

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

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.3136/M/2022
Assessment Year: 2020-21**

M/s. Osource Global Pvt. Ltd., Unit No.4, 5 th Floor, 'B' Wing, Phoneix House, High Street Phoneix, 462, S.B. Marg, Lower Parel-W, Mumbai – 400 013 PAN: AAACO6555F	Vs.	Asst. Director of Income Tax, CPC, Bangalore, Karnataka – 560 500
(Appellant)		(Respondent)

Present for:

Assessee by : Shri R.N. Vasani, A.R. &
Shri V.H. Vasani, A.R.

Revenue by : Shri K.C. Selvamani, D.R.

Date of Hearing : 21 . 03 . 2023

Date of Pronouncement : 31 . 03 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. Osource Global Pvt. Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 14.11.2022 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)) qua the assessment year 2020-21 on the grounds inter-alia that :-

“(1) The Learned Commissioner of Income Tax (Appeals) (NFAC) committed a gross error of law and facts by confirming additions of Rs.7,16,299/- & Rs 3,70,141/- in respect of payment of employee's contribution towards EPF and ESIC respectively, which was paid before due date of filing return of income.

(2) He failed to appreciate the facts that PF & ESIC contribution of employees' were paid before the due date of filing the return of income.

(3) Learned CIT(A) (NFAC) failed to appreciate the facts that the appeal filed was against the intimation u/s. 143(1) issued by the CPC, Bangalore.

(4) He failed to appreciate the facts that the payment is of revenue nature and since appellant has already made the payment and has not retained the same, the said expenses is covered u/s. 37(1) of the Income Tax Act, 1961.”

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee company being into providing services related to consultancy, business process outsourcing and software development and assistance filed the return of income for the year under consideration i.e. A.Y. 2020-21 declaring total income of Rs.2,21,15,750/- which was processed under section 143(1) of the Income Tax Act, 1961 (for short 'the Act') after making disallowance of Rs.7,16,299/- & Rs.3,70,141/- qua employees contribution towards Employees Provident Fund (EPF) and Employees State Insurance Corporation (ESIC) respectively under section 36(1)(va) of the Act by the CPC, Bangalore [Assessing Officer(AO)].

3. 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 assessee has come up before the Tribunal by way of filing present appeal.

4. 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.

5. The Ld. CIT(A) has confirmed the disallowance of Rs.7,16,299/- & Rs.3,70,141/- total amounting to Rs.10,86,440/- made by the CPC Bangalore (AO) qua late payment of employees contribution to PF and ESIC 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 ESIC was deposited well before the date of filing the return of income.

6. We are of the considered view that this issue is now no longer 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 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 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 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 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.”

7. 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 by the Ld. CIT(A) vide impugned order 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 Ld. A.R. for the assessee raised contention 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.

8. 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.

9. In view of the matter appeal filed by the assessee is dismissed.

Order pronounced in the open court on 31.03.2023.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 31.03.2023.

* 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.