

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.528/Bang/2022 : Asst.Year 2018-2019

M/s.Shahi Electricals No.16, Robertson Road Frazer Town Bengaluru - 560 005. PAN : AAOFS3728F.	v.	The Assistant Director of Income-tax, CPC, Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.Sairam, CA

Respondent by : Smt.Priyadarshini Baseganni, Addl.CIT-DR

Date of Hearing : 02.08.2022	Date of Pronouncement : 02.08.2022
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ORDER

Per George George K, JM :

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 10.05.2022. 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] passed under section 250 of the Act in so far as it is against the Appellant is opposed to Law, weight of evidence, probabilities, facts and circumstances of the Appellant's case.

2. The appellant denies himself liable to be assessed on total income of Rs.89,89,910/- as determined by the learned assessing officer and upheld by the learned CIT[A] as against the returned income by the appellant of Rs.88,75,220/- under the facts and circumstances of the case.

3. *The learned Commissioner of Income Tax (Appeals) failed to appreciate that the Explanation 2 to section 36(va) and Explanation 5 to Section 43B of the Act inserted by the Finance Act, 2021 is prospective in nature and the same is applicable from the assessment year 2021-22 onwards and not applicable to the impugned assessment year and consequently the appellant is entitled for deduction on the facts and circumstances of the case.*

4. *The learned Commissioner of Income Tax [Appeals] erred in making an addition of Rs 1,14,685/- to business income, being payments made by the appellant in respect of Employee's contribution to EPF and ESI beyond the due dates mentioned in the respective Acts but before the due date of filing return of income by relying on newly inserted Explanation 5 to section 43B by Finance Act 2021.*

5. *The learned Commissioner of Income Tax [Appeals] failed to appreciate that the Explanation 2 to section 36(1)(va) and Explanation 5 to Section 43B of the Act was inserted by Finance act 2021 and the explanatory memorandum to the Finance Act, 2021 proposing amendment in section 36(1)(va) as well as section 43B is applicable only prospectively from 01.04.2021.*

6. *The learned Commissioner of Income Tax (Appeals) has failed to appreciate the decision of the Jurisdictional Hon'ble High court of Karnataka in case of Essae Teraoka Private limited vs DCIT in ITA No 480/2013 dated 04-02-2014 and the case of Spectrum consultants India Private Limited vs CIT(Kar) W.P No 8834/11 dated 17-04-2013 and also the case of CIT v. Sabari Enterprises (Kar) 298 ITR 141.*

7. *The learned Commissioner of Income Tax (Appeals) failed to appreciate that all the ESI and PF payments in respect of Employees contribution were made before the due date of filing the return of income under Section 139(1) of the Act and consequently the employee contribution to Provident fund and ESI fund is an allowable deduction in the hands of the appellant on the facts and circumstances of the case.*

8. *The learned Commissioner of Income Tax (Appeals) failed to appreciate that the addition made by the learned Assessing Officer by invoking the provisions of Section 143(1) of the Act is without jurisdiction and not applicable to the facts and circumstance of the case of the appellant.*

9. *The appellant craves leave to add, alter, amend, substitute or delete any or all of the grounds of appeal urged above.*

10.*For the above and other grounds to be urged during the course of hearing of the appeal the Appellant prays that the appeal be allowed in the interest of equity and justice.”*

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

For the assessment year 2018-2019, the return of income was filed on 24.10.2018, declaring total income of Rs.88,75,220. The assessee was served with an intimation u/s 143(1) of the I.T.Act by assessing the total income at Rs.89,89,910. 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.1,14,685 being late remittance of employees' contribution to PF and ESI under the respective Acts.

4. 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.

5. 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).

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

7. 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 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."

7.1 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.

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

Order pronounced on this 02nd day of August, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 02nd August, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-NFAC Delhi
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore