

IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI

BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No. 1838/Mum/2021

(A.Y: 2018-19)

Emkay Facilities Services Pvt Ltd B-11, Ground Floor, Veena Beena, Prabodhnkar Thakare Road, Sewree (W) – Mumbai-400015	Vs.	ACIT (CPC), Bangalore [DCIT Circle – 6(1)(1) Mumbai]-400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCE0492R		
Appellant	..	Respondent

Appellant by :	None
Respondent by :	Mr.B.K.Bagchi, Sr. DR

Date of Hearing	28.03.2022
Date of Pronouncement	30.03.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) Delhi passed u/s 154 and 250 of the Act. The assessee has raised the following grounds of appeal:

1) *In the facts and circumstances of the case and in law*

the Assessing Officer (CPC) erred in adding Rs. 33,73,061/- on account of alleged delay in payment towards Provident Fund, ESIC and any Other Welfare Fund u/s 36(1)(va) r.w.s 43B and 2(24)(x) of the Act thereby

- a) Disregarding the case laws of Bombay High Court and Supreme Court etc.
- b) Making adjustment u/s 143(1) which is not permissible because the same are not prima facie adjustment as per various judgements of High Court and Supreme Court.
- c) By overlooking the fact that even though the same is paid on or before due date of filing of return.

2) In the facts and circumstances of the case and in law, the Commissioner of Income tax (Appeals), NFAC also erred in confirming the disallowance of Rs. 33,73,061/- on account of alleged delay in payment towards Provident Fund, ESIC and any Other Welfare Fund u/s 36(1)(va) r.w.s 43B and 2(24)(x) of the Act.

a) By disregarding the judgement of Jurisdictional High Court of Bombay in the case of Ghatge Patil Transports Ltd. 368 ITR 749 and Hind Filter Ltd 90 taxmann.com 51 (Bombay) and Alom Extrusions Ltd. [2009] 319 ITR 306 (SC).

By disregarding the fact that the judgement of Jurisdictional High Court is binding even in faceless appeal and assessment as per the order of Mahadev Cold Storage 127 taxmann.com 722 (Agra) I which it is held that, "Though Centralized NFAC has been created by Notification by CBDT, it should be ensured that c) By disregarding the fact that the amendment made to section 36(1)(va) by the Finance Act, 2021 is not retrospective as is recently held in the case of M/s

Crescent Roadways Private Limited (ITA No. 1952/Hyd./2018).

IC1 Relief Prayed:

The appellant therefore prays follows,

1. To delete the disallowance of Rs. 33,73,061/- on account of alleged delay in payment towards Provident Fund, ESIC and any Other Welfare Fund made u/s 36(1)(va) r.w.s 43B and 2(24)(x) of the Act.

1D1 General: -

- The appellant reserves rights to add alter or delete any portion of this appeal before its conclusion.*
- A Detailed paper book along with case laws will be submitted at the time of hearing.*
- This appeal is filed in time.*

2. The brief facts of the case are that, the assessee company is engaged in business of providing security services and filed the return of income electronically on 31.10.2018 with the total income of Rs. 1,02,21,070/-.The assessee has received online query on 19.01.2019 in respect of eligibility of deposit received from the employees contributions towards PF and ESI and the details with respect to deposits/payments u/sec 36(1)(va) of the Act before due date u/s 139(1) of the Act. Whereas, the assessee has deposited the claim before the due date of return

of income of Rs. 29,34,235/- towards Provident fund(PF) contribution and Rs.4,37,050 towards E.S.I. contributions and other welfare fund of Rs. 1,776 but were disallowed u/s 36(1)(va) of the Act and the total income was determined of Rs.1,35,94,130/-and order u/sec154 of the Act was passed on 3-06-2020.

3. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). Whereas the CIT(A) has considered the facts of the case, grounds of the appeal and the assessee's submissions in respect of claims and confirmed the action of the A.O and dismissed the assessee appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Hon'ble Tribunal.

4. At the time of hearing, none appeared on behalf of the assessee. The Ld.DR submitted that the explanation 2 to Sec 36(1)(va) of the Act in finance Act 2021 was introduced and the amendment is applicable to the earlier years and supported the order of the CIT(A) appeal.

5. We heard the Ld.DR submissions and perused the material available on record. The contentions are that the assessee is governed by the law applicable to said Assessment year. Whereas the amended provisions/explanations are w.e.f F.Y 1-4-2021. The assessee for the various reasons could not deposit the employees contribution to provident fund & ESIC within the time allowed under prescribed Act. Whereas, the assessee has deposited the amount before filing of the return of income U/sec139(1) of the Act. The Ld.CIT(A) has referred to chart at page 6 to 9 of the order, whereas there is a delay in depositing the employees contribution to provident fund of Rs.29,34,235/- and the employees contribution to ESIC Rs.4,37,050/- The assessee has complied with the provisions of Law and deposited the contributions before the due date of filling the Return of income U/sec139(1) of the Act which cannot be disputed. The Ld.DR submitted that the amendment is retrospective applicable. The fact remains that the provisions/explanation was introduced in the Finance Act 2021 which is effective from 1-4-2021.

6. We considering the overall facts, circumstances and the submissions find on the similar issue the Hon'ble Tribunal in the case of M/s BI Worldwide India Pvt Ltd. Vs. DCIT in ITA No.433/Bang/2021 dated 04.01.2022. A.Y.2018-19 has considered the facts and provisions of law has observed at page 3 Para 9 & 10 of the order which is read as under and allowed the appeal:

9. 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."

10. In view of the judicial pronouncements cited supra, we hold that the amendment to section 36(1)(va) and 43B of the 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 made the payment before the due date of filing of return u/s 139(1) on 30.11.2018 of the Act. Accordingly, grounds raised by assessee stands allowed.

7. Similarly in the case of Shri Satish Kumar Sinha Vs. ITO in ITA No.293/Hyd/2021,A.Y 2019-20 order dated 23.08.2021, the Honble Tribunal has observed at Para 3.5 as under:

3.5. We have heard both the parties through video conference and gone through the material placed on record. In the instant case, there is no dispute that the amounts-in-question with regard to EPF and ESI were remitted to the concerned accounts before the due date of filing the return of income u/sn139(1). This, the Tribunal has consistently taken a view that if the PF and ESI are remitted to the respective accounts, the same are required to be allowed as deduction. In the case of KLR Industries Ltd., Vs. DCIT (2017) [83 taxmann.com 322] (Hyd), the Tribunal held as under:

"34. The A.O. disallowed the expenditure claimed by observing that the assessee has not remitted the employees contribution to PF and ESI within the prescribed date as mentioned in section 36(1)(va). Though, the assessee did not challenge the

disallowance before learned CIT(A) but he raised an additional ground before us challenging the said disallowance. It is the contention of the assessee that the employees contribution to ESI and PF though, was not paid within the due date as prescribed under section 36(1)(va) but such dues having been paid before the due date of filing of return of the income as prescribed under section 139(1), the amount is allowable as a deduction as per the provisions of section 43B. We find merit in the aforesaid submissions of the assessee. There are a number of judicial precedents on this issue wherein it is held that if the employees contribution to PF and ESI is paid within the due date of filing of return of income under section 139(1), then, the amount is allowable as a deduction in view of the provision of section 43B. In view of the afore said, we delete the addition of Rs.2,07,209".

3.5.1. Similarly, Hon'ble Punjab & Haryana High Court in the case of Pr.CIT Vs. Rajasthan Beverages Corporation Ltd., (2017) [84 taxmann.com 173] held that no disallowance can be made in respect of PF and ESI u/s.36(1)(va) of the Act, if the same are deposited on or before the due date of filing the return of income. For the sake clarity and convenience we extract relevant part of the order of the Hon'ble Rajasthan High as under:

"5. So far as the question relating to privilege fees amounting to Rs.26.00 Crores in the instant year as well as the deduction of claim of Rs.17,80,765/- on account of Provident Fund (PF) and ESI is concerned, this Court has extensively considered the aforesaid two questions in assessee's own case vide judgment and order dt.26.05.2016 referred to (supra) and has held that the privilege fees being a revenue expenditure, is required to be allowed as a revenue expenditure. This court in the aforesaid case has also allowed the claim of the assessee, in so far as payment of PF & ESI etc. is concerned, on the finding of fact that the amounts in question were deposited on or before the due date of furnishing of the return of income and taking in consideration

judgment of this Court in CIT v. State Bank of Bikaner & Jaipur [2014] 363 ITR 70/43 taxmann.com 411/225 Taxman 6 (Mag.) (Raj.) and CIT v. Jaipur Vidhut Vitaran Nigam Ltd. [2014] 363 ITR 307/49 taxmann.com 540/[2015] 228 Taxman 214 (Mag.) (Raj.) and accordingly both the questions are covered by the aforesaid judgment and against the revenue". Against which the revenue has filed SLP before the Hon'ble Supreme Court, which was dismissed by the Hon'ble Apex Court in (2017) [85 taxmann.com 185]. Therefore, taking the consistent view and respectfully following the view taken by the Co-ordinate Bench of the ITAT in the case of KLR Industries Ltd., Vs. DCIT (supra), we hold that no disallowance could be made in respect of employees contribution of PF and ESI if the same are deposited before the due date of filing the return of income. Accordingly, we set aside the order of Ld.CIT(A) and delete the addition made by the AO. The appeal of the assessee on this ground is allowed".

Respectfully following the same, I set aside the order of the CIT (A) and delete the addition made by the Assessing Officer on this issue".

2. Respectfully following the same, I hold that since the assessee has deposited the Employees Contribution to the PF and ESI before the date of filing the return of income, as per the ITA No. 293 of 2021 Satish Kumar Sinha Hyderabad amended provision applicable to the to the relevant A.Y, the same is not to be disallowed. Assessee's appeal is accordingly allowed.

3. In the result, assessee's appeal is allowed.

8. We considering the ratio of judicial decisions and the facts emanated in the course of hearing find that the amendment was brought in finance Act 2021 w.e.f 1-4-2021. The law was not framed/amended in the relevant Assessement year and any legal proposition

which cast additional burden/liability on the assessee cannot be implemented retrospectively. We considering the overall facts, circumstances, judicial decisions, are of the reasoned view that the amendment to section 36(1)(va) of the Act will not be applicable to Assessment Year 2018-19. The assessee has deposited the employees contribution of provident fund & ESIC before the due date u/sec139(1) of the Act. Accordingly, we set-aside the order of the CIT(A) and direct the assessing officer to delete the disallowance and allow the grounds of appeal in favour of the assessee.

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

Order pronounced in the open court on 30.03.2022.

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 30.03.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Mumbai / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai