

**आयकरअपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम**

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष**

**BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &  
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.102/Viz/2021**

**(निर्धारण वर्ष / Assessment Year : 2018-19)**

Sanjana Flexipack Private Limited  
Plot NP-84/3, D-Block  
Auto Nagar  
Visakhapatnam  
**[PAN : AATCS1423P]**  
**(अपीलार्थी/ Appellant)**

Vs. Income Tax Officer  
Ward 1(1)  
Visakhapatnam

**(प्रत्यर्थी/ Respondent)**

अपीलार्थी की ओर से/ Appellant by

: Shri PV Madhusudana Rao, AR

प्रत्यर्थी की ओर से / Respondent by

: Shri SPG Mudaliar, DR

सुनवाई की तारीख / Date of Hearing

: 08.03.2022

घोषणा की तारीख/Date of Pronouncement

: 07.04.2022

**ORDER**

**Per Shri Balakrishnan S, Accountant Member**

This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-1 [for short, "CIT(A)"], National Faceless Appeal Centre (NFAC), Delhi in DIN & Order No.ITBA/NFAC/S/250/2020-21/1031068165(1) dated 27.02.2021 for the A.Y. 2018-19.

2. Brief facts of the case are that the assessee, a private limited company, deriving income from business income has filed its return of income u/s 139(1) for the A.Y.2018-19 on 21.09.2018, declaring total income of Rs.28,71,314/-. However, the Centralized Processing Centre (CPC) has served an order dated 16.10.2019, assessing the total income at Rs.29,53,626/-. The CPC has disallowed a sum of Rs.82,312/-, being late payment of Employee contribution of PF of Rs.72,038/- and ESI of Rs.10,274/-.

3. Aggrieved by the order of the CPC, the assessee filed appeal before the CIT(A) which was migrated to the NFAC in terms of notification No.76/2020 in S.O.No. 3296(E), dated 25/09/2020 from CBDT. The CIT(A) held that the payment of employees contribution made after the due 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 as per the Employees' Provident Fund Scheme/Employees' State Insurance Scheme is liable to be added to the income of the assessee. The Ld.CIT(A) relied on the decision of Hon'ble Gujarat High Court in the case of Gujarat State Road Transport Corporation [2014] 41 taxmann.com 100, as held that

employees' contribution not be paid within the due date specified under PF/ESI is not to be allowed as per section 36(1)(va). The Finance Bill 2021 recently introduced in the Parliament has also clarified by inserting explanation in section 36 of the Income Tax Act, 1961 to the above effects as under.

*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."*

4. Aggrieved by the order of the Ld.CIT(A), the assessee filed appeal before the Tribunal and raised the following grounds of appeal.

*The order of the learned Commissioner of Income-Tax (Appeals), National Faceless Appeal Centre, Delhi (hereinafter referred to as "CIT(A)") is bad and unsustainable in the eyes of law as the same is passed without proper application of mind, as it is also contrary to the spirit and provisions of the Income Tax Act, 1961 (hereinafter referred to as "the Act").*

- The only dispute in this appeal is the addition of Rs.82,312/- made by the CIT(Appeals) National faceless assessment centre, towards disallowance of employee's contribution to PF & ESI. The appellant submits that though the amount could not be paid within the due dates under the PF Act and ESI Act, the same were paid before the due date of filing the return u/s 139(1) of the Act. Thus, the appellant submits that the amount is allowable u/s 43B of the Act.*
- The above contention of the appellant is duly supported by the jurisdictional ITAT Order dt.20.09.2017 of the Hon'ble ITAT, Visakhapatnam in the case of Eastern Power Distribution Company of AP Ltd in ITA No.374/Viz/2017. The appellant submits that the disallowance is not warranted as the issue is squarely covered by the aforesaid decision of the Hon'ble ITAT, Visakhapatnam Bench.*

The only issue involved in this appeal is as regards to the order of Ld.CIT(A) sustaining the disallowance of deduction claimed on account of Employees' contribution to PF & ESI by invoking the amended provisions of

section 36(1)(va) r.w.s. 43B of the Act, treating the amended provisions applicability as retrospective.

