

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC - A” BENCH : BANGALORE**

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT

ITA No.685/Bang/2022
Assessment Year : 2019-20

Ms. Nalina Dyave Gowda, #129/25, Shree Paada, Sanjeev Shetty Layout, Bidadi, Bengaluru – 560 109. PAN : AQCPN 0102 A	Vs.	The ADIT, CPC, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Ms. Sunaina Bhatia, CA
Revenue by	:	Shri. Ganesh R. Ghale, Standing Counsel

Date of hearing	:	21.11.2022
Date of Pronouncement	:	24.11.2022

ORDER

This is an appeal by the assessee against the order dated 29.06.2022 of NFAC, Delhi, relating to Assessment Year 2019-20.

2. The only issue that arises for consideration in this appeal is as to whether the Revenue authorities were justified in making a disallowance on delayed payment of employee’s contribution to ESI and PF of Rs.14,58,631/- made by the assessee beyond the due date by invoking the provisions of section 36(1)(va) of the Income Tax Act, 1961 (hereinafter called ‘the Act’).

3. On the above issue, it is not disputed that as per the decision of the Hon’ble Supreme Court rendered in the case of CHECKMATE SERVICES PVT LTD VS CIT-1 in CIVIL APPEAL 2833/2016 vide its judgment dated 12 October 2022 decided the issue on

allowability/treatment of 'delayed' Employee PF Contribution payment in hands of assessee under provisions of Income Tax Act and held that Section 36(1)(va) and Section 43B(b) operate on totally different equilibriums and have different parameters for due dates, i.e., employee's contribution is linked to payment before the due dates specified in the respective Acts and employer's contribution is linked to payment before the due dates specified in the respective Acts and employer's contribution is linked to the payment before the prescribed due date for filing of return u/s. 139(1) of Income Tax Act, 1961. The result of any failure to pay within the prescribed dates also leads to different results. In the case of employee's contribution, any failure to pay within the prescribed due date under the respective PF Act or Scheme will result in negating employer's claim for deduction permanently forever u/s.36(1)(va). On the other hand, delay in payment of employer's contribution is visited with deferment of deduction on payment basis u/s.43B and is therefore not lost totally. Therefore as per the above decision, the disallowance made by the Revenue authorities were fully justified.

4. Learned Counsel for the assessee however submitted that in the intimation issued under section 143(1) of the Act, on 14.12.2020 the aforesaid disallowance was made and therefore one has to examine as to whether it was within the powers of the Revenue authorities to make the disallowance while electronically processing the return of income under section 143(1)(a) of the Act. Learned Counsel for the assessee firstly pointed out that as per the proviso to section 143(1)(a) of the Act, any adjustment has to be made only after due intimation to the assessee. Learned Counsel for the assessee brought to our notice that in page 6 of the intimation under section 143(1) of the Act, dated 14.12.2020, it has

been mentioned that there was a communication dated 17.11.2020 sent by email to the assessee before making the impugned disallowance and it is further mentioned therein at page 6 top of the intimation in the form of a note which reads as follows:

“Note: Please refer to this office communication dated and 17.Nov 20 sent to the email ID and nbenterprises 81@gmail.com. As there has been no response/the response given is not acceptable the adjustment(s) as mentioned below are being made to the total income as per the provisions of Section 143(1)(a)”

5. Learned Counsel for the assessee submitted that it is not clear from the aforesaid wordings in the intimation as to whether the response of the assessee to the impugned disallowance was considered or not. Factually, the details of notice issued by Centralized Processing Centre (CPC) while electronically processing the Assessee's return was that the Assessee filed revised return on 28.9.2020. CPC sent proposal for disallowing delay payment of employees contribution to ESI/PF dated 5.10.20 and 5.11.20. Assessee sent response to the same dated 21.10.20 and 27.11.20.

6. It is clear from the intimation under section 143(1) of the Act that the disallowance has been made on the basis of audit report in Form 3CD wherein the fact that employees contribution was paid beyond the date of ESI and PF and hence not allowable as deduction under section 36(1)(va) of the Act has been clearly mentioned. The Assessee's response has been considered by making a reference to communication dated 17.11.20 probably instead of 27.11.20. The mere fact that the wordings “as there has been no response in the intimation” referred to

earlier has not been struck off, it cannot be presumed that the reply of the assessee dated 27.11.20202 has not been considered while issuing the intimation under section 143(1) of the Act.

6. The next submission of the learned Counsel for the assessee was that as per the second proviso to section 143(1)(a) of the Act, if no response is received within 30 days, only then adjustment can be made. According to the learned Counsel for the assessee, the assessee sent a reply to the proposed disallowance and since the impugned intimation was dated 14.12.2022, without considering the reply of the Assessee, the same is invalid.

7. This argument is devoid of any merits because if response is received from the assessee, then there is no time frame for making any adjustment and this is very clear from the second proviso to section 143(1)(a) of the Act which reads as follows:

“Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—

- (a) the total income or loss shall be computed after making the following adjustments, namely:—*
 - (i) any arithmetical error in the return; [***]*
 - (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;*
 - (iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;*
 - (iv) disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return;*

- (v) *disallowance of deduction claimed under [sections 10AA or under any of the provisions of Chapter VI-A under the heading “C. – Deductions in respect of certain incomes”, if] the return is furnished beyond the due date specified under sub-section (1) of section 139; or*
- (vi) *addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:*

Provided that no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode:

Provided further that the response received from the assessee, if any, shall be considered before making any adjustment, and in a case where no response is received within thirty days of the issue of such intimation, such adjustments shall be made;”

8. It is very clear from the intimation under section 143(1)(a) of the Act that while issuing intimation, the reply of the assessee has been duly considered and therefore the period of 30 days becomes irrelevant. In the facts and circumstances of the given case, we are of the view that the disallowance under section 143(1)(a) of the Act is valid in view of the decision made by Hon’ble Supreme Court in the case of Checkmate services (supra). The assessee will not be entitled to deduction of belated payment of ESI and PF of employees’ share of contribution as per the provision to section 36(1)(va) of the Act. We find no merits in this appeal and accordingly appeal filed by the assessee is dismissed.

9. In the result, appeal of the assessee is dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(N. V. VASUDEVAN)
Vice President

Bangalore,
Dated: 24.11.2022.
/NS/*

Copy to:

- | | |
|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.