

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
SHRI S RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 3172/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2020-21)

Ramesh Narayan Shetty Prop M/s Geeta Caterers 407, Natasha Tower, Juhu Versova Link Road, Andheri(W) Mumbai-400061	बनाम/ Vs.	DCIT, CPC CPC BANGALORE KARNATAKA 560100
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAEPS2794R		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Haridas Bhatt
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Minal Kamble Sr.DR.
सुनवाईकीतारीख/ Date of Hearing	:	30.01.2023
घोषणाकीतारीख / Date of Pronouncement	:	31.01.2023

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeal has been filed by the assessee against the impugned order dated 15.11.2022, passed by National Faceless Appeal Centre (NFAC), Delhi for AY 2019-20 in relation to the adjustment in the intimation u/s 143(1).

2. The Assessee has challenged the disallowance of Rs. 1069,597/- being payment of PF and ESI u/s 36(1)(va).

3. The Assessee in the return of income filed on 08.02.2021 had declared total income of Rs. 12,54,460/-. The said return was processed online by CPC Bangalore and accordingly, adjustment of Rs. 1,69,597/- was made in the intimation u/s 143(1) on account of late payment of employee contribution towards PF & ESI. The contention of the Assessee has been that most of the payments have been made within the due date of 15 day of next months as per the respective Act, but only for certain period of same was paid slightly belatedly, but much before the due date of filing of return income.

4. Before the Ld. CIT(A) various submissions and judgments were cited by the Assessee in favor of the proposition that if the payment of PF & ESI has been made before the due date of filing of the return of income u/s 139(1) the same should not be disallowed.

5. The Ld. CIT (A), also noted that in the Audit report in Form 3CB, the auditors have reported due date an actual date of payment for the sums u/s 36(1)(va), and therefore, as per provision of section

143(1)(a)(iv) adjustment is justify. After detail discussion he finally relied upon the decision of Hon'ble Supreme Court "**Checkmate Services Private Limited vs. CIT**".

6. On perusal of the material placed on record, we find that, it is undisputed fact that at payment of PF & ESI for sums amounting to Rs. 1,69,597/- was not made within the due date prescribed under the PF & ESI Act, but has been filed much before the due date of filing the return of income.

6. Before us, the Ld. Counsel submitted that in the case of the Assessee for AY 2018-19 & 2019-2020, this issue has been decided in favour of the Assessee by the order of the Tribunal dated 12.05.2022. However, now Hon'ble Supreme Court in the case of "**Checkmate Services Private Limited vs. CIT**" has decided this issue against the Assessee.

7. The relevant observation and finding given by the Hon'ble Supreme Court in para 31-37 and para 52-54 of the judgement are summarized as under:

- Section 43B falls in Part-V of the IT Act. What is apparent is that the scheme of the Act is such that sections 28 to 38 deal with different kinds of deductions, whereas sections 40 to 43B spell out special provisions, laying out the mechanism for assessments and expressly prescribing conditions for disallowances. In terms of this scheme, section 40 (which too start with a non obstante clause overriding sections 30-38), deals with what cannot be deducted in computing income under the head "Profits and Gains of Business and Profession". Likewise, section 40A(2) opens with a non obstante clause and spells out what expenses and payments are not deductible in certain circumstances. Section 41 elaborates conditions which apply with respect to certain deductions which are otherwise allowed in respect of loss, expenditure or trading liability etc. If this scheme is considered, sections 40-43B, are concerned with and enact different conditions, that the tax adjudicator has to enforce, and the assessee has to comply with, to secure a valid deduction. [Para 31]
- The scheme of the provisions relating to deductions, such as sections 32-37, on the other hand, deal primarily with business,

commercial or professional expenditure, under various heads (including depreciation). Each of these deductions has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfillment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions would render the claim vulnerable to rejection. In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of section 36(iv). It is noteworthy, that this provision was part of the original IT Act, it has largely remained unaltered. On the other hand, section 36(1)(va) was specifically inserted by the Finance Act, 1987, with effect from 1-4-1988. Through the same amendment, by section 3(b), section 2(24) which defines various kinds of "income" inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt. i.e., amounts received (or deducted

from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(vo) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (ie., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (Le., section 36(1)(iv)).

[Para 32]

- The significance of this is that Parliament treated contributions under section 36(1)(vo) differently from those under section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund" However, the

phraseology of section 36(1)(va) differs from section 36(1)(iv), it enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, Le.. that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date. [Para 33]

- It is therefore, manifest that the definition of contribution in section 2(c) is used in entirely different senses. In the relevant deduction clauses. The differentiation is also evident from the fact that each of this contribution is separately dealt with in different clauses of section 36(1). All these establish that Parliament. While introducing section 36(1)(va) along with section 2(24)(4), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two [Para 34]
- It is evident that the intent of the lawmakers was clear that sums referred to in clause (b) of section 438, Le.. "sum payable as an

employer, by way of contribution" refers to the contribution by the employer. The reference to "due date" in the second proviso to section 43B was to have the same meaning as provided in the explanation to section 36(1)(va). Parliament therefore, through this amendment, sought to provide for identity in treatment of the two kinds of payments: those made as contributions, by the employers, and those amounts credited by the employers, into the provident fund account of employees, received from the latter, as their contribution. Both these contributions had to necessarily be made on or before the due date. [Para 37]

- 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)(vo) and simultaneously inserting the second proviso of section 43B, its intention was not to treat the disparate nature of the amounts, similarly. 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 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 entitles an assessee to the benefit of deduction from the total income. The essential objective of section 43B is to ensure that if assessee is 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. [para 52]

- 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 employer's income, and the latter 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.

[Para 53]

- 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 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 employee's contributions which are deducted from their income. They are not part of the assessee employer's income nor are they head 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. [Para 54]

8. Thus, once the Hon'ble Supreme Court has held that if the payment has been made with respect employees contribution after the due date, the same has to be disallowed and cannot be allowed as deduction and therefore, a djustment has rightly been made. Section 143(1)(a) provides for following adjustment:-

- 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 "for increase in income indicated in the audit report but not taken into account in computing the total income in the return;*
- (v). Disallowance of deduction claimed under "[section 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.

9. Thus, if there is any incorrect claim apparent from any information in the return, then adjustment is permissible. Here in this case, once the claim of deduction as per the law is not allowable, same can be disallowed in the intimation u/s 143(1). The judgment of Hon'ble Supreme Court is a law, which has to be interpreted that this was the position of law from the date of enactment of provision. Further, clause (iv) states that, if any disallowance of expenditure has been indicated in the audit report, but not taken into account in computing the total income in the return, same also can be adjusted. The auditor in the audit report specifies the due date as prescribed under 36(1)(va) and the date on which deposit has been made, then in the computation of income, the same cannot be claimed as deduction, because the law envisages that such payment is disallowable, because it has not been paid within the due date.

10. Accordingly, we hold that such an adjustment is permissible under the scope of section 143(1).

11. In the result, **appeal of the Assesses is dismissed.**

Orders pronounced in the open court on 31st Jan, 2023.

Sd/-
(S Rifaur Rahman)
Accountant Member

Sd/-
(Amit Shukla)
Judicial Member

मुंबई Mumbai;दिनांक Dated : 31.01.2023

Mrs.Urmila

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./ Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai