IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.222/Mum./2023

(Assessment Year : 2019–20)

Shantaram Narayan Mhatre
At Vashi Village, Plot no.17
Vashi, Navi Mumbai 400 703
PAN – AFKPM8644R

……. Appellant

v/s

Commissioner of Income Tax (Appeals)
National Faceless Appeal Centre, Delhi

…….Respondent

Assessee by : None
Revenue by : Shri Milind S. Chavan

Date of Hearing – 23/03/2023	Date of Order – 30/03/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 25/11/2022, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*], which in turn arose from the order dated 29/12/2020, passed under section 154 of the Act, for the assessment year 2019–20.

2. In this appeal, the assessee has raised the following grounds:–

"(1) The Ld. CIT(A) has erred in confirming the order passed u/s 154 of the I.T. Act, 1961 rejecting the request of appellant for rectification of demand

determined while processing the Return of Income u/s 143(1)/ 143(1)(a) of the I.T. Act, 1961 without appreciating the facts of the case as well as of law.

(2) The Ld. CIT (A) has erred in passing an order confirming the disallowance made by CPC without providing reasonable opportunity of being heard in respect of applicability of decision of Hon'ble Apex Court.

Without prejudice to the above:

(3) The appellant submits that Hon'ble CIT(A) has erred in upholding disallowance of an amount of Rs. 4,15,943/- (3,60,762+55,181) being employee's contribution towards PF & ESIC without appreciating the facts of the appellants case & the facts in the case of CHECKMATE SERVICES PRIVATE LIMITED V/S COMMISSIONER OF INCOME TAX-1 (Civil Appeal No. 2833 of 2016) dated 12.10.2022 decided by Hon'ble Apex court in respect of disallowance made by the Ld. Assessing Officer in that case while completing the assessment u/s 143(3) and not u/s 143(1)(a) of the I.T. Act, 1961.

(4) The Ld. CIT (A) has erred in dismissing the appeal in contradiction to decision laid down by the jurisdictional bench of Hon'ble ITAT in the case of Hon'ble ITAT, 'SMC' Bench in case of M/s P R Packing service V/s Assistant Commissioner of Income Tax-25(3), in ITA No. 2376/Mum/2022 there by making the same as void ab initio.

(5) The appellant craves leave to add, amend, alter and/or vary any of the grounds at time or before the hearing of this appeal.

(6) The appellant therefore prays that the disallowance made by CPC while processing the return of income u/s 143(1)/143(1)(a) confirmed vide order passed u/s 154 of LT Act, 1961 & order of Hon'ble CIT(A) passed u/s 250 of the IT Act, 1961 not being in accordance with the provisions of law and the law laid down by Hon'ble Jurisdictional bench of ITAT, Mumbai the disallowance made deserves to be & may please be deleted."

3. When this appeal was called for hearing neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed, despite service of notice of hearing. Therefore, in view of the above, we proceed to dispose off the present appeal ex–parte, qua the assessee after hearing the learned Departmental Representative (*"learned D.R"*) and on the basis of material available on record.

4. In this appeal, the only grievance of the assessee is against the disallowance on account of delayed payment of employees' contribution to

Provident Fund (P.F) and Employees State Insurance Corporation (E.S.I.C) under section 36(1)(va) of the Act.

5. The brief facts of the case as emanating from the record, are: The assessee is a labour contractor carrying out works for Government Bodies and Local Authorities. For the year under consideration, the assessee filed his return of income on 23/07/2020, declaring a total income of Rs.44,82,139. The said return of income was processed under section 143(1) of the Act computing the total income of the assessee at Rs.53,24,857, after making disallowance of Rs.8,42,718, on account of delayed payment of employee's contribution to P.F. and E.S.I.C. under section 36(1)(va) of the Act. Rectification application filed by the assessee against the aforesaid intimation issued under section 143(1) of the Act was disposed off vide order dated 29/12/2020, passed under section 154 without granting any relief to the assessee in respect of the issue involved.

6. In an appeal against the order passed under section 154 of the Act, the learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee by following the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. v/s CIT, [2022] 448 ITR 518 (SC) and upheld the disallowance made under section 36(1)(va) of the Act. Being aggrieved, the assessee is in appeal before us.

7. The learned D.R. submitted that the issue arising in the present appeal is squarely covered in favour of the Revenue by the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra).

8. We have considered the submissions of the learned D.R. and perused the material available on record. We find that the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra) held that the payment towards employee's contribution to P.F. and E.S.I.C., after the due date prescribed under the relevant statute is not allowable as a deduction under section 36(1)(va) of the Act. The relevant findings of the Hon'ble Supreme Court, in the aforesaid decision, are 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 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.
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> *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."*

9. From the perusal of the submissions made by the assessee before the learned CIT(A), as noted from Pages–6 to 8 of the impugned order, we find that as per the assessee, he has already disallowed an amount of Rs.3,70,178, on account of employee's contribution to P.F. and an amount of Rs.22,013, on account of employee's contribution to E.S.I.C. while declaring his total income of Rs.44,82,139, in his return of income. However, vide intimation issued under section 143(1) of the Act, the entire amount of Rs.8,42,718, was disallowed under section 36(1)(va) of the Act including the amount already disallowed by the assessee. Thereafter, against the aforesaid intimation issued under section 143 of the Act, the assessee filed an application under section 154 of the Act which was disposed off vide order order dated 29/12/2020, without granting any relief to the assessee in respect of the issue involved. It is only against this order passed under section 154 of the Act, the assessee filed an appeal before the learned CIT(A), which was dismissed vide impugned order following the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra). Thus, the impugned order under challenge in the present appeal arose from the order passed under section 154 of the Act and not from the intimation issued under section 143(1) of the Act. The view taken by the ADIT, CPC, under section 154 of the Act is in consonance with the law laid down by the Hon'ble Supreme Court in the aforesaid decision and, hence, the claim of deduction towards delayed payment of employee's contribution to P.F. and E.S.I.C. becomes an incorrect claim under section 143(1) of the Act. Accordingly, to this extent, we find no infirmity in the order passed by the learned CIT(A).

10. The assessee in the grounds of appeal has made reference to the decision of the Tribunal in P.R. Packaging Services Ltd. v/s ACIT, in ITA no. 2376/Mum./2022, to support his claim. We find that the Tribunal vide subsequent decision in Nissan Enterprises Ltd. v/s DCIT–CPC, in ITA no.3270/ Mum./2022, vide order dated 17/02/2023, after considering the aforesaid decision in P.R. Packaging Services Ltd. (supra) decided the similar issue in favour of the Revenue by following the aforesaid decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra).

11. Further, as regards the claim of the assessee that while making the disallowance under section 36(1)(va) of the Act, the amount already disallowed by the assessee in his return of income has again been disallowed and thus resulted in double disallowance, we deem it appropriate to restore this aspect to the file of the Assessing Officer for necessary verification. Upon verification, if the claim of the assessee regarding double disallowance is found to be correct, then the relief to that extent be granted to the assessee. As a result, grounds raised by the assessee are partly allowed for statistical purposes.

12. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 30/03/2023

Sd/-	**Sd/-**
OM PRAKASH KANT	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 30/03/2023

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai