

IN THE INCOME TAX APPELLATE TRIBUNAL  
“D” BENCH, MUMBAI  
BEFORE SHRI M BALAGANESH, ACCOUNTANT MEMBER &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2308/Mum/2021  
(A.Y: 2018-19)

Malgudi Foods Pvt Ltd 8, Kamala Bhavan Sharma, Industrial Estate, Walbhat Road, Rammandir (E), Mumbai – 400063.	Vs.	DCIT, CPC Bangalore.
PAN/GIR No. : AAECM8352L		
Appellant	..	Respondent

Appellant by :	None
Respondent by :	Shri T. Shankar. DR

Date of Hearing	17.05.2022
Date of Pronouncement	19.05.2022

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The appeal is filed by the assessee against the order of the CIT(A) National Faceless Appeal Centre, (NFAC), Delhi passed u/s 143(1) and 250 of the Act. The assessee has raised the following grounds of appeal:

1. *On the facts and circumstances of the case, and in law, the CIT(A) NFAC erred in confirming the disallowance made of Rs.18,77,840/- being payment of PF and ESICdues*

*u/s 36(1)(va) of the Act considering the same as not deposited on time ignoring the fact that delay was marginal and payment was made before filing the return.*

*2. On the facts and circumstances of the case and in law the AO failed to appreciate:*

*a. that the payments were deposited in the relevant fund before the due date of filing the return.*

*b. Amendment made in Finance Act 2021 pertaining to non-applicability of due date as provided in Sec. 43B of the Act is not retrospective in nature.*

*3. The appellant, therefore, prays that the disallowance of Rs.18,77,840/- in respect of late payment of PF shall be deleted.*

2. The brief facts of the case that the assessee company engaged in the business of Hospitality services & granting of franchise. The assessee's books of accounts are audited u/s 44AB of the Act and filed the return of income for the A.Y 2018-19 on 20.10.2018 disclosing a total income of Rs.44,29,209/-. The return of income was processed u/s 143(1) and the intimation dated 17.10.2019 was received through e-mail where the employee contribution of provident fund (PF) and ESIC aggregating to Rs.18,77,840/- was disallowed u/s 36(1)(va) of the Act due to delay in deposit of PF and

ESIC under the respective Act and the total income was determined at Rs63,07,050/-.

3. Aggrieved by the intimation, the assessee has filed an appeal before the CIT(A), whereas the CIT(A) has confirmed the addition in respect of the belated deposits of PF and ESIC contributions and dismissed the appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Honble Tribunal.

4. At the time of hearing, none appeared on behalf of the assessee. The Ld.DR submitted that the explanation 2 to Sec 36(1)(va) of the Act in finance Act 2021 was introduced and the amendment is applicable to the earlier years and supported the order of the CIT(A) appeal.

5. We heard the Ld.DR submissions and perused the material available on record. The contentions are that the assessee is governed by the law applicable to said Assessment year. Whereas the amended provisions/explanations are w.e.f F.Y 1-4-2021. The assessee for the various reasons could not deposit the employees contribution to provident fund & ESIC

within the time allowed under prescribed Act. Whereas, the assessee has deposited the amount before filing of the return of income U/sec139(1) of the Act. The Ld.CIT(A) has referred to chart at page 2&3 of the order, whereas there is a delay in depositing the employees contribution to provident fund and ESIC aggregating to Rs6,44,744/- The assessee has complied with the provisions of Law and deposited the contributions before the due date of filling the Return of income U/sec139(1) of the Act which cannot be disputed. The Ld.DR submitted that the amendment is retrospective applicable. The fact remains that the provisions/explanation was introduced in the Finance Act 2021 which is effective from 1-4-2021.

