

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.359/Bang/2021
Assessment Year : 2019-20

Shri. Gopalakrishna Aswini Kumar, No.21 and 22, Autocrat Engineers, Phase – 1, Export Promotion Industrial Park, Whitefield, Bengaluru – 560 066. PAN : ABLPK 6831 H	Vs.	The Assistant Director of Income Tax, CPC, Bengaluru.
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Assessee by	:	Shri. Cuddapah Ramesh, CA
Revenue by	:	Smt. Shilpa N. C, Additional CIT(DR)(ITAT), Bengaluru

Date of hearing	:	12.10.2021
Date of Pronouncement	:	13.10.2021

ORDER

Per N. V. Vasudevan, Vice President

This is an appeal by the assessee against the order dated 19.07.2021 of CIT(A) National Faceless Appeal Centre (NFAC), Delhi, relating to Assessment Year 2019-20.

2. The assessee is an individual. He carries on the business of manufacturing of spares. Assessee filed return of income for Assessment Year 2019-20 on 01.11.2019 declaring total income of Rs.3,19,47,138/-. The return filed by the assessee was processed under section 143(1) of the Income Tax Act 1961 (hereinafter called the ‘Act’), by the Central Processing Centre (CPC). By an intimation dated 01.05.2020, the total income of the assessee was assessed at

Rs.3,37,39,551/-. The difference in the income declared in the return of income and as computed in the intimation under section 143(1) of the Act was due to addition of Rs.17,92,413/-. The aforesaid sum was ESI and PF contribution of employees' share which the assessee deposited with the authorities under the PF and ESI within the due date for filing return of income under section 139(1) of the Act and those payments were beyond the due date as prescribed in the relevant law relating to contribution to PF and ESI. The actual date of payment of PF and ESI by the assessee on the date of payment were as follows:

Nature of Fund	Amount received from employees	Due date of payment as per respective Acts.	Actual date of payment
Provident fund	2,18,631	15-May-18	22-May-18
Provident fund	19,195	15-May-18	24-Nov-18
Provident fund	9,707	15-Jun-18	26-Nov-18
Provident fund	1,346	15-Jun-18	23-Feb-19
Provident fund	26,065	15-Jul-18	26-Nov-18
Provident fund	1,472	15-Jul-18	23-Feb-19
Provident fund	2,06,708	15-Aug-18	17-Aug-18
Provident fund	6,221	15-Aug-18	26-Nov-18
Provident fund	1,472	15-Aug-18	23-Feb-19
Provident fund	2,06,859	15-Sep-18	18-Sep-18
Provident fund	43,581	15-Sep-18	16-Jan-19
Provident fund	20,768	15-Sep-18	25-Apr-19
Provident fund	2,44,259	15-Oct-18	16-Oct-18
Provident fund	52,942	15-Oct-18	16-Jan-19
Provident fund	2,71,802	15-Nov-18	22-Nov-19
Provident fund	33,498	15-Nov-18	18-Jan-19
Provident fund	13,112	15-Dec-18	18-Jan-19
Provident fund	19,455	15-Jan-19	19-Jan-19
ESI	30,177	15-May-18	23-May-18
ESI	2,972	15-May-18	02-Jan-19
ESI	30,904	15-Jun-18	18-Jun-18
ESI	26,170	15-Jul-18	16-Jul-18
ESI	754	15-Jul-18	25-May-19
ESI	28,222	15-Aug-18	20-Aug-18
ESI	753	15-Aug-18	24-May-19
ESI	28,865	15-Sep-18	22-Sep-18
ESI	10,783	15-Sep-18	24-May-19
ESI	23,095	15-Sep-18	25-May-19
ESI	31,751	15-Oct-18	18-Oct-18
ESI	35,626	15-Nov-18	15-Dec-18
ESI	19,397	15-Nov-18	25-May-19

ESI	40,496	15-Dec-18	17-Dec-18
ESI	40,755	15-Jan-19	16-Jan-19
ESI	44,600	15-Mar-19	16-Mar-19
Total	17,92,413		

3. Aggrieved by the aforesaid addition made to the total income of the assessee, the assessee preferred appeal before the CIT(A). With regard to employee's share of contribution to PF and ESI, the CIT(A) referred to the amendment made to section 36(1)(va) and 43B of the Act by the Finance Act, 2021. The Finance Act, 2021 has amended section 36, sub-section (1), in clause (va), by inserting Explanation-2 which reads thus:

"Explanation 2.—For the removal of doubts, it is hereby clarified that 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 this clause;".

