

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

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

**I.T.A. No. 622/PUN/2021 – A.Y. 2017-18**

Fashionking Brands Pvt. Ltd.  
1 Butte Patil Plaza,  
Off Karve Road, Nalstop, Pune.  
PAN: AAACC 7418 H

: Appellant

Vs.

The Dy. C.I.T CPC, Bangaluru

: Respondent

Appellant by : Ms. Kimaya Kudwa  
Respondent by : Shri Ramnath P. Murkunde  
Date of Hearing : 28-09-2022  
Date of Pronouncement : 29-09-2022

**ORDER**

**PER BENCH**

This appeal preferred by the assessee emanates from the order National Faceless Appeal Centre (NFAC), Delhi, 30-08-2021 for the assessment year 2017-18, as per the following grounds of appeal.

1. The learned CIT(A), National Faceless Appeal Centre; erred in law and on facts in confirming the addition of Rs. 14,30,749/- u/s 36(1)(va) of the ITA, 1961; made by the learned DCIT, CPC, Bengaluru for delay in depositing Employee's Contribution of PF and ESIC. The learned I-T Authorities ought to have appreciated that the payment were made before filing of the return of income u/s 139(1) of the ITA, 1961 and hence the said expenditure is allowable as deduction, as so held by various Honorable High Courts.
2. The learned I-T Authorities ought to have appreciated that amendment made by the Finance Act 2021 to section 43B and 36(1)(va) of the ITA, 1961; is prospective i.e. effective from AY 2021-22 and thus not applicable in the instant case, as held by various Honorable ITAT.
3. Appellant contends that, appellant is eligible for claim of deduction of Education Cess paid for the year amounting to Rs. 24,52,873/- on Profits and Gains from Business or Profession {being 91.97% of total Education Cess of Rs. 26,67,077/-), considering the decisions of the Honorable Jurisdictional Bombay High Court in the case of Sesa Goa Ltd. Vs. JCIT- 423 ITR 426.

4. The appellant craves leave to add, alter, clarify, explain, modify, delete any of the grounds of appeal, and to seek any just and fair relief.

2. The first issue involved in this appeal is the disallowance of employees' contribution to Provident Fund as well as ESI. 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 the present case before us, the payment of employee's' contribution to provident fund and ESI was before the due date of filing of return of income u/s 139(1) of the Act and pertains to A.Y. 2017-18.

3. 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), 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."*

4. 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 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, ESIC, 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 1<sup>st</sup> April 2021 and will accordingly apply in relation to assessment year 2021-22 and subsequent assessment years. Before us, the assessment year involved is 2017-18. Since the assessment year under consideration is 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 Hon'ble 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 case thereby not warranting any disallowance since the amount in question was admittedly deposited before the due date u/s 139(1) of the Act. We direct the A.O to delete the addition made u/s 36(1)(va) of the Act from the hands of the assessee. **Ground No. 1 and 2 of assessee's appeal are allowed.**

5. The next issue in this appeal is with regard to the disallowance of deduction on Education cess and secondary and higher education cess. This particular ground has to fail in view of statutory Amendment carried out to section 40(a) of the Act with retrospective effect covering the year under consideration.

Further, we find, the Kolkata Bench of the Tribunal in the case of Kanoria Chemicals and Industries Ltd. Vs. Addl. CIT in

M I.T.A. No. 2184/Kol/2018 dated 26-10-2021 has held that the Education cess is an additional surcharge levied on income-tax and hence it partakes the character of Income-tax. Accordingly, it was held that the Education cess is not allowable as deduction. The Tribunal also noted the judgment rendered by Hon'ble Bombay High Court in the case of Sesa Goa Ltd. 117 taxman.com 96 and by Hon'ble Rajasthan High Court in the case of Chambalal Fertilizers and Chemicals Ltd. Vs. Jt. CIT (I.T.A No. 52/2018 dated 31-7-2018) wherein it was held that the Education Cess was allowable as deduction. However, the Tribunal observed that the judgment rendered by the Hon'ble Supreme Court in the case of CIT Vs. K. Shrinivasan (1972) 83 ITR 346 was not brought to the notice of the Hon'ble High Courts. The Tribunal expressed a view that the decision rendered by the Hon'ble Supreme Court in the case of K. Shrinivasan (supra) shall prevail on this issue and accordingly held that the Education Cess is not allowable as deduction. Following this proposition of law and on same parity of reasoning the Bangalore Tribunal in the case of Ray & Keshavan Associates Pvt. Ltd. Vs. Dy. CIT Cir. 1(1)(2), Bangaluru in ITA No. 603/Bang/2020 dated 11-5-2022 held that payment of Education Cess including secondary and higher secondary education cess is not allowable as deduction. The Id. A.R. also conceded that this ground has to be decided against the assessee and liable to be dismissed.

6. Following the aforesaid decisions and the Amendment taken place in the Statute with retrospective effect to section 40(a) of the Act we hold that payment of Education Cess including secondary and higher secondary education is not allowable as deduction. **Ground No. 3 is dismissed.**

7. **Ground No. 4** is general in nature.

8. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on this 29<sup>th</sup> September 2022.

Sd/-

sd/-

**(INTURI RAMA RAO)**  
**ACCOUNTANT MEMBER**

**(PARTHA SARATHI CHAUDHURY)**  
**JUDICIAL MEMBER**

Pune; Dated, this 29<sup>th</sup> day of September 2022  
Ankam

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The Pr. CIT- 1, Pune
4. The NFAC, Delhi
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	28-09-2022	Sr.PS
2	Draft placed before author	29-09-2022	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
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11	Date of dispatch of order		