

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
JAIPUR BENCHES,"SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष  
BEFORE: Hon'ble SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 372/JP/2022  
निर्धारण वर्ष / Assessment Year : 2019-20

M/s. Bikaner Engineering Works O-12, Parijat, Ashok Marg, C-Scheme Jaipur	बनाम Vs.	The ITO Ward-6(3) Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAAFB 9274 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Mrs. Prabha Rana, Advocate  
राजस्व की ओर से / Revenue by: Shri Mirza Azhar Beign, JCIT

सुनवाई की तारीख / Date of Hearing : 25/01/2023  
उदघोषणा की तारीख / Date of Pronouncement: 27 /02/2023

आदेश / ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the Id. CIT(A) dated 18-08-2022, National Faceless Appeal Centre, Delhi [ hereinafter referred to as (NFAC) ] for the assessment year 2019-20 wherein the assessee has raised the following grounds of appeal.

“1. The Id.CIT(A) erred in confirming the addition of Rs.46,062/- made by the AO representing delay in remittance of employees contribution towards Provident Fund.

2. The Id.CIT(A) erred in confirming the addition of Rs.44,341/- made by the AO representing delay in remittance of employees contribution towards ESI.

2.1 Brief facts of the case are that the assessee is a Private Limited Company which filed the return of income on 27-09-2019 for the assessment year 2019-20 declaring total income at Rs.10,28,490/-. The return of income was processed u/s 143(1) of the Income Tax Act, 1961 on 29-06-2020 by the Central Processing Centre (for short ‘‘CPC’’) and thus determined total income of the assessee at Rs.11,18,890/- thereby making addition of Rs.90,403/- on the returned income whose details are as under:-

1. Addition towards Provident Fund	Rs.46,062/-
2. Addition towards ESI	<u>Rs.44,341/-</u>
Total	<u>Rs.90,403/-</u>

This addition of Rs.90,403/- is made by the AO (i.e. Rs.46,062/- towards PF and Rs.44,341/- towards ESI) being the late payment of Employees Contribution under Provident Fund and ESI Acts.

2.2 In first appeal, the Id. CIT(A) has confirmed the disallowance made by the AO on account of late deposit of employees contribution towards PF and ESI under respective Acts by observing as under:-

(viii) .....it is also clear that the above clarificatory amendment brought in by the Finance Act, 2021 applies to the issue in the instant appeal also. The amendment declares that provisions of Section 43B does not apply and deemed to have never been applied for the purpose of determining the due date. Therefore, in view of the above discussions, the employee's contribution to the PF and ESI, not deposited by the appellant within the due date as per section 36(1)(va) of the I.T. Act, 1961, cannot be allowed and accordingly, the grounds taken by the assessee are dismissed.''

2.3 During the course of hearing, the Id.AR of the assessee has filed the detailed written submission alongwith various case laws praying mainly therein that AO has grossly erred in deciding the database issue viz. disallowance made u/s 36(1)(va) of the Act in 143(1)(a). Further, he submitted that there are divergent views being expressed by various High Courts on late payment of PF & ESI. As against the decision in the case of Gujarat State Road Transport Corporation, SLP filed by the assessee before the Hon'ble Apex Court was pending, therefore, the AO was totally not correct in making the additions made in the assessment framed u/s 143(1) of the Act wherein database issued cannot be considered. The Id. AR of the assessee relied on following decisions.

1. Rajasthan Renewable Energy Corp. Ltd. (Raj. H.C. dated 6-08-2019).
2. Shailendra Garg C/o Garment Craft India (P) Ltd. (Raj. H.C. dated 15-02-2018)
3. CIT vs State Bank of Bikaner & Jaipur, 99 DTR 131 (Raj)

4. CIT vs Jaipur Vidyut Vitran Nigam Ltd. 363 ITR 307 (Raj.)
5. Pr. CIT vs Rajasthan State Seed Corp. Ltd. (2016) 386 ITR 267 (Raj)
6. ITO vs SBBJ (2014) 363 ITR 70 (Raj)
7. DCIT vs Jaipur Vidyut Vitaran Nigam Ltd. (ITAT Jaipur Bench ITA No. 1287/JP/2019 dated 18-01-2021 – 61 CCH 0057 (Jpr. Trib)

2.4 On the other hand, the ld. DR supported the order of the ld.CIT(A) and also relied upon the judgement of Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT (Civil Appeal No. 2833 of 2016 dated 12 Oct. 2022.

2.5 The Bench has heard both the parties and perused the materials available on record including the case laws cited by both the parties. In this case, it is noted that the AO disallowed the amount of Rs.90,403/- u/s 36(1)(va) of the Act on the ground that payments of employees contribution towards EPF and PF had not been made on or before the due date by the employer as per respective Acts which has been confirmed by the ld. CIT(A). It is not imperative to repeat the facts of the case and the case laws cited by both the parties. The Bench has observed that the recently the Hon'ble Supreme has opined in the case of Checkmate Services Pvt. Ltd. vs CIT-1, 143 Taxmann.com 178 (SC)/Civil Appeal No. 2833 of 2016 held that the provision of Section 43B of the Act shall not apply to employee's

contribution to PF/ESI and the due date specified u/s 36(1)(va) of the Act shall apply for determination of deductibility of employee's contribution to PF/ESI. The relevant portion of the Judgement of Hon'ble Supreme in the case of Checkmate Services Pvt. Ltd. vs CIT-1 (supra) is reproduced as under:-

“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 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](#).

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.”

In view of the above deliberations and the decision taken by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1(supra), the Bench

sustains the addition confirmed by the Id. CIT(A) and the appeal of the assessee is dismissed.

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

Order pronounced in the open court on 27/02/2023.

Sd/-  
(संदीप गोसाईं)  
(Sandeep Gosain)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 27 /02/2023

\*Mishra

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Bikaner Engineering Works, Jaipur
2. प्रत्यर्था / The Respondent- The ITO Ward-6(3), Jaipur
3. आयकर आयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्ड फाईल / Guard File (ITA No. 372/JP/2022)

आदेशानुसार / By order,

Asstt. Registrar