

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH : COCHIN**

**BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.876/Coch/2022
Assessment Year :2018-19

M/s. Kanaka Polypack Private Limited, XVI, Keezhmad Panchayat, Ashokapuram, Aluva, Ernakulam District, Kerala – 683 101. PAN :AAFCK 1498 J	Vs.	ACIT, Corporate Circle - 1(1), Kochi – 682 018.
ASSESSEE		RESPONDENT

Assessee by	:	Shri. Manu Kurian, CA
Revenue by	:	Smt. J M Jamuna Devi, Sr. AR.

Date of hearing	:	28.02.2023
Date of Pronouncement	:	08.03.2023

ORDER

Per Padmavathy S, Accountant Member

This appeal by the assessee is against the order passed by the CIT(A), NFAC, Delhi, dated 15.06.2022 for Assessment Year 2018-19.

2. The issue involved in this appeal is as to whether the employees' contribution to Provident Fund and Employees State Insurance which the employer deducts and pays over to the concerned authorities beyond the date prescribed for payment of such contribution but nevertheless the contribution has been paid within the due date prescribed for filing return of

income u/s.139(1) of the Income Tax Act, 1961, can be allowed as deduction by applying the second proviso to Sec.43B of the Act.

3. The assessee is a private limited company engaged in manufacturing and supply of plastic products. The assessee filed the return of income for AY 2018-19 on 24.10.2018, declaring an income of Rs.93,17,511. The return was processed u/s.143(1) where an amount of Rs.2,81,205 was disallowed towards delayed remittance of employee contribution to PF/ESI. The assessee filed a rectification petition in this regard stating that though there is a delay, the amount is remitted before the due date for filing the return of income u/s.139(1) and accordingly should be allowed u/s.43B. The AO rejected the submissions and retained the disallowance the order passed u/s.154. Aggrieved the assessee preferred an appeal before the CIT(A) who sustained the disallowance to the extent of employee's contribution.

4. Aggrieved, the assessee is in appeal before the Tribunal. There is a delay of 12 days in filing the appeal before the Tribunal. The assessee filed a condonation petition in this regard. Having heard both the parties and perused the material on record, we are of the view that there is a reasonable and sufficient cause for the delay in filing the appeal before the Tribunal. Therefore following the Hon'ble Supreme Court decision in the case of Collector, Land Acquisition Vs. MST.Katiji & Ors., (167 ITR 471) (SC) we condone the delay of 12 days in filing the appeal and admit the appeal for adjudication

5. In so far as the question whether the employees contribution to Provident Fund and Employees State Insurance which the employer deducts and pays over to the concerned authorities beyond the date prescribed for payment of such contribution but nevertheless the contribution has been paid within the due date prescribed for filing return of income u/s.139(1) of

the Income Tax Act, 1961, can be allowed as deduction by applying the second proviso to Sec.43B of the Act, prior to 1.4.2021 was a controversy as the aforesaid amendments were not retrospective Amendments. The said issue prior to 1.4.2021 was subject matter of appeal before Hon'ble Supreme Court in the case of CHECKMATE SERVICES PVT LTD VS CIT-1 in CIVIL APPEAL 2833/2016. The Hon'ble Supreme Court vide its judgment dated 12 October 2022 decided the issue on allowability/treatment of 'delayed' Employee PF Contribution payment in hands of assessee under provisions of Income Tax Act. The Hon'ble Supreme Court upheld the view of the Hon'ble Gujarat and Kerala High Court in CIT v. Gujarat State Road Transport Corpn. [2014] 41 taxmann.com 100/ 366 ITR 170/223 Taxman 398 (Guj.), CIT v. Merchant Ltd. [2015] 61 taxmann.com 119/235 Taxman 291/378 ITR 443 (Ker.) which was to the effect that Section 36(1)(va) and Section 43B(b) operate on totally different equilibriums and have different parameters for due dates, i.e., employee's contribution is linked to payment before the due dates specified in the respective Acts and employer's contribution is linked to payment before the due dates specified in the respective Acts and employer's contribution is linked to the payment before the prescribed due date for filing of return u/s. 139(1) of Income Tax Act, 1961. The result of any failure to pay within the prescribed dates also leads to different results. In the case of employee's contribution, any failure to pay within the prescribed due date under the respective PF Act or Scheme will result in negating employer's claim for deduction permanently forever u/s.36(1)(va). On the other hand, delay in payment of employer's contribution is visited with deferment of deduction on payment basis u/s.43B and is therefore not lost totally.

“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 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 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 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.

6. In view of the law laid down by the Hon'ble Supreme Court, we hold that Section 36(1)(va) and Section 43B(b) operate on totally different equilibriums and have different parameters for due dates, i.e., employee's contribution is linked to payment before the due dates specified in the respective Acts and employer's contribution is linked to payment before the due dates specified in the respective Acts and employer's contribution is linked to the payment before the prescribed due date for filing of return u/s. 139(1) of Income Tax Act, 1961. The result of any failure to pay within the prescribed dates also leads to different results. In the case of employee's contribution, any failure to pay within the prescribed due date under the respective PF Act or Scheme will result in negating employer's claim for deduction permanently forever u/s.36(1)(va).

7. Consequently, the issue is decided in favour of the Revenue. The appeal is accordingly dismissed.

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

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(GEORGE GEORGE K)
Judicial Member

Sd/-

(PADMAVATHY S)
Accountant Member

Bangalore,
Dated: 08.03.2023.
/NS/*/f:Desai S Murthy /

Copy to:

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|-------------|---------------|
| 1. Assessee | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.