IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE "SMC-C" BENCH, BANGALORE

Before Shri George George K, Judicial Member

ITA No.388/Bang/2021 : Asst.Year 2019-2020

M/s.The Continental Restaurant & Café Co., #13 Museum Road Behind Museum Road Post Office Bengaluru – 560 001. **PAN : AAKFT0249A.**	v.	The Income Tax Officer Ward 1(2)(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.Narendra Sharma, Advocate
Respondent by : Sri.Ganesh R.Ghale, Standing Counsel

Date of Hearing : 08.10.2021		**Date of Pronouncement : 11.10.2021**

O R D E R

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 31.07.2021. The relevant assessment year is 2019-2020.

2. The grounds raised read as follows:-

"1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned Commissioner of Income tax (Appeals) / National Faceless Appeal Centre (NFAC for short) is not justified in upholding the determination of total income of appellant in the limitation u/s 143(1) of the Act, at Rs.1,86,337/- as against the returned income of Rs.64,092/-, on account of the disallowance of Rs.1,22,245/- made u/s 36(1)(va) of the Act, based upon the details in the Tax Audit Report of the Chartered Accountant in Form 3CD, under the facts and in the circumstances of the appellant's case.

3. The learned CIT(A) / NFAC ought to have appreciated that the aforesaid disallowance of Rs.1,22,245/- in respect of the belated payments of the Employee's share of PF and ESI was allowable having regard to the judgment of the Hon'ble

Karnataka High Court in the case of Essae Teroka Limited reported in 366 ITR 408 (Kar) since the same has been paid before the due date for filing the return of income u/s 139(1) of the Act and hence, the disallowance made ought to have been deleted.

4. The learned CIT[A] I NFAC is not justified in holding that the amendment made by insertion of Explanation 2 to the provisions of section 36[1][va] of the Act and the insertion of Explanation 5 to section 43B of the Act by the Finance Act, 2021 with effect from 01/04/2021 was clarificatory / declaratory in nature and therefore, these amendments were retrospective in operation under the facts and in the circumstances of the appellant's case.

4.1 The learned CIT[A] I NFAC ought to have appreciated that the aforesaid amendments by the Finance Act, 2021 cannot be regarded as retrospective in nature as they were not in the nature of a beneficial legislation to remove intended hardships cast on the assessee and therefore, the disallowance sustained on this basis is opposed to law and facts of the appellant's case.

4.2 The learned CIT[A] I NFAC is not justified in refusing the follow the binding judgement of the Hon'ble Jurisdictional High Court of Karnataka in favour of the assessee on the ground that the said judgment was rendered before the aforesaid clarificatory amendments made under the facts and in the circumstances of the appellant's case.

5. Without prejudice to the right to seek waiver with the Hon'ble CCIT /DG, the appellant denies itself liable to be charged to interest u/s. 234B and 234C of the Act, as computed in the intimation u/s.143[1] of the Act, under the facts and in the circumstances of the appellant's case.

6. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs."

3. The brief facts of the case are as follows:

The assessee is a firm. For the assessment year 2019-2020, the return of income was filed on 07.10.2019 declaring

income of Rs.64,092. Intimation u/s 143(1) of the I.T.Act was issued on 29.06.2020, wherein the total income was assessed at Rs.1,86,337. The difference between the returned income and the assessed income was on account of disallowance of a sum of Rs.1,22,245 being remittance of employees' contribution of provident fund of Rs.1.06,190 and ESI of Rs.16,055. The disallowance was made u/s 36(1)(va) of the I.T.Act for the reason that the assessee has not remitted the employees' contribution of PF and ESI within the due dates specified under the respective statutes.

4. Aggrieved, the assessee filed an appeal to the first appellate authority. Before the first appellate authority, it was contended that though the employees' contribution of PF and ESI was remitted belatedly under the respective Acts, the same was paid before the due date of filing of the return u/s 139(1) of the I.T.Act. Therefore, it was submitted that employees' contribution to PF and ESI need to be allowed as deduction. In this context, the learned AR relied on various judicial pronouncements. The CIT(A), however, dismissed the appeal of the assessee. The CIT(A) noticed the conflicting judicial pronouncements (judgments which are in favour and against the assessee) and held that the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 was retrospective in nature. The relevant finding of the CIT(A) reads as follow:-

> *"From the above amendment, it appears that the law is now clear i.e. employees' contribution to specified fund will not be allowed as deduction if there is delay in deposit even by a*

single day as per the due dates mentioned in the respective legislation.

The language and rational for these amendments clearly indicates that these amendments are retrospective in nature. The amendment to section 36(1)(va) specified states that explanation 2 to the said clause has been inserted to clarify that the provision of section 43B does not apply and deemed to never have been applied to the purpose of determining the due date. Similarly section 43B has been amended by the inserting explanation 5 to the said section to clarify that the provision of the section do not apply and deemed to never have been applied to any sum to which the provision of sub-clause (x) of clause (24) of section 2 applies. The words "deemed to never have been applied" clarifies all doubt about the nature of the amendments. They are retrospective in nature. The memorandum to the finance bill clarifies that the amendments was introduced to protect the interest of the employees and ensure that the employer do not unjustly get enriched by their contributions. The above amendments are clarificatory amendments. It was never the intention of the legislature to include sums received by the employer from his employees, for which the provision of section 2(24)(x) applies in the list of deductions us 43B. These clarificatory amendments are to clear a meaning of a provision of the Principle Act ;which was already implicit. Such clarificatory amendments are retrospective in nature as held in the following decisions.

