IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.1151/Bang/2022 : Asst.Year 2018-2019
ITA No.1152/Bang/2022 : Asst.Year 2019-2020

Smt.Nalguttu Bhavani Mahadevpura Post, Hoodi Thigalarapalaya, Whitefield Road Bangalore North Bengaluru – 560 048. **PAN : APAPB3521L.**	v.	The Income Tax Officer Ward 5(3)(5) Bangalore.
(Appellant)		(Respondent)

Appellant by : --- None ---
Respondent by : Smt.Priyadarshini Baseganni, Addl.CIT-DR

Date of Hearing : 18.01.2023		**Date of Pronouncement : 18.01.2023**

O R D E R

Per George George K, JM :

These appeals at the instance of the assessee are directed against two separate orders of the CIT(A), both dated 21.09.2021. The relevant assessment years are 2018-2019 and 2019-2020.

2. The common grounds raised in both the appeals, except variance in figures, reads as follows:-

> *"1. The order of the learned Assessing Officer is opposed to the facts of the case and law applicable to it.*
>
> *2. The learned Assessing Officer has erred in not following the ratio laid down by the Several Supreme Court Judgment quoted below and High Court & ITAT judgments noted in annexure.*
>
> - *Commissioner of Income tax v. M/s.Alom Extrusions Limited*
> - *Allied Motors Private Limited v. CIT*
> - *CIT v. Vinay Cement Limited*

- *PCIT v. M/s.Rajasthan State Beverages Corporation Ltd.*

3. The learned Assessing Officer has erred in not considering the ESI & PF employees contributions Rs.9,71,068.00 as application ignoring the fact that, under law such contribution are allowable under Section 43B of the Act as the same was paid by the assessee on or before the due date for furnishing the return of income as per Section 139(1) of the Act.

With above grounds we request to allow Rs.9,71,068.00 disallowed and process the refund."

3. The brief facts of the case are as follows:

For the assessment years 2018-2019 and 2019-2020, the returns of income were filed on 31.10.2018 and 31.10.2019, respectively, declaring total income of Rs.15,16,134 (for A.Y.2018-2019) and Rs.8,13,998 (for A.Y. 2019-2020). The assessee was served with an intimation u/s 143(1) of the I.T.Act by assessing the total income at Rs.31,55,405 (for A.Y.2018-2019) and Rs.17,85,066 (for A.Y.2019-2020). The reasons for the difference between the returned income and the assessed income u/s 143(1) of the I.T.Act was on account of disallowance of sum of Rs.16,39,271 (for A.Y.2018-2019) and Rs.9,71,068 (for A.Y.2019-2020) being late remittance of employees' contribution to PF and ESI under the respective Acts.

4. Aggrieved by the intimation u/s 143(1) of the I.T.Act, the assessee preferred appeals before the first appellate authority. It was stated that the assessee had paid the employees' contribution to PF and ESI prior to the due date of filing of the return u/s 139(1) of the I.T.Act. Therefore, it was submitted that the assessee is entitled to deduction of employees' contribution to PF and ESI having regard to the provisions of

section 43B of the I.T.Act. In this context, the assessee relied on the judgment of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT, reported in 366 ITR 408 (Kar.).* The CIT(A), however, rejected the appeal of the assessee. The CIT(A) noticed the difference between employer and employees' contribution to PF and ESI and held that only employers contribution to PF and ESI is entitled to deduction u/s 43B of the I.T.Act, if the same is paid prior to due date of filing of return of income u/s 139(1) of the Act. It was further held that the amendment to section 36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory and has got retrospective operation.

5. Aggrieved, assessee has filed the present appeals before the Tribunal. The case was first posted for hearing on 16.01.2023, none was present on behalf of the assessee. The case was again posted on 17.01.2023. On the said date Sri.Sharath H.M., CA represented on behalf of the assessee and sought for adjournment of the case to 18.01.2023. On 18.01.2023, none was present on behalf of the assessee. There is a delay of 394 days in filing these appeals. The assessee has also not given power of attorney to any representative. We find there is no useful purpose of adjourning this case, since, the issue raised is *prima facie* covered against the assessee by the judgment of the Hon'ble Apex Court in the case of *Checkmate Services (P.) Ltd. Vs CIT-1, [2022] 143 taxmann.com 178 (SC).* Therefore, we proceed to dispose of the case after hearing the learned DR.

6. The learned DR brought to our attention 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 Hon'ble Apex Court has held that Section 43B(b) of the I.T.Act does not cover employees' contributions to PF, ESI etc. deducted by employer from salaries of employees and that employees' contribution has to be deposited within the due date u/s 36(1)(va) of the I.T.Act, i.e. due dates under the relevant employees welfare legislation like PF Act, 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 I.T.Act.

7. We have heard the learned DR and perused the material on record. We notice that the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. v. CIT (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 I.T.Act whether otherwise allowable u/s.43B of the I.T.Act, putting to rest the contradicting decisions of various High Court. The relevant finding of the Hon'ble Supreme Court reads as follows:-

> *"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 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."

8. In view of the above judgment of the Hon'ble Supreme Court, we hold that the employees' contribution to PF and ESI should be remitted before the due date as per explanation to section 36(1)(va) of the I.T.Act, i.e. on or before the due date under the relevant employee welfare legislation like PF Act, ESI Act etc., for the same to be otherwise allowable u/s.43B of the I.T.Act. We, therefore, see no reason to interfere with the orders of the CIT A). It is ordered accordingly.

9. In the result, the appeals filed by the assessee are dismissed.

Order pronounced on this 18th day of January, 2023.

Sd/-	**Sd/-**
(Padmavathy S)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 18th January, 2023.
Devadas G*
Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-NFAC Delhi
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore