IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE

Before Shri George George K, JM & Shri Laxmi Prasad Sahu, AM

ITA No.409/Bang/2022 : Asst.Year 2018-2019

M/s.L.K.Trust No.101, Infantry Road Bengaluru North Bangalore – 560 001. **PAN : AAATL0522A.**	v.	The Deputy Commissioner of Income-tax (CPC) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.V.Sridhar, CA
Respondent by : Sri.Suresh Rao, Addl.CIT-DR

Date of Hearing : 25.07.2022		**Date of Pronouncement : 25.07.2022**

O R D E R

Per George George K, JM :

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 25.04.2022. The relevant assessment year is 2018-2019.

2. The grounds raised read as follows:-

"1. The order of the learned Commissioner of Income-tax (Appeals) Bengaluru-11, Bengaluru in Income tax appeal Number:CIT(A)-11/BNG/10496/2017-18 dated 25.04.2022 in DIN:ITBA/APL/M/250/2022-23/1042836019(1) dismissing the appeal filed against the intimation u/s 143(1) of the Income Tax Act, dated 04.11.2019 passed by the Deputy Commissioner of Income Tax, Centralized Processing Centre, Income-tax Department, Bengaluru in DIN:CPC/1819/A5/1922129617 is so far as it is against the interest of the appellant, is opposed to law, weight of evidences, facts and circumstances of the case.

2. The learned Commissioner of Income tax (Appeals) erred in dismissing the appeal filed by the appellant without condoning the delay of 731 days.

3. The learned Commissioner of Income tax (Appeals) failed to appreciate the application for condonation of delay in proper perspective. The appellant had sufficient cause for not

presenting the appeal within the period allowed by law.

4. The learned Commissioner of Income tax (Appeals) should have appreciated that the delay is not willful or owing to negligence on the part of the appellant.

5. The learned Commissioner of Income tax (Appeals) should have disposed off the appeal on merits.

6. The learned Commissioner of Income tax (Appeals) should have observed that the issue involved in appeal, viz., allowance of Employees' Contribution to Provident Fund and Employees' State Insurance is decided in favour of the appellant by not only the Karnataka High Court, but also in various decisions rendered by the Hon'ble Income Tax Appellate Tribunal, Bengaluru.

7. The learned Commissioner of Income tax (Appeals) should have observed that substantial justice should prevail over technical consideration of the condonation of delay in filing the appeal.

8. The learned Commissioner of Income tax (Appeals) should have considered that the ultimate purpose of tax proceedings is to determine the tax liability in accordance with law.

9. The appellant had prima facie case to get the additions deleted i.e., addition on account of Employees' Contribution to Provident Fund and Employees State Insurance deleted as per law laid down by the various High Courts.

10. The learned Commissioner of Income tax (Appeals) should have applied the law in a meaningful manner which sub-serves the ends of justice.

11. The learned Commissioner of Income tax (Appeals) wrongly threw the meritorious matter at the very threshold and caused justice being defeated.

12. The learned Commissioner of Income tax (Appeals) should have appreciated that the appellant would not stand to benefit by filing the appeal late.

13. The appellant craves leave to add, delete, amend or substitute any of the grounds of appeal raised herein.

14. The grounds of appeal raised herein may be read as without prejudice to each other.

> *For these and other grounds that may be urged at the time of hearing before the Income-tax Appellate Tribunal, the appellant prays that the order of Commissioner of Income-tax (Appeals) be set aside, and direct the Assessing Officer to delete the addition made in the intimation u/s 143(1) dated 04.11.2019, and the appeal be allowed, in the interests of justice."*

3. There was a delay of 731 days in filing the appeal before the CIT(A). The CIT(A) dismissed the appeal rejecting condonation of delay of 731 days without going into the merits of the issue. The explanation for the delay in filing the appeal by the assessee was that intimation u/s. 143(1) was received on 21.11.2019 and the assessee's Counsel passed away on 14.12.2019 whereby there was dislocation of work. The assessee was entitled for a refund of Rs.97,54,290 as per intimation which was granted by the AO after affording opportunity to the assessee. The assessee was unaware of the adjustment made in the intimation and since there was no demand payable but only a reduction of loss, the adjustment made in the intimation escaped assessee's attention. Due to COVID-19 pandemic, the Supreme Court granted extension of limitation from 15.3.2020 till 2.10.2021. Thus, the assessee was prevented by bonafide reasons in filing the appeal belatedly.

4. On identical facts, the Co-ordinate Bench of the Bangalore ITAT in the case of M/s.Khoday India Ltd. v. DCIT in ITA Nos.407 & 408/Bang/2022 (order dated 19.07.2022) has condoned the delay of 731 days in filing the appeal before the CIT(A). The relevant finding of the ITAT reads as follows:-

"8. As far as the appeal for AY 2018-19 is concerned, the CIT(Appeals) dismissed the appeal rejecting condonation of delay of 731 in filing the appeal before him, without going into the merits of the issue. The explanation for the delay in filing the appeal by the assessee was that intimation u/s. 143(1) was received on 21.11.2019 and the assessee's counsel passed away on 14.12.2019 whereby there was dislocation of work. The assessee was entitled for a refund of Rs.18,65,473 as per intimation which was granted by the AO after affording opportunity to the assessee. The assessee was unaware of the adjustment made in the intimation and since there was no demand payable but only a reduction of loss, the adjustment made in the intimation escaped assessee's attention. Due to COVID-19 pandemic, the Supreme Court granted extension of limitation from 15.3.2020 till 2.10.2021. Thus, the assessee was prevented by bonafide reasons in filing the appeal belatedly.

9. The Hon'ble Supreme Court, in the case of Mst. Katiji (supra), has explained the principles that need to be kept in mind while considering an application for condonation of delay. The Hon'ble Apex Court has emphasized that substantial justice should prevail over technical considerations. The Court has also explained that a litigant does not stand to benefit by lodging the appeal late. The Court has also explained that every day's delay must be explained does not mean that a pedantic approach should be taken. The doctrine must be applied in a rational common sense and pragmatic manner. In the case of Shakuntala Hegde, L/R of R.K. Hegde v. ACIT, ITA No.2785/Bang/2004 for the A.Y. 1993-94, the Tribunal condoned the delay of about 1331 days in filing the appeal wherein the plea of delay in filing appeal due to advice given by a new counsel was accepted as sufficient. The Hon'ble Karnataka High Court in the case of CIT v. ISRO Satellite Centre, ITA No. 532/2008 dated 28.10.2011 has condoned the delay of five years in filing appeal before them which was explained due to delay in getting legal advice from its legal advisors and getting approval from Department of Science and PMO. In the aforesaid decision, the Hon'ble Court found that the very liability of the assessee was non-existent and therefore condoned the delay in filing appeal. In condoning the delay in filing the appeals, the expression 'sufficient cause' should receive liberal construction and advancement of substantial justice is of prime importance. Discretion of condoning the delay has to be exercised on the facts of each case.

10. Keeping in mind the aforesaid principles, we find that the explanation of the assessee for delay in filing the appeals put forth before the CIT(Appeals) are bonafide and genuine reasons which constitute 'sufficient cause' for the delay. The number of days of delay cannot be looked in isolation and the reasons or explanation of the assessee for the delay have to be considered in the light of the test of bonafide reasons constituting sufficient cause for the delay in a pragmatic manner. In our opinion, the CIT(Appeals) ought to have condoned the delay in the instant case and adjudicated the appeals on merits. We therefore condone the delay in filing both the appeals before the CIT(Appeals)."

5. In view of the above order of the ITAT, we condone the delay of filing the appeal before the CIT(A) and proceed to dispose of the matter on merits. As regards the issue on merits, we find that the same is squarely covered in favour of the assessee by various orders of the ITAT, wherein, it was held that amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act 2021 is only prospective. Since, the issue on merits is covered in favour of the assessee by various orders of Bangalore Bench of the ITAT, we deem it appropriate to adjudicate the issue on merits.

6. The brief facts of the case are as follows:

For the assessment year 2018-2019, the return of income was filed on 28.09.2018, declaring total income of Rs.3,06,88,250. The assessee was served with an intimation u/s 143(1) of the I.T.Act by assessing the total income at Rs.3,11,65,670. One of the reasons for the difference between the returned income and the assessed income u/s 143(1) of the I.T.Act was on account of disallowance of sum of Rs.2,40,860 being late remittance of employees' contribution to PF and ESI under the respective Acts.

7. Aggrieved by the intimation u/s 143(1) of the I.T.Act, the assessee preferred an appeal before the first appellate authority. It was stated that the assessee had paid the employees' contribution to PF and ESI prior to the due date of filing of the return u/s 139(1) of the I.T.Act. Therefore, it was submitted that the assessee is entitled to deduction of employees' contribution to PF and ESI having regard to the

provisions of section 43B of the I.T.Act. In this context, the assessee relied on the judgment of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT, reported in 366 ITR 408 (Kar.)*. The CIT(A), however, rejected the appeal of the assessee. The CIT(A) noticed the difference between employer and employee contribution to PF and ESI and held that only employers contribution to PF and ESI is entitled to deduction u/s 43B of the I.T.Act, if the same is paid prior to due date of filing of return of income u/s 139(1) of the Act. It was further held that the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory and has got retrospective operation.

8. Aggrieved, assessee has filed this appeal before the Tribunal. The learned AR submitted that an identical issue was decided in favour of the assessee by the Tribunal in the case of M/s. Shakuntala Agarbathi Company Vs. DICT in ITA No.385/Bang/2021 (order dated 21.10.2021).

9. The learned Departmental Representative supported the orders of the Income Tax Authorities.

10. We have heard the rival submissions and perused the material on record. On identical facts, the Bangalore Bench of the Tribunal in the case of M/s. Shakuntala Agarbathi Company Vs. DCIT (supra) by following the dictum laid down by the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT (supra)*, had 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 Actby 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."

10.1 Therefore, the amended provisions of section 43B as well as 36(1)(va) of the I.T.Act are not applicable for the assessment years under consideration. By following the binding decision of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT (supra)*, the employees' contribution paid by the assessee before the due date of filing of return of income u/s 139(1) of the I.T.Act is an allowable deduction. Accordingly, we decide this issue in favour of the assessee and the disallowance made by the Assessing Officer is deleted.

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

Order pronounced on this 25th day of July, 2022.

Sd/-	**Sd/-**
(Laxmi Prasad Sahu)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 21st July, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-11, Bangalore.
4. The Pr.CIT (Central), Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore