

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

**BEFORE SHRI INTURI RAMA ROAO, ACCOUNTANT MEMBER
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**

Sr. No.	I.T.A No.	Asstt. Year	Appellant	Respondent
1.	552/PUN/2021	2019-20	Avinash Mulchand Gothi (HUF),03, Aristocat Society, Behind State Bank of India, Old Agra Road, Nashik-422 002 PAN: AABHQ 5452 M	The Asstt. CIT, Circle.1, Nashik
2.	563/PUN/2021	2018-19	Kalokhe Stone Crusher, Plot No. 19, Laxmi Baug, Talegtaon Dabhade, Pune-411 506 PAN: AAKFK 3228 Q	The Dy. CIT CPC, Bangaluru
3-4	564 & 565/PUN/2021	2017-18 & 2018-19	Glazium Facades Pvt. Ltd. 210 Ashoka Centre, Pune-Satara Road, Bibewadi Corner, Pune-411 009 PAN: AAECG 6663 L	The Dy. CIT CPC, Bangaluru
5.	580/PUN/2021	2018-19	Shree Balaji Associates LLP San Mahu Complex 5, Opp. Poona club, Bund Garden Road, Pune. PAN: ABDFS 3963 Q	The Dy. CIT, CPC, Bangaluru
6.	582/PUN/2021	2019-20	Charan Satpal Anand, C/o. Jai Durga Industrial Services, 498 Jotiba Nagar, Kalewadi, Pune-411 017 PAN: AEDPA 1414 R	The Asstt. D.I.T., CPC, Bangluru

Appellants No. 1, 3, 4, 5 & 6 by : None

Appellant No. 2 by : Shri C.V. Deshpande (through virtual)

Respondents by : Shri Ramnath P. Murkunde

Date of Hearing : 27-09-2022

Date of Pronouncement : 27-09-2022

ORDER

PER SHRI PARTHA SARATHI CHAUDHURY, JM

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

ITA No. 552/PUN/2021 for A.Y. 2019-20 – Avinash Mulchand Gothi (HUF)

- “1. On the basis of the facts, in the circumstances of the case and as per law, the NFAC is not justified in confirming the disallowance on account of delayed payment of employees’ contribution to Provident Fund and Employees State Insurance Corporation Fund of Rs. 1,73,046/- made by CPC Bangalore while processing the return of income u/s 143(1) of the Act.
2. On the basis of the facts and in the circumstances of the case and as per law, the NFAC is not justified in confirming the disallowance of Rs. 1,73,046/- made by CPC, Bangalore on account of delay in payment of employees’ contribution to Provident Fund and Employees’ State Insurance Corporation Fund by relying on the Explanation 5 to section 43B of the Act particularly when the said Explanation is effective from 01-04-2021.
3. The appellant craves for the addition to, deletion, alteration, modification of the above grounds of appeal.”

ITA No. 563/PUN/2021 for A.Y. 2018-19 – Kalokhe Stone Crusher

1. The Id. CIT(A)-12 Pune, erred in law and on facts in confirming the addition of Rs. 1,78,512/- on account of delay in depositing Employees’ Contribution to PF/ESI Act made by the Asstt. Director of Income-tax, CPC Bangalore.
2. The IT authorities ought to have appreciated that amendment to section 43B r.w.s. 36(1)(va) r.w.s. 143(1)(a)(iv) by Finance Act, 2021 is prospective i.e. effective from April 01, 2021 and thus not applicable in the instant case.
3. The IT authorities ought to have appreciated that the Employee Contribution to PF/ESI is allowable as deduction u/s 43B of the Act although disallowable u/s 36(1)(va) of the Act.
4. The Id. CIT(A) ought to have appreciated that prima facie adjustment u/s 143(1) of the Act was not justified in view of the debateable and divergent view of different High court on allowability of employees’ share of ESI/Provident fund.
5. The Id. CIT(A)-12, Pune erred in disregarding the decision of the jurisdictional High Court which is binding upon him.

ITA No. 564 & 565/PUN/2021 for A.Y. 2017-18 & 2018-19 – Glazium Facades P.Ltd.

- “1. In the facts and circumstances of the case and in law, the CIT(A) has erred in considering the claim of deduction u/s 36(1)(va) r.w.s. 43B of the Act and have made an addition of Rs. 21,11,467/- on account of contributions to labour welfare funds which are in the nature of provident fund and employee State Insurance. The said addition being based on the surmises and conjecture; the same may please be deleted.
2. The details submitted in the audit report regarding contributions received from employees for various funds as referred to in section 36(1)(va) are required to be submitted mandatorily and the auditor is in no position to state whether the expenditure is allowable or disallowable u/s 36(1)(va). And hence the disallowance of expenditure u/s 36(1)(va) is outside the scope of assessment u/s 143(1)(a) of the Act.
3. The appellant prays that in the interest of justice, it maybe allowed to furnish addental evidences which may be relevant to decide the issue under consideration.
4. The appellant craves, leave to add, alter, delete above or any other grounds of appeal.”

ITA No. 582/PUN/2021 for A.Y. 2019-20 – Charan Satpal Anand

- “1. On the facts and the circumstances of the case and in law, the CIT has erred in disallowing employees’ contribution to PF and ESIC u/s 36(1)(v)(a) though the same are paid before filing of return of income.
2. The appellant craves for leave to, add & amend the ground of appeal before or at the time of hearing of the appeal.

ITA No. 580/PUN/2021 for A.Y. 2018-19 – Shree Balaji Associates Pune LLP

- “1. On the facts and in the circumstances of the case and in law, the Id. CIT(a)-12 Pune has erred in confirming the addition made by the Id. A.O of Rs. 2,29,310/- under the head Profit and Gains from business and profession without appreciating the fact that though the payment of employees’ provident fund and employees’ State Insurance Contribution was made after the due date specified under relevant act but was made before the due date of filing of return of income u/s 139(1) of the Act and so no disallowance is warranted u/s 36(1)(va) r.w.s. 43B of the Act. The appellant hereby prays that the disallowance of Rs. 2,29,310/- may please be deleted.
2. On the facts and in the circumstances of the case and in law, the Id. CIT(A)-12, Pune has erred in confirming the addition made by the Id. A.O of Rs. 2,29,310/- under the head Profit and Gains from Business and profession without appreciating the fact the explanation 2 to the section 36(1)(va) of the Act was inserted by Finance Act, 2021 w.e.f. 01-04-2021 and hence not applicable to the A.Y. 2018-19. The appellant hereby prays that the disallowance of Rs. 2,20,310/- may please be deleted.
3. The appellant hereby reserves the right to add, amend, alter or raise any additional ground or grounds of appeal or delete or withdraw any of the ground of appeal/s.”

2. 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.

3. 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 employees' contribution to provident fund was before the due date of filing of return of income u/s 139(1) of the Act.

4. 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 employees' 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 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.”

5. In the aforesaid decision, the Tribunal has relied on Hon'ble Jurisdictional 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(1) of the Act. In fact, it was held by Hon'ble Himachal Pradesh High Court in Nipso Polyfabrics Ltd. (supra) 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. 552/PUN//2021 the assessment year is 2019-20, in ITA No. 563/PUN/2021 the assessment year is 2018-19, in ITA No. 564 & 565/PUN/2021 the assessment years are 2017-18 & 2018-19, in ITA No. 580/PUN/2021 the assessment year is 2018-19 and in ITA No. 582/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 Hon'ble High Courts' decisions including Hon'ble 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 and also pertains to prior assessment years prior to A.Y. 2021-22. 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 above captioned matters.

6. In the result, all the appeals filed by the assesseees in ITA No. 552/PUN/2021 for A.Y. 2019-20 in the case of Avinash Mulchand Gothi (HUF), in ITA No. 563/PUN/2021 for A.Y. 2018-19 in the case of Kalokhe Stone Crusher, in ITA No. 564 & 565/PUN/2021 for A.Y. 2017-18 & 2018-19 the case of Glazium Facades Pvt. Ltd., in ITA No. 580/PUN/2021 for A.Y. 2018-19 in the case of Shree Balaji Associates Pune LLP and in ITA No. 582/PUN/2021 for A.Y. 2019-20 in the case of Charan Satpal Anand stands allowed.

Order pronounced in the open Court on this 27th September 2022.

Sd/-
(INTURI RAMA RAO)
ACCOUNTGANT MEMBER

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, this 27th day of September 2022
Ankam

Copy of the Order forwarded to :

1. The Appellants
2. The Respondent.
3. The Respective CITs
4. The Respective CIT(A)NAFC
5. The D.R. ITAT 'A' Bench Pune.
6. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune

/// TRUE COPY ///

		Date	
1	Draft dictated on	27-09-2022	Sr.PS
2	Draft placed before author	27-09-2022	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	27-09-2022	Sr.PS/PS
7	Date of uploading of order	27-09-2022	Sr.PS/PS
8	File sent to Bench Clerk	<u>27-09-2022</u>	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		