

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'B' BENCH, KOLKATA**

**Before Shri Sanjay Garg, Judicial Member
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 729/KOL/2022
Assessment Year: 2020-2021**

***Care Container Lines Pvt. Limited,.....Appellant
6B, Diamond Chamber, 8th Floor,
4, Chowringhee Road, Kolkata-700016
[PAN: AAEC8088R]***

-Vs.-

***ADIT, CPC/ DCIT, Circle-7(1), Kolkata.....Respondent
Centralized Processing Centre,
Income Tax Department,
Bengaluru/
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700069***

Appearances by:

*No one, appeared on behalf of the assessee
Smt. Ranu Biswas, Addl. CIT, Sr. D.R., appeared on
behalf of the Revenue*

**Date of concluding the hearing : February 13, 2023
Date of pronouncing the order : February 16, 2023**

O R D E R

Per Dr. Manish Borad, Accountant Member:-

This appeal at the instance of assessee for assessment year 2020-21 is directed against the order of ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 18.10.2022,

which is arising out of the order under section 143(1) of the Act on 24.12.2021 framed by ADIT, CPC, Bengaluru.

2. The grounds of appeal raised by the assessee are as under:-

(1) That, on the facts and in the circumstances of the case, the Ld. CIT(A) was wrong in ignoring the fact and in law that the disallowance of the employee's contribution to PF and ESI in the aggregate sum of Rs. 1,42,43,864/- under section 36(1)(va) read with section 2(24)(x) of the I.T. Act, 1961 is illegal and liable to be deleted.

(2) That, on the facts and in the circumstances of the case, the Ld. CIT(A) was wrong in ignoring the fact and in law that the disallowance of the employee's contribution to PF and ESI was paid before the due date of filing the return of Income.

(3) That the appellant craves the right to amend, modify, change, alter or add any ground of appeal at the time of hearing.

3. From perusal of the above grounds, we notice that the only issue for our consideration is regarding disallowance of employees' contribution to P.F. and ESI totaling to Rs.1,42,43,864/- under section 36(1)(va) read with section 2(24)(x) of the Income Tax Act.

4. At the time of hearing, none appeared on behalf of the assessee. With the assistance of ld. D.R., we have perused the records and decided to adjudicate the appeal *ex-parte qua* the assessee.

5. At the outset, ld. D.R. submitted that the alleged sum towards P.F. and ESI has been deposited by the assessee after the due date prescribed under the Act. Therefore, in view of the recent judgment of the Hon'ble Supreme Court dated 12.10.2022 in the case of Checkmate Services Pvt. Limited -vs.- CIT (Civil Appeal No. 2833 of 2016), the alleged disallowance has been rightly sustained by the ld. CIT(Appeals).

6. We have heard the ld. D.R. and perused the relevant records placed before us. We notice that employees' contribution towards P.F. and ESI has been deposited by the assessee after the due date as prescribed under the P.F. and ESI Act. The plea of the assessee is that the said amount has been deposited before the due date of filing of the return of income under section 139(1) of the Act. Recently Hon'ble Apex Court in the case of Checkmate Services Pvt. Limited -vs.- CIT (Civil Appeal No. 2833 of 2016) dated 12.10.2022 has decided the said issue and has held against the assessee observing 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 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 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 assesseees 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. ”

7. Respectfully following the above judgment, we are inclined to hold that since there is a delay in deposit employees' contribution towards P.F. and ESI beyond the due date as prescribed under the P.F. & ESI Act, the alleged sum is liable to be disallowed under section 36(1)(va) read with section 2(24)(x) of the Act. Thus no interference is called for in the finding of the Id. CIT(Appeals) and the grounds raised by the assessee are dismissed.

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

Order pronounced in the open Court on 16th February, 2023.

Sd/-

**(Sanjay Garg)
Judicial Member
Kolkata, the 16th day of February, 2023**

Sd/-

**(Manish Borad)
Accountant Member
Kolkata, the 16th day of February, 2023**

*Copies to :(1) Care Container Lines Pvt. Limited,
6B, Diamond Chamber, 8th Floor,
4, Chowringhee Road, Kolkata-700016*

(2) **ADIT, CPC/ Deputy Commissioner of Income Tax,
Circle-7(1), Kolkata
Centralized Processing Centre,
Income Tax Department, Bengaluru/**

**Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-700069**

(3) Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre (NFAC),
Delhi;

4) *Commissioner of Income Tax- ;*

(5) *The Departmental Representative*

(6) *Guard File*

TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.