

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCHES “C”, BANGALORE**

**Before Shri N.V.Vasudevan, VP & Ms.Padmavathy S, AM**

ITA No.726/Bang/2021: Asst.Year 2019-2020

M/s.Cadopt Technologies Private Limited, No.3m-407 2 <sup>nd</sup> Floor 3 <sup>rd</sup> Main Road, East of NGEF Layout Kasturi Nagar Bengaluru – 560 043. <b>PAN : AAFCC8405K.</b>	v.	The Assistant Director of Income Tax, CPC, Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.R.E.Balasubramaniam, CA

Respondent by : Sri.Muzaffar Hussain, CIT-DR

<b>Date of Hearing : 08.02.2022</b>	<b>Date of Pronouncement : 10.02.2022</b>
-------------------------------------	-----------------------------------------------

**ORDER**

**Per Padmavathy S, AM :**

This appeal is against the order of the CIT(A), National Faceless Appeal Centre (NFAC) dated 27.09.2021. The relevant assessment year is 2019-2020.

2. The grounds raised read as follows:-

*“1. That the impugned order is opposed to facts and law insofar as it is prejudicial to the interests of the appellant.*

*2. That the ld.CIT(A) erred in confirming the order of the ld.AO in which he added back the contribution to Employees Provident Fund and Employees State Insurance Corporation without considering the fact that these were paid in the previous year itself.*

*3. That the ld.CIT(A) erred in confirming the order of the ld.AO and in doing so, he failed to appreciate that Section 43B of the Income Tax Act has an overriding effect on Section 36(1)(va) in accordance with the decision of the Hon’ble Supreme Court which has held that deduction shall be allowed so long as the payment is made within the due date for furnishing return of income under section 139(1) of the Income Tax Act.*

*4. Without prejudice to the above grounds, the action of the ld.CIT(A) in treating the amendment to section 36(1)(va) and section 43B vide Finance Act, 2021 as retrospective in nature is untenable and*

*unwarranted inasmuch as the same is opposed to various decisions of the Hon'ble Supreme Court on the subject and also on the fact that the Memorandum explaining the provisions in the Finance Bill, 2021, issued by the Finance Ministry clearly states that the amendment shall take effect from 1<sup>st</sup> April, 2021 and shall apply to AY 2021-22 and subsequent assessment years."*

3. Brief facts of the case are as follows:

The assessee is a company registered under the Companies Act, 2013 and engaged in the business of manpower outsourcing, consultancy and resale of software. For the assessment year 2019-2020, the company filed its return of income on 25.09.2019 declaring loss of Rs.13,55,480. A notice u/s 143(1)(a) of the Income Tax Act (the Act) dated 03.03.2020 was served on the assessee wherein the CPC proposed to disallow Provident fund and ESI contribution amounting to Rs.5,15,994 u/s 36(1)(va).

4. The assessee submitted the response to the proposal by relying on the Supreme Court decision in the case of CIT v. Alom Extrusions Ltd. (2009) 319 ITR 306 which supported the stand taken by the assessee that even though the contributions to employees state insurance and employees provident fund have been made belatedly, they have been paid within the return filing date as per section 139(1) and accordingly is liable for deduction.

5. The A.O. however did not accept the contention of the assessee and issued intimation u/s 143(1) of the Act dated 07.05.2020 in which he added the sum of Rs.13,55,480 being delayed payment of ESI and ESI by invoking the provisions of section 36(1)(va) of the Act.

6. Before the CIT(A) the assessee submitted that A.O. misdirected himself in treating Rs.5,15,994 on account of belated remittance of contribution to EPF/ESI as the income of the Assessee under Section

2(24)(x) r. w. s. 36(1)(va). The due date referred to in Section 36(1)(va) of the Act must be read in conjunction with Section 43B(b) of the Act and a reading of the same would make it amply clear that the due date as mentioned in Section 36(1)(va) is the due date as mentioned in section 43B(b) i.e. payment/contribution made to the Provident Fund Authority any time before filing the return for the year in which the liability to pay accrued and hence, the aforementioned amount is eligible for deduction as the same was remitted before the due date applicable -to the Assessee for furnishing the return of income. In this regard, the assessee placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT vs Sabari Enterprises (298 ITR 141), wherein it was held that provisions of section 43B of the Act is applicable even to employees' contribution paid belatedly and if such belated payment is made on or before the due date of filing of the return of income u/s 139(1) of the Act, the same should be allowed as deduction. The Hon'ble ITAT of Bangalore has allowed deduction in this regard in the case of DCIT vs Adecco India Pvt. Ltd. (ITA 964/Bang/2013) by relying on the above mentioned judgments of the High Court & Supreme Court. It was further submitted that the deduction u/s 43B of the Act has to be allowed in case of employees share of contribution made belatedly to Employees State Insurance and Employees Provident Fund as long as the same has been paid within the return filing date as per 139(1) of the Act.

