IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA Nos.1942 & 1943/M/2021
Assessment Years: 2018-19 & 2019-20

DCIT, Circle-1, Room No.22, B-Wing, 6th Floor, Ashar IT Park, Wagle Industrial Estate, Thane (W)- 400 604	Vs.	M/s. Antony Waste Handling Cell Limited, 1403/04, Dev Corpora, Near Cadbury Junction, Khopat, Thane – 400 601 **PAN: AACCA9772C**
(Appellant)		(Respondent)

CO Nos.43 & 44/M/2022
(Arising out of ITA Nos.1942 & 1943/M/2021)
Assessment Years: 2018-19 & 2019-20

M/s. Antony Waste Handling Cell Limited, 1403/04, Dev Corpora, Near Cadbury Junction, Khopat, Thane – 400 601 **PAN: AACCA9772C**	Vs.	DCIT, Circle-1, Room No.22, B-Wing, 6th Floor, Ashar IT Park, Wagle Industrial Estate, Thane (W)- 400 604
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Gaurav A. Potdar , A.R.
Revenue by : Shri Mehul Jain, D.R.

Date of Hearing : 26 . 05 . 2022
Date of Pronouncement : 31 . 05 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

For the sake of brevity aforesaid appeals and cross objections bearing common question of law and facts are being disposed of by way of composite order.

2. Appellant DCIT, Circle-1, Thane (hereinafter referred to as the Revenue) and the cross objector M/s. Antony Waste Handling Cell Limited (hereinafter referred to as the assessee) by filing the present appeals and cross objections sought to set aside the impugned orders even dated 02.03.2021 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) [hereinafter referred to as the CIT(A)] on the grounds inter alia that:

Revenue's appeals

ITA No.1942/M/2021 A.Y. 2018-19

"1. Whether the Ld. CIT(A) has erred in facts and circumstances of the case by giving relief in claim of deduction towards employee's contribution deposited into the Provident Fund and ESIC by the assessee company after the due date as specified in the respective Act but before the date of filing of return of income?

2. Whether on the facts and in the circumstances of the case and in Law, the Ld. CTT(A) did not err In allowing relief to the assessee ignoring the contents mentioned in the CBDT Circular No. 22/2015 dated 17/12/2015, which is carificatory in nature, that the provisions of Sec. 43B include within its ambit only the Employer's contribution to various welfare funds and even if such contribution is not paid within the due date as prescribed in the relevant statute, the same will be allowable as a deduction on the basis of actual payment before the due date for filing the return by the assessee as per section 139(1) of the I. T. Act, 1961, however, as far as the allowability of Employee's contribution to such welfare funds are concerned, they will be solely and exclusively governed by the provisions of Sec. 36(1)(va) without any reference to sec. 43B?

3. Whether on the facts and in the circumstances of the case and in Law. the Ld. CIT(A), has failed to appreciate the fact that the assessee is not entitled to claim deduction with respect to employee's contribution in view of the insertion of explanation 2 to Clause (va) of section 36(1) and explanation 5 to section 43B of the I. T. Act by the Finance Act of 2021, which are clearly of retrospective nature being the same is of curative/declaratory of the previous law?
4. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal."

ITA No.1943/M/2021 A.Y. 2019-20

"1. Whether the Ld. CIT(A) has erred in facts and circumstances of the case by giving relief in claim of deduction towards employee's contribution deposited into the Provident Fund and ESIC by the assessee company after the due date as specified in the respective Act but before the date of filing of return of income?

2. Whether on the facts and in the circumstances of the case and in Law, the Ld. CIT(A) did not err in allowing relief to the assessee ignoring the contents mentioned in the CBDT Circular No. 22/2015 dated 17/12/2015, which is clarificatory in nature, that the provisions of Sec. 43B include within its ambit only the Employer's contribution to various welfare funds and even if such contribution is not paid within the due date as prescribed in the relevant statute, the same will be allowable as a deduction on the basis of actual payment before the due date for filing the return by the assessee as per section 139(1) of the I. T. Act, 1961, however, as far as the allowability of Employee's contribution to such welfare funds are concerned, they will be solely and exclusively governed by the provisions of Sec. 36(l)(va) without any reference to sec. 43B?

3. Whether on the facts and in the circumstances of the case and in Law. the Ld. CIT(A), has failed to appreciate the fact that the assessee is not entitled to claim deduction with respect to employee's contribution in view of the insertion of explanation 2 to Clause (va) of section 36(1) and explanation 5 to section 43B of the I.T. Act by the Finance Act of 2021, which are clearly of retrospective nature being the same is of curative/declaratory of the previous law?

4. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal."

<u>Grounds of Assessee's Cross Objections</u>

<u>CO No.43/M/2022 for A.Y. 2018-19</u>

> ***"The appellant (DCIT Cir 1 , Thane) has filed an appeal to ITAT against the order of C1T (A) u/s 250 for AY 18 - 19, where the appeal is decided in our favor. The only issue in the appeal is disallowance of employees' contribution to PF and ES1C amounting to Rs.82,83,307/-, not paid before due date of filing of 1 Tax return. The total Tax Effect under the appeal is of Rs.27,33,491/-. In this regard we would like to bring to your notice the Circular No. 17/2019 - I T, dated 8lh August 2019, which sets a monetary limit for filing of appeal by department in ITAT. This Circular sets a threshold of Tax Effect amounting to Rs.50 lac for filing of appeal by department in ITAT . Please note in our case, total tax effect is Rs.27,33,491/-, hence the appeal of the revenue deserves to be dismissed as not maintainable . The same issue is decided in the favour of assessee by ITAT, Cuttack Bench in case of DCIT vs. DIPENDRA BAHADUR SINGH , ITA No. 265/Ctk/2020; Asst. yr. 2013-14."***

<u>CO No.44/M/2022 for A.Y. 2019-20</u>

> ***"The appellant (DCIT Cir 1 , Thane) has filed an appeal to ITAT against the order of CIT (A) it's 250 for AY 19 - 20, where the appeal is decided in our favor. The only issue in the appeal is disallowance of employees' contribution to PF and ESIC amounting to Rs.47,68,650/-, which is not paid before due date of filing of I Tax return. The total Tax Effect under the appeal is of Rs.15,891389/-. In this regard we would like to bring to your notice the Circular No. 17/2019 -Income Tax, dated 8th August 201 9, which sets a monetary limit for filing of appeal by department in ITAT. This Circular sets a threshold of Tax Effect amounting Rs.50 lacs, filing of appeal by department in ITAT . Please note in our case, total tax effect is Rs.15,89,389/-, hence the appeal of the revenue deserves to be dismissed as not maintainable . The same issue is decided in the favour of assessee by ITAT, Cuttack Bench in case of DCIT vs. DIPENDRA BAHADUR SINGH , ITA No. 265/Clk/2020; Assf. yr. 2013-14."***

3. Briefly stated facts necessary for adjudication of the controversy at hand are : assessee is into the business of manufacturing basic chemicals and chemical intermediates, filed its return of income showing nil taxable income. However, it is noticed by the Assessing Officer (AO) that expenditure for employees' contribution towards Provident Fund (PF) & Employee

State Insurance Contribution (ESIC) are not allowable having not been deposited before the due date under the relevant Act and thereby made an addition of Rs.82,83,307/- and Rs.47,68,646/- for A.Y. 2018-19 & 2019-20 respectively on account of disallowance of employees' contribution towards PF & ESIC.

4. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the addition by allowing the appeal. Feeling aggrieved from the impugned order the Revenue has come up before the Tribunal by way of filing present appeals.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly the assessee has deposited an amount of Rs.82,83,307/- and Rs.47,68,646/- for A.Y. 2018-19 & 2019-20 respectively towards employees' contribution of PF & ESIC after due date prescribed under the relevant act but well before filing the return of income. The Ld. CIT(A) decided the issue by following the decision rendered by Hon'ble Bombay High Court in case of CIT vs. Hindustan Organics Chemicals (366 ITR 1) and CIT vs. Ghatge Patil Transporters Ltd. (368 ITR 749) by returning following findings:

> ***"4. I have considered the grounds of appeal, gone through the submissions of the appellant and seen the order u/s. 143(1) of the CPC Bangalore dated 09.06.2020 The only issue relates to disallowance of employees contribution to provident fund and ESIC amounting to Rs. 47,68,646/-. The appellant has submitted that although there is a delay with the above payment but the payments***

have been made before the due date of filing of income tax return. The appellant has relied on the judgment of - CIT 4 vs M/s. Hindustan I Organics Chemicals (366 ITR 1) of Bombay High Court and Ghatge Patil I Transport Ltd on (2014) 368 ITR 749 (Bombay) wherein it is stated that the deductions would be allowed if the amount was paid on or before the due dates of furnishing of return of income u/s. 139(1) of the Act. The hon'ble Bombay High Court in ITA No. 399 of 2012 held as under: -

> ***In this view of the matter and in view of the facts that the Supreme Court has expressly held that the amendments to section 438 that were brought about by the Finance Act 2003 are retrospective in nature, we find that the ITAT was fully justified in deleting the addition of Rs. 1,82,77,138/~ on account of delayed payment of Provident fund of employees contribution. We therefore find that no substantial question of law arises on this count as sought to be contended by Mr Malhotra on behalf of Revenue.***
>
> ***Also in the case of Ghatge Patil Transport Limited (2014) 368 ITR 749 Bombay the Hon'ble Bombay High Court held that the deduction would be allowed if the amount was paid on or before the due date of furnishing of return u/s, 139(1) of the Act.***
>
> ***The appellant has submitted that since the payment has been made by him before the due date of furnishing of return of income no disallowance can be made.***

Following the above judgments the disallowances made are not sustainable and hence deleted."

7. This issue has also been decided by the co-ordinate Bench of the Tribunal in case of Kalyan Gas Services vs. CIT in ITA No.2028/M/2021for A.Y 2018-19 by returning the following findings:

9. Hon'ble High Court of Bombay in case of Ghatge Patil Transporters Ltd. (supra) held that both employees' and employer's contribution are covered under amendment to section 43B and covered under judgment of Hon'ble Supreme Court in case of CIT vs. Alom Extrusions Ltd. (2009) 319 ITR 306 and such deduction claimed by the assessee is allowable.

10. Co-ordinate Bench of the Tribunal in case of M/s. Adyar Ananda Bhavan Sweets India P. Ltd. vs. ACIT (supra) also decided the identical issue in favour of the assessee by holding that the payment of employees contribution qua PF & ESIC if made before

the due date of filing of return of income, the same is allowable deduction as per provisions of Section 2(24)(x) r.w.s. 36(1)(va) r.w.s. 43B of the Act.

11. In view of what has been discussed above, we are of the considered view that since the amended provisions contained under section 43B read with section 36(1)(va) of the Act are not applicable for the year under consideration i.e. A.Y. 2018-19 as the amendment will be effective from A.Y. 2021-22 and the AO/ Ld. CIT(A) have erred in disallowing the same. Consequently, impugned order passed by the Ld. CIT(A) is set aside and appeal filed by the assessee is allowed."

8. In view of what has been discussed above, we are of the considered view that the Ld. CIT(A) has decided the issue by thrashing the facts on the basis of decision rendered by Hon'ble Bombay High Court in case of Hindustan Organics Chemicals (supra) and Ghatge Patil Transporters Ltd. (supra) wherein it is held that when the employees' contribution towards PF & ESIC is deposited well before filing the return of income, the deduction thereof is allowable as the amended provisions contained under section 36(10(va) read with section 43B of the Act are applicable with effect from A.Y. 2021-22. So finding no illegality or perversity in the impugned order passed by the Ld. CIT(A) both the appeals of the Revenue are dismissed.

9. Assessee has filed cross objections by raising sole ground in both the cross objections that the present appeals are liable to be dismissed having low tax effect as per circular No.17 of 2019 dated 08.08.2019. However, at the outset, both the Ld. A.R. and Ld. D.R. have fairly conceded that these appeals are not covered under the category of low tax effect cases. Hence, both the cross objections filed by the assessee are dismissed, even otherwise having become infructuous.

10. Consequently, appeals filed by the Revenue as well as cross objections filed by the assessee are dismissed.

Order pronounced in the open court on 31.05.2022.

Sd/-	**Sd/-**
(GAGAN GOYAL)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 31.05.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.