

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC - A” BENCH : BANGALORE**

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT

ITA No.555/Bang/2022
Assessment Year : 2018-19

Shri. Kakalkoppa Ningappa Harish, 11, Adithya Communications, Mullusoge, Kushal Nagar – 571 234. PAN : ABBPH 7724 A	Vs.	DCIT, CPC, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. S. Ramasubramanyam, CA
Revenue by	:	Shri. Ganesh R Ghale, Standing Counsel for Department.

Date of hearing	:	28.07.2022
Date of Pronouncement	:	10.08.2022

ORDER

This is an appeal by the assessee against the order dated 23.06.2022 passed by the National Faceless Appeal Centre (NFAC), Delhi, relating to Assessment Year 2018-19.

2. In this appeal, the only issue that requires consideration is as to whether the Revenue authorities were justified in upholding the addition of Rs. 31,62,212/- in Assessment Year 2018-19 u/s.43B of the Income Tax Act, 1961(Act) on account of delayed payment of employees’ contribution deposited by employer with the EPF and ESIC authorities beyond the due date specified under the relevant laws relating to contribution of EPF and ESIC, but before the due date for filing the return of income under section 139 of the Act.

3. It was the case of the assessee that employees' share of ESI has been paid before the due date for filing of return u/s.139(1) of the Act (this fact is not in dispute) and hence has been considered allowable on the basis of decision of Supreme Court in CIT vs. Alom Extrusions Ltd (2009) 319 ITR 306 (SC) and other cases such as CIT Vs Magus Customers Dialog (P) Ltd (Kar), CIT Vs Sabri Enterprises (2008) 298 ITR 141 (Kar), Consultants India P Ltd Vs CIT Bangalore III (2013) 597/34 Taxman.com 20 (Kar).

4. With regard to employee's share of contribution to PF and ESI, the CIT(A) referred to the amendment made to section 36(1)(va) and 43B of the Act by the Finance Act, 2021. The Finance Act, 2021 has amended section 36, sub-section (1), in clause (va), by inserting Explanation-2 which reads thus:

"Explanation 2.—For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;".

The finance Act, 2021 also amended section 43B by inserting Explanation-5 thereto which reads thus:

"Explanation 5.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies."

5. According to the CIT(A), by virtue of newly inserted Explanation 2 to clause (va) of sub-section (1) of the said section, the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under the said clause. The CIT(A)

also held that Section 43B of the Income-tax Act relates to allowing certain deductions only on actual payments. Clause (b) of the said section provides that any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year, in which such sum is actually paid by him. Proviso to the said section provides that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return. By virtue of insertion of Explanation 5 to this section, the provisions of the said section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of subclause (x) of clause (24) of section 2 applies.

6. The CIT(A) was of the view that Section 36(1)(va) and section 43B(b) operate on totally different footings and have different parameters for due dates, i.e., employee's contribution is linked to payment before the due dates specified in the respective Acts or Funds and employer's contribution is linked to the payment before the prescribed due date for filing of return u/s.139(1) Income Tax Act, 1961. The result of any failure to pay within the prescribed

dates also leads to different results. In the case of employee's contribution, any failure to pay within the prescribed due date under the respective PF Act or Scheme will result in negating employer's claim for deduction permanently forever u/s.36(1)(va). On the other hand, delay in payment of employer's contribution is visited with deferment of deduction on payment basis u/s.43B and is therefore not lost totally. This legal distinction between employees' contribution and employer's contribution under the Act was duly recognised by the Courts also. The CIT(A) in this regard referred to the following judicial pronouncement wherein the aforesaid distinction has been accepted viz., CIT v. Gujarat State Road Transport Corpn. [2014] 41 taxmann.com 100/ 366 ITR 170/223 Taxman 398 (Guj.), Popular Vehicles & Services Pvt Ltd v. CIT [2018] 96 taxmann.com 13/257 Taxman 120/406 ITR (Ker), CIT Vs. Bharat Hotels 410 ITR 417 (Delhi).

7. The CIT(A), thereafter held that the amendment to section 36(1)(va) by insertion of 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 there therefore was applicable with retrospective effect by necessary intendment of deeming nature expressly stated therein. The CIT(A) upheld the addition made by the AO.

8. We find that identical issue has been considered in the following decisions:

M/s Mahadev Cold Storage vs Jurisdictional AO - ITA.No.41 & 42/Agra/2021

M/s Essae Teraoka (P.) Ltd vs DCIT - [2014] 43 taxmann.com 33 (Karnataka)

Anand Kumar Jain vs ITO - ITA NO 4192/MUM/2012

ValueMomentum Software Services Private Limited vs. DCIT I.T.A. No. 2197/HYD/2017 [Assessment Year: 2013-14] dated 19.05.2021

Mohan Ram Chaudhary vs. ITO ITA No. 51&54-55/Jodh/2021 [Assessment Year: 2018-19] dated 28.09.2021

9. The Hon'ble Karnataka High Court in the case of Essae Teraoka Pvt. Ltd., (supra) has taken the view that employee's contribution under section 36(1)(va) of the Act would also be covered under section 43B of the Act and therefore if the share of the employee's share of contribution is made on or before due date for furnishing the return of income under section 139(1) of the Act, then the assessee would be entitled to claim deduction. Therefore, the issue is covered by the decision of the Hon'ble Karnataka High Court. In this case there is no dispute that the assessee made payment of the Employees share of PF/ESI on or before the due date for filing return of income for AY 2017-18 u/s.139(1) of the Act. The next aspect to be considered is whether the amendment to the provisions to section 43B and 36(1)(va) of the Act by the Finance Act, 2021, has to be construed as retrospective and applicable for the period prior to 01.04.2021 also. On this aspect, we find that the explanatory memorandum to the Finance Act, 2021 proposing amendment in section 36(1)(va) as well as section 43B is applicable only from 01.04.2021. These provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect unless the legislature specifically says so. In the decisions referred to by us in the earlier paragraph of this order on identical issue the tribunal has taken a view that the aforesaid amendment is applicable only prospectively

i.e., from 1.4.2021. We are therefore of the view that the impugned additions made under section 36(1)(va) of the Act, deserves to be deleted.

10. The learned DR submitted that in the event of Hon'ble Supreme Court taking a view as taken by the Hon'ble Gujarat High Court in the case of Gujarat State Road Transport Corporation, the Revenue shall be at liberty to seek rectification. The prayer so made is accepted, subject to statutory limitations, if any. Another submission made by him was that the Hon'ble Supreme Court in the case of Zile Singh Vs. State of Haryana & others in Civil Appeal No.6638 of 2004 Judgment dated 7.10.2004 has held that four factors have to be seen when the question before a Court is as to whether law has to be regarded as retrospective and those four factors are (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. According to him, if the above guidelines are applied, the amendment to Sec.36(1)(va) of the Act by the Finance Act, 2021 has to be regarded as retrospective. I am unable to accept the submission firstly for the reason that the legislature did not choose to make the amendment retrospective. Secondly, the amendment seeks to fasten a liability on the Assessee and the amendment does not seek to remove any hardship faced by an Assessee. Therefore the amendment has to be regarded as only prospective, even going by the parameters laid down by the Hon'ble Supreme Court as above.

11. In the result, appeal of the assessee is allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(N. V. VASUDEVAN)
Vice President

Bangalore,
Dated: 10.08.2022.
/NS/*

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.