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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.230 & 315 to 320/Bang/2022
Assessment Years :2017-18, 2012-13, 2013-14, 2014-15, 2015-16, 2016-17 & 2018-19 respectively

Kalkura Refrigeration and Kitchen Equipments Pvt. Ltd. Ambagilu Udupi 576105 **PAN NO : AADCK4607K**	**Vs.**	CIT(A)-2 Panaji
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Krishnamurthy Shibaraya, A.R.
Respondent by	:	Shri Ganesh R. Ghale, Standing counsel for dept.

Date of Hearing	:	12.05.2022
Date of Pronouncement	:	12.05.2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

These appeals by assessee are directed against the different orders of CIT(A) for the assessment years 2012-13 to 2018-19 dated 4.2.2022. The issue in these appeals are common in nature and hence these appeals are heard together and disposed of in common order for the sake of convenience.

2. In all these appeals, the assessee raised a legal ground with regard to issue of notice u/s 153C of Act as bad in law as the AO erred in issuing the said notice without sufficient documentary evidence for any undisclosed income. At the time of hearing, the Ld.

A.R. not pressed this ground and made an endorsement to this effect. Accordingly, this ground is dismissed as not pressed in all these appeals.

3. The next ground in all these appeals is with regard to the disallowance u/s 36(1)(va) of the Act on the ground that employees' contribution towards PF & ESI has been paid by the assessee beyond the due date prescribed in the respective Act though it was paid within the due date of filing the return of income u/s 139(1) of the Act. In these assessment years, assessee remitted the employees' PF contribution to the Government beyond the date prescribed in PF Act though it was remitted within the date prescribed u/s 139(1) of the Act.

4. We have heard both the parties, perused the e of materials available on record and gone through the orders of the authorities below. Similar issue came up for consideration before this Tribunal in the case of Rajendran Sudagar in ITA No.13/Bang/2022 dated 11.4.2022, wherein it was held as under:-

"6. I heard Ld. D.R. 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 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 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 36[1][va] and 43B of the Actby Finance Act, 2021 is only prospective in nature and not retrospective.

(i) DhabriyaPolywood 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 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.

In view of the above order of the Tribunal, we are inclined to decide this issue in favour of the assessee against the revenue in all these appeals.

5. Next ground the assessee raised in ITA No.320/Bang/2022 is with regard to the disallowance of business promotion expenses. At the time of hearing, this ground is not pressed. Accordingly dismissed.

6. Next common ground in ITA No.230/Bang/2022 & 320/Bang/2022 is with regard to addition towards stock valuation. In these assessment years, the AO. Observed that there is difference in valuation of closing stock in assessment year 2017-18 at Rs.4,40,570/- and in assessment year 2018-19 at Rs.2,70,230/-. Before Ld. CIT(A), assessee has not explained the reasons for such discrepancies to the satisfaction of the AO by adducing the requisite evidence to show that either no shortfall exist in this valuation of closing stock or that the methodology by the AO in computing closing stock was flawed. Accordingly, Ld. CIT(A) relied on the judgement of Hon'ble Supreme Court in the case of Ld. CIT(A) Vs. British Paints India Ltd 54 Taxman 499 (SC) wherein it was observed that AO is justified in rejecting the assessee's method of valuation and in holding that assessee's case in process and finished products are liable to be valued at 100% of cost. The Hon'ble Court observed as follows:-

"It is not only the right but the duty of the Assessing Officer to consider whether or not the books disclose the true state of accounts and the correct income can be deduced therefrom. It is incorrect to say that the officer is bound to accept the system of accounting regularly employed by the assessee, the correctness of which had not

been questioned in the past. There is no estoppel in these matters, and the officer is not bound by the method followed in the earlier years.

Section 145 confers sufficient power upon the officer - nay, it imposes a duty upon him - to make such computation in such manner as he determines for deducing the correct profits and gains. This means that where accounts are prepared without disclosing the real cost of the stock-in-trade, albeit on sound expert advice in the interest of efficient administration of the company, it is the duty of the ITO to determine the taxable income by making such computation as he thinks fit. Any system of accounting which excludes, for the valuation of the stock-in-trade, all costs other than the cost of raw material for the goods in process and finished products, is likely to result in a distorted picture of the true state of the business for the purpose of computing the chargeable income. Such a system may produce a comparatively lower valuation of the opening stock and the closing stock, thus showing a comparatively low difference between the two. In a period of rising turnover and rising prices, the system adopted by the assessee, as found by the Tribunal, is apt to diminish the assessment of the taxable profit of a year. The profit of one year is likely to be shifted to another year which is an incorrect method of computing profits and gains for the purpose of assessment. Each year being a self-contained unit, and the taxes of a particular year being payable with reference to the income of that year, as computed in terms of the Act, the method adopted by the assessee had been found to be such that income could not properly be deduced therefrom. It was, therefore, of his statutory power, as he had done in the instant case, for determining what, in his opinion, was the correct taxable income".

6.1 Accordingly, he confirmed the addition. Against this assessee is in appeal before us. The Ld. A.R. submitted that percentage variation between the value of closing stock computed by the assessee and the AO is very minimal and it is due to wrong application of method by the AO and since the value is very minimal and it has to be ignored.

7. On the other hand, Ld. D.R. relied on the order of the lower authorities.

8. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. In this case, the value adopted by the AO as well as by assessee are as follows:-

A.Y.	Closing stock as per Assessee	Closing stock as per A.O.	Difference	Difference in %
2017-18	92,19,016	96,59,586	4,40,570	4.78%
2018-19	97,40,734	100,10,964	2,70,230	2.77%

9. As seen from above the variation in valuation adopted by AO as compared to the assessee's valuation is very minimal and there is a chance of such nominal variation due to application of wrong price while computing the value. Further, this is only revenue neutral as the closing stock of one assessment year will become the opening stock of another assessment year and it is revenue neutral. Accordingly, the addition is deleted in both assessment years.

10. Next ground in ITA No.230/Bang/2022 in assessment year 2017-18 is with regard to addition in un-reconciled sundry debtors. In this assessment year, the AO made addition of Rs.2,34,748/- on account of variation in the creditors balance which could not be explained before the AO by the assessee. This ground is not pressed before us and accordingly, this ground of the assessee is dismissed as not pressed.

11. In the result, all the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 12th May, 2022

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 12th May, 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.