7. The CIT (A) dismissed the appeal of the assessee on the following grounds

(i) That with reference to employees' contribution to PF and ESI, referred to the provisions of section 2(24)(x) and 36(1)(va) of the Act and held that section 36(1)(va) specifically covers the employees' contribution to

PF and ESI the same cannot be considered under any other provisions including the provisions of section 37 or section 43B.

(ii) That section 43B of the Act relates to allowing certain deductions only on actual payments. Clause (b) of section 43B 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 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.

(iii) 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.

(iv) That the legal distinction between employees' contribution and employer's contribution under the Act was duly recognised by the Courts in below listed decisions, wherein the courts have clearly distinguished the facts from the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd (supra)

(a) CIT v. Gujarat State Road Transport Corporation (2014) 41 taxamnn.com 100 / 366 ITR 170 / 223 Taxman 398 (Guj.),

(b) CIT v Merchem Ltd (2015) 61 taxmann.com 119/235 Taxman 291/378 ITR 443 (Ker)

(b) Popular Vehicles & Services Pvt. Ltd. v. CIT (2018) 96 taxmann.com 13 / 257 Taxman 120 / 406 ITR (Ker)

8. The CIT(A) thereafter held that there were contradicting decisions by the various High Courts on considering section 36(1)(va) and 43B and in the back drop of that Finance Bill 2021 brought in explanations to section 36(1)(va) and 43B.

8.1 The Finance Act, 2021 amended section 36(1)(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.”*

8.2. Finance Act, 2021 also amended section 43B by inserting explanation 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.”*

8.3. The CIT(A) based on various judicial pronouncements held that the amendment to section 36(1)(va) by inserting 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 therefore was applicable with retrospective effect and dismissed the appeal of the assessee.

9. Aggrieved by the order of the CIT(A), the assessee has filed this appeal before us. Following are the issues for our consideration

(i) Whether the assessee would be entitled to deduction of employees' contribution to PF and ESI provided the payments were made prior to the due date of filing the return of income u/s 139(1) of the Act?

(ii) Whether the amendment by Finance Act, 2021 to section 36(1)(va) and 43B are not clarificatory in nature and hence prospective?

10. Before us, the learned AR submitted that the assessee's case is covered by the judgment of Co-ordinate Bench of the ITAT Bangalore in the case of M/s.Shakuntala Agarbathi Company v. DCIT in ITA No.385/Bang/2021 (order dated 21.10.2021).

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

12. We have heard rival submissions and perused the material on record. In the case M/s.Shakuntala Agarbathi Company v. DCIT (supra) the ITAT Bangalore took cognizance of both the issues in terms whether employee contribution to PF/ESI is also eligible for deduction where the payments are made before the due date of filing the return of income u/s 139(1) and also the issue of whether the amendments made to sections 36(1)(va) and 43B are not clarificatory in nature. The relevant finding of the ITAT in the case of M/s.Shakuntala Agarbathi Company (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.*

*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 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 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 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."

13. By following the decision of the Co-ordinate Bench in the case of M/s.Shakuntala Agarbathy Company (supra) and also the binding decision

of the Hon'ble jurisdictional High Court in the case of Essae Teraoka Pvt. Ltd. v. DCIT (supra) we decide this issue in favour of the assessee that the employee's contribution paid by the assessee before the due date of filing the return of income u/s.139(1) of the Act is allowable as a deduction and the disallowance made by the Assessing Officer is deleted.

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

Order pronounced on this 10<sup>th</sup> day of February, 2022.

**Sd/-**  
**(N.V.Vasudevan)**  
**VICE PRESIDENT**

**Sd/-**  
**(Padmavathy S)**  
**ACCOUNTANT MEMBER**

Bangalore; Dated : 10<sup>th</sup> February, 2022.  
Devadas G\*

Copy to :

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

Asst.Registrar/ITAT, Bangalore