

IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC” BENCH, MUMBAI  
BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 1702/Mum/2022

(A.Y: 2018-19)

|  |     |                                       |
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| Dipen Kumarpal Parekh<br>603, Patel Niwas, Sainath<br>Road, Malad (W)<br>Mumbai – 4000064. | Vs. | Assessing Officer,<br>NFAC, New Delhi |
| PAN/GIR No. : AADPP6112D   |     |                                       |
| Appellant  | ..  | Respondent                            |

|                 |                          |
|-----------------|--------------------------|
| Appellant by :  | Shri Ashwin Kashinath.AR |
| Respondent by : | Shri R.P. Veena.DR       |

|                       |            |
|-----------------------|------------|
| Date of Hearing       | 23.08.2022 |
| Date of Pronouncement | 24.08.2022 |

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The assessee has filed the appeal against the order of the CIT(A)-National Faceless Appeal Centre (NFAC), Delhi passed u/s 154 and 250 of the Act. The assessee has raised the following grounds of appeal:

- 1. The learned CIT (A) erred in upholding the order of Assessing Officer-CPC u/s 154 of the Income Tax Act, 1961 dated 25.02.2020 for the above referred Assessment Year in making addition of Rs,5,59,040/-on account of late payment of PF and ESIC as per PF and ESIC Act. It is submitted that he entire amount is paid before the end of relevant financial year and before filing the return of*

*income and as such in accordance with the provision of section 43B of the Act, no disallowance is called for.*

*2. The disallowance of Rs. 5, 99,040/-made by Learned CIT (A) is based on conjectures and surmises and is contrary to the law. The addition of Rs.5,59,040/-u/s 36(1)(va) of the Act is contrary to the facts and provision of the Act and the disallowance made ought to be deleted.*

*3. The appellant reserves the right to add, to alter or to amend the grounds of appeal.*

2. The Brief facts of the case are that, the assessee is an individual and proprietor of M/s. Deep Plastic Industries. The assessee has filed the return of income for A.Y. 2018-19 on 30.09.2018 disclosing a total income of Rs. 13,98,070/-. The return of income was processed u/s 143(1) of the Act and subsequently rectification request was filed on 8-02-2020. The CPC has passed the rectification order u/sec154 of the Act dated 25-02-2020, where the employee contribution of provident fund (PF) and ESIC aggregating to Rs.5,59,040/-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 assessed at Rs. 19,57,110/-.

3. Aggrieved by the rectification order U/sec154 of the Act, the assessee has filed an appeal before the CIT(A), whereas the CIT(A) has confirmed the addition of belated deposits/payments of PF and ESIC contributions and dismissed the appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Hon'ble Tribunal.

4. At the time of hearing, the Ld. AR of the assessee submitted that the CIT(A) has not considered the facts, law and the assessee is governed by the law applicable to said assessment year. Whereas the amended provisions/explanations are with effect from F.Y 1-4-2021. The Ld. AR supported the submissions with the factual paper book and judicial decisions and prayed for allowing the appeal.

5. Contra, 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.

6. We heard the rival submissions and perused the material available on record. The submissions of the Ld.AR 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 employee's contribution to provident fund & ESIC within the time allowed under prescribed Act. Whereas, the assessee has deposited the employees contribution to provident fund and ESIC aggregating to Rs5,59,040/-before filing of the return of income U/sec 139(1) of the Act. The Ld.AR demonstrated the details of payment of PF & ESIC in Form No 3CD statement in Tax Audit report U/sec44AB of the Act placed at page 4 of the paper book and also the CIT(A) highlighted the disallowance u/sec36(1)(va) of the Act at page 4 of the CIT(A)order. 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 applicable retrospectively. The fact remains that the

provisions/explanation was introduced in the Finance Act 2021 which is effective from 1-4-2021.

7. 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.*

8. 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 and 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 disallowances and allow the grounds of appeal in favour of the assessee

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

Order pronounced in the open court on 24.08.2022.

Sd/-  
(BASKARAN BR)  
**ACCOUNTANT MEMBER**

Sd/-  
(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 24.08.2022

KRK, PS

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