The finance Act, 2021 also amended section 43B by inserting Explanation-5 thereto which reads thus:

"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."

According to the CIT(A), 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. The CIT(A) also held that 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 the said 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.

4. The CIT(A) was of the view that Section 36(1)(va) and section 43B(b) operate on totally different footings and have different parameters for due dates, i.e., employee's contribution is linked to payment before the due dates specified in the respective Acts or Funds and employer's contribution is linked to the payment before the prescribed due date for filing of return u/s.139(1) Income Tax Act, 1961. The result of any failure to pay within the prescribed dates also leads to different results. In the case of employee's contribution, any failure to pay within the prescribed due date under the respective PF Act or Scheme will result in negating employer's claim for deduction permanently forever u/s.36(1)(va). On the other hand, delay in payment of employer's contribution is visited with deferment of deduction on payment basis u/s.43B and is therefore not lost totally. This legal distinction between employees' contribution and employer's contribution under the Act was duly recognised by the Courts also. The CIT(A) in this regard referred to the decision of the Hon'ble Gujarat High Court in CIT v. Gujarat State Road

Transport Corpn. [2014] 41 taxmann.com 100/ 366 ITR 170/223 Taxman 398 (Guj.) wherein the aforesaid distinction has been accepted

5. The CIT(A), thereafter held that the amendment to section 36(1)(va) by insertion of explanation 2 and the amendment to section 43B by insertion to explanation 5 by the Finance Bill 2021 was only declaratory / clarificatory in nature and there therefore was applicable with retrospective effect by necessary intendment of deeming nature expressly stated therein. The CIT(A) finally dismissed the appeal of the Assessee.

6. Aggrieved by the order of the CIT(A), the Assessee is in appeal before the Tribunal. We have heard the rival submissionis. We find that the issue raised in this appeal whether there could be disallowance of Employees share of ESI/PF paid belatedly as per the due dates laid down in the law relating to contribution of ESI/PF, if the same has nevertheless been paid on or before the due date for filing return of income u/s.139(1) of the Act, has been decided in favour of the Assessee in the following decisions, holding that there cannot be any such disallowance:

M/s Mahadev Cold Storage vs Jurisdictional AO - ITA.No.41 & 42/Agra/2021

M/s Essae Teraoka (P.) Ltd vs DCIT - [2014] 43 taxmann.com 33 (Karnataka)

Anand Kumar Jain vs ITO - ITA NO 4192/MUM/2012

ValueMomentum Software Services Private Limited vs. DCIT I.T.A. No. 2197/HYD/2017 [Assessment Year: 2013-14] dated 19.05.2021

Mohan Ram Chaudhary vs. ITO ITA No. 51&54-55/J0odh/2021 [Assessment Year: 2018-19] dated 28.09.2021

7. The Hon'ble Karnataka High Court in the case of Essae Teraoka Pvt. Ltd., (supra) has taken the view that employee's contribution under section 36(1)(va) of the Act would also be covered under section 43B of the Act and therefore if the share of the employee's share of contribution is made on or before due date for furnishing the return of income under section 139(1) of the Act, then the assessee would be entitled to claim deduction. Therefore, the issue is covered by the decision of the Hon'ble Karnataka High Court. The next aspect to be considered is whether the amendment to the provisions to section 43B and 36(1)(va) of the Act by the Finance Act, 2021, has to be construed as retrospective and applicable for the period prior to 01.04.2021 also. On this aspect, we find that the explanatory memorandum to the Finance Act, 2021 proposing amendment in section 36(1)(va) as well as section 43B is applicable only from 01.04.2021. These provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect unless the legislature specifically says so. In the decisions referred to by us in the earlier paragraph of this order on identical issue the tribunal has taken a view that the aforesaid amendment is applicable only prospectively i.e., from 1.4.2021. We are therefore of the view that the impugned additions made under section 36(1)(va) of the Act in both the Assessment Years deserves to be deleted.

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

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(CHANDRA POOJARI)
Accountant Member

Sd/-

(N. V. VASUDEVAN)
Vice President

Bangalore.

Dated: 13.10.2021.

/NS/*

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.