IN THE INCOME TAX APPELLATE TRIBUNAL
SMC BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI,ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2442/Mum/2021

(A.Y: 2019-20)

Shiv Sagar Restaurant Pvt Ltd,Dharam Prem Apartments,Nehru Road, Vile Parle(East) Mumbai-400057	Vs.	A.O.,CPC Bangalore, Karnataka-560500
PAN/GIR No. : AABCS1285M		
Appellant	..	Respondent

Appellant by :	Mr.Jigar Sangani.AR
Respondent by :	Ms.Samruddhi Hande.DR

Date of Hearing	25.05.2022
Date of Pronouncement	25.05.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the orders of the National Faceless Appeal Centre (NFAC), Delhi (hereinafter 'the CIT(A)') passed u/s 143(1) and 250 of the Act. The assessee has raised the following grounds of appeal:

1. The Hon'ble CIT(A) erred in confirming the order of the learned Assessing Officer disallowing employee contribution to Provident Fund of Rs.4,92,415/- though

claimed U/sec43B as the same was paid before due date of filling of return of Income.

2.The Honble CIT(A) erred in passing the order against principles of natural justice as no opportunity of proper hearing was given to the appellant neither by the Honorable CIT(A) nor by the learned assessing officer.

3.The Honorable CIT(A) erred in not allowing the employers contribution of Rs4,92,415/- on the basis of amendment to section 36(1)(va) and explanation to section 43B(b) presuming the same to be retrospective though it was clearly stated in the Act it is effective from 1.4.21 and further without giving any opportunity to the Appellant of being heard in this issue.

4. The Appellant prays that the amount of Rs.4,92,415/- be allowed based on the facts of the case and various decisions relied upon by the Appellant before the Honorable CIT(A).

2. The brief facts of the case are that the assessee company is engaged in the Hotel business. The assessee has filed the return of income on 22.10.2019 for the A.Y 2019-20 disclosing a total income of Rs.11,23,210/- and the return of income was processed u/s 143(1) of the Act and intimation dated 27.02.2020 was received through e-mail where the employee contribution of provident fund(PF) of Rs.4,92,415/- was disallowed u/s 36(1)(va) of the Act due to delay in deposit of PF

and under the respective Act and the total income was determined at Rs.16,15,620/-.

3. Aggrieved by the intimation, the assessee has filed an appeal before the CIT(A),whereas the CIT(A) has confirmed the addition in respect of the belated deposits of PF contributions and dismissed the appeal. Aggrieved by the CIT(A)order, the assessee has filed an appeal before the Honble Tribunal.

4. At the time of hearing, the Ld. AR of the assessee submitted that the CIT(A) has not considered the facts, law and the asseessee is governed by the law applicable to said assessment year. Whereas the amended provisions/explanations are with effect from F.Y1-4-2021.The Ld.AR relied on the judicial decisions and prayed for allowing the appeal.

5. Contra, 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.

6. We heard the rival submissions and perused the material available on record. The ld. AR's contentions are that the assessee for the various reasons could not deposit the employees contribution to provident fund within the time allowed under prescribed Act. Whereas, the assessee has deposited the amount before filing of the return of income U/sec 139(1) of the Act. Which cannot be disputed. The Ld.DR submitted that the amendment is retrospective applicable but the Ld.AR submissions are that the amendment has come w.e.f 1-4-2021and the same is applicable prospectively. The fact remains that the provisions/explanation was introduced in the Finance Act 2021 w.e.f 1-4-2021.

7. We considering the overall facts, circumstances and the submissions find on the similar issue, the Co-ordinate Bench of this Hon'ble Tribunal in M/s Kalpesh Synthetics Pvt Ltd Vs DCIT. Cpc in ITA no 1785/Mum/2021.A.Y 2018-19 order dated 27.04.2022 has considered the facts, provisions of law and allowed the appeal and observed at Page10 Para 9 &10 which is read as under:

9 what a tax auditor states in his report are his opinion and his opinion cannot bind the auditee at all. In this light, when one considers what has been reported to be 'due date' in column 20 (b) in respect of contributions received from employees for various funds as referred to in Section 36(1)(va) and the fact that the expression 'due date' has been defined under Explanation (now Explanation 1) to Section 36(1)(va) provides that "For the purposes of this clause, 'due date' means 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 thereunder or under any standing order, award, contract of service or otherwise", one cannot find fault in what has been reported in the tax audit report. It is not even an expression of opinion about the allowability of deduction or otherwise; it is just a factual report about the fact of payments and the fact of the due date as per the Explanation to Section 36(1)(va). This due date, however, has not been found to be decisive in the light of the law laid down by Hon'ble Courts above, and it cannot, therefore, be said that the reporting of payment beyond this due date in the tax audit report constituted "disallowance of expenditure indicated in the audit report but not taking into account in the computation of total income in the return" as is sine qua non for disallowance of Section 143(1)(a)(iv). When the due date under Explanation to Section 36(1)(va) is judicially held to be not decisive for determining the disallowance in the computation of total income, there is no good reason to proceed on the basis that the payments having been made after this due date is "indicative" of the disallowance of expenditure in question. While preparing the tax audit report, the auditor is expected to report the information as per the provisions of the Act, and the tax auditor has done that, but that information ceases to be relevant because, in terms of the law laid down by Hon'ble Courts, which binds all of us as much as the enacted legislation does, the said disallowance does not come into play when the payment is made well before the due date of filing the income tax return under section 139(1). Viewed thus also,

the impugned adjustment is vitiated in law, and we must delete the same for this short reason as well.

10. In view of the detailed discussions above, we are of the considered view that the impugned adjustment in the course of processing of return under section 143(1) is vitiated in law, and we delete the same. As we hold so, we make it clear that our observations remain confined to the peculiar facts before us, that our adjudication is confined to the limited scope of adjustments which can be carried out under section 143(1) and that we see no need to deal with the question, which is rather academic in the present context, as to whether if such an adjustment was to be permissible in the scheme of Section 143(1), whether the insertion of Explanation 2 to Section 36(1)(va), with effect from 1st April 2021, must mean that so far as the assessment years prior to the assessment years 2021-22 are concerned, the provisions of Section 43B cannot be applied for determining the due date under Explanation (now Explanation 1) to Section 36(1)(va). That question, in our humble understanding, can be relevant, for example, when a call is required to be taken on merits in respect of an assessment under section 143(3) or under section 143(3) r.w.s. 147 of the Act, or when no findings were to be given on the scope of permissible adjustments under section 143(1)(a)(iv). That is not the situation before us. We, therefore, see no need to deal with that aspect of the matter at this stage.

8. We find on the identical 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 and

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.

9. 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 Assessment year and any legal proposition which cast additional burden/liability on the assessee shall be applicable prospectively. 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 2019-20. The assessee has deposited the employee's contribution of Provident fund before the due date of return of income u/sec 139(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.

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

Order pronounced in the open court on 25.05.2022

Sd/-	Sd/-
(PRASHANT MAHARISHI)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 25.05.2022

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.

आदेशानुसार/ BY ORDER,

//True Copy//

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(Asst. Registrar)
ITAT, Mumbai