

**3IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.527/Bang/2022
Assessment year : 2019-20

Park View Service Station, No.1, Kanakapura Road, MNK Road, Basavangudi, Bengaluru-560 004. PAN - AAHFP 6527 A	Vs.	The Asst. Director of Income Tax, (CPC), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Sairam V, C.A
Revenue by	:	Shri K.R Narayan, Addl. CIT (DR)

Date of hearing	:	02.08.2022
Date of Pronouncement	:	02 .08.2022

ORDER

Per Laxmi Prasad Sahu, Accountant Member

This appeal by the assessee is directed against the order of the National Faceless Appeal Centre (NFAC), Delhi dated 22.4.2022 for the asst. year 2019-20 with the following substantive grounds of appeal:-

- “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.63,67,550/- as determined by the learned assessing officer and upheld by the learned CIT[A] as against the returned income by the appellant of Rs.62,24,400/- 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 a sum of Rs 1,43,146/- 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 DOT 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 Vs 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 Id.AR of the assessee said that the Id.CIT(A) failed to appreciate that CBDT Circular No.22/2015 cannot override the provisions of section 43B and the amendments made in this regard in the Finance Act 2021 is prospective in nature, consequently, there cannot be disallowance u/s 36(1)(va) of the Act. The Id.AR reiterated the submission made before the CIT(A) which is placed on record. He further submitted that the amendment made in the Finance Act 2021 is prospective in nature. He also relied on the judgment of Hon'ble jurisdictional High Court in the case of Essae Teraoka Pvt. Ltd., Vs. DCIT [2014] 366 ITR 408/222 Taxman 170/32 taxmann.com 33 (Kar).

4. On the other hand, the ld.DR supported the order of the lower authorities and he vehemently submitted that there was clear provision in the Income-tax Act u/s 36(1)(va) in this regard. Once the assessee received the employees contribution firstly it is created as income of the assessee u/s 2(24)(x) and if the assessee deposits the concerned amount within the due date specified in the respective act then the assessee will get deduction as per sec.36(1)(va) of the Act. The employee's contribution received is under sec.36(1)(va) but not u/s 43B of the Act. The amendment made by the Finance Act 2021 is only a clarificatory in nature, therefore, the order of the lower authorities should be restored.

5. We heard both sides and perused the entire materials on record and orders of the authorities below. Coming to the substantive issue of ESI/PF with regard to additions made by the AO of Rs.63,67,550/- and upheld by the CIT(A) as against the returned income by the assessee of Rs.62,24,400/- the tax effect of Rs.53,022/-, the assessee's plea that the same has been paid before the due date of filing of Income-tax return u/s 139(1) and after the due date prescribed in the corresponding statutes; respectively. We notice in this factual backdrop that the legislature has not only incorporated necessary amendment in Sections 36(1)(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f.

1.4.2021 only. It is further not an issue that the foregoing legislative amendments have proposed employers' contribution/disallowance u/s 43B of the Act as against employee's contribution u/s 36(1)(va) of the Act; respectively. The similar issue has been decided by the Hyderabad Bench in the case of M/s Chiphercloud India Pvt. Ltd., in ITA No.1367/Hyd/2018 and also keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1.4.2021, we hold that the impugned disallowance is not sustainable in view of all these latest developments.

6. The impugned ESI/PF disallowance is directed to be deleted therefore. Hence, we allow the appeal of the assessee.

7. In the result, the assessee's appeal is allowed in above terms.

Order pronounced in court on 2nd day of Aug, 2022

Sd/-

(BEENA PILLAI)

Judicial Member

Bangalore,

Dated, 2nd Aug, 2022

Sd/-

(LAXMI PRASAD SAHU)

Accountant Member

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.