

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)
AND
SHRI GAGAN GOYAL (ACCOUNTANT MEMBER)**

ITAs No.1942 & 1943/Mum/2021
(Assessment Years : 2019-20 & 2018-19)

DCIT, Circle-1, Room No.22, B-Wing, 6 th Floor, Ashar IT Park, Wagle Industrial Estate, Thane (W)-400 604	vs	M/s Antony Waste Handling Cell Limited, 1403/04, Dev Corpora, Near Cadbury Junction, Khopat, Thane-400 601 PAN : AACCA9772C
APPELLANT		RESPONDENT

Cross Objections No.43 & 44/Mum/2022
(Assessment Years : 2019-20 & 2018-19)

M/s Antony Waste Handling Cell Limited, 1403/04, Dev Corpora, Near Cadbury Junction, Khopat, Thane-400 601 PAN : AACCA9772C	vs	DCIT, Circle-1, Room No.22, B-Wing, 6 th Floor, Ashar IT Park, Wagle Industrial Estate, Thane (W)-400 604
CROSS OBJECTOR		RESPONDENT

Assessee represented by	Shri Gaurav A Poddar
Department represented by	Shri Chetan M Kacha, Sr.AR.

Date of hearing	20/01/2023
Date of pronouncement	23/01/2023

ORDER

PER BENCH:

The appellant, DCIT, Circle-1, Thane (hereinafter referred to as 'the Revenue') and the Cross Objector M/s Antony Waste Handling Cell Limited (hereinafter referred to as 'the assessee') by filing the present appeals and cross objections sought to set aside the impugned orders of even dated 02/03/2021 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) [hereinafter referred to as 'the CIT(A)'] on the grounds inter alia that:

Revenue's appeals

ITA No.1942/M/2021 A.Y. 2018-19

"1. Whether the Ld. CIT(A) has erred in facts and circumstances of the case by giving relief in claim of deduction towards employee's contribution deposited into the Provident Fund and ESIC by the assessee company after the due date as specified in the respective Act but before the date of filing of return of income?

2. Whether on the facts and in the circumstances of the case and in Law, the Ld. CIT(A) did not err In allowing relief to the assessee ignoring the contents mentioned in the CBDT Circular No. 22/2015 dated 17/12/2015, which is clarificatory in nature, that the provisions of Sec. 43 B include within its ambit only the Employer's contribution to various welfare funds and even if such contribution is not paid within the due date as prescribed in the relevant statute, the same will be allowable as a deduction on the basis of actual payment before the due date for filing the return by the assessee as per section 139(1) of the I. T. Act, 1961, however, as far as the allowability of Employee's contribution to such welfare funds are concerned, they will be solely and exclusively governed by the provisions of Sec. 36(1)(va) without any reference to sec. 43B?

3. Whether on the facts and in the circumstances of the case and in Law. the Ld. CIT(A), has failed to appreciate the fact that the assessee is not entitled to claim deduction with respect to employee's contribution in view of the insertion of explanation 2 to Clause (va) of

section 36(1) and explanation 5 to section 43B of the I. T. Act by the Finance Act of 2021, which are clearly of retrospective nature being the same is of curative/declaratory of the previous law?

4. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal,"`

ITA NO.1943/M/2021 A.Y. 2019-20

"1. Whether the Ld. CIT(A) has erred in facts and circumstances of the case by giving relief in claim of deduction towards employee's contribution deposited into the Provident Fund and ESIC by the assessee company after the due date as specified in the respective Act but before the date of filing of return of income?

2. Whether on the facts and in the circumstances of the case and in Law, the Ld. CIT(A) did not err in allowing relief to the assessee ignoring the contents mentioned in the CBDT Circular No. 22/2015 dated 17/12/2015, which is clarificatory in nature, that the provisions of Sec. 43B include within its ambit only the Employer's contribution to various welfare funds and even if such contribution is not paid within the due date as prescribed in the relevant statute, the same will be allowable as a deduction on the basis of actual payment before the due date for filing the return by the assessee as per section 139(1) of the I. T. Act, 1961, however, as far as the allowability of Employee's contribution to such welfare funds are concerned, they will be solely and exclusively governed by the provisions of Sec. 36(l)(va) without any reference to sec. 43B?

3. Whether on the facts and in the circumstances of the case and in Law. the Ld. CIT(A), has failed to appreciate the fact that the assessee is not entitled to claim deduction with respect to employee's contribution in view of the insertion of explanation 2 to Clause (va) of section 36(1) and explanation 5 to section 43 B of the I.T. Act by the Finance Act of 2021, which are clearly of retrospective nature being the same is of curative/declaratory of the previous law?

4. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal."

2. Briefly stated, facts necessary for adjudication of the controversy at hand are : assessee filed its returns of income by declaring total income at NIL which were processed under section 143(1) of the Income Tax Act, 1961 (for short, 'the Act') vide order dated 21/11/2019 assessing the income of the assessee at Rs.82,83,307/- and Rs. 47,68,646/- for A.Ys 2018-19 & 2019-20 after making disallowance of Rs.82,83,307/- and Rs.47,68,646/- respectively

on account of disallowance of employees' contribution towards PF & ESIC on account of delayed payment prescribed under the Act.

3. The assessee carried the matter before the Ld.CIT(A) by way of filing appeal who has deleted the disallowance made by the AO on account of delayed payment of PF & ESIC qua employee's contribution by allowing the appeals. Feeling aggrieved with the impugned order passed by Ld.CIT(A) Revenue as well as assessee have come up before the Tribunal by way of filing present appeals and cross objections.

4. We have heard the Ld.Authorised Representatives of the parties to the appeals, 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 law applicable thereto.

5. Undisputedly, assessee company has made delayed payment of employees contribution of PF & ESIC as per the due date prescribed under the relevant Act. It is also not in dispute that amount of Rs.82,83,307/- and Rs.47,68,646/- for A.Ys. 2018-19 & 2019-20 respectively on account of disallowance of employees' contribution towards PF & ESIC has been paid by the assessee after the due date prescribed under the Act as per section 36(1)(va) of the Act but before the due date of filing the return of income.

6. The Ld.A.R. for the assessee contended that the payment was made by the assessee company qua the employees contribution on account of PF and ESIC well before due date of filing the returns of income cannot be disallowed and relied upon the decision rendered by Hon'ble Bombay High Court in the case of CIT vs Ghatge Patil Transporters Ltd 368 ITR 749 (Bom) and various other judgements

mentioned in the written submissions running from page 1 to 47 of the paper book.

7. However, on the other hand, the Ld.D.R. for the Revenue by relying upon the order passed by the Ld.CIT(A) contended that when the employees contribution of PF & ESIC has not been deposited by the employer before due date prescribed under the Act, assessee is not entitled for any deduction.

8. We have heard rival contentions and perused the relevant material on record. Admitted facts are that the payment of ESI & PF contribution regarding employees' contribution is made after the due date prescribed under the relevant Acts. Now the issue in question has been settled by the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd (supra). The relevant para of which is extracted below:-

"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. Panwi 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, Atom Extrusions 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 43 B, 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(l)(va) and simultaneously inserting the second proviso of Section 43 B, 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 43 B 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 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.

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 43 B.

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 assessee is 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. Respectfully following the decision rendered by the Hon’ble Supreme Court in the case of Checkmate Services Pvt Ltd vs CIT(supra), we are of the considered view that Ld.CIT(A) has erred in deciding the issue in favour of the assessee as the employees’ contribution towards PF / ESIC lying deposited with the employer has to be deposited before the due date prescribed under the relevant Acts . Since the assessee has failed to comply with the condition precedent for depositing the employees’ contribution to PF & ESIC before the due date prescribed under the Act, it is not entitled for any deduction. So, the impugned order passed by the Ld.CIT(A) is hereby set aside and order passed by the Assessing Officer is hereby upheld.

9. In view of our decision on the appeals filed by the Revenue, the Cross Objections filed by the assessee supporting the order of the Ld. CIT(A) becomes infructuous; hence, dismissed.

10. Resultantly, appeals filed by the Revenue are allowed and the Cross Objections filed by the assessee are dismissed.

Order pronounced in the open court on 23/01/2022

Sd/-

sd/-

(GAGAN GOYAL)	(KULDIP SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dt : 23rd January, 2023

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि.,
मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,
Asstt. Registrar / Senior Private
Secretary, **ITAT, Mumbai**