

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” “B”BENCH: BANGALORE**

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

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| ITA No.10/Bang/2022 |
| Assessment Year:2019-20 |

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| M/s. Nalpak Restaurants #2702, Gokulam Road V.V. Mohalla Mysuru 570 002 PAN NO : AAFFN9875M | Vs. | ITO Ward-1(2) Mysuru & CPC Bangalore |
| APPELLANT | | RESPONDENT |

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| Appellant by | : | Ms. Sunaina Bhatia, A.R. |
| Respondent by | : | Shri Ganesh R. Ghale, Standing counsel for dept. |

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| Date of Hearing | : | 11.04.2022 |
| Date of Pronouncement | : | 11.04.2022 |

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order passed by Ld. CIT(A), National Faceless Appeal Centre, Delhi and it relates to the assessment year 2019-20. The only issue urged in this appeal relates to disallowance of Rs.8,04,667/- being employees contribution to provident fund and employees state insurance, u/s 36(1)(va) of the Income-tax Act,1961 [‘the Act’ for short] in AY 2019-20.

2. The assessee filed its return of income for AY 2019-20 on 24.10.2019. The return of income was processed u/s 143(1) of the Act, wherein the disallowance u/s 36(1)(va) of the Act was made on

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the ground that the employees contribution to PF and ESI has been paid by the assessee beyond the due date prescribed in the respective Acts.

3. The assessee challenged the above said addition by filing appeal before Ld. CIT(A) contending that the disallowance should not be made, since the above said payment has been made prior to the due date prescribed u/s 139(1) of the Act. In this regard, the assessee relied on the decision rendered by jurisdictional Karnataka High Court in the case of Sabari Enterprises (298 ITR 141)(Kar). However, the Ld. CIT(A) rejected the contentions of the assessee by following the amendment brought in by the Finance Act, 2021 in sections 43B and 36(1)(va) of the Act. Aggrieved, the assessee has filed this appeal before me.

4. The learned AR submitted that the assessee has remitted the employees contribution of PF & ESI before the due date prescribed u/s 139(1) of the Act, even though the contribution was paid in few instances beyond the due date prescribed in the respective Statutes. He invited my attention to the copy of tax audit report filed for the year, particular column 20(b) of the report, wherein the details of remittance of PF & ESI are given in support of his submission that the impugned contribution has been paid before the due date prescribed u/s 139(1) of the Act in the impugned year.

5. The question whether the payment made beyond the due date prescribed under respective statutes, but before the due date prescribed u/s 139(1) of the Income tax Act was considered and decided in favour of the assessee by the Tribunal in the case of M/s. Shakuntala Agarbathi Company Vs. DICT in ITA No.385/Bang/2021

(order dated 21.10.2021). The learned Departmental Representative supported the orders of the Income Tax Authorities.

6. I heard both parties and perused the record. On identical facts, the Bangalore Bench of the Tribunal in the case of M/s. Shakuntala Agarbathi Company Vs. DCIT (supra) by following the dictum laid down by the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT (supra)*, had held that the assessee would be entitled to deduction of employees' contribution to PF and ESI provided that the payment was made prior to the due date of filing of the return of income u/s 139(1) of the I.T.Act. It was further held by the ITAT that amendment by Finance Act, 2021, to section 36[1][va] and 43B of the Act is not clarificatory. The relevant finding of the ITAT in the case of M/s. Shakuntala Agarbathi Company Vs. DCIT (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 EssaeTeraoka (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

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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 appellants-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 [EssaeTeraoka \(P.\) 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](#)

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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.”

7. Therefore, the amended provisions of section 43B as well as 36(1)(va) of the I.T. Act are not applicable for the assessment year under consideration. By following the binding decision of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT (supra)*, the employees' contribution paid by the assessee before the due date of filing of return of income u/s 139(1) of the I.T. Act is an allowable deduction. Accordingly, we decide this issue in favour of the assessee and the disallowance made by the Assessing Officer is deleted.

8. The Ld D.R submitted that the Hon'ble Gujarat High Court has taken a contrary view on this issue in the case of *CIT vs. Gujarat Road Transport Corpn.* (2014)(41 taxmann.com 100) and the matter is pending before Hon'ble Supreme Court. Accordingly, he prayed that in the event of Hon'ble Apex Court taking a view in favour of the revenue on this issue confirming the view taken by Hon'ble Gujarat

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High Court, then the Revenue should be given liberty to seek rectification of the present order. The prayer of the Ld D.R so made is accepted, subject to the statutory limitations, if any.

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

Order pronounced in the open court on 11th Apr, 2022

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 11th Apr, 2022.
VG/SPS

Copy to:

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

By order

Asst. Registrar,
ITAT, Bangalore.