IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER

आ.अ.सं/.I.T.A No. 1836/Del/2020
निर्धारणवर्ष/Assessment Year : 2018-19

M/s. Tempo Automobiles Pvt. Ltd., 419-A, World Trade Centre, Barakhamba Lane, New Delhi - 110 001.	**बनाम Vs.**	**DCIT, CPC, Bangalore.**
PAN No. AABCT5842P		
अपीलार्थी/ Appellant		**प्रत्यर्थी/ Respondent**

निर्धारितीकीओरसे **/ Assessee by :**	**None;**
राजस्वकीओरसे **/ Department by**	**Shri Sumit Kumar Verma, Sr. D. R.;**

सुनवाईकीतारीख/ Date of hearing :	05.01.2023
उद्घोषणाकीतारीख/Pronouncement on :	24.02.2023

आदेश / O R D E R

PER C. N. PRASAD, J.M.

1. This appeal is filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-9 [hereinafter

referred to CIT (Appeals)], New Delhi, dated 9.09.2020 for the Assessment Year 2018-19.

2. In its appeal the assessee has raised the following grounds of appeal:-

> "1. That the learned Commissioner of Income Tax (Appeals) has grossly erred in law and on facts in sustaining the order of intimation so passed by learned Assessing Officer under section 143(1) of the Act and the additions made thereafter, which additions were beyond the scope and jurisdiction of intimation order so passed under section 143(1) of the Act.
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> 2. That the Learned Commissioner of Income Tax (Appeals) has erred in law and on facts in sustaining addition amounting to Rs.*2,56,243/-* on account of provision of gratuity u/s 40A(7) ignoring the fact that same has been disallowed in computation of income & ITR by the assessee appellant.
>
> 3. That the learned Commissioner of Income Tax (Appeals) has further erred in law and on facts by sustaining a disallowance of a sum of Rs.*1,51,9091-* on account of payment of employee contribution with regards to PF/ESI/ superannuation fund and while sustaining the said disallowance, the learned CIT (A) has failed to appreciate the fact that the payments of the same were made prior to filing of return of income and as such, said expenditure was an allowable expenditure.
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> 3.1 That in doing so, the learned CIT (Appeals) has failed to appreciate the fact that the requisite documents/evidences along with explanations were tendered by assessee, but learned CIT (Appeals) based its decision on preconceived notions and misconceived facts and as such, the disallowance so sustained should be deleted.
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> 4. That the Learned Commissioner of Income Tax (Appeals) has erred in law and on facts in not considering the

submissions made by the assessee appellant on 17.08.2020 on e-filing portal.

4.1 That the Ld. Commissioner of Income Tax (Appeals) has further erred in law and on facts in stating in his order that no compliance was made by the assessee appellant on the dates fixed for hearing and sustained the additions made by the Assessing Officer, arbitrarily and without any justification.

5. That the learned Commissioner of Income Tax (Appeals) has relied on judgments totally inapplicable to the facts of assessee - appellant and has also based her findings on mere suspicion and surmises which are contrary to material available on record and as such, the addition so sustained needs to be deleted.

6. That the: learned Commissioner of Income Tax (Appeals) has erred in law and on facts in sustaining addition in the hands of assessee - appellant without giving any fair and proper opportunity of being heard to the assessee, thereby, violating the principles of natural justice."

3. The notice issued by the Registry posting the appeal for hearing on 21.07.2022 returned un-served by the Postal authorities observing that the addressee had left. Similarly the notice issued fixing the appeal for hearing on 4.01.2023 also returned un-served with the remark "Left" by Postal authorities. Therefore the appeal is decided after hearing the ld. DR on merits.

4. We observe that the ld. CIT (Appeals) passed order ex-parte sustaining the disallowance made at Rs.2,56,243/- under section 40A(7) of the Act in respect of provision for gratuity and disallowance of Rs.1,51,909/- under section 36(1)(va) of the Act in respect of employees contribution to PF/ESI. On going through the order of the ld. CIT (Appeals) we observed that the ld. CIT (Appeals) on one hand

appeal was dismissed observing that there is delay in filing the appeal and on the other hand adjudicating the issues on merits. The ld. CIT (Appeals) sustained the order passed by the CPC under section 143(1) in respect of disallowance made towards provision for gratuity as well as employees contribution to Provident Fund.

5. In so far as delay is concerned, we observe that the order under section 143(1) of the Act was passed on 22.10.2019 and the assessee claimed that this order was served on the assessee on 20.11.2019 and the appeal said to have been filed on 4.12.2019. However, the ld. CIT (Appeals) disbelieved the contention of the assessee observing that the assessee has not furnished any proof of service of order. Therefore, he was of the view that there was a delay in filing of the appeal. We disagree with the view taken by the ld. CIT (Appeals). The ld. CIT (Appeals) should have called for the record and examined whether the order under section 143(1) was served on the assessee especially when he was passing the order ex-parte without hearing the assessee. No efforts were made. Therefore, the view of the ld. CIT (Appeals) that the appeal is filed with a delay is only an assumption. Therefore, we hold that there is no delay in filing the appeal as the order under section 143(1) was received by the assessee on 20.11.2019 and the appeal since filed on 4.12.2019 in the absence of any evidence contrary to this.

6. Coming to the merits of the disallowance the contention of the assessee was that provision on account of gratuity of

Rs.2,56,243/- was already disallowed in the return filed by the assessee which was completely ignored. Copy of return placed in the record before us also suggests that the assessee has made disallowance of Rs.2,56,243/- under section 40(A) in column 9. Therefore the contention of the assessee that it has already disallowed the provision for gratuity of Rs.2,56,243/- in the return of income filed has to be examined. Therefore, we set aside this issue to the file of the Assessing Officer for verification and to decide after examining the return filed by the assessee in the light of the submissions made in the grounds of appeal. This ground is allowed for statistical purposes.

7. Coming to PF & ESI in respect of employees' contribution the issue is covered against the assessee by the decision of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. Vs. CIT in Civil Appeal No. 2833 of 2016 (dated October 12, 2022) and the Hon'ble Supreme Court decided the issue against the assessee, holding as under:-

> "51. The analysis of the various judgments cited on behalf of the assessee i.e., *Commissioner of Income-Tax v. Aimil Ltd.24*; *Commissioner of Income-Tax and another v. Sabari Enterprises25*; *Commissioner of Income Tax v. Pamwi Tissues Ltd.26*; *Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd*.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.

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.

24 *Commissioner of Income-Tax Vs. Aimil Ltd.,* [2010] 321 ITR 508 (Delhi High Court).
25 *Commissioner of Income-Tax and another Vs. Sabari Enterprises*, [2008] 298 ITR 141 (Karnataka High Court).
26 *Commissioner of Income Tax Vs. Pamwi Tissues Ltd.,* [2009] 313 ITR 137 (Bombay High Court).
27 *Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd.*, [2013] 35 taxmann.com 616 (Rajasthan High Court).

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."

Respectfully following the decision of the Hon'ble Supreme Court we sustain the disallowance made towards employees contribution to PF/ESI under section 36(1)(va) of the Act. This ground of the assessee is dismissed.

8. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on : 24/02/2023

Sd/-	**Sd/-**
(B.R.R. KUMAR)	**(C. N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 24/02/2023

MEHTA

Copy forwarded to :

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	20.02.2023
Date on which the typed draft is placed before the dictating member	23.02.2023
Date on which the typed draft is placed before the other member	24.02.2023
Date on which the approved draft comes to the Sr. PS/ PS	24.02.2023
Date on which the fair order is placed before the dictating member for pronouncement	24.02.2023
Date on which the fair order comes back to the Sr. PS/ PS	24.02.2023
Date on which the final order is uploaded on the website of ITAT	24.02.2023
Date on which the file goes to the Bench Clerk	24.02.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	