

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI

**BEFORE SHRI S. RIFAUR RAHMAN, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA No.1357/Mum/2022
(Assessment Year: 2019-20)

2M Ateliers & Design Pvt. Ltd. 62, Evergreen Industrial Estate, Shakti Mill Lane, Mahalaxmi, Mumbai-400 011	Vs.	Asst. DIT, CPC Bengaluru, Karnataka-560 001
PAN/GIR No. AAACZ 5314 P		
(Appellant)	:	(Respondent)
Appellant by	:	None
Respondent by	:	Shri Vranda U. Matkari
Date of Hearing	:	10.08.2022
Date of Pronouncement	:	07.11.2022

ORDER

Per Kavitha Rajagopal, J. M.:

This appeal has been filed by the assessee as against the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2019-20.

2. As there was no representation on behalf of the assessee, we hereby proceed to decide the appeal by hearing the Id. Departmental Representative (Id. DR for short) and on perusal of the materials available on record. It is observed that the appeal was filed by the assessee belatedly after a delay of 180 days and that 90 days was covered by the decision of Hon'ble Supreme Court in Re: Cognizance for Extension of Limitation and

the assessee prayed for condoning the delay of remaining 90 days. The reason stated by the assessee was found to be a reasonable cause for the delay and after hearing the Id. DR we condone the delay in filing the appeal.

3. The assessee has challenged the addition on account of employer's contribution to ESIC, amounting to Rs.67,933/- and employee's contribution to Provident Fund (PF) of Rs.2,81,284/- u/s.36(1)(va) of the Act on the ground that the same was paid after the due date prescribed under the relevant Acts, where the total income of the assessee was assessed at Rs.50,14,760/-, as against the returned income of Rs.46,65,550/- passed by the Assessing Officer (A.O. for short).

4. The brief facts are that the assessee company is a private limited company, having income from business and profession. The assessee filed its return of income for the impugned year, declaring total income of Rs.46,65,550/-. The assessee company was subjected to tax audit u/s.44AB of the Act and intimation u/s.143(1) received from CPC determined total income of assessee at Rs.50,14,760/- by making disallowance on the EPF and ESIC paid beyond the due date prescribed under the relevant Act.

5. Aggrieved by the disallowance made towards delayed payment of employee's contribution to PF and ESIC, the assessee preferred an appeal before the Id. CIT(A). The Id. CIT(A) confirmed the addition made by the A.O. on the ground that the assessee is not entitled to deduction u/s.2(24)(x) r/w section 36(1)(va) of the Act, owing to the delay in the said payments before the due date prescribed under the relevant Act.

6. The ld. CIT(A) also held that section 43B is applicable only to employer's contribution and not to employee's contribution as in the case of the assessee. The ld. CIT(A) relied on the decision of the co-ordinate benches which is as under:

- *JCIT vs. ITC Ltd.* (ITAT, SB – Kol) 112 ITD 57
- *IMP Power Ltd. vs. ITO* (ITAT, Mum) 107 TTJ 522
- *Popular Vehicles & Services Pvt. Ltd. vs. CIT* (2018) 96 taxmann.com 13 (Kerala HC)
- *Unifac Management Services India Pvt. Ltd. vs. DCIT* (2019) 260 Taxman 60 (Madras HC)

wherein it has held that section 43B was not applicable to employee's contribution towards PF and ESIC.

7. The assessee is in appeal before us challenging the order of the ld. CIT(A), in confirming the disallowance made by the A.O.

8. The ld. DR for the Revenue contended that the assessee having failed to deposit the impugned amount pertaining to PF and ESIC before the due date prescribed under the relevant Act, the assessee was not entitled to the deduction claimed for. The ld. DR further contended that section 43B is applicable to employer's contribution, even if the payment is made on or before the due date for filing of the returns, as specified u/s.139(1) of the Act. The same is not applicable to employee's contribution. The ld. DR relied on the decisions of the lower authorities.

9. Having heard the submissions of the ld. DR and perused the materials on record, it is evident that the assessee has made payments towards PF and ESIC after the due date prescribed under the relevant Act but before the due date of filing of the returns

u/s.139(1) of the Act. From the assessee's submissions, it is evident that the assessee has made the impugned payment before the due date of filing of the returns and has relied on the decision of the Hon'ble Apex Court in the case of *CIT vs. Vinay Cements Ltd.* [2007] 213 CTR (SC) 268, *CIT vs. Alom Extrusions Limited* (2009) 319 ITR 306 (SC) and the Hon'ble Bombay High Court in the case of *CIT vs. Hindustan Organics Chemicals Ltd.* [2014] 366 ITR 1 (Bom) and various other decisions of the co-ordinate benches. The assessee has relied on the proposition laid down in the case of *Alom Extrusions Limited* (supra), wherein it was held that the amendment to section 43B brought about by Finance Act, 2003 w.e.f 01.04.2004 were retrospective in nature and the same operates from 01.04.1988. The assessee further submits that the second proviso to section 43B was deleted w.e.f. 01.04.2004 and that the first proviso was also amended to allow deductions, pertaining to the A.Y. subsequent to 01.04.2004. The assessee claimed deduction of the impugned amount, pertaining to A.Y. 2019-20, where there was a delay in the payment of the PF and ESIC, nevertheless paid before the due date of filing of the returns. It is observed that there has been several decisions of the Hon'ble Apex Court and the Hon'ble Jurisdictional High Court on this issue and the co-ordinate bench in favour of the assessee, which had allowed the deductions pertaining to PF and ESIC u/s.2(24)(x) r.w.s. 36(1)(va) even in cases where there was delay in depositing the said amount. We would like to place our recent decision of the Hon'ble Apex Court in the case of *Checkmate Services Pvt. Ltd. vs. CIT* (in Civil Appeal No. 2833 of 2016, order dated 12.10.2022), wherein the Hon'ble Apex Court held that the non obstante clause u/s.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. It is also held that there is a distinction between the employer's and employee's contribution and states that the non-obstante clause would not dilute or override the employer's obligation to deposit the amount retained or deducted by it from the employee's income, unless the employer has deposited the same on before the due date. It is also held that in case of such liabilities the due date is what is specified by the statute. The relevant extract of the said decision is cited hereunder for ease of reference:

54. *In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation 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 assessee 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.*

10. We are of the view that the Hon'ble Apex Court has distinguished the employer's contribution and employee's contribution and has categorized the latter as amount held in trust by the employer. It has emphasized that these deposits should be made as per the

relevant Acts which are in the nature of welfare enactments and has casted upon the assessee the duty to deposit the same on or before the due date specified by the respective Act.

11. From the above observation and by respectfully following the said decision, we find that there is no infirmity in the order of the Id. CIT(A) in disallowing the deduction claimed by the assessee.

12. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 07.11.2022

Sd/-

(S. Rifaur Rahman)
Accountant Member

Mumbai; Dated : 07.11.2022

Roshani, Sr. PS

Sd/-

(Kavitha Rajagopal)
Judicial Member

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai