

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 190/Ind/2022
(Assessment Year:2020-21)

M/s. Tesla Transformers (India) Ltd. Bhopal	vs.	ACIT 3(1) Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAGCT 8705 J		
Assessee by	None	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	28.02.2023	
Date of Pronouncement	02.03.2023	

ORDER

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the order dated 03.06.2022 of Ld. Commissioner of Income Tax (Appeals) (in short Ld. CIT(A), National Faceless Appeal Centre, Delhi for Assessment Year 2020-21.

2. None has appeared on behalf of the assessee when this appeal was called for hearing. It transpires from record that since beginning assessee is not appearing before Tribunal despite repeated notice issued to the assessee through registered post as well as e-mail. Even today neither the assessee appeared nor any adjournment application is filed. Accordingly this bench proposes to hear and dispose of this appeal *ex-parte*. The assessee has raised following grounds of appeal:

1. That the ld. CIT(A) erred in holding that the AO has not erred in applying rate of tax of 22% prescribed under section 115BAA when the assessee has filed prescribed Form 10-IC under section 115BAA within time limit prescribed as per provisions of the Taxation And Other laws (Relaxation and Amendment of Certain Provisions) Act, 2020..

2.That in any case the ld. CIT(A) erred in holding that rate of tax @22% was not applicable inspite of CBDT Circular No.6/ 2022 dt. 17-03-2022 prescribing time upto 30-06- 2022 to file form 10-IC

3.That the ld. CIT(A) erred in disallowing delayed payment of employee contribution to ESI/PF of Rs.33,17,085/- which have been paid before due date of filing of return.

3. Ground no.1 & 2 are regarding the applicability of the Income Tax rate as prescribed u/s 115BAA of Income Tax. We have heard the Ld. DR and carefully perused the impugned order of the authorities below.

3. The return of income filed by the assessee was processed u/s 143(1) of the Act by the CPC Bangalore, whereby the tax was computed by applying 30% rate of income tax as against the claim of assessee @ 22% as per the provisions of section 115BAA of the Act. The assessee challenged the action of the CPC, Bangalore by filing the appeal before the Ld. CIT(A) and submitted that the assessee is eligible for the lower tax rate as prescribed u/s 115BAA of the Income Tax Act.

3. Ld. CIT(A) did not accept this contention of the assessee on the ground that the form 10-IC has not been filed/uploaded by the assessee within the extended time limit which was also relaxed by the Amendment of certain Provisions of Act 2020. It is noted that in grounds of appeal the assessee has specifically raised this issue that the assessee has filed the prescribed form 10-IC u/s 115BAA within time limit prescribed as per the Provisions of Taxation and other laws ("Relaxation and Amendment of Certain Provisions) Act 2020". The assessee has claimed that the Ld. CIT(A) has denied the claim despite the CBDT, Circular 6/2022 dated 17.03.2022 prescribing time limit for filing form 10-IC up to 30th June,

2022 whereas the assessee undisputedly, filed/uploaded the form 10-IC on 16.03.2021.

4. Ld. DR has fairly submitted that the extension of time limit is required to be verified at the level of the Ld. AO.

5. Having considered the contention of the assessee as well as the impugned order of the Ld. CIT(A), we find that the Ld. CIT(A) has denied the benefit of lower tax as provided u/s 115BAA of the Act on the ground that the assessee fails to furnish the form 10-IC within the statutory time limit. Ld. CIT(A) has not disputed the fact that the assessee uploaded form 10-IC on 16.01.2021. However, the Ld. CIT(A) has considered the extended date of filing the form 10-IC as 15.01.2021 and thereby the form submitted by the assessee on 16.03.2021 was treated as beyond the time limit. Since the assessee has claimed that the time limit was extended by the CBDT vide circular no.6/2022 up to 30th June 2022 therefore, this aspect of the matter is required to be verified by the Ld. AO as to whether the time limit was extended as well as whether the assessee has submitted form 10-IC within the time limit as extended from time to time by the CBDT. Accordingly, this issue is set aside to the record of the Ld. AO for reconsideration and adjudication after ascertaining extended time limit for filing form 10-IC. Needless to say the assessee be given a proper opportunity of hearing before passing a fresh order.

6. Ground no.3 is regarding disallowance of delayed payment on account of ESI/PF.

7. The assessee has claimed that the payments towards Employees Contribution were made before due date filing of return of income u/s 139(1) of the Income Tax Act. However, it is not disputed that there was a delay in payment as per respective acts of ESI/PF. This fact is recorded by the Ld. CIT(A) in para 4.3 as under:

“In the case on hand, the appellant claimed to have deposited the employees contribution in respect of EPF/ESIC totaling to Rs.33,17,085/- beyond the due date of the respective Acts but before

the due date of filing of return of income as specified u/s 139(1) of the Act, and hence, appellant's claim for eligibility for deduction.

8. Ld. DR has pointed out this issue is now covered by the judgement of Hon'ble Supreme Court in the case of **Checkmate Services (P.) Ltd. [2022] 448 ITR 518 (SC)** the relevant para is extracted below:

50. *The Constitution Bench, in Commissioner. of [Customs v. Dilip Kumar & Co.](#) 23 endorsed as following:*

“24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, [Article 265](#) of the Constitution [“265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law.”] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature.

34. *The passages extracted above, were quoted with approval by this Court in at least two decisions being [CIT v. Kasturi & Sons Ltd.](#) [[CIT v. Kasturi & Sons Ltd.](#), (1999) 3 SCC 346] and [State of W.B. v. Kesoram Industries Ltd.](#) [[State of W.B. v. Kesoram Industries Ltd.](#), (2004) 10 SCC 201] (hereinafter referred to as “Kesoram Industries case [[State of W.B. v. Kesoram Industries Ltd.](#), (2004) 10 SCC 201]”, for brevity). In the later decision, a Bench of five Judges, after citing the above passage from Justice G.P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute:*

‘(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which

is not expressed; it cannot import provisions in the statute so as to supply any deficiency;

(ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and

(iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing [Commissioner of Income Tax v. Ace Multi Axes Systems Ltd.](#), 2018 (2) SCC 158 Commissioner. of [Customs v. Dilip Kumar & Co.](#), 2018 (9) SCC 1.

unjust in a taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly.”

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 Enterprises](#)²⁵; [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 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 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 *Commissioner of Income-Tax Vs. Aimil Ltd.*, [2010] 321 ITR 508 (Delhi High Court).

Commissioner of Income-Tax and another Vs. Sabari Enterprises, [2008] 298 ITR 141 (Karnataka High Court).

Commissioner of Income Tax Vs. Pamwi Tissues Ltd., [2009] 313 ITR 137 (Bombay High Court).

Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd., [2013] 35 taxmann.com 616 (Rajasthan High Court).

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 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 employer's 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 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. Having considered the undisputed facts of the case as well as the impugned order of the CIT(A), at the outset, we noted that this issue is now covered by the judgment of Hon'ble Supreme Court in the case of **Checkmate Services (P.) Ltd.(supra)**. Accordingly, following binding

precedence of Hon'ble Supreme Court, we do not find any error and illegal in the impugned order of Ld. CIT(A) qua this issue. Thus, ground no.3 of this appeal is dismissed.

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

Order pronounced in the open court on 02.03.2023.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 02.03.2023

Patel/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

*Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore*