

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

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

ITA No.50/Bang/2022
Assessment year : 2017-18

Rashi Eco Tourism Ltd., Sy.No.177, Nowkalpalya, Kagalipura, Off Kanakapura Road, Bangalore – 560 082. PAN: AAECR 3967J	Vs.	The Assistant Director of of Income Tax, CPC, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Sandeep Chalapathy, 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 by the assessee is directed against the order dated 24.11.2021 of the CIT(Appeals)-11, Bangalore for the assessment year 2017-18.

2. The only issue in these appeal is regarding disallowance of delayed payment of employers and employees contribution to PF and ESI u/s. 43B r.w.s. 36(1)(va) of the Act by the revenue authorities.

3. The assessee company filed its return declaring total income of Rs.39,21,400. The return was processed u/s. 143(1) and subsequently rectified u/s. 154 by order dated 13.1.2020 disallowing the belated payments of employers and employees contribution to ESI and PF of Rs.21,98,007.

4. The assessee filed appeal before the CIT(Appeals) against the order of AO passed u/s.154. The CIT(Appeals) stated that the impugned disallowance u/s. section 36(1)(va) r.w.s. 43B was made due to delayed remittance of the contribution to PF & ESI when the return was processed u/s. 143(1) of the Act and the disallowance did not arise out of the rectification order passed u/s. 154 of the Act. The CIT(Appeals) also stated that the in the order under appeal i.e. order u/s. the AO only withdrew excess TDS credit. Hence CIT(Appeals) dismissed the appeal on the basis that the impugned issue was not subject matter of rectification order against which appeal was before him. Aggrieved, the assessee is in appeal before the Tribunal.

5. Before us, the Id. AR submitted that the CIT(Appeals) was not justified in holding that the disallowance of contribution to PF & ESI does not fall within the provisions of section 154 of the Act and it is not a mistake apparent from record. He relied on the decision of the jurisdictional High Court in favour of the assessee even under proceedings u/s. 154 of the Act.

6. The Id. DR supported the order of the CIT(Appeals).

7. We have considered the rival submissions and perused the material on record. It is the undisputed fact that the employees' contribution amounting to Rs.21,98,007 which is collected by the assessee is deposited into the Government account before the due date for filing the return of income. The debate is with respect to the allowability of the same which has not been considered by the CIT(Appeals) on merits stating that this is not issue for consideration in an appeal filed against an order u/s.154. The ld AR's contention is that the Jurisdictional decision of the High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT reported in 366 ITR 408 (Kar.) in which the issue is held in favour of the assessee is a record available and the order passed u/s.154 by the AO has not considered this material on record. Considering this argument and that the assessee has a favourable case on merits basis the decision of the Hon'ble Karnataka High Court we are proceeding to adjudicate the matter on merits in the following paragraphs.

8. 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?

9. 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.”

10. 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.

11. In the result, the appeal by the assessee is allowed in favour of the assessee..

Pronounced in the open court on this 6th day of June, 2022.

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-
(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.