

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

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESEIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.126/Bang/2022
Assessment year : 2018-19

Valdel Engineers & Constructions Private Ltd., No.133 & 133/1, The Residency, 5 th floor, Residency Road, Bengaluru – 560 025. PAN: AAACK 7684H	Vs.	The Deputy Commissioner of Income Tax,CPC, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Pranav Krishna, Advocate
Respondent by	:	Shri Sankar Ganesh K., Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	23.05.2022
Date of Pronouncement	:	23.05.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal by the assessee is against the order of the CIT(Appeals)-11, Bangalore dated 22.10.2021. The relevant assessment year is 2018-19.

2. Though various grounds are raised in this appeal, the main issue is limited to the addition on account of disallowance of employees contribution to the Employees State Insurance Corporation [ESIC] of

Rs.20,55,150 u/s. 36(1)(va) r.w.s. 43B of the Income-tax Act, 1961 [the Act].

3. Brief facts of the case are that the assessee is a domestic company and filed its return of income on 28.11.2018 declaring an income of Rs.23,90,56,050. The return was processed u/s. 143(1) of the Act on 16.10.2019 by the DCIT, CPC making an addition of Rs.20,55,150 on account of the disallowance u/s. 36(va) r.w.s. 43B of the Act and determining income at Rs.24,11,11,200 due to the belated payment of employees contribution to ESIC.

4. The assessee contended in appeal before the CIT(Appeals) that though the employees contribution to ESIC was remitted belatedly, but the remittance was within the due date for filing the return of income u/s. 139(1) of the Act and therefore the disallowance by the AO was not called for. However, none appeared before the CIT(Appeals) at the time of hearing and the CIT(Appeals) passed an *ex parte* order after considering the material on record.

5. The CIT(Appeals) observed that AO had issued a notice u/s. 143(1)(a) read with first proviso thereto proposing the adjustment of Rs.20,55,157 since the employees contribution to ESIC was not deposited within the specified due date under the relevant statute. Since there was no response to the notice, the AO passed the intimation u/s. 143(1) of the Act making the said disallowance and addition.

6. The CIT(Appeals) dismissed the appeal of the assessee with the following observations:-

- (i) Referring to the provisions of section 2(24)(x) and 36(1)(va) of the Act, section 36(1)(va) specifically covers the employees' contribution to ESI, the same cannot be considered under any other provisions including the provisions of section 37 or section 43B.
- (ii) Section 43B of the Act relates to allowing certain deductions only on actual payments. Clause (b) of section 43B provides that any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed (irrespective of the previous year in which the liability pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year, in which such sum is actually paid by him. Proviso to the said section provides that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.
- (iii) Section 36(1)(va) and section 43B(b) operate on totally different footings and have different parameters for due dates, i.e., employee's contribution is linked to payment before the due dates specified in the respective Acts or Funds and employer's contribution is linked to the payment before the prescribed due date for filing of return u/s.139(1) Income Tax Act, 1961. The result of any failure to pay within the prescribed dates also leads to different results. In the case of employee's contribution, any failure to pay within the prescribed due date under the respective PF Act or Scheme will result in negating employer's claim

for deduction permanently forever u/s.36(1)(va). On the other hand, delay in payment of employer's contribution is visited with deferment of deduction on payment basis u/s.43B and is therefore not lost totally.

- (iv) The legal distinction between employees' contribution and employer's contribution under the Act was duly recognised by the Courts in below listed decisions, wherein the courts have clearly distinguished the facts from the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (2009) 319 ITR 306. He placed reliance on the following decisions:-
- (a) CIT v. Gujarat State Road Transport Corporation (2014) 41 taxamnn.com 100 / 366 ITR 170 / 223 Taxman 398 (Guj.)
 - (b) CIT v Merchem Ltd (2015) 61 taxmann.com 119/235 Taxman 291/378 ITR 443 (Ker)
 - (c) Popular Vehicles & Services Pvt. Ltd. v. CIT (2018) 96 taxmann.com 13 / 257 Taxman 120 / 406 ITR (Ker)
 - (d) Unifac Management Services (India) P. Ltd. [2018] 100 taxmann.com (Mad).

7. The CIT(A) thereafter noted that there were contradicting decisions by the various High Courts on considering section 36(1)(va) and 43B and in the backdrop of that Finance Bill, 2021 by insertion of Explanations to section 36(1)(va) and 43B.

8. The Finance Act, 2021 amended section 36(1)(va) by inserting Explanation 2 which reads thus:-

“Explanation 2. – For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the “due date” under this clause.”

9. The Finance Act, 2021 also amended section 43B by inserting explanation 5 thereto which reads thus:-

“Explanation 5. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies.”

10. Based on various judicial pronouncements, the CIT(A) held that the amendment Finance Bill, 2021 to section 36(1)(va) by insertion of Explanation 2 and the amendment to section 43B by insertion of Explanation 5 was only declaratory / clarificatory in nature and therefore was applicable with retrospective effect and dismissed the appeal of the assessee.

11. Aggrieved by the order of the CIT(A), the assessee is in appeal before us.

12. The following issues arise for our consideration :-

- (i) Whether the assessee would be entitled to deduction of employees' contribution to ESI provided the payments were made prior to the due date of filing the return of income u/s 139(1) of the Act?
- (ii) Whether the amendment by Finance Act, 2021 to section 36(1)(va) and 43B are not clarificatory in nature and hence prospective?

13. Before us, the learned AR submitted that the assessee's case is covered by the decisions of Co-ordinate Bench of the Bangalore in the case of *Shri Gopalakrishna Aswini Kumar v. ADIT, ITA*

No.359/Bang/2021 dated 13.10.2021 and Technocon Constructions & Infrastructure P. Ltd. v. DCIT, ITA No.670/Bang/2021 dated 1.2.2022.

14. The learned Departmental Representative, on the other hand, supported the order of the CIT(A).

15. We have heard rival submissions and perused the material on record. In the case of *M/s.Shakuntala Agarbathi Company v. DCIT* in ITA No.385/Bang/202, by order dated 21.10.2021, the Tribunal took cognizance of both the above issues viz., (i) whether employee contribution to PF/ESI is also eligible for deduction where the payments are made before the due date of filing the return of income u/s 139(1); (ii) whether the amendments made to sections 36(1)(va) and 43B are not clarificatory in nature. The relevant finding of the ITAT in the case of *M/s.Shakuntala Agarbathi Company (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 *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 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 Essae Teraoka (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 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.”

16. By following the aforesaid decision of the Co-ordinate Bench, and also the binding decision of the Hon’ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd. v. DCIT (supra)*, we hold that the employee’s contribution towards ESIC paid by the assessee before the due date of filing the return of income u/s.139(1) of the Act is allowable as a deduction. The disallowance made by the AO is deleted. This issue is decided in favour of the assessee.

17. The other grounds of the assessee regarding interest u/s. 234A, 234B & 234C of the Act is consequential and mandatory in nature.

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

Pronounced in the open court on this 23rd day of May, 2022..

Sd/-

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

(PADMAVATHY S)
ACCOUNTANT MEMBER

Bangalore,

Dated, the 23rd 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.