IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "SMC", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.2983/M/2022
Assessment Year: 2018-19

Income Tax Officer-28(1)(1), Room No.329, 3rd Floor, 6th Tower, Vashi Railway Station Complex, Vashi, Navi Mumbai– 400 703	Vs.	Shri Bhupendra Rampratap Singh, C-2, 13, 1st Floor, Flat No.1, Sector-16, Vashi Navi Mumbai, Mumbai – 400 703 **PAN: ALAPS9848P**
(Appellant)		(Respondent)

CO No.11/M/2023
(Arising out of ITA No.2983/M/2022)
Assessment Year: 2018-19

Shri Bhupendra Rampratap Singh, C-2/13/1:1, Sector-16, Vashi, New Mumbai, Thane – 400 703 **PAN: ALAPS9848P**	Vs.	Income Tax Officer-28(1)(1), Room No.329, 3rd Floor, 6th Tower, Vashi Railway Station Complex, Vashi, Navi Mumbai– 400 703
(Appellant)		(Respondent)

Present for:
Assessee by : Shri A.M. Shetty, A.R.
Revenue by : Shri Anil Gupta, D.R.

Date of Hearing : 14 . 03 . 2023
Date of Pronouncement : 28 . 03 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

Aforesaid appeal filed by the Income Tax Officer-28(1)(1), Navi Mumbai (hereinafter referred to as the 'Revenue') and the cross objections filed by the Shri Bhupendra Rampratap Singh (hereinafter referred to as the 'assessee') emanated from the common impugned order dated 26.09.2022 passed by the National Faceless Appeal Centre (NFAC) the Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2018-19 bearing common question of law and facts are being disposed of by way of composite order in order to avoid repetition of discussion.

2. The Revenue and the assessee by filing the present appeal and cross objections respectively sought to set aside the impugned order dated 26.09.2022 on the grounds inter-alia that:

ITA No.2983/M/2022 (Grounds of Revenue's appeal)

"1. Whether on the facts and circumstances of the case and in law, the Id. CIT(A) was justified in allowing the appeal of the assessee for delay in depositing employee's contribution to the Employee's Provident Fund / ESI fund without appreciating the fact that Explanation-5 to section 43B of the Income Tax Act, 1961 was inserted by Finance Act, 2021.

2. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in allowing the appeal of the assessee contrary to the Hon'ble Supreme Court decision dated 12/10/2022 in the case of Checkmate Services Private Limited Vs. CIT[2022], 143 taxmann.com 178 (SC), wherein issue with respect to the allow allowability of deduction claimed w/s.36(1)(va), the employee's contribution and section 43B of the Act have been decided in favour of Revenue."

CO No.11/M/2023 (Grounds of assessee's Cross Objections)

"1. On the facts and circumstances of the Rs.2,51,400 case and in law, the Ld. CIT(A) was justified in allowing the appeal of the assessee for delay in depositing the employees' contribution to PF/ESI fund in terms of the ground no.1 taken by the appellant that the intimation u/s. 143(1) sent by the Ld. DCIT, CPC was bad in law the Ld. DCIT, CPC has made an addition of Rs.8,13,593 u/s. 143(1)(a)(iv) which does not permit prima-facie adjustment of any amount unless it is indicated as disallowance of expenditure in the audit report not considered in computation of total income.

2. on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in allowing the appeal of the assessee since the insertion of explanation (5) to section 43B of income tax act, 1961 by finance act, 2021 has no relevance to the assessee's case since the assessee's case relates to prima-facie addition made u/s. 143(1)(a)(iv).

3. On the facts and circumstances of the case and in law, the ld. cit(a) was justified in allowing the appeal of the assessee [by order no ITBA/NFAC/S/250/2022- 23/1045964507(1) dated 26.09.2022] since the decision of hon. supreme court in the case of checkmate services Pvt. Ltd. vs. CIT[2022], 143 taxmann.com178 was delivered on 12.10.2022 which was subsequent to the order of Ld. CIT(A).

4. Your respondent is relying on the judgement of M/s PR Packaging Service vs. Assistant Commissioner of Income Tax ITAT Mumbai Bench SMC, ITA No 2376/Mum/2022 dated 07.12.2022 which has distinguished the decision of Hon"ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT [2022] dated 12.10.2022.

The decision of supreme court in the case of checkmate services Pvt. Ltd. vs. cit [2022] was rendered in the context where original assessment was framed u/s. 143(3) of the act and not u/s. 143(1)(a)."

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee being proprietor of M/s. Hightech Construction Company filed the return of income for the year under consideration i.e. A.Y. 2018-19 declaring total income of Rs.15,85,420/- which was processed under section 143(1) of the Income Tax Act, 1961 (for short 'the Act') after making disallowance of employees contribution to Provident Fund (PF) and Employees State Insurance (ESI) amounting to

Rs.8,13,593/- under section 36(1)(va) of the Act. Thereafter the assessee has filed a rectification application under section 154 of the Act which was partly allowed. The assessee challenged the order passed by the CPC Bangalore [Assessing Officer (AO)] under section 154 before the Ld. CIT(A) which was also dismissed.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the disallowance made by the CPC Bangalore (AO) by dismissing the appeal filed by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue as well as the assessee have come up before the Tribunal by way of filing present appeal and cross objections respectively.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, 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.

6. The Ld. CIT(A) has confirmed the disallowance of Rs.8,13,593/- made by the CPC Bangalore (AO) on account of late payment of employees contribution to PF and ESI prescribed under the Act, which is now under challenge before the Tribunal on the grounds inter-alia that the disallowance has been made under section 143(1) without any notice and as such is not sustainable and that; the employees contribution to PF and ESI was deposited well before the date of filing the return of income.

7. We are of the considered view that this issue is now no long res-integra having been decided by the Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. vs. CIT order dated 12.10.2022 by returning following findings:

> *"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. Pamwi 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, Alom Extrutions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.*
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> *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 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."

8. By following the decision rendered by Hon'ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT (supra), we are of the considered view that this issue has been rightly decided against the assessee as the employees' contribution on account of PF was lying deposited with the employer had to be deposited before the due date prescribed under the Act. Since the assessee has failed to comply with the condition precedent for depositing the employees' contribution on account of PF before the due date prescribed under the Act the assessee is not entitled for any deduction. The contention raised by the Ld. A.R. for the assessee that the decision rendered by the Hon'ble Supreme Court in case of Checkmate Services (Supra) is not applicable as the disallowance was made by the CPC Bangalore (AO) under section 143(1)(a) of the Act and not under section 143(3) of the Act and relied upon the order passed by the co-ordinate Bench of the Tribunal in case of M/s. P.R. Packaging Service vs. ACIT in ITA No.2376/M/2022 order dated December 7, 2022.

9. We have perused the order passed by the co-ordinate Bench of the Tribunal but unable to agree with the same on the ground that

when any incorrect claim is made by the assessee which is apparent from the information provided in the return then adjustment is permissible. In other words when the claim of deduction made by the assessee is not allowable as per law there is no bar to disallow the same under section 143(1)(a) of the Act. Even otherwise the law laid down by the Hon'ble Supreme Court in case of Checkmate Services (supra) is the law of land which is applicable to the issue at hand from the date of enactment of a relevant provision. So in the instant case when the assessee has admittedly deposited the employees contribution to the PF and ESI after due date prescribed under relevant Act the same has been rightly disallowed by the Ld. CIT(A) qua which the assessee is not entitled for any deduction.

10. In view of the matter appeal filed by the Revenue is hereby allowed and cross objections filed by the assessee are dismissed.

Order pronounced in the open court on 28.03.2023.

Sd/-	**Sd/-**
(S RIFAUR RAHMAN)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 28.03.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.