

THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 508/Mum/2022 (A.Y. 2018-19)

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| DCIT-13(2)(2) Room No. 571 5 th Floor Aayakar Bhavan M.K. Road Churchgate Mumbai-400 020. | Vs. | M/s. Sodexo Technical Services India Pvt. Ltd. 1 st Floor, Gemstar Complex, Ramchandra Lane Extension Kanchpada, Malad West Mumbai-400 064. PAN : AAECM7924N |
| (Appellant) | | (Respondent) |

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| Assessee by | Shri M.A. Gohel |
| Department by | Shri/Ms. Vrunda Matkarni |
| Date of Hearing | 21.06.2022 |
| Date of Pronouncement | 22.06.2022 |

ORDER

Per B.R.Baskaran (AM) :-

The revenue has filed this appeal challenging the order dated 09/12/2021 passed by Ld. CIT(A), National Faceless Appeal Centre, Delhi and it relates to the assessment year 2018-19. The solitary issue urged in this appeal relates to disallowance of Rs.5,85,06,427/-, being employees contribution to provident fund & ESI, made u/s 36(1)(va) of the Income-tax Act,1961 [the Act' for short], which was deleted by Ld CIT(A).

2. The assessee filed its return of income for AY 2018-19 on 29.11.2018. The extended due date for filing return of income u/s 139(1) for this year was 30-11-2018. The return of income was processed u/s 143(1) of the Act, wherein the above said disallowance was made u/s 36(1)(va) of the Act on the ground that the employees contribution to PF and ESI has been paid by the assessee beyond the due date prescribed in the respective Acts.

3. The assessee challenged the above said addition by filing appeal before Ld. CIT(A) contending that the disallowance should not be made, since the above said payments have been made prior to the due date for filing return of income prescribed u/s 139(1) of the Act. In this regard, the assessee relied on the decision rendered by Hon'ble Bombay High Court in the case of Ghatge Patil Transport Ltd. (368 ITR 749) and other case laws in support of its claim. The Ld. CIT(A) accepted the contentions of the assessee and accordingly deleted the disallowance. Aggrieved, the revenue has filed this appeal.

4. The Ld D.R submitted that the amendment brought in by the Finance Act, 2021 in sections 43B and 36(1)(va) of the Act is clarificatory in nature and hence it shall have retrospective application. Accordingly, she contended that the Learned CIT(A) should have applied the amended provisions and confirmed the disallowance. He submitted that the intention of the legislature has been clarified by way of amendment made in Finance Act, 2001. In this regard, she placed his reliance on the decision rendered by Hon'ble Supreme Court in the case of Zile Singh vs. State of Haryana (Appeal (civil) 6638 of 2004).

5. The Ld A.R, however, supported the order passed by Learned CIT(A). He submitted that the Ld CIT(A) has rendered his decision by following the decision rendered by him in the assessee's own case for assessment year 2013-14 and also the decision rendered by the Tribunal in the case of Sodexo Food Solutions India (P) Ltd (2019)(103 taxmann.com 437).

6. We heard the parties and perused the record. The question whether the payment made beyond the due date prescribed under respective statutes, but before the due date prescribed u/s 139(1) of the Income tax Act was considered and decided in favour of the assessee by the Bangalore bench of Tribunal in the case of M/s. ShakuntalaAgarbathi Company Vs. DICT in ITA No.385/Bang/2021 (order dated 21.10.2021). The question as to whether the amendment made by Finance Act, 2021 shall have retrospective effect or not was also answered in this order.

7. In the case of M/s. Shakuntala Agarbathi Company Vs. DCIT (supra), the Tribunal has followed the decision rendered by the Hon'ble jurisdictional Karnataka High Court in the case of Essae Teraoka Pvt. Ltd Vs. DCIT (2014)(43 taxmann.com 33)(Kar), wherein the Hon'ble High Court has held that the assessee would be entitled to deduction of employees' contribution to PF and ESI provided that the payments were 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 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) [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.”

8. Accordingly, we are of the view that the amendment made by Finance Act, 2021 in the provisions of section 43B as well as 36(1)(va) of the I.T. Act are not applicable for the assessment year under consideration. We notice that the Hon'ble jurisdictional Bombay High Court has also held in the case of Ghatge Patil Transport Ltd (supra) that the employees contributions remitted on or before the due date for filing return of income is allowable as deduction. Accordingly, we hold that the employees' contribution paid by the assessee on or before the due date for filing of return of income u/s 139(1) of the I.T. Act is an allowable deduction.

9. The assessee has filed copy of tax audit report before us. In the serial no. 20(b), the tax auditor has given details of dates of payments of employees contribution of PF& ESI. We noticed earlier that the extended due date for filing return of income for the year under consideration was 30-11-2018. We notice from serial no. 20(b) that some of the payments have been made beyond 30-11-2018. Accordingly, we confirm the order passed by Learned CIT(A) only in respect of those payments made on or before 30-11-2018, i.e., the disallowance shall be sustained in respect of payments made after 30-11-2018 and to that extent order passed by Ld CIT(A) is reversed. We order accordingly.

10. In the result, the appeal of the revenue is partly allowed.

Order pronounced in the open court on 22.06.2022.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 22/06/2022

Copy of the Order forwarded to :

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

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai