalore - 560 042. PAN: AAECB 5878L	Vs.	The Dy. Commissioner of Income-tax, Circle-(1)(1)(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri C.R Krishna, CA
Revenue by	:	Smt. Priyadarshini Besaganni, JCIT (DR)

Date of Hearing	:	28-12-2021
Date of Pronouncement	:	04-01-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

The appeal filed by the assessee is directed against the order of the NFAC dated 01/10/2019 for the assessment year 2018-19.

2. The assessee has raised the following grounds:-

"1. On the facts and circumstances of the case the learned CIT (Appeal) erred in disallowing the claim in respect of belated remittance of Employee's provident fund and ESI Contribution of Rs.9,45,931/-. After the omission of the second proviso to section 43B w.e.f. 01-04-2004, the deduction is allowable under the first proviso, if the payment is made on or before the due date for furnishing the return of income

2. On the facts and circumstances of the case the learned CIT (Appeal) erred in disallowing the claim in respect of belated remittance of

Employee's provident fund based on the insertion to explanation to section 36 of Income Tax Act, 1961 by the Finance Act, 2021. The assessee believes that explanation to section 36 by Finance Act, 2021 has prospective effect and not retrospective effect. Hence the addition of Rs.9,45,931/- needs to be deleted.”

3. The brief facts of the case are that the assessee is a private limited company. For the assessment year 2018-19, return of income was filed on 30.11.2018 declaring a total income of Rs.20,12,34,160/-. The return was processed u/s 143(1) of the Income-tax Act. In the intimation issued u/s 143(1) of the Act, the CPC made an adjustment of the employees' contribution to PF and ESI to the tune of Rs.9,45,931/- on the ground that the assessee did not remit the employees' contribution to PF and ESI within the due date specified under the respective Acts.

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

5. 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 Act and in view of the judgment of the Hon'ble jurisdictional High Court in the case of Sahari Enterprises 298 ITR 141, the assessee is entitled to deduction of the same. During the course of hearing before the CIT(A), the assessee made written submissions relaying on few more decisions of the jurisdictional High Court viz., CIT Vs. Spectrum Consultants India Pvt. Ltd., 206 CTR 241 and Essae Teraoka Pvt. Ltd., Vs. DCIT 366 ITR 408. 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.

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

7. 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)*

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

9. 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."

10. In view of the judicial pronouncements cited supra, we hold that the amendment to section 36(1)(va) and 43B of the Act will not have application for the relevant assessment year, namely assessment year 2018-2019. 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 30.11.2018 of the Act. Accordingly, grounds raised by assessee stands allowed.

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

Order pronounced in the open court on 4th January, 2022.

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

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 4th January, 2022
/Vms /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore

1. Date of Dictation
.....
2. Date on which the typed draft is placed
before the dictating Member
3. Date on which the approved draft comes to Sr.P.S
.....
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.....
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8. Date on which the file goes to the Bench Clerk
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9. Date on which order goes for Xerox &
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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
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12. The date on which the file goes to dispatch section
for dispatch of the Tribunal Order
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13. Date of Despatch of Order.
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