

IN THE INCOME TAX APPELLATE TRIBUNAL 'A' BENCH, PUNE

**BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**

Sr. No.	I.T.A No.	Asstt. Year	Appellant	Respondent
1.	406/PUN/2021	2018-19	Joshirao Engineering 39/1A-39/2/1 Vadgaon Budruk, Opp. Indian Home Pipe Co., PAN PNEJ06105B	The Dy. CIT, CPC, Bangaluru
2.	412/PUN/2021	2019-20	M/s. Capital Constructions, 10 Siddhi Park, Sharanpur Road, Nashik 422 002 PAN AACFC 7452 L	The Asstt. CIT, Circle 1, Nashik
3.	413/PUN/2021	2018-19	M/s. Nirmal Jyot Facilities Plot No. 1, Ashirwad society, Near Gajanan Society, Delstar Road, Karad 415 124 PAN: AAECN 0671K	The Dy. CIT, CPC, Bangaluru
4.	414/PUN/2021	2019-20	-do-	-do-

Appellant No. 1 by : Shri Sandeep Sathe
Appellants No. 2, 3 & 4 by : Written submissions
Respondents by : Shri Ramnath P. Murkunde
Date of Hearing : 19-09-2022
Date of Pronouncement : 19-09-2022

ORDER

PER SHRI PARTHA SARATHI CHAUDHURY

These appeals preferred by the above-mentioned assesseees as per the captioned matter emanates from the respective orders of the Id. CIT(A)/(NFAC) for the respective assessment years as appearing hereinabove, as per the following grounds of appeal.

ITA No. 406/PUN/2021 for A.Y. 2018-19 – Joshirao Engg. Pune.

1. *Ld. CIT(A) erred in not deleting the addition of Rs. 3,90,807/- to income of the assessee on account of delayed payment of ESIC and PF. As per section 43B these sums are allowable as deduction though the payments are made beyond due date prescribed under ESIC and PF Act, but paid before the due date of filing of the return of income. This view is upheld by jurisdictional ITAT Pune, in case of Dy. CIT Vs. Shri Pradeep Barku Patil ITA No. 1769/PN/2013 for A.Y. 2010-11. Also jurisdictional Bombay HC has also upheld this view in case of CIT Vs. Ghatge Patil Transports Ltd.*

2. *The Id. CIT also erred in applying amendment to section 36 and 43B, which are applicable from A.Y. 2021-22. In the Memorandum of Budget, it has been mentioned that the amendment to section 36 and 43B will apply from assessment year 2021-22 and onwards.*
3. *The assessee prays leave to add such other evidence as may be necessary to substantiate its case.*
4. *The assessee prays to add, alter, amend and for withdrawal of any of the grounds of appeal as and when the occasion demands."*

ITA No. 412/PUN/2021 for A.Y. 2019-20 – M/s. Capital Constructions,

- “1. *On the basis of the facts, in the circumstances of the case and as per law, the CIT(A) – (NFAC) is not justified in ignoring the submissions made on behalf of the appellant and confirming the disallowance on account of employees contribution to Provident Fund and Employees State Insurance Corporation Fund of Rs. 7,40,261/- made by CPC Bangalore while processing the return of income u/s 143(1) of the Act.*
2. *The appellant craves for the addition to, deletion, alteration, modification of the above grounds of appeal.*

ITA No. 413/PUN/2021 for A.Y. 2018-19 – Nirmal Jyot Facilities Pvt. Ltd.

1. *Whether on the facts and in the circumstances of case and in law, CIT(A) was correct in arriving at conclusion that delayed payment of Employees contribution to EPF, ESI and other Welfare fund amounting to Rs. 14,14,713/- is not eligible for deduction under section 36(1)(va) read with section 43B as Finance Act, 2021 has made amendment by insertion of explanation 2 to section 36(1)(va) and explanation 5 to section 43B which has retrospective effect.*
2. *Whether on the facts and in the circumstances of the case and in laws, A.O at CPC while passing of order u/s 143(1) has exceeded the powers under section 143(1)(a)(iv) by disallowing delayed payment of Employee contribution to EPF, ESI and other Welfare fund amounting to Rs. 14,14,713 as not eligible for deduction under section 36(1)(va) read with section 43B.*

ITA No. 414/PUN/2021 for A.Y. 2019-20 – Nirmal Jyot Facilities Pvt. Ltd.

1. *Whether on the facts and in the circumstances of case and in law, CIT(A) was correct in arriving at conclusion that delayed payment of Employees contribution to EPF, ESI and other Welfare fund amounting to Rs. 18,39,112/- is not eligible for deduction under section 36(1)(va) read with section 43B as Finance Act, 2021 has made amendment by insertion of explanation 2 to section 36(1)(va) and explanation 5 to section 43B which has retrospective effect.*
2. *Whether on the facts and in the circumstances of the case and in laws, A.O at CPC while passing of order u/s 143(1) has exceeded the powers under section 143(1)(a)(iv) by disallowing delayed payment of Employee contribution to EPF, ESI and other Welfare fund amounting to Rs. 18,39,112/- as not eligible for deduction under section 36(1)(va) read with section 43B."*

2. So far as ITA No. 406/PUN/2021 for A.Y. 2018-19 in the case of Joshi Rao Engineering, the assessee was represented by authorised representative. In ITA

No. 412/PUN/2021 for A.Y. 2019-20 in the case of M/s. Capital Constructions, and in ITA No. 413 & 414/PUN/2021 for A.Y. 2018-19 & 2019-20, in the case of Nirmal Jyot Facilities Pvt. Ltd., written submissions were filed.

3. The facts and circumstances and the issues involved in all these appeals are absolutely identical and similar. Therefore, these cases were heard together and are disposed of by this consolidated order.

4. The only issue involved in all these appeals is the disallowance of employees' contribution to Provident Fund as well as ESIC. It is the case of the assessee that as per various decisions of Pune Tribunal it has been held that if the employees' contribution to provident fund is paid before the due date of filing of return of income, then it is deductible as per provisions of section 43B of the Income-tax Act, 1961 (hereinafter referred to as "the Act") and the amendment made by the Finance Act, 2021 inserting Explanation 2 to section 43B is applicable prospectively i.e. from A.Y. 2021-22. Admittedly, in all the present cases before us, the payment of impugned employee's' contribution to provident fund was before the due date of filing of return of income u/s 139 clause (1) of the Act.

5. We find the issue is squarely covered by the decision of Pune Tribunal in the case of Prashant Arun Sangai Vs. ADIT, CPC, Bangaluru in ITA No. 466/PUN/2021 for A.Y. 2019-20, order dated 22-06-2022 as well as in the case of SIP Moulds Pvt. Ltd. Vs. ITO Ward 2(1) Nashik in ITA No. 551/PUN/2021 for A.Y. 2019-20, order dated 28-06-2022. There is a consolidated order passed by the Tribunal in ITA No. 538/PUN/2021 and others in the case of Tilokchand Bhabutmal Shah Vs. ADCIT, CPC Bangaluru, etc., order dated 28-06-2022, where the facts before the Tribunal were that the A.O made disallowance on the ground that the assessee had not deposited the employee's' share of EPF and

ESI etc. within due date prescribed under respective Statutes, but paid before due date for filing Return of Income under the provisions of section 139(1) of the Act. On appeal before the Id. CIT(A), the Id. CIT(A) confirmed the said disallowance. The Tribunal held as follows:

6. *When the matter was called on none appeared on behalf of the appellants listed at Sl. No.2 to 6 of above cause title, despite due service of notice of hearing, except in the case of Tilokchand Bhabutmal Shah (listed at Sl. No.1 of the above cause title). Therefore, we proceed to dispose of all the appeals on merits after hearing the Id. CIT-DR.*

7. *We heard the Id. CIT-DR and perused the material on record. The only issue raised through various grounds of appeal in this appeal is against the confirmation of disallowance of Rs.1,46,592/- made by the Assessing Officer u/s 36(1)(va) of the Act on account of late deposit of the Employees' share of EPF and ESI etc.*

8. *At the outset, Id. AR appearing on behalf of the appellant Tilokchand Bhabutmal Shah listed at Sl. No.1 of above cause title filed a copy of recent decision of Co-ordinate Bench of this Tribunal in the case of Prashant Arun Sangai vs. ADIT in ITA No.466/PUN/2021 for the assessment year 2019-20 order dated 22.06.2022 stating that the identical issue was decided by the Tribunal (supra) in favour of the assessee. Referring to this decision of the Tribunal (supra), he submitted that principle of consistency should be applied to the facts of the present case. The Id. CIT-DR has expressed no objection on this submission of the assessee.*

9. *Considering the submission of the Id. AR and perusing the recent decision of the Tribunal (supra), we find that the identical issue was came up before this Tribunal in the case of Prashant Arun Sangai (supra) wherein the Tribunal decided the similar issue in favour of the assessee relying on the decision of the Hon'ble Himachal Pradesh High Court in the case of CIT vs. Nipso Polyfabriks Ltd. (2013) 350 ITR 327 (HP). The relevant paragraphs of the said decision of the Tribunal (supra) are extracted herein under :-*

"4. We have heard the Id. DR and gone through the relevant material on record. There is no appearance from the side of the assessee despite notice. We are, therefore, proceeding to dispose of the appeal ex parte qua the assessee on merits.

5. It is seen as an admitted position from the impugned order as well as the statement of facts before the Id. first appellate authority that the assessee did deduct employees' share of EPF and ESI and paid the same after the due date under the respective legislations but before the time stipulated for filing return u/s 139(1) of the Act for the year under consideration. In our opinion, this issue is no more res integra in view of several judgments allowing deduction u/s 36(1)(va) of employees' share of contribution deposited after due date under the respective Acts but before the date prescribed u/s 139 of the Act. The Hon'ble Himachal Pradesh High Court in CIT vs. Nipso Polyfabriks Ltd. (2013) 350 ITR 327 (HP) has held that there exists no difference between employees or employer's contribution and both are to be allowed as deduction if deposited before the due date.

6. At this juncture, it is relevant to mention that the Finance Act, 2021 has inserted Explanation 2 below section 36(1)(va) providing that 5 the provisions of section 43B shall not apply for the purpose of determining the due date under this clause w.e.f. 01.04.2021. The effect of this amendment is that if the amount of employees' contribution towards EPF, ESI, etc is delayed by an employer beyond the due date under the respective Acts, the disallowance will be called for notwithstanding the fact that it was deposited before the due date u/s 139 of the Act. The Memorandum

explaining the provisions of the Finance Bill, 2021, provides that this amendment will take effect from 1st April, 2021 and will, accordingly apply in relation to assessment year 2021- 2022 and subsequent assessment years. Since the assessment year under consideration is 2019-20, which is anterior to the amendment carried out with effect from A.Y. 2021-22, we hold that the position of law as set out by various Hon'ble High Courts including the one in CIT vs. Nipso Polyfabriks Ltd. (supra) squarely applies to the facts and circumstances of the instant case, thereby not warranting any disallowance since the amount in question was admittedly deposited before due date u/s 139(1) of the Act. The addition is therefore, directed to be deleted."

10. *Similarly, the Hon'ble Jurisdictional High Court in the case of CIT vs. Ghatge Patil Transports Ltd. 368 ITR 749 (Bom.) has taken identical view as taken by the Hon'ble Himachal Pradesh High Court in the case of Nipso Polyfabriks Ltd. (supra) and decided the issue in favour of the assessee.*

11. *Respectfully following the above judicial precedents, we hold that the ratio laid down by the Hon'ble High Courts cited above is squarely applicable to the facts of the present case. Therefore, following the principle of consistency, we direct the Assessing Officer to delete the addition of Rs.1,46,592/- made u/s 36(1)(va) of the Act.*

12. *In the result, the appeal filed by the assessee in ITA No.538/PUN/2021 for A.Y. 2019-20 stands allowed."*

6. In the aforesaid decision, the Tribunal has relied on Hon'ble jurisdiction High Court decision in the case of CIT Vs. Ghatge Patil Transports Ltd. 368 ITR 749 (Bom) which followed the decision of Hon'ble Himachal Pradesh High Court in the case of CIT Vs. Nipso Polyfabrics Ltd. (2013) 350 ITR 327 (HP). Therefore, we are of the considered view that this issue is no more res integra in view of several judgments allowing deduction u/s 36(1)(va) of employees' share of contribution deposited after the due date under the respective Statutes but before the date prescribed u/s 139 clause (1) of the Act. In fact, it was held by Hon'ble Himachal Pradesh High Court that there exists no difference between the employees' or employers' contribution and both are to be allowed as deduction if deposited before the due date. The relevant observations we need to mention at this juncture that the Finance Act, 2021 has inserted Explanation 2 below section 36(1)(va) providing that the provisions of section 43B shall not apply for the purpose of determining the due date under this clause w.e.f. 01-04-2021. The effect of this amendment is that if the amount of employees' contribution towards EPF, ESI, etc. is delayed by an employer beyond the due date under the respective Acts, the disallowance will be called for notwithstanding the fact

that it was deposited before the due date u/s 139(1) of the Act. The Memorandum explaining the provisions of the Finance Bill 2021, provides that this amendment will take effect from 1st April 2021 and will accordingly apply in relation to assessment year 2021-22 and subsequent assessment years. Before us, in ITA No. 406/PUN//2021 the assessment year is 2018-19, in ITA No. 412/PUN/2021 the assessment year is 2019-20, in ITA no. 413/PUN/2021 the assessment year is 2018-19 and in ITA No. 414/PUN/2021 the assessment year is 2019-20. Since the assessment years under consideration are earlier to the amendment carried out with effect from A.Y. 2021-22, we hold that the position of law as set out by various High Courts decisions including jurisdictional Bombay High Court in the case of Ghatge Patil Transports Ltd (supra) and Hon'ble Himachal Pradesh High Court in Nipso Polyfabrics Ltd (supra) squarely applies to the facts and circumstances of the instant cases thereby not warranting any disallowance since the amounts in question were admittedly deposited before the due date u/s 139(1) of the Act. We direct the A.O to delete the additions made u/s 36(1)(va) of the Act from the hands of the above mentioned assesseees as appearing in the aforesaid captioned matters.

7. In the result, all appeals filed by the assesseees in ITA No. ITA No. 406/PUN/2021 for A.Y. 2018-19 in the case of Joshirao Engg., ITA No. 412/PUN/2021 for A.Y. 2019-20 in the case of M/s. Capital Constructions and ITA No. 413 & 414/PUN/2021 for A.Y. 2018-19 and A.Y. 2019-20 in the case of Nirmal Jyot Facilities, stands allowed.

Order pronounced in the open Court on this 19th September 2022. 56

Order pronounced in the open Court on this 19th September 2022.

Sd/-
(R.S. SYAL)
VICE PRESIDENT

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, this 19th day of September 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT- 3, Pune
4. The Respective CIT(A)
5. The D.R. ITAT 'B' Bench Pune.
6. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune

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		Date	
1	Draft dictated on	19-09-2022	Sr.PS
2	Draft placed before author	19-09-2022	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		