

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

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 59/Bang/2022
Assessment Year : 2019-20

M/s. Technocon Builders, # 337, SF 8, Karuna Complex, Sampige Road, Malleshwaram, Bangalore – 560 003. PAN: AAIFT3196L	Vs.	The Deputy Commissioner of Income Tax, Circle - 2 (2)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Rajagopal, CA
Revenue by	:	Shri Priyadarshi Mishra, Addl. CIT (DR)

Date of Hearing	:	16-03-2022
Date of Pronouncement	:	16-03-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal by the assessee has been filed by assessee against the order dated 22.11.2021 u/s. 250 passed by the National Faceless Appeal Centre (NFAC), Delhi relating to Assessment Year 2019-20 on following grounds of appeal:

“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.4,35,400/-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 43B 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(1)(va) and Explanation 5 to the section 43B which takes effect from 1st April 2021 and is applicable to the AY 2021-22onwards 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."*

2. The brief facts of the case are as follows:

The assessee is in the business of execution of works contract. For the assessment year 2019-2020, return of income was filed on 31.10.2019 declaring total income of Rs.91,53,820/-. The return was processed u/s 143(1) of the I.T.Act. In the intimation issued u/s 143(1) of the I.T.Act, the CPC disallowed the employees' contribution to PF and ESI to the tune of Rs.4,06,534/-. The reason for making the disallowance was that the assessee did not remit the employees' contribution to PF and ESI within the due date specified under the respective Acts.

3. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A). 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 I.T.Act and in view of the judgment of the *Hon'ble jurisdictional High Court Pr.CIT vs. Hind Filter Ltd. in ITA No. 662 of 2015.* The assessee is entitled to deduction of the same. 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 about to section 36(1)(va) and 43B of the I.T.Act.

4. Aggrieved, the assessee has filed this appeal before the Tribunal.

4.1 The Ld.AR submitted that an identical issue is decided in favour of the assessee by the *coordinate Bench* of this *Tribunal* in following cases:

- *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)

5. The learned Departmental Representative supported the orders of the Income Tax Authorities.

6. 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."

6.1 We also note that *Hon'ble jurisdictional High Court* in case of *Essae Taroka (P.) Ltd.* reported in (2014) 266 CTR 246 and *Spectrum Consultants India (P.) Ltd.* reported in (2013) 266 CTR 94 has affirmed the above view. In view of the judicial pronouncements cited supra, we hold that the amendment to section 36(1)(va) and 43B of the I.T.Act will not have application for the relevant assessment year, namely assessment year 2019-2020. Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to PF and ESI since the assessee has made the payment before the due date of filing of return u/s 139(1) of the I.T.Act. It is ordered accordingly.

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

Order pronounced in the open court on 16th March, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 16th March, 2022.
/MS /

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

By order

Assistant Registrar,
ITAT, Bangalore