

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

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

<b>ITA No. 600/Bang/2021</b>
<b>Assessment Year : 2018-19</b>

Shri Ashwin Shetty, No. 63/A, 13 <sup>th</sup> Cross, J.P. Nagar 3 <sup>rd</sup> Phase, Bangalore – 560 078. PAN: ANAPS7985B	<b>Vs.</b>	The Assistant Commissioner of Income Tax, CPC, Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri S.N. Shyanbhag, Advocate
Revenue by	:	Shri Priyadarshi Mishra, Addl. CIT (DR)

Date of Hearing	:	17-03-2022
Date of Pronouncement	:	31-03-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal by the assessee has been filed by assessee against the order dated 09.09.2021 u/s. 250 passed by the National Faceless Appeal Centre (NFAC), Delhi relating to Assessment Year 2018-19 on following grounds of appeal:

*“1. The Learned Commissioner of Appeals has erred in confirming the addition of Rs.16,11,013/-being belated payment of employees contribution of ESI and PF paid before due date for filing the Return of income and an amount of Rs.18,362/- being club expenses incurred by the employees made by the A.O. CPC in 143(1) proceedings.*

*2. The CIT(A) erred in holding that the amendment by way explanation 2 to section 36(1) (va) and explanation 5 to the section 43B made in the finance Act 2021 has retrospective effect as such the decisions relied on by the appellant are not applicable.*

3. *The above amendments made in the finance Act 2021 is not applicable retrospectively but only from 1-4-2021 onwards as such above addition made u/s 36(1) (va) has to be deleted.*

4. *The CIT(A) has held that appellant has not produced any evidence for addition of Rs. 18,362/- being Club expenses incurred by the appellant when it is hospitality expenses incurred to entertain the customers of the appellant, further it is debatable issue and as such addition cannot be made in 143(1) proceedings.*

5. *For these and such other grounds that will be urged at the time of hearing of this appeal, the addition of Rs.16,11,013/- u/s 36(1) (a) and addition of Rs.18362/being club expenses may be deleted and such other orders may be passed to meet the ends of justice.”*

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

For the assessment year 2018-2019, return of income was filed by assessee on 06.10.2018 declaring total income of Rs. 37,46,301/-. 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. 16,11,013/-. 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. Further sum of Rs. 18,362/- also stood disallowed being club expenses incurred for its employees.

**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. The Club expenses disallowed was also upheld by the Ld.CIT(A) by holding that assessee did not make any submissions in respect of the same.

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

**5. Ground no. 1** is raised by assessee challenging the disallowance of club expenses of Rs. 18,362/-.

**6.** It was contended that the assessee *had paid subscription to club membership fee to promote the business promotion which is allowable as per the ratio laid down by the Hon'ble Supreme Court in the case of CIT Vs. United Glass Mfg. Co. Ltd., reported at (2012) 28 taxmann.com 429. During the proceedings, it was argued that the expenses have been incurred for the business promotion of the company and the facilities have been used by the director as well as other employees of the company. Considering the submissions of the assessee, since the expenditure has been incurred for business promotion and for the purposes of the business of the assessee company, the disallowance made is deleted.*

**7.** The Ld.Sr.DR strongly supported the orders of the authorities below and reiterated the observation made therein.

We have perused the submissions advanced by both sides in light of records placed before us.

**8.** In the present case also the assessee has incurred the expenses on account of club membership fees for the employees and to entertain customers. An identical issue the *Hon'ble Madras High Court* in the case of *CIT Vs. Sundaram Industries Ltd.* reported in 240 ITR 335 held as under:

*“Section 37 postulates that any expenditure laid out or expended wholly and exclusively for the purpose of the business or profession shall be allowed in computing the income of the assessee. The essential requirement for claiming the deduction of the expenditure is that the expenditure should have been incurred wholly and exclusively for the purposes of business of the assessee in the instant case, the assessee was a company and it was found by the Appellate Tribunal that the expenditure by way of subscription to the clubs was incurred for the purpose of promoting the business of the company and in view of the finding of the Tribunal, it must be held that the expenditure incurred was an allowable business expenditure. In the case of subscription to clubs, in so far as the assessee was concerned, the expenditure was incurred to promote and foster its business relationship. The object of the assessee was that its directors by remaining as members in some of the city clubs would give them certain social status, and it was obvious that by being members of the club, they would be able to meet various kinds of people in a calm and cool atmosphere of the club and because of the meeting they would develop business relationship, benefiting the assessee. Therefore, it could not be said that the possible advantage to the assessee was remote and far fetched. No doubt, there might be a personal benefit enjoyed by the director by the various types of amenities afforded at the club. But the personal benefit that went to the director was incidental to the membership of the club. The question whether a particular expenditure is allowable or not has to be tested from the point of view of the person expending the same and the object with which he incurred the expenditure. The assessee had not spent the money with the object of providing a personal relaxation to the director, but it was incurred to promote its business. In the commercial world, the contact with the right person is vital for an efficient business organisation. The expenditure incurred could not be regarded as having been incurred for the personal benefit of the director. In each case, it has to be seen whether the object of the expenditure was to promote the business of the assessee. In view of the finding by the Tribunal, the assessee-company had incurred the expenditure wholly and exclusively for the purpose of its business and therefore the expenditure incurred by way of subscription to the club was an allowable expenditure.”*

**9.** On a similar issue the Hon'ble Supreme Court in the case of *CIT Vs. United Glass Mfg.* (supra) held as under:

*“3.3.As far as Question No. 1 is concerned, the issue is answered in favour of the assessee in the order passed today in civil appeal arising out S.L.P.(C) No. 20791 of 2009. As far as Question No. 2 is concerned, we find that a series of judgements have been passed by High Courts holding that club membership fees for employees incurred by the assessee is business expense under **Section 37** of the Income Tax Act, 1961. We also find that none of the decisions have been challenged in this Court. Even otherwise, we are of the view that it is a pure business expense.”*

**10.** Respectfully following the above view, we direct the Ld.AO to delete the disallowance made under section 37(1) of the Act.

**Ground no. 1 raised by assessee stands allowed.**

**11. Ground nos. 2-3** is in respect of disallowance u/s. 35(1)(va) of the Act.

**11.1** 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)

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

**13.** 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."

**14.** 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 2018-2019. 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.

**Accordingly, ground nos. 2-3 stands allowed.**

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

**Order pronounced in the open court on 31<sup>st</sup> March, 2022.**

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 31<sup>st</sup> March, 2022.

/MS /

**Copy to:**

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

By order

Assistant Registrar,  
ITAT, Bangalore