6. We considering the overall facts, circumstances and the submissions find on the similar issue, the Coordinate Bench of this Hon'ble Tribunal in M/s Kalpesh Synthetics Pvt Ltd Vs DCIT. Cpc in ITA no 1785/Mum/2021.A.Y 2018-19 order dated 27.04.2022 has considered the facts, provisions of law and allowed the appeal and observed at Page10 Para 9 &10 which is read as under:

9        what a tax auditor states in his report are his opinion and his opinion cannot bind the auditee at all. In this light, when one considers what has been reported to be 'due date' in column 20 (b) in respect of contributions received from employees for various funds as referred to in Section 36(1)(va) and the fact that the expression 'due date' has been defined under Explanation (now Explanation 1) to Section 36(1)(va) 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", one cannot find fault in what has been reported in the tax audit report. It is not even an expression of opinion about the allowability of deduction or otherwise; it is just a factual report about the fact of payments and the fact of the due date as per the Explanation to Section 36(1)(va). This due date, however, has not been found to be decisive in the light of the law laid down by Hon'ble Courts above, and it cannot, therefore, be said that the reporting of payment beyond this due date in the tax audit report constituted "disallowance of expenditure indicated in the audit report but not taking into account in the computation of total income in the return" as is sinequa non for disallowance of Section 143(1)(a)(iv). When the due date under Explanation to Section 36(1)(va) is judicially held to be not decisive for determining the disallowance in the computation of total income, there is no good reason to proceed on the basis that the payments having been made after this due date is "indicative" of the disallowance of expenditure in question. While preparing the tax audit report, the auditor is expected to report the information as per the provisions of the Act, and the tax auditor has done that, but that information ceases to be relevant because, in terms of the law laid down by Hon'ble Courts, which binds all of us as much as the enacted legislation does, the said disallowance does not come into play when the payment is made well before the due date of filing the

*income tax return under section 139(1). Viewed thus also, the impugned adjustment is vitiated in law, and we must delete the same for this short reason as well.*

*10. In view of the detailed discussions above, we are of the considered view that the impugned adjustment in the course of processing of return under section 143(1) is vitiated in law, and we delete the same. As we hold so, we make it clear that our observations remain confined to the peculiar facts before us, that our adjudication is confined to the limited scope of adjustments which can be carried out under section 143(1) and that we see no need to deal with the question, which is rather academic in the present context, as to whether if such an adjustment was to be permissible in the scheme of Section 143(1), whether the insertion of Explanation 2 to Section 36(1)(va), with effect from 1<sup>st</sup> April 2021, must mean that so far as the assessment years prior to the assessment years 2021-22 are concerned, the provisions of Section 43B cannot be applied for determining the due date under Explanation (now Explanation 1) to Section 36(1)(va). That question, in our humble understanding, can be relevant, for example, when a call is required to be taken on merits in respect of an assessment under section 143(3) or under section 143(3) r.w.s. 147 of the Act, or when no findings were to be given on the scope of permissible adjustments under section 143(1)(a)(iv). That is not the situation before us. We, therefore, see no need to deal with that aspect of the matter at this stage.*

7. We considering the ratio of judicial decision and the facts emanated in the course of hearing find that the amendment was brought in finance Act 2021 w.e.f 1-4-2021. The law was not framed/amended in the

relevant Assessment year and any legal proposition which cast additional burden/liability on the assessee shall be applicable prospectively. We considering the overall facts, circumstances, judicial decisions, are of the reasoned view that the amendment to section 36(1)(va) of the Act will not be applicable to assessment year 2018-19. The assessee has deposited the employee's contribution of Provident fund & ESIC before the due date of return of income u/sec 139(1) of the Act. Accordingly, we set-aside the order of the CIT(A) and direct the assessing officer to delete the disallowance and allow the grounds of appeal in favour of the assessee.

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

Order pronounced in the open court on 19.05.2022

Sd/-

(M BALAGANESH)  
**ACCOUNTANT MEMBER**

Sd/-

(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 19.05.2022

KRK, PS

*ITA No. 2308/Mum/2021  
Malgudi Foods Pvt Ltd, Mumbai.*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

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**आदेशानुसार/** BY ORDER,

( Asst. Registrar)  
ITAT, Mumbai