

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

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

ITA No.590/Bang/2022 : Asst.Year 2018-2019

M/s.Sri Family Biznet Pvt.Ltd. No.7, 16 th Cross, Sri Byraweshwara Industrial Estate, Andhrahalli Main Road Near Peenya 2 nd Stage Bengaluru - 560 091. PAN : AAQCS1322N.	v.	The Deputy Commissioner of Income-tax (CPC) Bangalore.
(Appellant)		(Respondent)

Appellant by : --- None ---

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

Date of Hearing : 19.09.2022	Date of Pronouncement : 19.09.2022
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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 31.05.2022. The relevant assessment year is 2018-2019.

2. The grounds raised read as follows:-

"1. The learned Commissioner of Income tax (Appeals) (NFAC) has erred in facts and in law by passing an order which is opposed to the facts of the case.

2. The learned CIT(A) has erred in disallowing Rs.23,57,155 to the return of income stating that employees contribution has not credited to the employees account on or before the due date.

3. The learned CIT(A) has erred in facts and law by not considering the deduction as provided under section 43B of the Income tax Act, 1961, even though contribution is made

before the due date of filing ITR.

4. The learned CIT(A) has erred in ignoring the legal precedents set by the jurisdictional Tribunal and High Court.

5. The learned CIT(A) has failed to appreciate the fact that these legislative amendments incorporated in section 36(1)(va) and 43B by Finance Act, 2021, are prospective in application w.e.f. April 1, 2021.

6. Such other grounds as may be urged at the time of hearing.”

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

For the assessment year 2018-2019, the return of income was filed on 07.10.2018, declaring loss of Rs.11,24,39,612. The assessee was served with an intimation u/s 143(1) of the I.T.Act by re-computing the total loss at Rs.11,00,82,457. The reasons for the difference between the returned loss and the assessed loss u/s 143(1) of the I.T.Act was on account of disallowance of sum of Rs.23,57,155 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. None appeared on behalf of the assessee. Therefore, we proceed to dispose of the appeal on merits, after hearing the learned DR.

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

7. We have heard the learned DR 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 in ITA No.385/Bang/2021 (order dated 21.10.2021)* 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 19th day of September, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 19th September, 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