

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**
(Through web-based video conferencing platform)

**BEFORE SHRI N.K. CHOUDHRY, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**I.T.A. Nos. 25 & 28/VIZ/2021
(Asst. Year : 2019-20 & 2016-17)**

The Chodavaram
Co-operative Sugars Ltd.,
Chodavaram Mandalam,
Govada Chodavaram,
Visakhapatnam.

- Vs. 1. Asst. Director of Income
Tax, CPC, Bangalore.
2. ITO, Ward-5(2),
Visakhapatnam.

PAN No. AAAAT 4375 N
(Appellant)

(Respondent)

Assessee by : Shri C.Subrahmanyam, FCA
Department by : Shri V.Srinivasa Rao, Sr.DR

Date of hearing : 08/09/2021.

Date of pronouncement : 23/09/2021.

ORDER

PER BENCH

These appeals have been preferred by the Assessee against the separate orders dated 02/03/2021 impugned herein passed by the Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre [for short, "Id. Commissioner (NFAC)"], Delhi u/sec. 250 of the Income Tax Act, 1961 (hereinafter referred to as "Act") for the A.Ys. 2019-20 & 2016-17. As the issue involved in both

the appeals is common, therefore for the sake of convenience and brevity have been taken into consideration simultaneously and hence we will quote the facts of ITA No. 25/VIZ/2021 and result of the same shall apply *mutatis mutandis* to both appeals.

Brief facts of the case are as under:-

2. The Assessee being a Co-operative society engaged in manufacturing and sale of sugar, filed its return of income on dated 31/10/2019 for which assessment u/sec. 143(1) of the Act was completed on dated 16/09/2020 by assessing loss of Rs.10,34,34,964/-. The assessing officer made the addition of Rs. 1,19,93,542/- as delayed payment qua employees share of ESI and PF

3. The Assessee challenged the said addition before the Id. Commissioner (NFAC), who vide order dated 02/03/2021 dismissed the appeal of the Assessee, by concluding as under:-

"I have gone through the submission and grounds of appeal of the appellant. In this case the Assessee is in appeal about the addition of Rs. 1,19,93,542/- as delayed payment of employees share of ESI and PF. The Assessee has argued that if paid within the due date of filing of return, same had to be allowed by the CPC. Now there are certain judgments which are in favour of the Revenue.

1. *Hon'ble Madras High Court in 100 taxman 244 Madras has held that the belated payment of employees contribution not allowable as deduction u/sec. 43B.*
2. *Hon'ble Gujarat High Court in 115 taxman 340 (Gujarat) held that Suzlon failed to deposit employee's contribution towards PF and ESI within time and hence addition u/sec. 43B has been held justified.*
3. *In 96 taxman 13 (Kerala) Hon'ble Kerala High Court has held that no deduction if employees contribution to PF deposited after due date.*

In this case, CBDT, New Delhi also clarified vide Circular No. 22/2015 bearing file No. 279/Misc/140/2015—ITJ dated 17 December 2015, it is clearly mentioned that this circular does not apply to claim of deduction relating to employee's contribution to welfare funds which are governed by section 36(1)(va) of the IT Act.

The amendment has been also brought in the recent finance Act that the delayed payment cannot be allowed u/ sec. 43B.

The report, the addition of Rs. 1,19,93,542/- is confirmed on the basis of judgments of Hon'ble High Courts and CBDT circular. Hence, the appeal of the Assessee is dismissed.

In the result, the appeal of the appellant is dismissed.”

4. Against the impugned order, Assessee preferred the instant appeal on the following grounds of appeal:-

- "1. That under the facts and circumstances of the case, the order passed u/sec. 143(1) of the I.T. Act is contrary to the provisions of the Act and facts of the case.*
- 2. The Id. Commissioner of Income Tax (Appeals), National Faceless Appeals Centre (in short "CIT(A), NFAC") erred in confirming the addition of Rs. 1,19,93,542/-, the payment of Employee's share of ESI & PF, on the ground that the belated payment of employee's contribution is not allowable u/sec. 36(10)(va) of the I.T. Act.*
- 3. The "Ld. CIT(A), NFAC" ought to have held that PF contribution of Employees if paid within the due date of filing of return of income is allowable for deduction in view of the provisions of sec. 36(1)(va) and sec. 43B of the I.T. Act.*
- 4. The "Ld. CIT(A), NFAC" before giving the verdict on the disputed issue failed to discuss/consider the various submissions made by the Assessee on dt. 27/01/2021. This way the order passed by "Ld. CIT(A), NFAC" is one sided and against all judicial norms.*
- 5. The "Ld. CIT(A), NFAC" failed to adhere to the judicial discipline as laid down by the Hon'ble Bombay and Andhra*

