

IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM

BEFORE SHRI DUVVURU R L REDDY, HON'BLE JUDICIAL MEMBER
&
SHRI S. BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

	I.T.A. No.192/Viz/2021		
	(Asst. Year :2017-18)		
Nooka Raju Vegi, Visakhapatnam. PAN: ABNPV 6431 A (Appellant)	Vs.	Deputy Commissioner of Income Tax, Circle-1(1), Visakhapatnam. (Respondent)	
	Assessee by:	None	
	Revenue by:	Shri SPG Mudaliar, Sr. AR	
	Date of hearing:	14/03/2022	
	Date of pronouncement:	16/03/2022	

O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal is filed by the assessee against the order of the Id. CIT (A), National Faceless Appeal Centre (NFAC), Delhi in DIN No. ITBA/NFAC/S/250/2021-22/1035023352(1), dated 23/08/2021 passed U/s. 154 r.w.s 250(6) of the Act for the AY 2017-18.

2. The assessee has raised four grounds in his appeal 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.”

3. At the time of hearing, none appeared before us to represent the case of the assessee.

4. At the outset, we find that the issue before us 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 measure of penalizing employers who mis-utilize 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."

5. In the case of the assessee, it is not disputed that the amount of employee's contribution to PF & ESI 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 2017-18 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 to PF & ESI 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. Hence, we hereby direct the Ld. AO to delete the addition made in the hands of the assessee towards disallowance of payment made in regard to the employee's contribution to PF & ESI fund.

6. In the result, appeal of the assessee is allowed.

Pronounced in the open Court on the 16th March, 2022.

Sd/-
(S. BALAKRISHNAN)
Accountant Member

Sd/-
(DUVVURU R L REDDY)
Judicial Member

Dated: 16th March, 2022.

OKK

Copy to:

1. *The Assessee: Nooka Raju Vegi C/o. Madhusudhana Rao Dhavala, Chartered Accountant, Flat No.305, GVK Plaza, Seethammapeta, Visakhapatnam, Andhra Pradesh-530016.*
2. *The Revenue: DCIT, Circle-1(1), Direct Taxes Building, Opp. Raitu Bazar, MVP Colony, Visakhapatnam, Andhra Pradesh – 530017.*
3. *The CIT(A), National Faceless Appeal Centre (NFAC), Delhi.*
4. *The D.R., ITAT, Visakhapatnam.*
5. *Guard file.*

By order

Sr. Private Secretary,
ITAT, Visakhapatnam.