

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH: BANGALORE**

SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

MP. No.127/Bang/2022 (In ITA No.338/Bang/2022)
Assessment Year: 2018-19

The Dy. Commissioner of Income-tax, CPC, Bangalore	Vs.	M/s. Automac Diesels P.B. Road, Vidyanagar Huballi 580031 PAN No.AACFA 3742 K
APPELLANT		RESPONDENT

ITA No.338/Bang/2022
Assessment Year: 2018-19

M/s. Automac Diesels P.B. Road, Vidyanagar Huballi 580031 PAN No.AACFA 3742 K	Vs.	The Dy. Commissioner of Income-tax, CPC, Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Smt. Suman Lunkar, C.A
Respondent by	:	Shri Ganesh R Ghale, Standing Counsel

Date of Hearing	:	02.12.2022
Date of Pronouncement	:	19.12.2022

ORDER

PER LAXMI PRASAD SAHU, ACCOUNTANT MEMBER:

M.P. No.127/Bang/2022:

Present miscellaneous petition (M.P.) is filed by the revenue against order passed by the Tribunal in ITA No.338/Bang/2022 for the assessment

year (AY) 2018-2019 dated 02/06/2022. First, I adjudicate the Miscellaneous Petition filed by the revenue.

2. The Ld.DR. reiterated the grievance raised in M.P. and submitted that there is mistake regarding disallowance due to belated remittance of PF/ESI pursuant to the decision of Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. Vs CIT-1 reported in [2022] 143 taxmann.com 178. The ld. AR objected for recalling the order passed by the bench and submitted that there is no mistake apparent from the record.

3. Considering the rival submissions, I observed that there is apparent mistake on the order passed by the bench in regard to the belated remittance of PF/ESI as per the respective Act in pursuant to the decision of Hon'ble Supreme Court recently passed in case of Checkmate Services (P.) Ltd. Vs CIT-1 (supra). I therefore, rectify this mistake which is apparent from the record and the order passed by the bench is recalled.

4. In the result the miscellaneous petition filed by the revenue is allowed. The case was heard on merits.

ITA No. 338/Bang/2022:

5. The ld. DR submitted that the latest decision of the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. Vs CIT-1, [2022] 143 taxmann.com 178 (SC), where the Apex Court has held that Section 43B(b) does not cover employees' contributions to PF/ESI etc. deducted by employer from the salaries of employees and that employees' contribution has to be deposited within the due date u/s 36(1)(va) of the Act i.e. due dates under the relevant employees welfare legislation like PF/ESI Act etc., failing which the same would be treated as 'income in the hands of the employer' u/s.2(24)(x) of the Act. Therefore, the order of lower authorities should be restored.

6. The Id. AR reiterated the order dated 02/06/2022 passed by the bench and submitted that in the intimation issued under section 143(1)(a) of the Act on 18.09.2019, 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. She further submitted that the only prime facie arithmetical mistakes has be rectified and referred to the Explanation of the section.

5. On the rejoinder submitted by the Id.DR, the adjustments u/s 143(1)(a) of the Act can be made and in the section, it is very clear that which type of adjustments can be made. He also relied on judgment of the Hon'ble Madras High Court in the case of AA520 Veerappampalayam Primary Agricultural Cooperative Credit Society Ltd. Vs. Deputy Commissioner of Income-tax reported in (2022) 138 taxmann.com 571, wherein he also relied on the decision of the coordinate bench of the Tribunal in the case of M/s. IV Sanctum vs Asstt. Director of Income Tax CPC Bengaluru, in ITA No. 986/Bang/2022 vide order dated 24.11.2022 for the AY 2019-20.

7. After considering the rival submissions I notice that the Hon'ble Supreme Court in the case of Checkmate Services (supra) has considered the issue of whether the employees' contribution paid before due date for filing the return of income u/s.139(1) of the Act otherwise allowable u/s.43B of the Act and putting to rest the contradicting decisions of various High Courts. The relevant extract of the decision is as under:-

"52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(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 isto 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 assessee's 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 assessee 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.

53. 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.

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.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed."

8. Keeping in view of the decision of the Hon'ble Supreme Court, I uphold that the addition can be made in respect of the employees' contribution in regard to PF/ESI, which has not been deposited within the stipulated date as per the respective Act, since in the case on hand, the assessee has not deposited the employees, contribution within the due date as per the respective Act. Therefore, the disallowance can be made as per section 36(1)(va) r.w.s. 2(24)(x) of the Act. Hence, respectfully following the judgment of Hon'ble Supreme court cited (supra), the arguments of the assessee is not acceptable.

8.1 The Ld. A.R. has also raised on the issue that the disallowance/addition cannot be made u/s 143(1)(a) of the Act. A similar issue has been decided by the coordinate bench of the Tribunal in ITA No.188/Coch/2021 for the AY 2016- 17 vide order dated 28.07.2022 and also following the judgment of the Hon'ble Madras High Court, in which it has been held that the addition can be made u/s 143(1)(a) of the Act, the relevant para is as under:

_ In this case the assessee filed his return of income belatedly and return was processed under Section 143(1)(a) of the Act by observing that "in schedule Chapter VI-A, under Part-C deduction in respect of certain incomes, in Sl.No. 2.1 deduction is claimed under Section 80P however return is not filed within due date". Against this observation the assessee filed writ petition before the Hon'ble Madras High Court and the writ petition has been dismissed by observing as under: -

"7. The scope of an 'intimation' under section 143(1)(a) of the Act, extends to the making of adjustments based upon errors apparent from the return of income and patent from the record, Thus to say that the scope of 'incorrect claim' should be circumscribed and restricted by the Explanation which employs the term 'entry' would, in my view, not be correct and the provision must be given full and unfettered play. The explanation cannot curtail or restrict the main thrust or scope of the provision and due weightage as well as meaning has to be attributed to the purposes of section 143(1)(a) of the Act.

8.2 Respectfully following the above judgments, we reject the contention raised by the assessee.

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

10. In the combined result, the miscellaneous petition filed by the revenue is allowed and the appeal of the assessee is dismissed. A common order be kept in respective case files.

Order pronounced in the court on 19th December, 2022

(Laxmi Prasad Sahu)
Accountant Member

Bangalore,
Dated 19th December, 2022
Vms

Copy to:

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

By order
Sd/-

Asst. Registrar/ITAT, Bangalore.

1. Date of Dictation
2. Date on which the typed draft is placed
before the dictating Member
3. Date on which the approved draft comes to Sr. P. S
.....
4. Date on which the fair order is placed
before the dictating Member
5. Date on which the fair order comes back to the Sr. P.S.
.....
6. Date of uploading the order on website.....
7. If not uploaded, furnish the reason for doing so
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8. Date on which the file goes to the Bench Clerk
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endorsement.....
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11. The date on which the file goes to the Assistant Registrar
for signature on the order
12. The date on which the file goes to dispatch section for
dispatch of the Tribunal Order
13. Date of Despatch of Order.
14. Dictation note enclosed.....