

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU “B” BENCH, BENGALURU**

**Before Shri N.V. Vasudevan, Vice President
and
Ms. Padmavathy S., Accountant Member**

ITA No. 577/Bang/2022 (Assessment Year: 2018-19)		
Shri Rajanikanth Reddy No.21, 14th Main, Venkateshwara Layout, Madiwala Bengaluru 560068 PAN – ABLPR5981K	vs	The Income Tax Officer- 4(2)(2) Bengaluru
(Appellant)		(Respondent)

Assessee by:	Ms. Sunaina Bhatia, Advocate
Revenue by:	Shri K.R. Narayan, Addl. CIT-DR
Date of hearing:	13/09/2022
Date of pronouncement:	20/09/2022

ORDER

Per: Padmavathy, A.M.

This is an appeal filed by the assessee against the order of the learned CIT(A), NFAC, Delhi in appeal No. CIT(A)/Bengaluru-4/10069/2020-21 dated 25.05.2022 for AY 2018-19.

2. The assessee has raised the following grounds of appeal: -

“1. The order of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned Commissioner of Income tax [Appeals] / National Faceless Appeal Centre [NFAC for short] is not justified in upholding the determination of total income of appellant in the Order u/s. 154 of the Act, at Rs. 1,92,26,970/- as against the returned income of Rs. 1,09,63,817/-, under the normal provisions, on account of the disallowance of Rs. 82,63,148/- made u/s.36[1][va] of the Act, based upon the details in the Tax Audit

Report of the Chartered Accountant in Form 3CD, under the facts and in the circumstances of the appellant's case.

*3. The learned CIT[A] / NFAC ought to have appreciated that the aforesaid disallowance of Rs. 82,63,148/- in respect of the belated payments of the Employee's share of PF and ESI was allowable having regard to the judgement of **the Hon'ble Karnataka High Court in the case of EssaeTeroka Limited reported in 366 ITR 408 [Kar]** since the same has been paid before the due date for filing the return of income u/s 139(1) of the Act and hence, the disallowance made ought to have been deleted.*

4. The learned CIT[A] / NFAC is not justified in holding that the amendment made by insertion of Explanation 2 to the provisions of section 36[1][va] of the Act and the insertion of Explanation 5 to section 43B of the Act by the Finance Act, 2021 with effect from 01/04/2021 was clarificatory / declaratory in the nature and therefore, these amendments were retrospective in operation under the facts and in the circumstances of the appellant's case.

4.1 The learned CIT[A] / NFAC ought to have appreciated that the aforesaid amendments by the Finance Act, 2021 cannot be regarded as retrospective in nature and therefore, the disallowance sustained on this basis is opposed to law and facts of the appellant's case

4.2 The learned CIT[A] / NFAC is not justified in refusing to follow the binding judgement of the Hon'ble Jurisdictional High Court of Karnataka in favour of the assessee on the ground that the said judgment was rendered before the aforesaid clarificatory amendments made under the facts and in the circumstances of the appellant's case.

5. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s. 234A, 234B and 234-C of the Act, as computed in the intimation u/s.143[1]/154 of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

6. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs."

3. The brief facts of the case are that the assessee is engaged in the business of management of Municipal Solid Waste for which the assessee has

secured the contract from the BBMP. The assessee filed his return of income for the relevant assessment year on 06.10.2018 declaring total income of Rs.1,17,38,717. Along with the return of income, the assessee has also filed the report under Section 44AB of the Income Tax Act, 1961 (the Act) in Form 3CB & 3CD dated 06.10.2018. While processing the return the CPC made addition to the returned income under Section 143(1)(a)(iv) of the Act on account of delayed payment of employee contribution to PF and ESI vide order dated 08.01.2020. Subsequently CPC passed a rectification order u/s.154 dated 10.02.2020 revising the interest charged u/s.234B of the Act. Aggrieved by the order passed u/s.154, assessee filed appeal before the CIT(A).

4. The CIT(A) confirmed the addition made by the CPC under Section 143(1)(a)(iv) of the Act by observing as under: -

“4. Observations, Findings and Decision

i) I have considered the submission made by the appellant. It is seen that the return of income is processed by CPC. As the Employee's Contribution of PF and ESI were paid by the appellant after the "due date" as per the explanation below section 36(1)(va) of the IT Act, 1961, the same was added back to the total income of the appellant in the light of provision of Section 2(24)(x) r.w.s. 36(1)(va) of the Act relying upon the information given by the auditor in Form 3CD. As per the provisions of section 143(1)(a)(iv) the following adjustment can be made:

"143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely: —

(a) the total income or loss shall be computed after making the following adjustments, namely:

(ii)

(iii)

(iv) disallowance of expenditure indicated in the Audit Report but not taken into account in computing the total income in the return;

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ii) This shows that CPC is within the power to make such adjustment as Appellant's auditor himself has indicated in the tax audit report that such payments have been made beyond the due date prescribed in the section 36(1)(va) of the I T Act, 1961, but Appellant has claimed it in the Return of Income against the Audit Report. Accordingly, the issues raised by the appellant on this count does not seem to carry much weight.

iii) *The submission of the appellant in respect of disallowance of employee's contribution is duly considered. However, the same cannot be accepted in view of the amendments made to section 36 and 43B by the Finance Act, 2021. The Finance Act, 2021 has amended section 36, which reads as under-*

"In section 36 of the Income-tax Act, in sub-section (1), in clause (va), the Explanation shall be numbered as Explanation 1 thereof and after Explanation 1 as so numbered, the following Explanation shall be inserted, namely: —

'Explanation 2.—For the removal of doubts, it is hereby clarified that the provisions of section 438 shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;'. "

iv) *The finance Act, 2021 has also amended section 43, as under-*

"In section 438 of the Income-tax Act, after Explanation 4, the following Explanation shall be inserted, namely:

"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."

v) *Thus, the Finance Act, 2021, has amended section 36 of the Income-tax Act, relating to other deductions. Sub-section (1) of the said section provides for allowing of deductions provided for in the clauses thereof for computing the income referred to in section 28 of the said Act. Clause (va) of the said sub-section provides for allowance of deduction for any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that for the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise. **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.***

vi) *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 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 subclause (x) of clause (24) of section 2 applies.***

vii) Reference is also made to the Supreme Court judgement in the case of Commissioner of Income Tax-I, Ahmedabad vs. Gold Coin Health Food Pvt. Ltd. (2018) 9 SSC 622 wherein while dealing with a similar issue. Hon'ble Supreme Court in Para 15 of the decision has quoted the following:

"In Principles of Statutory interpretation, 11th Edn. 2008. Justice G.P. Singh has stated the position regarding retrospective operation of statutes as follows:-

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies and approved by the Supreme Court. For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law or the meaning or effect of any statute. Such Acts are usually held to be retrospectives.

*The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'. But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall **be deemed always to have meant**' or '**shall be deemed never to have included**' is **declaratory, and is in plain terms retrospective**. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law.*

*The presumption against retrospective operation is not applicable to declaratory statutes..... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. **It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended..... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A***

clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to 'explain' a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectively is inapplicable to such legislations as these are explanatory and declaratory in nature:-Zile Singh vs. State of Haryana, (2004) 8 SCC 1.

viii) From the wordings above, it is also clear that the above clarificatory amendment brought in by the Finance Act, 2021 applies to the issue in the instant appeal also. The amendment declares that provisions of section 43B does not apply and deemed to have never been applied for the purpose of determining the due date. Therefore, in view of the above discussions, the employee's contribution to the PF and ESI, not deposited by the appellant with in the due date as per section 36((1)(va) of the I T Act,1961, cannot be allowed and accordingly, the grounds taken by the assessee are dismissed.”

Aggrieved, assessee is in appeal before the Tribunal.

5. The learned AR submitted that an identical issue was decided in favour of the assessee by the Tribunal in the case of M/s. ShakuntalaAgarbathi 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. ShakuntalaAgarbathi Company Vs. DCIT (supra) by following the dictum laid down by the Hon'ble jurisdictional High Court in the case of *EssaeTeraokaPvt. 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. ShakuntalaAgarbathi 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 Act. The Hon'ble jurisdictional High Court in the case of EssaeTeraoka (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 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 *EssaeTeraoka (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) *DhabriyaPolywood 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."

8. 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 *EssaeTeraokaPvt. 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 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.

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

Dictated and pronounced in the open Court on 20th September, 2022.

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

Sd/-
(Padmavathy S)
Accountant Member

Bengaluru, Dated: 20th September, 2022

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By Order

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Assistant Registrar
ITAT, Bengaluru

n.p.