Pradesh High Courts, reported in 156 ITR 11 & 169 ITR 564 respectively, for the proposition that when there are several judgments of different Hon'ble High Courts both in favour and against the Assessee the view favourable to the Assessee is to be followed.

6. *For these and other reasons that are to be urged at the time of hearing of the case the appellant prays that the impugned disputed addition is to be deleted in the interest of justice."*

5. Having heard the parties at length and perused the material available on record. The issue involved in the instant appeal relates to the deposit of employees contribution qua ESI & PF after the prescribed dates as per the relevant Acts i.e. ESI & PF, but before filing of return u/sec. 139(1) of the Act. The Ld. Commissioner (NFAC) while relying upon the three judgments of various High Courts, such as, Hon'ble Madras High Court [100 taxman 244 (Madras)], Hon'ble Gujarat High Court [115 taxman 340 (Gujarat)] and Hon'ble Kerala High Court [96 taxman 13 (Kerala)] which are in favour of the Revenue Department and CBDT Circular No. 22/2015, dated 17/12/2015 dismissed the appeal of the Assessee by affirming the disallowance u/sec. 43B of the Act.

5.1 The contention of the Assessee is that PF and ESI contribution of Employees, if paid within the due date of filing of return of income u/s 139(1) of the Act, then the same is allowable for deduction as per section 43B of the Act.

5.2 The Id. Commissioner failed to consider the judgments in favour of the Assessee, few of which was are referring, passed by the Hon'ble Karnataka High Court in the case of *Essase Teraoka*

(P) Ltd. Vs. DCIT (366 ITR 408); the Hon'ble Rajasthan High Court in the case of *CIT Vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd.* (35 Taxman 616) and the Hon'ble Punjab & Haryana High Court in the case of *M/s. R.M. Exports Vs. CIT* in ITA No. 115/2009 decided on 06/08/2013.

5.3 It is not in controversy that there are various judgments on both sides and the controversy has been settled by the Hon'ble Apex Court in the case of **CIT Vs. M/s. Vegetables Products Ltd. (88 ITR 192)** by holding “ **if two reasonable constructions of a taxing provision are possible, that construction which favours the Assessee must be adopted.**” Meaning thereby if view/judgment is available in favour of the Assessee then the same should be followed.

5.4 The Jurisdictional Co-ordinate Bench of the Tribunal in the case of *DCIT Vs. M/s. Eastern Power Distribution Company of A.P. Ltd.* in ITA No. 609/VIZ/2014, dated 29/07/2016 extensively discussed all the issues raised including the issue in hand and after considering all aspects and judgements of the Hon'ble High Courts in favour and against the Revenue Department and the Assessee, held that contribution received from the employees if deposited on or before the due date of furnishing return of income u/sec. 139(1) of the Act, then no disallowance can be made towards employees contribution to provident fund. For the sake of brevity and ready reference, the concluding part of the order is reproduced herein below:-

“5. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The A.O. made additions towards belated payment of employees' contributions to PF. According to the A.O., employees'”

contribution to provident fund is deductible under the provisions of section 36(1)(va) of the Act, if the same is paid on or before the due date specified under the provident fund Act. The A.O. further was of the opinion that in view of the clear provisions of section 2(24)(x) r.w.s. 36(1)(va) of the Act, any recovery from employees towards provident fund contribution is deemed to be income of the assessee, if the employer not paid the same to the provident fund account of the employee within due date specified under the provisions of PF Act. It is the contention of the assessee that second proviso to section 43B of the Act provides that no deduction shall be allowed unless such sum is actually been paid on or before due date as specified in explanation to 36(1)(va) of the Act which was omitted by the Finance Act, 2003 w.e.f. 1.4.2004 and accordingly, there was no special provision regarding employees' contribution to PF. It is further contended that as per the amended provisions of section 43B of the Act, any sum payable by the assessee as an employer by way of contribution to PF shall be allowed, if the same is paid on or before the due date of filing of return of income u/s 139(1) of the Act.

6. The only issue to be resolved is whether the assessee would be entitled to claim deduction for the employees' contribution made to PF after the due date prescribed under the PF Act, but before the due date prescribed for filing of income tax return in the light of the provisions contained in section 36(1)(va) of the Act and section 43B(b) of the Act. It is the contention of the assessee that there is no distinction between employer and employee contribution after omission of second proviso of section 43B of the Act by Finance Act, 2003 w.e.f. 1.4.2004. We find force in the arguments of the assessee for the reason that there is no difference between employees and employer contribution under the PF Act. Section 6 of Provident Fund Act provides for contribution and the manner in which such contribution shall be made. Paragraph 30 of the PF Scheme provides for payment of contributions. As per the said scheme, the employer at the first instance shall make the total contribution including employees' share. Paragraph 32 provides for recovery of member share of contribution and as per the scheme, the employer can recover the employees' share from the wages paid to the employee. Therefore, as per the PF Act and scheme of contributions, the contributions means and include both employees' and employer's share. Similarly, section 2(c) of the Provident Fund Act defines the contribution to mean a contribution payable in respect of a member under the scheme or the contribution payable in respect of an employee to whom the scheme applies. There is a prescribed mode of payment of contributions under the PF Act. Under the said Act, the employer shall contribute both employees and employer share along with administrative charges before the due date specified under the PF Act. The Act prescribed only one due date for depositing the contribution i.e. 15th of subsequent month with the grace period of 5 days which indicates that there is no difference between employee

and employer contribution. If the legislature intends to differentiate employees and employer contribution, then there would have been two due dates like in the case of Income Tax Act. Therefore, from the above, it is clear that the Provident Fund Act does not differentiate employees and employer contribution and contribution means both employees and employer contribution under the PF scheme.

7. Section 43B of the Act provides for certain deductions to be allowed only on actual payment basis. Sub clause (b) of section 43B of the Act covers 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 the employees. The proviso to section provides that any sum paid by the assessee on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance can be made under the provisions of section 43B of the Act. A careful consideration of section 43B of the Act, it is clear that an extension is granted to the assessee to make the payment of PF contributions or any other fund till the due date of furnishing return of income u/s 139(1) of the Act. Therefore, in our opinion, there is no difference between employees and employer contribution to PF and if such contribution is made on or before the due date of furnishing return of income u/s 139(1) of the Act, then deduction is to be allowed under the provisions of section 43B of the Act.

8. **The Hon'ble Karnataka High Court, in the case of Essae Teraoka (P) Ltd. Vs. DCIT 366 ITR 408** took the view that the word contribution occurring in section 43B of the Act would include employees' contribution to PF in the light of the definition of the word contribution as per the provisions of section 2(c) of the PF Act. As per the said section, contribution would mean both employer's contribution and employees' contribution. Accordingly, it was held that the provisions of section 43B of the Act allowing deduction for payment made before the due date of filing of Income Tax return cannot be ignored. Similarly, the ITAT, Hyderabad Tribunal in the case of Tetra Soft (India) Pvt. Ltd. Vs. ACIT (2015) 40 ITR (Trib) 470 held that when assessee remitted employees' contribution to PF within due date of filing return of income u/s 139(1) of the Act, amount of employees' contribution to PF cannot be disallowed. Similar view was upheld by the Chennai bench of the ITAT, in the case of ACIT Vs. Farida Shoes Pvt. Ltd. (2016) 46 CCH 29. The coordinate bench held that if assessee had not deposited employees' contribution towards provident fund up to the due date as prescribed under relevant statute, but before due date of filing of return no disallowance could be made in view of the provisions of section 43B of the Act. In the case of **CIT Vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. 35 Taxman 616**, the Hon'ble High Court of Rajasthan, after referring to the apex court decision in the case of CIT Vs. Alom Extrusions Ltd. 319 ITR 306 & CIT Vs. Vinay Cement Ltd.

held that the deductions should be allowed for the payment of employees' contribution made before the due date of filing of return. Similarly, in the case of CIT Vs. State Bank of Bikaner, the Hon'ble Rajasthan High Court held that contribution paid after the due date under the respective Act, but before filing the return of income u/s 139(1) of the Act cannot be disallowed u/s 43B of the Act and or u/s 36(1)(va) of the Act.

9. The Ld. D.R. relied upon the decision of Hon'ble High Court of Kerala, in the case of CIT vs. Merchem Ltd, reported in (2015) 378 ITR 443 and submitted that employees' contribution to provident fund is allowed as deduction, if the same is deposited on or before the due date specified under the provisions of provident fund Act. The D.R. also relied upon the decision of Gujarat High Court, reported in (2014) 366 ITR 170, wherein the Hon'ble Gujarat High Court held that since assessee had not deposited said contribution to respective fund account on the date as prescribed in explanation to section 36(1)(va) of the Act, disallowance made by the A.O. was just and proper. Though, the D.R. relied upon certain judicial precedents which are in favour of the revenue, in view of the decision of Hon'ble Supreme Court, in the case of **CIT Vs. M/s. Vegetables Products Ltd. reported in 88 ITR 192**, wherein the Hon'ble Supreme Court held that if two reasonable constructions of a taxing provision are possible that construction which favours the assessee must be adopted, therefore, by respectfully following the decision of Supreme Court, when divergent views are expressed by different judicial forums, we prefer to follow the views expressed by the Courts which are in favour of the assessee.

10. Considering the facts and circumstances of this case and also following the judicial precedents as discussed above, we are of the view that there is no distinction between employees' and employer contribution to PF, and if the total contribution is deposited on or before the due date of furnishing return of income u/s 139(1) of the Act, then no disallowance can be made towards employees' contribution to provident fund. The CIT(A) after considering the relevant details rightly deleted the additions made by the A.O. We do not see any reasons to interfere with the order of the CIT(A). Hence, we inclined to uphold the CIT(A) order and dismiss the appeal filed by the revenue."

5.6 We also deem it appropriate to record the finding of the Co-ordinate Bench of ITAT at Hyderabad on identical issue, in the case of *Value Momentum Software Services Pvt. Ltd. Vs. DCIT* in

ITA No. 2197/Hyd/2017 decided on 19/05/2021, which is as under:

“The Explanation to Memorandum of Finance Act, 2021 amendment in section 36(1)(va) and 43B of the Act wherein corresponding explanation has been inducted to the effect that 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. It further provides that this amendment will take effect from 01/04/2021 and consequently will apply from A.Y. 2021-22 onwards which goes to show that the Legislature itself has condoned the impugned default before 01/04/2021 .

5.7 From the aforesaid analyzations and considerations, we are of the considered view that as in the instant case, the employees contribution qua ESI & PF for the Asst. Year: 2019-20 has been deposited before the due date of furnishing the return of income u/sec. 139(1) of the Act and therefore cannot be subjected to disallowance, consequently, the addition sustained by the Id. Commissioner (NFAC) is liable to be deleted.

6. Resultantly, both the appeals under consideration i.e. ITA Nos. 25 & 28/VIZ/2021 stands allowed.

Order Pronounced in open Court on this 23rd day of Sep., 2021.

sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(N.K. CHOUDHRY)
Judicial Member

Dated: 23rd Sep., 2021.

vr/-

Copy to:

1. *The Assessee - The Chodavaram Co-operative Sugars Ltd., Chodavaram Mandalam, Govada Chodavaram, Visakhapatnam.*
2. *The Revenue -*
 - a) *Asst. Director of Income Tax, CPC, Bangalore.*
 - b) *ITO, Ward-5(2), Visakhapatnam.*
3. *The Pr.CIT,*
4. *The CIT(A)-NFAC, Delhi.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.