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.339 & 340/Ind/2022
Assessment Years: 2017-18 & 2018-19

Praveen Madhukarrao Satwaskar 1159, Sudama Nagar Indore PAN-AJSPS7468M	v.	The Deputy Commissioner of Income Tax, CPC, Bangalore.
(Appellant)		(Respondent)

Assessee by:	Shri Soumya Bumb, AR
Respondent by:	Shri Ashish Porwal, Sr. DR
Date of hearing:	11.04.2023
Date of pronouncement:	13 .04.2023

O R D E R

SHRI VIJAY PAL RAO, J.M.:

These appeals by the assessee are directed against the order dated 22.08.2022 of Ld. Commissioner of Income Tax (Appeals) (in short Ld. CIT(A), National Faceless Appeal Centre, Delhi arising from the order of CPC u/s 143(1) of the Act for Assessment Years 2017-18 & 2018-19.

2. The solitary issue arises in these appeals of the assesse is whether the CIT(A) is justified in confirming the additions made by the AO u/s 36(1)(va) r.w.s. 2(24)(x) of the Act on account of late payment of employees contribution towards ESI and EPF but before the due date of filing the return of income under section 139(1) of the Income Tax Act.

3. The CPC while processing the return of income made the addition on account of belated payment to ESI and EPF towards

employees contribution under section 36(1)(va) r.w.s. 2(24)(x) of the Income Tax Act for A.Y. 2017-18 & 2018-19 of Rs.577911/- & Rs. 18,11,093/- respectively. The assessee challenged the action of the AO before the CIT(A) but could not succeed.

3. Before the Tribunal, the learned AR of the assessee has submitted that payments of EPF and ESIC related to employees contribution have been made after due dates of payments prescribed under respective Acts but before the due date of filing income tax return u/s 139 of the 1.T. Act, 1961. The same should not be disallowed as Honourable Supreme Court held in the SLP in case of CIT v. Rajasthan State Beverages Corporation Ltd 2017 250 TAXMAN 0016 that amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(1)(va). In order to provide certainty, the revenue has made both the sections i.e. Sec 36(1)(va) and Sec.43B of the I.T. Act, 1961 independent of each other and has proposed in the Memorandum to Finance Bill 2021 to -(1) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the due date under this clause; and (ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies. These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. Hence, here it is contended that the legislature itself has condoned the impugned default before 01-04-2021.

4. On the other hand, the learned DR has submitted that the issue is now settled and covered by the decision of Hon'ble Supreme Court in the case of ***Checkmate Services Pvt. Ltd. Vs. Commissioner of Income Tax*** **448 ITR 518 (SC).**

5. Having considered the rival submissions as well as relevant material on record we find that there is a delay in making the payment by the assesse to EPF and ESI funds as the payments were made after the due dates as per the respective acts. However, the payments were made before the due date of filing the return under section 139(1) of the Income Tax Act. There is no dispute that earlier there were divergent views of the different High Courts on this issue and the issue is now finally settled by the Hon'ble Supreme Court in the case of ***Checkmate Services Pvt. Ltd. v Commissioner of Income Tax (supra).*** The relevant part of ruling of Hon'ble Supreme Court in para 51 to 55 is as under:-

> *"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 Enterprises25; 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 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."*

6. Thus, now the issue is no longer *res integra* and has finally been settled by the Hon'ble Supreme Court against the assessee and in favour of the Revenue. Respectfully, following the judgment of Hon'ble Supreme Court, we do not find any error and illegality in the impugned order of the CIT(A) and the same is upheld.

7. Ground no.1 does not amongst the impugned order and also not press by the ld. AR of the assessee. Hence the same is dismissed.

8. In the result, the appeals of the assessee are dismissed.

Order pronounced on 13 /04/2023 in open court.

Sd/-	**Sd/-**
(B.M. BIYANI)	**[VIJAY PAL RAO]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 13/04/2023
Indore
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