

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD
(Through Virtual Hearing)

BEFORE SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER
AND
SRI S.S. GODARA, JUDICIAL MEMBER

	ITA No. 447 & 448/Hyd/2021		
	AYs: 2018-19 & 2019-20		
Darshan Vijaysinh Bhatia, Prop M/s. DVB Design Plus Engineering, Hyderabad. PAN: ABXPB 8421 E	VS.	DCIT, Circle-11(1), Hyderabad.	
(Appellant)		(Respondent)	
	Assessee by	Sri Krishna Kumar Dalmia	
	Revenue by	Sri Subbaraju Penmetsa, Sr. AR	
	Date of hearing:	14/12/2021	
	Date of pronouncement:	11/01/2022	

ORDER

PER A. MOHAN ALANKAMONY, A.M:

Both these appeals are filed by the assessee against the orders of the Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi in DIN No. ITBA/NFAC/S/250/2021-22/1036375705(1), dated 14/10/2021 and DIN No. ITBA/NFAC/S/250/2021-22/1035267008(1), dated 2019-20 passed U/s. 143(1) r.w.s 250(6) of the Act for the A.Y. 2018-19 and 2019-20 respectively.

2. At the outset, Ld. AR submitted before us that there is a delay of 03 days in filing the appeal before the Tribunal. In this regard, the assessee had filed an affidavit seeking condonation of delay wherein the reasons for filing the appeal beyond the prescribed time limit was explained. For reference, the relevant portion from the affidavit is extracted herein below: -

“.....

- 4) *We have filed appeal online to Hon'ble Income Tax Appellate Tribunal vide Acknowledgement No. 1635063100 on 24/10/2021. As per the online submission, we have to submit physical appeal as per the rule prescribed under Income Tax Appellate Tribunal, Hyderabad within 30 days ie on or before 23/11/2021.*
- 5) *We have submitted the physical copy of appeal on 5/11/2021 within the time period of 23/11/2021 (copy attached).*
- 6) *That in this way there is no delay in filing of appeal.*
- 7) *In view of the above, we humbly request your goodself to kindly condone the delay in filing of appeal if any and accept our appeal”*

3. On perusal of the affidavit filed by the assessee, We are of the view that the reason for the delay was due to trivial time gap between online submission of the appeal and submission of physical copy of the appeal before the Tribunal. Therefore, in the interest of justice, We hereby condone the slight delay in filing the appeal before the Tribunal and proceed to adjudicate the appeal on merits.

4. The assessee has raised several grounds in his appeals for both the AYs 2018-19 and 2019-20 which are identical in nature however, the crux of the issue is that:

“The Ld. CIT (A) has erred in confirming the disallowance of expenditure incurred towards payment made for employees’ contribution to PF & ESI though they were remitted in the Government Treasury within the due date of filing the income tax return.”

5. At the outset, We find the issue is settled by the Memorandum Explaining the Provisions in Finance Bill, 2021 wherein it is stated that amendment to section 36(1)(va) and section 43B of the Act will take effect from 1/4/2021. The relevant portion of the Memorandum is extracted herein below for reference.

Rationalisation of various Provisions

“Payment by employer of employee contribution to a fund on or before due date

Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.

Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head ‘Profits and gains of business or profession’.

Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee’s account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, “due date” to mean the date by which the assessee is required as an employer to credit an employee’s contribution to the employee’s account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.

Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer’s contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer’s contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the

assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who misutilize employee's contributions.

Accordingly, in order to provide certainty, it is proposed to –

- (i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the –due date under this clause; and*
- (ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies. These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.”*

6. In the case of the assessee it is not disputed that the employee's contribution of Rs. 13,42,280/- and Rs. 16,68,187/- for the AYs 2018-19 and 2019-20 respectively was deducted by the assessee and remitted in the Government Treasury within the due date of filing the return of income under the Income Tax Act, 1961. Since the case of the assessee relates to assessment year 2018-19 and 2019-20 and the amendment

though clarificatory in nature has come into effect from 1/4/2021, for the relevant year under consideration it would suffice that the employee's contribution deducted by the assessee is remitted in the Government Treasury within the due date of filing of the return of income as prescribed under the Act. Therefore, the disallowance made by the Ld. Revenue Authorities is deserved to be deleted. Similar view was expressed by the Hyderabad SMC Bench of the Tribunal in the case *Salzgitter Hydraulics (P.) Ltd vs. Income Tax Officer* in ITA No. 644/Hyd/2020, dated 15/06/2021. Hence, We hereby direct the Ld. AO to delete the addition made in the hands of the assessee amounting to Rs. 13,42,280/- and Rs. 16,68,187/- for the AYs 2018-19 and 2019-20 respectively towards disallowance of payment made with regard to the employee's contribution to PF & ESI fund.

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

Pronounced in the open Court on the 11th January, 2022.

Sd/-
(S.S. GODARA)
JUDICIAL MEMBER

Sd/-
(A. MOHAN ALANKAMONY)
ACCOUNTANT MEMBER

Hyderabad, Dated: 11th January, 2022.

OKK

Copy to:-

- 1) **Appellant:** Darshan Vijaysinh Bhatia Prop. M/s. DVB Design Plus Engineering, Plot No.67B, Anrich Industrial Estate, Bollaram, Medak District, Hyderabad-502325.

- 2) **Respondent:** The Deputy Commissioner of Income Tax, Circle-11(1), Hyderabad.
- 3) The CIT(A), National Faceless Appeal Centre (NFAC), Delhi.
- 4) The DR, ITAT, Hyderabad
- 5) Guard File
- 6)