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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No. 2392/Mum/2022
(A.Y.2018-19)

M/s Flamingo Pharmaceuticals Limited 7/1 Corporate Park, Sion Trombay Road, Chembur Mumbai – 400071	Vs.	National Faceless Assessment Centre, Delhi Circle 14(1)(2) Aayakar Bhavan, Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACF4211B		
Assessee	..	Respondent

Appellant by :	Ravindra Poojary
Respondent by :	Ketki Desai

Date of Hearing	16.11.2022
Date of Pronouncement	30.11.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the order passed the NFAC, Delhi, dated 30.08.2022 for A.Y. 2018-19. The assessee has raised the following grounds before us:

> *"1. The ld. CIT(A) erred on the facts and in the circumstances of the case and in law in confirming the disallowance u/s 36(1)(va) of the Act of Rs.91,26,617/- being late deposit of Employees Contribution towards Provident Fund & ESI under the respective act without appreciating that the payment s made on before due date of filing return of income then no disallowance be made in the case of assessee under section 36(1)(va) of the Act of Income Tax Act, 1961.*

2. The appellant craves leave to add, amend, alter, change vary or substitute any of the aforesaid grounds or raise an additional ground."

2. The return of income declaring total income of Rs. nil /- was filed on 30.09.2018. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued and assessment u/s 143(3) r.w.s 144B of the Act was finalized on 26.09.2021. During the course of assessment the A.O noticed that assessee has made payments towards contribution received from the employees towards to PF/ESIC of Rs.91,26,617/- after due date for deposition as prescribed under the respective Act. The assessee submitted that these amount had been deposited before the due date of filing return of income for assessment year 2018-19 and claimed that these should be allowed as deduction. However, the A.O has not allowed the claim of the assessee holding that amount was not deposited as prescribed in the specified act.

3. Aggrieved, the assessee filed before the ld. CIT(A). The ld. CIT(A) dismissed the appeal of the assessee.

4. Heard both the sides and perused the material on record. It is undisputed fact that assessee had deposited amount of Employees Contribution towards EPF and ESI to the Government's account beyond the due date as prescribed in the EPF act and the ESI act but before the due date of filing income tax return. As per provisions of Sec. 36(1)(va) with respect to any sum received by the assessee from any of its employees to which provision of Sec.2(24)(x) applied, if credited by the assessee to the employee's account in the relevant fund or funds on or before the due date, the assessee was entitled to the deduction. The Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT-1 Civil Appeal No. 2833 of 2016 and others dated 12.10.2022 held

that provision of Sec. 43B cannot be applied in the case of employees contribution which are held in trust by the employees. It is an essential condition for the deduction that such amounts are deposited within the due date specified in the particular law. As per provisions of Sec. 36(1)(va) with respect to any sum received by the assessee from any of its employees to which provisions of Sec. 2(24)(x) applied if credited by the assessee to the employees account in the relevant fund or funds on or before the due date the assessee was entitled to the deduction. If the employers did not deposit the amount towards employees contribution on or before the due date as prescribed under the EPF/ESI, the assessee was not entitled to the deduction. The relevant operating part of the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT-1 Civil Appeal No. 2833 of 2016 and others dated 12.10.2022 is reproduced as under:

> *"51. The analysis of the various judgments cited on behalf of the assessee i.e., 11.27 and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrutions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.*
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> *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 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.

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 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.

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."

Since, the issue on hand being squarely covered by the decision of Hon'ble Supreme Court in the case mentioned as supra, therefore, we dismiss the ground of appeal of the assessee.

5. In the result, the assessee filed by the assessee stand dismissed.

Order pronounced in the open court on 30.11.2022

Sd/-	Sd/-
(Amit Shukla)	(Amarjit Singh)
Judicial Member	Accountant Member

Place: Mumbai
Date 30.11.2022
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.