

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

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.618/Bang/2021
Assessment year : 2019-20

M/s. International Aerospace Manufacturing Pvt. Ltd., Sy.No.3, Varthur Hobli, Kempapura Village, Bengaluru – 560 037. PAN: AACCI 4063N	Vs.	The Assistant Director of Income Tax, CPC, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Shreeshkumar Hegde, CA
Respondent by	:	Shri M S Nethrapal, Addl. DIT

Date of hearing	:	06.06.2022
Date of Pronouncement	:	06.06.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal is at the instance of assessee directed against the order of the CIT(Appeals), National Faceless Appeal Centre, Delhi dated 22.9.2021 for the assessment year 2019-20.

2. The only issue involved in this appeal disallowance of delayed payment of employees contribution to Provident Fund (PF) and Employees State Insurance (ESI) aggregating to Rs.18,54,198 u/s. 36(1)(va) r.w.s. 43B of the Income-tax Act, 1961 [the Act].

3. The assessee company filed its return on 30.11.2019 declaring total income of Rs.12,05,72,990. In the intimation passed by the CPC u/s. 143(1) of the Act, payment of Rs.18,54,198 was disallowed u/s. 36(1)(va) r.w.s. 43B of the Act on the ground of belated remittance of the contribution to PF & ESI.

4. On appeal, the CIT(Appeals) based on various judicial pronouncements held that the amendment to section 36(1)(va) by inserting explanation 2 and the amendment to section 43B by insertion to explanation 5 by the Finance Bill 2021 was only declaratory / clarificatory in nature and therefore was applicable with retrospective effect and dismissed the appeal of the assessee. Aggrieved, the assessee is in appeal before the Tribunal.

5. The Id. AR submitted that though there were belated payments towards employees contribution to ESI & PF under the respective statute, but the payments were made within the due date for filing the return u/s. 139 of the Act and no disallowance was called for. He relied on several decisions of the jurisdictional High Court and the orders of this Tribunal in support of his contentions.

6. We have considered the rival submissions and perused the material on record. Following issues arise for consideration:-

- (i) Whether the assessee would be entitled to deduction of employees' contribution to PF and 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?

7. These issues are squarely covered in favour of the assessee by the decision of the coordinate Bench of this Tribunal in the case of M/s.Shakuntala Agarbathi Company v. DCIT, ITA No.385/Bang/2021 (order dated 21.10.2021). The relevant findings of the Tribunal are 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.”

8. Following the decision of the Co-ordinate Bench in the case of M/s.Shakuntala Agarbathy Company (supra) and also the binding decision of the Hon'ble jurisdictional High Court in the case of Essae Teraoka Pvt. Ltd. v. DCIT (supra), we decide this issue in favour of the assessee that the employee's contribution 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 and the disallowance is deleted.

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

Pronounced in the open court on this 06th day of June, 2022.

Sd/-

(BEENA PILLAI)
JUDICIAL MEMBER

(PADMAVATHY S.)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 6th June, 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.