5. Before us, the ld.counsel for the assessee admitted the factual positions. The Revenue has not disputed the fact that the payment to employees contribution to PF is well within the due date of filing of return of income by the assessee u/s.139(1) of the Act. The assessee relied on the decision of ITAT, Visakhapatnam in the case of Eastern Power Distribution Company of AP Ltd. in ITA No. 374/Viz/2017 dated 20/09/2017. The assessee also contended that amendment brought in by the Finance Act 2021 to section 36(1)(va) of the Act especially the insertion of Explanation 2 should be construed only as prospective in as much as the insertion of the amended provision should be construed only w.e.f. 01.04.2021 i.e. for & from the assessment year 2021-22. The CIT(A) finally held that the insertion of Explanation 2 inserted by Finance Act, 2021 to Section 36(1)(va) of the Act is clarificatory, which clarify that the definition of 'due date' as per Section 43B of the Act is deemed to have been applied for the purpose of employees contribution.

6. On the other hand, the ld. DR only relied on the order of the CIT(A) and stated that the CIT(A) has passed exhaustive order explaining all

provisions of the Act.

7. We have heard rival contentions and perused the relevant material on record. Admitted facts are that the payment of PF contribution regarding employees' contribution is made within the due date of filing of return of income. The Revenue has disputed that the employees' contribution received by the assessee would be treated as income of the assessee because the same has not been deposited in the Government account within the due date as prescribed under the respective Acts. Now, the question arises, whether by the Finance Act, 2021, the provisions of Section 36(1)(va) by inserting the Explanation 2 r.w.s. 43B of the Act have been amended, whereby it is clarified that the provisions of Section 43B of the Act shall not apply and shall be deemed ought to have been applied for the purpose of determining the due date under this clause. This amendment has brought in the statute book to provide certainty about the applicability of provisions of Section 43B of the Act in spite of belated payment of employees contribution. We also noted from the memorandum explaining the provisions to Finance Act, 2021, wherein relevant Clauses to said memorandum clearly intended that the amendment shall take effect from 01.04.2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years. The relevant Clauses 8 & 9 of the memorandum explaining the provisions are reproduced as under:-

“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's 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 measures 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.*

In the present case also, before insertion of Explanation 2 to Section 36(1)(va) of the Act, there is ambiguity regarding due date of payment of employees' contribution on account of provident fund and ESI, whether the due date is as per the respective Acts or up to the due date of filing of return of income of the assessee. As noted by Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd., 367 ITR 466, an amendment made to a taxing statute can be said to be intended to remove hardship only of the assessee and not of the Department. Imposing of a retrospective levy on the assessee would cause undue hardship and for that reason Parliament specifically chose to make

the proviso affective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 01.04.2021 i.e. for and from assessment year 2021-22 of Explanation-2 to s. 36(1)(va) of the Act and not retrospectively.

8. Thus, from the above, it is clear that the amendment brought in the statute i.e., by Finance Act, 2021, the provisions of Section 36(1)(va) r.w.s. 43B of the Act amended by inserting Explanation 2 is prospective and not retrospective. Hence, the amended provisions of Section 43B r.w.s. 36(1)(va) of the Act are not applicable for the assessment year 2018-19 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue of assessee's appeal is allowed.

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

Order Pronounced in open Court on 07<sup>th</sup> April, 2022.

**Sd/-**

(दुव्वूरु आर.एल रेड्डी)  
(DUVVURU RL REDDY)

न्यायिकसदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

Dated : 07.04.2022

L.Rama, SPS

**Sd/-**

(एस बालाकृष्णन)  
(S.BALAKRISHNAN)

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee– Sanjana Flexipack Private Limited, Plot NP-84/3, D-Block, Auto Nagar, Visakhapatnam
2. राजस्व/The Revenue – Income Tax Officer, Ward 1(1), Visakhapatnam
3. आयकर आयुक्त (अपील)/ The Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi
4. Principal Commissioner of Income Tax
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/ DR,ITAT, Visakhapatnam
- 6.गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary  
ITAT, Visakhapatnam