

IN THE INCOME TAX APPELLATE TRIBUNAL
SMC "C" BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA Nos.35 & 36/Bang/2022
Assessment years : 2018-19 & 2019-20

Alert Manpower, B 376, 9 th Cross, Peenya 1 st Stage, Ring Road, Peenya Industrial Area, Bengaluru – 560 058. PAN: AATFA 4936G	Vs.	The Deputy Commissioner of Income Tax, CPC, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	None e
Respondent by	:	Shri Ganesh R. Ghale, Standing Counsel.

Date of hearing	:	09.05.2022
Date of Pronouncement	:	09.05.2022

ORDER

These appeals by the assessee are directed against the separate orders dated 18.10.2021 of the CIT(Appeals), National Faceless Appeal Centre (NFAC), Delhi for the assessment years 2018-19 & 2019-20.

2. None appeared for the assessee. I proceed to dispose of these appeals after hearing the Id. DR and after perusing the material on record.

3. There is a delay of 26 days in filing these appeals by the assessee. The assessee has filed petitions for condonation of delay in filing these appeals explaining that the delay occurred since the impugned order was not received by the assessee and it came to know about the impugned orders passed while filing the return of income for the AY 2021-22 and filed

the appeals accordingly by which time there was a delay. We are of the opinion that there is sufficient cause for delay in filing the appeals and following the decision of the Hon'ble Apex Court in the case of *Collector, Land Acquisition Vs. MST. Katiji and Others (1987) 167 ITR 471 (SC)*, the delay in filing these appeals is condoned.

4. The only issue in this appeal is regarding disallowance of delayed payment of employee contribution to PF and ESI u/s. 43B r.w.s. 36(1)(va) of the Act by the revenue authorities.

5. The assessee is a partnership firm engaged in the business of providing manpower to industries. The returns of income for the assessment years under consideration filed by the assessee were processed and the CPC, Bangalore vide intimation u/s. 143(1) disallowed a sum of Rs.8,55,212 and 8,95,198 for AYs 2018-19 & 2019-20 respectively on account of belated remittance of employees contribution to PF and ESI. The CIT(Appeals), NFAC confirmed the order of the AO. Against this the assessee is in appeals before Tribunal.

6. The Id. DR supported the orders of lower authorities and relied on the judgment of Supreme Court in the case of *Zile Singh v. State of Haryana & Ors. dated 7.10.2004*.

7. I have heard both the parties and perused the material on record. The payment of employee contribution to ESI and PF though belated, but was before the due date of filing the return of income u/s. 139(1) of the Act and otherwise allowable u/s. 43B of the Income-tax Act, 1961 [the Act].

8. This issue is covered by the order of this Tribunal in the case of *M/s Jana Urban Services For Transformation Pvt. Ltd. v. DCIT, CPC in ITA No.307/Bang/2021 dated 11.10.2021* wherein it was held as under:-

“As seen from the above, the assessee made a sum of Rs.19,04,700/- beyond the time prescribed under the relevant Act. Now the claim of assessee is that the above payment has been made towards PF beyond due date prescribed under the relevant Act, however, the same was made within due date of filing the return of income u/s 139(1) of the Act for the year under consideration. As such the said amount cannot be disallowed u/s 36(1)(va) of the Act and it is not hit by explanation 2 to sec.36(1)(va) of the Act which calls for payment within the due date prescribed under the relevant Act. For this purpose he relied on the judgment in the case of Essac Teraoka (P.) Ltd. v. Dy. CIT 366 ITR 408 (Kar.), wherein it has held as under:

“15. From bare perusal of this provision, it is clear that under the provision, for IT Act, an extension is given to the employer to make payment of contribution to provident fund or any other fund till the "due date" applicable for furnishing the return of income under sub-section(1) of section 139 of the IT Act in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with such return. In short, this provision states, notwithstanding anything contained in any other provision contained in this Act, a deduction otherwise allowable in this Act in respect of any sum payable by the assessee as an employer by way of contribution to any fund such as provident fund shall be allowed if it is paid on or before the due date as contemplated under Section 139(1) of the IT Act. This provision has nothing to do with the consequences, provided for under the PF Act/PF Scheme/ESI Act, for not depositing the "contribution" on or before the due dates therein.

16. In the present case, admittedly, though the employer did not deposit the contribution, within the stipulated time, as contemplated by paragraph-30 of the PF Scheme or before the due date under the provisions of the PF scheme/Act, he deposited the contribution to the PF/ESI fund before the due date contemplated under Section 139(1) of the Act.

17. Section 6 of the PF Act provides for contributions and matters which may be provided for in Schemes. Paragraph-29 of the PF Scheme states what is "Contribution". The expression "contribution" is also defined under the PF Act by Section 2(c) of the PF Act, which means a contribution payable in respect of a member under the Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies. If this definition is read with sub-para(1) of paragraph-29 in Chapter-V of the PF Scheme, it would mean that the contributions payable by the employer under the Scheme shall be at a particular rate and the contribution payable by the assessee shall be equal to the contribution payable by the employer.

18. Paragraph-30 of the PF Scheme provides for payment of contributions. Sub-para(1) of paragraph-30 states that the employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

19. From bare perusal of sub-para(1) of paragraph-30, it is clear that the word "contribution" is used not only to mean contribution of the employer but also contribution to be made on behalf of the member employed by the employer directly.

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 subsection(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.407712013.

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.

8. Further, he relied on the judgment of Hon'ble Karnataka High Court in the case of CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.) has held as under:

“This clause is inserted by the Finance Act with effect from April 1, 1988. The Explanation to this clause is read very carefully. "Due date" has been explained stating that: means the date by which the assessee is required as an employer to credit contribution to the employees' account in the relevant fund under any Act, rule or order or notification issued thereunder or under any standing order, award, contract of service or otherwise." Prior to the above clause was inserted to section 36 giving statutory deductions of payment of tax under the provisions of the Act, section 43B(b) was inserted by the Finance Act, 1983, which came into force with effect from April 1, 1984. Therefore, again the provision of section 43B(b) clearly provides that notwithstanding anything contained in the other provisions of the Act including section 36(l) clause (va) of the Act, even prior to the insertion of that clause the assessee is entitled to get statutory benefit of deduction of payment of tax from the Revenue. If that provision is read along with the first proviso of the said section which was inserted by the Finance Act, 1987, which came into effect from April 1, 1988, the letters numbered as clause (a), or clause (c) or clause (d) or clause (e) or clause (f) are omitted from the

above proviso and therefore deduction towards the employees contribution paid can be claimed by the assessee. The Explanation to clause (va) of section 36(1) of the Income-tax Act further makes it very clear that the amount actually paid by the assessee on or before the due date applicable in this case at the time of submitting returns of income under section 139 of the Act to the Revenue in respect of the previous year can be claimed by the assessee for deduction out of their gross income. The above said statutory provisions of the Income-tax Act abundantly makes it clear that, the contention urged on behalf of the Revenue that deduction from out of gross income for payment of tax at the time of submission of returns under section 139 is permissible only if the statutory liability of payment of provident fund or other contribution funds referred to in clause (b) are paid within the due date under the respective statutory enactments by the assessee as contended by learned counsel for the Revenue is not tenable in law and therefore the same cannot be accepted by us.

9. The Id.AR drew our attention to the deletion of the second proviso to section 43B of the Income-tax Act by the Finance Act 2003, which provision has come into force, with effect from April 1, 2004. The reliance placed upon the decision of the apex court in Allied Motors P. Ltd. v. CIT [1997] 224 ITR 677 and also on the decision in General Finance Co. v. CIT (Asst.) [2002] 257 ITR 338 (SC) in respect of applicability of section 43B(b) and also omission of clause (a) or (c) or (d) or (e) or (B referred to above occurred in the first proviso to section 43B, supports the case of the assessee and also relevant paragraphs extracted from Allied Motor's case [1997] 224 ITR 677 and paragraph 59 referred to supra in this judgment from the Finance Bill with all fours supports the case of the assessee/ respondents. Therefore, we have to answer the substantial question of law No. 1 framed by this court in these appeals at the instance of the Revenue against them, viz., in the negative. Accordingly, we answer the substantial question No. 1 framed in these appeals in the negative.

10. Further he relied on the following judgments:-

1. In Re-Cognizance for Extension of Limitation - Supreme Court of India in M.P No.665/2021 in SMW(C) No.3/2020 dt.19/7/2021.
 2. Salzgitter Hydraulics Pvt Ltd vs ITO [2021] 128 taxman.com 192 [Hyderabad Tribunal]
 3. M/s Crescent Roadways Pvt Ltd vs DyCIT - ITA.No.1952/Hyderabad/2018
 4. M/s Mahadev Cold Storage vs Jurisdictional AO - ITA.No.41 & 42/Agra/ 2021
 5. M/s Essae Teraoka (P.) Ltd vs DCIT - [2014] 43 taxmann.com 33 (Karnataka)
 6. Anand Kumar Jain vs ITO - ITA NO 4192/MUM/2012 ValueMomentum Software Services Private Limited vs. DCIT I.T.A. No. 2 197/HYD/20 17 [Assessment Year: 2013-14] dated 19.05.2021;
 7. Mohan Ram Chaudhary vs. ITO ITA No. 51&54-55/Jodh/2021 [Assessment Year: 2018-19] dated 28.09.2021;
 8. CIT v. Aimil Ltd. [2010] 321 ITR 508
 9. CIT v. Nipso Polyfabriks Ltd. [2013] 350 ITR 326
 10. CIT vs. Merchem Ltd. 378 ITR 443 (Kerala))
 11. Sagun Foundry (P.) Ltd. vs. CIT [2017] 291 CTR 557 (Allahabad) 12. Bata India Ltd. vs. DCIT [2020] 180 ITD 464 (Kolkata - Trib.)
 13. DCIT vs. Eastern Power Distribution Company of A.P. Ltd. [2016] 160 ITD 432 (Visakhapatnam - Trib.)
 14. Nuzivedu Swati Coastal Consortium vs. ITO [2015] 62 taxmann.com 258 (Hyderabad - Trib.)
 15. DCIT vs. Teesta Valley Tea Co. Ltd. [2017] 85 taxmann.com 301 (Kolkata - Trib.)
11. The Id.DR contention is that as per sec.43B(b) of the Income-tax Act and explanatory notes to Finance Act 1983, that

Employees' Contribution was never intended to be covered by sec.43B. This has been reiterated and reinforced through Explanation 5 to sec.43B and Explanation 2 to 36(1)(va) inserted by Finance Act 2021. If it was the intention of the legislature expressly made clear in the Finance Act 2021, through the explanatory notes, it would necessarily to be held that Explanation 5 to sec. 43B and Explanation 2 to sec.36(1)(va) would apply to all pending matters as on date.

12. We find no merit in the argument of the Id.DR since the explanation as provided in Finance Act 2021 prescribes that the amendment in both sec.36(va) as well as 43B by inserting corresponding explanation that although impugned PF comes in the form of provision and the same is applicable from 1/4/2021 onwards only. In the present case we are concerned with the asst. year 2017-18 and the amended provision could not be applied retrospectively as it is only applicable w.e.f 1/4/2021. Being so no disallowance could be made by the AO in respect of PF/ESI paid within the due date of filing return of income. Though, it was beyond the date mentioned in the respective Act. This view of ours is supported by various judgment relied on by the Id.AR. Accordingly the appeal of the assessee is allowed.”

9. The Id. DR submitted that the Hon'ble Gujarat High Court has taken a contrary view on this issue in the case of *CIT v. Gujarat Road Transport Corporation (2014) 41 taxmann.com 100*) and the matter is pending before the Hon'ble Apex 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 High Court, then the revenue should be given liberty to seek rectification of the present order. The prayer of the Id. DR so made is accepted, subject to the statutory limitations, if any.

10. Accordingly, following the above order of the Tribunal, I allow the grounds taken by the assessee on this issue.

11. In the result, the appeals by the assessee are allowed.

Pronounced in the open court on this 9th day of May, 2022.

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 9th May, 2022.

/Desai S Murthy/

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.