1. *National Housing Bankv. Addl.CIT ITA No.3704/Del/2010*
2. *CIT v. Poddar Cement Pvt. Ltd. (1997) 5 SCC 482*

Therefore after considering the submission of the appellant, relevant judicial decision and the amendment to the Income Tax Act, 1961 by the Finance Act 2021, the disallowance amounting to Rs.122245/- related to employees contribution to EPF & Rs.16055/- related to ESI paid after due date is confirmed. These grounds of appeal fail and are not allowed."

5. Aggrieved, the assessee has filed this appeal before the Tribunal. The learned AR submitted that the issue whether the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory or not is now settled by the following orders of the Tribunal:-

(i) Dhabriya Polywood Limited v. ACIT reported in (2021) 63 CCH 0030 Jaipur Trib.
(ii) NCC Limited v. ACIT reported in (2021) 63 CCH 0060 Hyd Tribunal.

(iii) Indian Geotechnical Services v. ACIT in ITA No.622/Del/2018 (order dated 27.08.2021).

6. The learned Standing Counsel by relying on the order of the Delhi Bench of the Tribunal in the case of Vedvan Consultants Pvt. Ltd. v. ACIT in ITA No.1312/Del/ 2020 (order dated 26.08.2021) submitted that the above order of the Tribunal had held that the amendment brought about to section 36(1)(va) and 43B of the I.T.Act is clarificatory and hence retrospective.

7. I have heard rival submissions and perused the material on record. Admittedly, the assessee has not remitted the employees' contribution of PF of Rs.1,06,190 and ESI of Rs.16,055 totaling to Rs.1,22,245 before the due date specified under the respective Act. However, the assessee had paid the same before the due date of filing of the return u/s 139(1) of the I.T.Act. The Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT reported in 366 ITR 408 (Kar.) has categorically held that the assessee would be entitled to deduction of employees' contribution to PF and ESI provided the payment was made prior to the due date of filing of return of income u/s 139(1) of the I.T.Act. The Hon'ble jurisdictional High Court differed with the judgment of the Hon'ble Gujarat High Court in the case of CIT v. Gujarat State Road Transport Corporation reported in 366

ITR 170 (Guj.). In holding so, the Hon'ble High Court was considering following substantial question of law:-

> *"Whether in law, the Tribunal was justified in affirming the finding of Assessing Officer in denying the appellant's claim of deductions of the employees contribution to PF/ESI alleging that the payment was not made by the appellant in accordance with the provisions u/s 36(1)(va) of the I.T.Act?"*

7.1 In deciding the above substantial question of law, the Hon'ble High Court rendered the following findings:-

> *"20. Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provided in sub para (1), the employer shall, before paying the member, his wages, deduct his contribution from his wages and deposit the same together with his own contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word "contribution" used in Clause (b) of Section 43B of the IT Act means the contribution of the employer and the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income under sub-section (1) of Section 139 of the IT Act is made, the employer is entitled for deduction.*
>
> *21. The submission of Mr.Aravind, learned counsel for the revenue that if the employer fails to deduct the employees' contribution on or before the due date, contemplated under the provisions of the PF Act and the PF Scheme, that would have to be treated as income within the meaning of Section 2(24)(x) of the IT Act and in which case, the assessee is liable to pay tax on the said amount treating that as his income, deserves to be rejected.*
>
> *22. With respect, we find it difficult to endorse the view taken by the Gujarat High Court. WE agree with the view taken by this Court in W.A.No.4077/2013.*
>
> *23. In the result, the appeal is allowed and the substantial question of law framed by us is answered in favour of the appellant-assessee and against the respondent-revenue. There shall be no order as to costs."*

7.2 The further question is whether the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory and declaratory in nature. The Hon'ble Supreme Court in the recent judgment in the case of M.M.Aqua Technologies Limited v. CIT reported in (2021) 436 ITR 582 (SC) had held that retrospective provision in a taxing Act which is "for the removal of doubts" cannot be presumed to be retrospective, if it alters or changes the law as it earlier stood (page 597). In this case, in view of the judgment of the Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT (supra) the assessee would have been entitled to deduction of employees' contribution of PF and ESI if the payment was made prior to due date of filing of the return of income u/s 139(1) of the I.T.Act. Therefore, the amendment brought about by the Finance Act, 2021 to section 36(1)(va) and 43B of the I.T.Act, alters the position of law adversely to the assessee. Therefore, such amendment cannot be held to be retrospective in nature. Even otherwise, the amendment has been mentioned to be effective from 01.04.2021 and will apply for and from assessment year 2021-2022 onwards. The following orders of the Tribunal had categorically held that the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is only prospective in nature and not retrospective.

(i) Dhabriya Polywood Limited v. ACIT reported in (2021) 63 CCH 0030 Jaipur Trib.

(ii) NCC Limited v. ACIT reported in (2021) 63 CCH 0060 Hyd Tribunal.

(iii) Indian Geotechnical Services v. ACIT in ITA No.622/Del/2018 (order dated 27.08.2021).

(iv) M/s.Jana Urban Services for Transformation Private Limited v. DCIT in ITA No.307/Bang/2021 (order dated 11th October, 2021)

7.3 In view of the aforesaid reasoning and the judicial pronouncements cited supra, the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 will not have application for the relevant assessment year, namely A.Y. 2019-2020. Accordingly, I direct the A.O. to grant deduction in respect of employees' contribution to PF and ESI since the assessee has made payment before the due date of filing of the return of income u/s 139(1) of the I.T.Act, It is ordered accordingly.

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

Order pronounced on this 11th day of October, 2021.

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 11th October, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)- NFAC, Delhi.
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore