

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE “SMC-B” BENCH, BANGALORE**

Before Shri George George K, Judicial Member

ITA No.376/Bang/2021 : Asst.Year 2017-2018

M/s.Bevel Gears (India) Pvt.Ltd. 17B Whitefield Road Sadaramangala Industrial Area Mahadevapura Post Bengaluru – 560 048. PAN : AAACB5722B.	v.	The Asst.Commissioner of Income-tax, Circle 1(1)(2) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.Gururaj Acharya, CA

Respondent by : Sri.Ganesh R.Ghale, Standing Counsel

Date of Hearing : 08.10.2021	Date of Pronouncement : 11.10.2021
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ORDER

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 23.06.2021. The relevant assessment year is 2017-2018.

2. The grounds raised read as follows:-

“1. The Assessment order to the extent of the disallowance is bad in law as well as on facts and is liable to be dismissed.

2. The learned AO has made a disallowance of expenditure in respect of Employee Contribution to Specified Funds The Learned AO failed to take into consideration the following case laws which are passed by the jurisdictional High Court of Karnataka where the assessee is assessed.

a. Essae Teroaka Pvt. Ltd. v. DCIT, Karnataka High Court ITA No.480/2013 dated 4th February, 2014.

b. CIT v. Sabari Enterprises (2008) 298 ITR 141 (Kar.)

c. Spectrum Consultants India (P) Ltd. v. CIT (2013) 34 taxmann.com 20 (Kar.)

The other case-laws where similar cases are assessed in favour of the assessee on similar issues are as under:

- d. *CIT v. Aimil Ltd. (2010) 321 ITR 508 (Del)*
- e. *CIT v. Kichha Sugar Company Ltd. (ITA No.50 of 2009) (Uttarakhand HC).*
- f. *CIT v. Nipso Plyfabrics Ltd. (2013) 350 ITR 327 (HP)*
- g. *CIT v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. (2013) 35 taxmann.com 616 (Raj)*
- h. *CIT v. Hemla Embroidery Mills (P) Ltd. (2013) 37 taxmann.com 160 (P&H)*

where it was held that even though the payment to specified fund was made after the due date under the said acts the payment to specified funds is allowable expenditure if they are paid within the due date specified u/s 139(1).

3. *In the order of the learned CIT(A) it is mentioned that notices for hearing have been issued from time to time and the last notice was issued on 11.06.2021 (with due date for submitting the reply being 17.06.2021) which has not been replied to. The learned CIT(A) has failed to recognize the fact that the new Income tax portal where the online submission are to be made was not operational during the period and until the date on which the order was received (23.06.2021).*

4. *The learned CIT has also referred to The Finance Act 2021 wherein an 'Explanation' to section 36(1)(va) has been added which reads that the provision of section 43B does not apply and is deemed to never have been applied for the purposes of determining the "due date" under this clause. The use of the words 'does not' and 'deemed to never have been applied' applies to all pending matters. However the learned CIT has failed to appreciate the fact that these legislative amendments incorporated in section 36(1)(va) and 43B by Finance Act 2021, are prospective in application i.e., w.e.f. April 1, 2021. The disallowance and the amendments are prospective as has been held by Hon. Income Tax Appellate Tribunal, Hyderabad in the case of Crescent Roadways Private Limited [TS-510-ITAT 2021 (HYD)]*

5. *The appellant assessee craves leave to add, alter, amend or to delete any of the grounds of appeal on or before hearing of appeal, and to file written submissions and paper book at the time of actual hearing before the Hon'ble CIT(Appeals)."*

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

The assessee is a company engaged in the business of manufacture of gear boxes etc. For the assessment year 2017-

2018, the return of income was filed on 18.10.2017 declaring 'NIL' income. The assessment was selected for scrutiny by issuance of notice u/s 143(2) of the I.T.Act. During the course of scrutiny assessment, it was noticed that employees' contribution to PF to the tune of Rs.3,46,929 and employees' contribution to ESI to the tune of Rs.47,126 have been remitted to the concerned funds beyond the stipulate due date. The A.O. by placing reliance on the CBDT Circular No.22/2015 dated 17.12.2015, held that the employees' contribution remitted to the concerned fund beyond the stipulated due date cannot be allowed as a deduction. Accordingly, assessment u/s 143(3) of the I.T.Act was completed vide order dated 12.12.2019.

4. Aggrieved, the assessee preferred an appeal to the first appellate authority. Before the first appellate authority, it was contended that the assessee had remitted the employees' contribution to PF and ESI before the due date of filing of return u/s 139(1) of the I.T.Act, hence, was entitled to deduction u/s 36(1)(va) of the I.T.Act. In this context, the assessee relied on various judicial pronouncements. The CIT(A) after noting the difference between the employer's and employees' contribution to the fund, held insofar as employees' contribution to fund, the employer who deducts the same from salary has to necessarily make the remittance within the due date specified in the respective Acts, failing which the assessee / employer losses the benefit of deduction. The CIT(A) in holding so, also placed reliance on the

amendment brought by the Finance Act, 2021 to section 36(1)(va) and 43B of the I.T.Act.

5. Aggrieved, the assessee has filed this appeal before the Tribunal. The learned AR relied on the judgment of the Hon'ble jurisdictional High Court in the case of Essae Teraoka (P.) Ltd. v. DCIT reported in 366 ITR 408 (Kar.). The learned AR submitted that the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory and does not apply for the relevant assessment year. In this context, the learned AR relied on 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 remitted the employees' contribution to PF and ESI before the due date for

filing of 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 by Finance Act, 2021 to Sec.36(1)(va) and 43B of the I.T.Act will not have application to relevant assessment year, namely A.Y. 2017-2018. 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