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

BEFORE SHRI PRASHANT MAHARISHI, AM

ITA No. 1317/MUM/2022
(Assessment Year 2018-19)

Pandurang Rama Poojari Nasreen Mazil, Gujarati Mandal Road, Vile Parle (E), Mumbai- 400 057	Vs.	National Faceless Appeal Centre Delhi, Mumbai 400 020
(Appellant)		**(Respondent)**

PAN No. AABPP5890L

Assessee by	:	Shri. Jigar Sangani
Revenue by	:	Shri. Ujjawal Chavan. (SR AR)

Date of hearing: 20.09.2022.
Date of pronouncement: 31.10.2022.

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee against the order passed by the National faceless appeal Centre Delhi for assessment year 2018 – 19 on 18/4/2022 wherein the appeal filed by the assessee against the order u/s 143 (1) dated 16/3/2019 issued by the Deputy Commissioner of income tax, central processing Centre, Bangalore (the learned AO) wherein the learned AO disallowed late payment of employees provident fund and employees State insurance scheme of ₹ 357,500.

02. Assessee raised following grounds of appeal: -

"1 The Honorable CIT(A) erred in confirming the order of the learned Assessing Officer disallowing employer's contribution to Provident Fund of Rs. 3,57,500 though claimed u/s 43B as the same was paid before due date of filing of return of Income Tax.

2. The Honorable CIT(A) erred in passing the order against principles of natural justice as no opportunity of proper hearing was given to the appellant neither by the Honorable CIT(A) nor by the learned assessing officer.

3. The Honorable CIT(A) erred in not allowing the employer's contribution od Rs 3,57,500 the basis of amendment to section 36(1)(VA) and explanation to section 43(B)(b) presuming the same to be retrospective though it was clearly stated in the Act it is effective from A.Y 1.4.21 and further without giving any opportunity to the Appellant of being heard in this issue.

4. The Appellant prays that the amount of ₹ 3,57,500 be allowed based on the facts of the case and various decision relied upon by the Appellant before the Honorable CIT(A)."

03. The only grievance pertains to the AO's action in making the addition of ₹ 357,500 on account of disallowance of late payment of provident fund and employees scheme insurance u/s 36 (1) (va) which are not paid before the due date prescribed Under the respective act.

04. Now the issue squarely covered against the assessee by the decision of the Honourable Supreme Court in case of **Checkmate Services (P.) Ltd. *v.* Commissioner of Income-tax-1 [2022] 143 taxmann.com 178 (SC)[12-10-2022**] wherein it has been held that:-

i. For AYs prior to 2021-22 also, due date u/s 36(1)(VA),not u/s 43B, applies for deductibility of employees' contributions to PF,ESI etc.

ii. Section 43B(b) does not cover employees' contributions to PF, ESI etc. deducted by employer from salaries of employees.

iii. The words "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" in section 43B (b) cover only employers' contributions to these funds to be borne and paid by employer out of his income, and not employees' contributions to these funds deducted by employer out of employees' income/salary. The former are sums which are liabilities of the employer to be borne by him out of his own income. The latter are sums deducted from others' income and held in trust by him and deemed to be his income under section 2(24)(x) unless deposited with concerned authorities on or before the due date as defined in *Explanation (now Explanation 1)* below section 36(1)(va) i.e. due dates under the relevant employee welfare legislation like PF Act, ESI Act etc.

iv. The *non-obstante* clause in section 43B cannot be interpreted as overriding section 36(1)(va) and cannot be interpreted to mean that employer will get deduction in respect of employees' contributions deducted from their salaries and deposited by employer after the due date u/s 36(1)(va) but on or before the due date u/s 43B ie due date of filing ITR.

v. The *non-obstante* clause in section 43B does not override section 36(1)(va) as both provisions operate in different fields. Section 43B(b) applies to employer's contributions while section 36(1)(va) applies to employees' contributions Therefore, even prior to insertion of *Explanation 2* in section 36(1)(va) and *Explanation 5* in Section 43B by the Finance Act,2021 w.e.f. 1-4-2021,section 43B will

not apply to employees' contributions to PF,ESI etc.

vi. The *deduction made by employers to approved provident fund schemes, is the subject matter of Section 36(1) (iv).* It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of "income" – inserted clause (x). This is a significant amendment, because Parliament *intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income.* The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, *on or before* the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

vii. The significance of this is that Parliament treated contributions under Section 36(1)(va) differently from those under Section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as *"sum paid by the assessee as an employer by way of contribution towards a recognized provident fund".* However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that *"any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the*

relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is *part of the employees' income, held in trust by the employer* is underlined by the condition that it has to be deposited on or before the due date.

viii. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

ix. There is no doubt that in *Alom Extrusions,* this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available. A reading of the judgment in *Alom Extrusions,* would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed.

x. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 36(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts *not amounting to income*. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament

intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is *received* from the employee or by way of deduction authorized by the statute) as income - it is the *character* of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. *were treated as income in the hands of the employer.* The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

xi. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the

employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income *and held in trust by the employer*. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

xii. The non-obstante clause in section 43B would not in any manner dilute or override the employer's obligation under section 36(1)(va) to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, *cannot apply in the case of amounts which are held in trust,* as it is in the case of employees' contributions- which are deducted from their income. *They are not part of the assessee employer's* income, nor are they heads of deduction *per se* in the form of statutory pay out. They are *others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law.* They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

05. Therefore now the decisions relied upon by the learned authorized representative of coordinate bench in Kalpesh Synthetics Pvt Ltd Vs DCIT In ITA number 1785/M/2021 and host of other decisions are no longer valid as the claim of the reduction of the assessee becomes an error apparent from the return of income filed and therefore correctly adjusted u/s 143 (1) of the act.

06. In the result appeal filed by the assessee is dismissed

Order pronounced in the open court on 31.10.2022.

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 31.10.2022
Sudip Sarkar, Sr.PS
Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai