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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.3134/M/2022
Assessment Year: 2017-18

M/s. Joindre Capital Services Ltd., 9/12, Bansilal Building, Office No.29-32, 3rd Floor, Homi Modi Street, Fort, Mumbai – 400 023 **PAN: AAACJ1480E**	Vs.	Commissioner of Income Tax, New Delhi National Faceless Appeal Centre, Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : None
Revenue by : Ms. Vranda U. Matkari, D.R.

Date of Hearing : 30 . 01 . 2023
Date of Pronouncement : 23 . 02 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. Joindre Capital Services Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 21.10.2022 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)] qua the assessment year 2017-18 on the grounds inter-alia that :-

> "1. On the facts and circumstances of the case as well as in law the learned Commissioner of Income Tax (Appeals) has erred in confirming the action of learned Assessing Officer (CPC) for making

an addition of Rs. 8,98,898/-on account of provision for gratuity without appreciating the fact that the same was paid by the appellant in a LIC gratuity fund during the relevant financial year.

2. The learned Commissioner of Income Tax (Appeals) has erred in confirming the action of learned Assessing Officer(CPC) for making an addition of Rs.1,82,848/- under section 36(1)(va) on account of late payment of employee's contribution to Provident Fund without appreciating the fact that the same was paid before the due date of filing of return of income.

3. The learned Commissioner of Income Tax (Appeals) has erred in confirming the action of learned Assessing Officer (CPC) for not giving credit of Dividend Distribution Tax paid of Rs. 16,90,072/- and without appreciating the fact that the appellant has erroneously selected the minor head as 107 (Tax on distributed income to unit holder) instead of 106 (Tax on distributed profit of domestic companies) and also not appreciating the fact that the appellant is a company and not a fund.

4. Appellant craves leave to add, alter and/or modify the grounds of appeal on or before the date of hearing of the appeal."

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee company being into the business of brokerage, filed return of income declaring its total income at Rs.7,78,31,560/- which was processed under section 143(1) of the Income Tax Act, 1961 (for short 'the Act') after making disallowance of gratuity amounting to Rs.8,98,898/- and disallowance of employees' contribution of provident fund (PF) amounting to Rs.1,82,848/- and disallowance of credit of dividend distribution tax paid by the assessee to the tune of Rs.16,90,072/-.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has dismissed the same for want of non prosecution by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

4. Assessee has not preferred to put in appearance despite service of summons. It appears that the assessee is not interested to assist the Bench. So the Bench has decided to dispose of the present appeal on the basis of material available on record with the assistance of the Ld. D.R. for the Revenue.

5. We have heard the Ld. D.R. for the Revenue, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and case law relied upon.

Ground No.1

6. The assessee by raising ground No.1 challenged the impugned order passed by the Ld. CIT(A) confirming the action of Assessing Officer (AO) for making addition of Rs.8,98,898/- on account of provision for gratuity. The Ld. A.R. for the assessee contended that the Ld. CIT(A) has failed to appreciate the fact that the same was paid by the assessee in Life Insurance Corporation (LIC) gratuity fund during the year under assessment.

7. However, we are of the considered view that when the assessee has not appeared before the Ld. CIT(A) nor filed detail of deposit with LIC gratuity fund the Ld. CIT(A) had no material before him to arrive at any decision. Since this fact is required to be primarily examined by the AO the issue is remanded back to the AO to allow the same after verifying the facts that the assessee has already paid the provision for gratuity in LIC gratuity fund for the year under consideration. So ground No.1 is determined in favour of the assessee for statistical purposes.

Ground No.2

8. The Ld. CIT(A) confirmed the addition of Rs. Rs.1,82,848/- under section 36(1)(va) of the Act on account of late payment of employees' contribution to PF, which is under challenge before the Tribunal on the ground that the same was deposited before the due date of filing the return of income. We are of the considered view that this issue is now no long res-integra having been decided by the Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. vs. CIT order dated 12.10.2022 by returning following findings:

> ***"51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd.; Commissioner of Income-Tax and another v. Sabari Enterprises; Commissioner of Income Tax v. Pamwi Tissues Ltd.; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. 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.***
>
> ***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."

9. By following the decision rendered by Hon'ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT (supra), we are of the considered view that this issue has been rightly decided against the assessee as the employees' contribution on account of PF was lying deposited with the employer had to be deposited before the due date prescribed under the Act. Since the assessee has failed to comply with the condition precedent for depositing the employees' contribution on account of PF before the due date prescribed under the Act the assessee is not entitled for any deduction. So ground No.2 is determined against the assessee.

Ground No.3

10. The Ld. CIT(A) confirmed the action of the AO/CPC for not giving credit of dividend distribution of tax paid to the tune of Rs.16,90,072/-, which is under challenge before the Tribunal. No doubt the assessee has specifically pleaded in ground No.3 raised in this appeal that the assessee had erroneously selected the minor head as 107 (tax on distributed income to unit holder) instead of 106 (tax on distributed profit of domestic companies), but we are of the considered view that when the assessee has already paid dividend distribution tax, though the head of deposit has been wrongly mentioned but the assessee is entitled for credit of the dividend distribution tax. So the AO is directed to give the credit to the assessee qua the amount of Rs.16,90,072/- paid as dividend distribution tax after due verification. So ground No.3 is determined in favour of the assessee for statistical purposes.

11. Resultantly, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 23.02.2023.

Sd/-	**Sd/-**
(PRASHANT MAHARISHI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 23.02.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.