IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No. 124/Bang/2022
Assessment Years : 2019-20

M/s. Sattva Media and Consulting Pvt. Ltd., No. 294/295, 2nd Floor, Amarjyothi Layout, Opp. EGL Tech Park, Domlur, Bangalore – 560 071. PAN: AANCS2959Q	**Vs.**	The Deputy Commissioner of Income Tax, Circle – 6 (1)(1), Bangalore.
APPELLANT		**RESPONDENT**

Assessee by	:	Shri Sudheendhra B R, Advocate
Revenue by	:	Shri Priyadarshi Mishra, Addl. CIT (DR)

Date of Hearing	:	18-05-2022
Date of Pronouncement	:	23-05-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal by the assessee has been filed by assessee against the order dated 23.12.2021 u/s. 250 passed by the National Faceless Appeal Centre (NFAC), Delhi relating to Assessment Year 2019-20 on following grounds of appeal:

> *"The grounds mentioned herein below are independent and without prejudice to the other grounds preferred by the Appellant.*
> *1. General Ground*
> *1.1 The order passed by the CIT(A), NFAC is bad in law and liable to be quashed.*

2. Grounds relating to disallowance of employee contribution to provident fund
2.1. The learned CIT(A), NFAC, Delhi erred in confirming the disallowance of employee contribution to provident fund amounting to Rs. 94,49,275 in computing the business income of the appellant under Chapter IVD of the Income tax Act, 1961.
2.2. The learned CIT(A), NFAC, Delhi erred in not appreciating that the employee contribution to provident fund amounting to Rs. 94,49,275 was paid within the due date as per section 139(1) of the Act.
2.3. The learned CIT(A), NFAC, Delhi erred in not appreciating that employee contribution to provident fund cannot be disallowed as it was paid within the due date as per section 139(1) of the Act.
2.4. On facts and circumstances of the case and law applicable, addition of Rs. 94,49,275 to business income should be deleted.

3. Prayer
3.1. In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the learned CIT(A) be quashed or in the alternative, the aforesaid grounds and relief prayed for thereunder be allowed. The appellant prays accordingly."

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

The assessee is a company. For the assessment year 2019-20 return of income was filed on 25.10.2019 declaring total income of Rs. 1,40,05,879/-. The return was processed u/s 143(1) of the I.T.Act. In the intimation issued u/s 143(1) of the I.T.Act, the CPC disallowed the employees' contribution to PF and ESI to the tune of Rs. 94,49,275/-. The reason for making the disallowance was that the assessee did not remit the employees' contribution to PF and ESI within the due date specified under the respective Acts.

3. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), it was submitted that the

assessee remitted the employees contribution to PF and ESI before the due date of filing of the return u/s 139(1) of the I.T.Act and in view of the judgment of the *Hon'ble jurisdictional High Court Pr.CIT vs. Hind Filter Ltd.* in *ITA No. 662 of 2015.* The assessee is entitled to deduction of the same. The Ld.CIT(A), however, dismissed the appeal of the assessee by relying on decision of *Hon'ble Gujarat High Court* in case of *Gujarat Road Transport Corporation* reported in *(2014) 41 taxmann.com 100*. The CIT(A) noticed the difference between the employees' contribution and the employer's contribution and held insofar as the employees' contribution to ESI and PF, the same need to be remitted within the due date as mentioned in the respective Acts. The CIT(A) also relied on the amendment brought about to section 36(1)(va) and 43B of the I.T.Act.

4. Aggrieved, the assessee has filed this appeal before the Tribunal.

4.1 The Ld.AR submitted that an identical issue is decided in favour of the assessee by the *coordinate Bench* of this *Tribunal* in following cases:

- *M/s.The Continental Restaurant & Café Co. v. ITO* in *ITA No.388/Bang/2021 (order dated 11.10.2021)*
- *M/s. Nirmal Enviro Solutions Pvt. Ltd. vs. DCIT* in *ITA No. 315/Bang/2021 (order dated 12.10.2021)*
- *Shri Gopalkrishna Aswini Kumar vs. ACIT* in *ITA No. 359/Bang/2021 (order dated 13.10.2021)*

5. The learned Departmental Representative supported the orders of the Income Tax Authorities.

6. We have heard rival submissions and perused the material on record. An identical issue was considered by the Tribunal in the

case of *The Continental Restaurant & Café Co. v. ITO (supra)*. The relevant finding of the Tribunal reads as follows:-

> *"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."*

6.1 We also note that *Hon'ble jurisdictional High Court* in case of *Essae Taroka (P.) Ltd.* reported in *(2014) 266 CTR 246* and *Spectrum Consultants India (P.) Ltd.* reported in *(2013) 266 CTR 94* has affirmed the above view. In view of the judicial pronouncements cited supra, we hold that the amendment to section 36(1)(va) and 43B of the I.T. Act will not have application for the relevant assessment year, namely assessment year 2019-20. Accordingly, we direct the A.O. to grant deduction in respect of employees' contribution to PF and ESI since the assessee has made the payment before the due date of filing of return u/s 139(1) of the I.T.Act. It is ordered accordingly.

In the result, the appeal filed by the assessee stands allowed.

Order pronounced in the open court on 23rd May, 2022.

Sd/-	Sd/-
(PADMAVATHY S)	(BEENA PILLAI)
Accountant Member	Judicial Member

Bangalore,
Dated, the 23rd May, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore