IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.670/Bang/2021 : Asst.Year 2019-2020

M/s.Technocon Constructions & Infrastructure Private Limited SF 9 & 10, Karuna Complex, Sampige Road, Malleshwaram Bangalore – 560 003. **PAN : AADCT0284F.**	v.	The Deputy Commissioner of Income-tax, Circle 7(1)(1) / Assistant Director of Income-tax, CPC, Bangalore
(Appellant)		(Respondent)

Appellant by : Sri.Rajgopal, CA
Respondent by : Smt.Priyadarshini Besaganni, JCIT-DR

Date of Hearing : 01.02.2022		**Date of Pronouncement : 01.02.2022**

O R D E R

Per Padmavathy S, AM

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 19.08.2021. The relevant assessment year is 2019-2020.

2. The grounds raised read as follows:-

"1. The impugned order passed by the learned Commissioner of Income Tax (Appeals) under section 250 of the Income Tax Act, 1961 to the extent -which is against the Appellant is opposed to law, without jurisdiction, weight of evidence, probabilities, facts and circumstances of the case.

2. The intimation of the learned assessing officer in so far it is prejudicial to the interest of the appellant is bad, erroneous in law and contrary to the facts and circumstances of the case and the Ld. Commissioner (Appeals) erred in upholding the same.

3. The learned Assessing Officer has erred, in law and in facts, by disallowing the employees contribution to provident fund and employees state insurance amounting to Rs.

4,33,873/- paid by the Appellant, though, the same was remitted before the due date of filing of return under section 139(1) of the Act.

4. The learned Assessing Officer has erred, in law and in facts, by not considering the provisions of Section 30 and Section 32 of the Employees' Provident Fund Scheme, 1952 wherein it is provided that the remittance of employees' contribution and employer's contribution to provident fund is to be paid by the employer in the capacity of employer.

5. The learned Assessing Officer has erred, in law and in facts, by applying section 36(1)(va) instead of Section 438 of the Income Tax Act, 1961.

6. The learned Assessing Officer has erred, in law and in facts, by not considering and passing an intimation/ order contrary to the decision of Hon'ble Supreme Court and the jurisdictional Karnataka High Court.

7. The Ld. Commissioner (Appeals) is erred in sustaining the addition made by the Ld. AO in his order by taking recourse to the amendment by way of insertion of Explanation 2 to section 36(l)(va) and Explanation 5 to the section 43B which takes effect from 1st April 2021 and is applicable to the AY 2021-22 onwards and hence not applicable to the current AY 2019-20, such amendment was substantive in nature and not formed part of statute books of the current FY 2018-19, application of law retrospectively is bad in law.

8. The Appellant submits that each of the above grounds are mutually exclusive and without prejudice to one another.

9. The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of objection at any time before or at the time of hearing before the Honourable Income Tax Appellate Tribunal ('Tribunal'), so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law. 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. The brief facts of the case are as follows:

For the assessment 2019-2020, the return of income was filed by the assessee, declaring total income of Rs.50,58,680. The assessee was served with intimation u/s

143(1) of the I.T. Act determining total income at Rs.54,92,560. The reason for the difference between the returned income and the income determined u/s 143(1) of the I.T. Act was on account of disallowance of Rs.4,33,873 being late remittance of employees' contribution to PF and ESI under the respective Acts.

4. Aggrieved, assessee preferred appeal before the First Appellate Authority. It was contended that assessee has paid the employees' contribution prior to the due date of filing of return under section 139(1) of the Act. Therefore, it was submitted assessee is entitled to deduction of the employees' contribution of PF and ESI having regard to the provision to section 43B of the Act. In this context, the assessee relied on the judgment of the Hon'ble Karnataka High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT, reported in 366 ITR 408*. The CIT(A) after noticing the difference between the employer's contribution and employees' contribution to PF and ESI held that only employer's contribution to the PF and ESI is entitled to deduction u/s 43B of the I.T.Act, if the payments are made prior to the due date of filing of the return u/s 139(1) of the I.T.Act. Further, by placing reliance on the judgment of the Hon'ble Apex Court in the case of *CIT Vs. Gold Coin Health Food Pvt. Ltd., reported in 304 ITR 308 (SC)*, the CIT(A) concluded that amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021, is clarificatory and has got retrospective operation.

5. Aggrieved, assessee has filed this appeal before the Tribunal. The learned AR relied on the ITAT's Order in the

case of M/s. Shakuntala Agarbathi Company Vs. DICT in ITA No.385/Bang/2021 (order dated 21.10.2021).

6. The learned Departmental Representative, on the other hand, supported the order of the CIT(A).

7. We have heard rival submissions and perused the material on record. On identical facts, the Bangalore Bench of the Tribunal in the case of M/s. Shakuntala Agarbathi Company Vs. DCIT (supra) by following the dictum laid down by the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT (supra)*, had held that the assessee would be entitled to deduction of employees' contribution to PF and ESI provided that the payments were made prior to the due date of filing of the return of income u/s 139(1) of the I.T.Act. It was further held by the ITAT that amendment by Finance Act, 2021, to section 36[1][va] and 43B of the Act is not clarificatory. The relevant finding of the ITAT in the case of M/s. Shakuntala Agarbathi Company Vs. DCIT (supra), reads as follows:

> *"7. We have heard rival submissions and perused the material on record. Admittedly, the assessee has remitted the employees' contribution to ESI before the due date for filing of 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 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.). 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.*
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> *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.*
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> *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.*
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> *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 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 to 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 Actby 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 by Finance Act, 2021 to Sec.36[1][va] and 43B of the Act will not have application to relevant assessment year, namely A.Y. 2019-2020. Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to 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."

7.1 The CIT(A) had relied on the judgment of the Hon'ble Apex Court in the case of *CIT Vs. Gold Coin Health Food Pvt. Ltd., (supra)* to content that the amendment to section 36(1)(va) and 43B of the Act is clarificatory. The judgment of the Hon'ble Apex Court in the case of *CIT v. Gold Coin Health Food Pct. Ltd. (supra)* is distinguishable. The Hon'ble Apex Court was considering the question of whether penalty can be imposed u/s.271(1)(c) of the Act for concealment of income

where returned losses were reduced in assessment and there was no tax payable by the assessee. Earlier, the Hon'ble Apex Court in the case of *Virtual Soft Systems in 289 ITR 83 [SC]* had taken the view that no penalty could be levied on mere reduction in loss as there would be no tax payable by the assessee, which was a sine-quo-non for imposition of penalty. Amendments were made by the Finance Act, 2002, to Section 271(1)(iii) of the Act by incorporating the expression "if any" and also in Explanation 4 setting out the meaning of the phrase "amount of tax sought to be evaded". The Hon'ble Apex Court in the case of *CIT Vs. Gold Coin Health Food [P] Ltd., [2008] 304 ITR 308 [SC]*, held that the Parliament clarified the position by using the expression "if any", which was not a substantive amendment creating penalty for the first time. It was held that income always included loss and even the unamended provisions would have to be interpreted in the manner that right from 01.06.1976 penalty would have been leviable. Hence, the Hon'ble Apex Court went on to hold that the amendment is clarificatory in nature and hence will apply for the period before 01.04.2003. The relevant observations of the Hon'ble Apex Court reads as follows :-

> *"6. It would be of some relevance to take note of what this Court said in Virtual's case (supra). Pointing out one of the important tests at para 51 it was observed that even if the statute does contain a statement to the effect that the amendment is clarificatory or declaratory, that is not the end of the matter. The Court has to analyse the nature of the amendment to come to a conclusion whether it is in reality a clarificatory or declaratory prsvision. Therefore, the date from which the amendment is made operative does not conclusively decide the question. The Court has to examine the scheme of the statute prior to the amendment and subsequent to the amendment to determine whether amendment is clarificatory or substantive.*

In Reliance Jute and Industries Ltd. vs. Commissioner of Income Tax, West Bengal (1979 (120) ITR 921) it was observed, by this Court that the law to be applied in income tax assessments is the law in force in the assessment year unless otherwise provided expressly or by necessary implication. Before proceeding further, it will be necessary to focus on the definition of the expression 'income' in the statute. Section 2 (24) defines' income' which is an inclusive definition, and includes losses i. e. negative profit. The position has been elaborately dealt with by this Court in Commissioner of Income Tax (Central), Delhi v. Harprasad & Co. P. Ltd. (1975 (99) ITR 118). This Court held with reference to the charging provisions of the statute that the expression 'income' should be understood to include losses. The expression profits and gains' refers to positive income whereas losses represent negative profit or in other words minus income. This aspect does not appear to have been noticed by the Bench in Virtual's case (supra). Reference to the - order by this Court dismissing the revenue's Civil Appeal No.7961 of 1996 in Commissioner of Income Tax v. Prithipal Singh and Co. is also not very important because that was in relation to the assessment year 1970-71 when Explanation 4 to Section 271 (1) ((c) was not in existence. The view of this Court in Horprasods case (supra) Leads to the irresistible conclusion that income also includes Losses. Explanation 4 (a) as it stood during the period 1.4.1976 to 1.4.2003 has to be considered in the background.

8. It appears that what the Finance Act intended was to make the position explicit which otherwise was implied. The recommendations of the Wanchoo Committee pursuant to which Explanation 4(a) was inserted w.e.f. 1.4.1976 needs to be noted. At para 2.74 it was noted as follows:

> *"2.74 We are not unaware that linking concealment penalty to tax sought to be evaded can, at times, lead to anomalies. We would recommend that, in cases where the concealed income is to be, set off against Losses incurred by an assessee under other heads of income or against losses brought forward from earlier years, and the total income thus, gets reduced to a figure smaller than the concealed income or even to a minus figure, the tax sought to be evaded should be calculated as if the concealed income were the total income."*

9. Reference to the Department Circular No.204 dated 24.7.1976 reported in 1977 (110) ITR 21 (St.) has also substantial relevance. Same reads as follows:

> *"New Explanation 4 defines 'the amount of tax sought to be evaded'. According to the definition, this expression will ordinarily mean the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the*

amount of income in respect of which particulars have been concealed. In a case, however, where on setting off the concealed income against any loss incurred by the assessee under other head of income or brought forward from earlier years, the' total income is reduced to a figure Lower than the concealed income or even to a minus figure, 'the tax sought to be evaded' will mean the tax chargeable on the concealed income as if it were the total income. Another exception to the general definition of the expression 'tax sought to be evaded' given earlier is a case to which Explanation 3 applies. Here, the tax sought to be evaded will be the tax chargeable on the entire total income assessed. "

10. A combined reading of the Committee's ecommendations and the Circular makes the position clear that Explanation 4(a) to Section 271 (1) (c) intended to levy the penalty not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between 1.4.1.976 to 1.4.2003 the position was that the penalty was leviable even in a case where addition of concealed income reduces the returned loss.

11. When the word "income" is read to include losses as held in Harprasad's case (supra) it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1.4.1976 to 1.4.2003. Even in the Circular dated 24.7.1976, referred to above, the position was clarified by Central Bureau of Direct Taxes (in short' CBDT). It is stated that in a case where on setting of the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable because in such a case "the tax sought to be evaded" will be tax chargeable on concealed income as if it is "total income". "

7.2 Thus, the judgment of the Hon'ble Apex Court in *CIT Vs. Gold Coin Health Food [P] Ltd., [2008] 304 ITR 308 [SC]*, took into consideration the evolved jurisprudence on the point of whether income includes loss and has interpreted that even before the amendment with effect from 01.04.2003, there was liability to penalty. Hence, it was concluded by the Hon'ble

Apex Court that the clarificatory nature of the amendment cannot be a ground to hold that earlier no penalty could be levied. However, the position in this case quite different as the Hon'ble jurisdictional High Court in the case of *Essae Teraoka [P] Ltd., Vs. DCIT, reported in [2014] 366 ITR 408 [Kar]* has considered the concept of 'due date' as appearing in 36[1][va] and section 43B of the Act and has taken the view that the assessee is entitled to the relief having regard to the use of the expression "contribution" under the Provident Fund Act. Now it has been provided that the due date in section 43B is of no consequence to judge the applicability of provisions of section 36[1][va]of the Act and that too with effect from 01.04.2021. In other words, there is sufficient intrinsic evidence to show that these amendments are not clarificatory in nature and the mere use of the expression "it is clarified" cannot be determinative of the nature of the amendment made. Furthermore, in the present case, Legislature has expressly given only prospective effect to these Explanations as is evident from the Memorandum Explaining the Provisions in the Finance Bill, 2021, by stating that the said amendment i.e., the insertion of another Explanation to the already existing explanation to clause [va] to sub-section [1] of section 36 of the Act, will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-2022 and subsequent assessment years. In contradistinction the relevant Finance Act, 2003 amending section 271(1)(iii) and Explanation 4 did not speak of application and merely provided that the amendments will take effect from 01.04.2003 [reproduced in para 5 of the judgment in case of Gold Coin (supra)].

7.3 Furthermore, a Constitution Bench of the Hon'ble Apex Court of 5 judges in the case of *CIT Vs. Vatika Township [P] Ltd., [2014] 367 ITR 466 [SC]*, has held as under:

> *"General Principles concerning retrospectivity*
>
> *30. A legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by legislation. Legislation is not just a series of statements, such as one finds in a work of fiction/ nonfiction or even in a judgment of a court of law. There is a technique required to draft legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of 'Interpretation of Statutes'. Vis-a-vis ordinary prose, legislation differs in its provenance, lay-out and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.*
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> *31. Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today rind in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should 'not find that his plans have been retrospectively upset. This principle of •law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips vs. Eyre', a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
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> *32. The obvious basis of the principle against retrospectivity is the principle of fairness, which must be the basis of every legal rule as was observed in the decision reported in L 'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which*

impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation. is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing these dicta, a little later.

33. The obvious basis of the principle against retrospectivity is the principle of fairness, which must be the basis of every legal rule as was observed in the decision reported in L 'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation. is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing these dicta, a little later.

33. We would also like to point out, for the sake of completeness, that where a benefit is conferred by legislation, the rule against a retrospective construction is different. If legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India Et Ors. v. Indian Tobacco Association', the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra Et Ors." It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here……"

7.4 The Hon'ble Apex Court in the case of *CIT v. Essar Teleholdings Ltd. (2018) 401 ITR 445 (SC)* considered the judgment of the Hon'ble Apex Court in the case of *CIT v. Gold Coins Health Foods (P.) Ltd. (supra)* and also the judgment of the Larger Bench of the Hon'ble Apex Court in the case of *CIT v. Vatika Township P. Ltd. (supra).* The Hon'ble Apex Court in the case of *CIT v. Essar Teleholdings Ltd. (supra),* held that judgment in the case of *CIT v. Gold Coins Health Foods (P.) Ltd. (supra)* is distinguishable and not applicable for the reason that Parliament clarified the position of law by changing the expression `any' by `if any' which was not a substantive amendment creating penalty for the first time. The Hon'ble Supreme Court followed the judgment in the case of *CIT v. Vatika Township P. Ltd. (supra)* and held that Rule 8D of the I.T.Rules does not apply retrospectively. For the aforesaid reason and the judicial pronouncements, cited supra, we hold that the judgment of the Hon'ble Apex Court relied on by the CIT(A) in the case of *CIT v. Gold Coins Health Foods (P.) Ltd. (supra)* does not have application to the present case.

7.5 Therefore, the amended provisions of section 43B as well as 36(1)(va) of the I.T.Act are not applicable for the assessment years under consideration. By following the binding decision of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT (supra)*, the employees' contribution paid by the assessee before the due date of filing of return of income u/s 139(1) of the I.T.Act is an allowable deduction. Accordingly, we decide this issue in

favour of the assessee and the disallowance made by the Assessing Officer is deleted.

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

Order pronounced on this 01st day of February, 2022.

Sd/-	**Sd/-**
(George George K)	**(Padmavathy S)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Bangalore; Dated : 01st February, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A) NFAC, Delhi.
4. The Pr.CIT, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore