IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC": NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA Nos. 546 & 547/DEL/2023
Assessment Year: 2018-19 & 2019-20

Sangita Khanna (legal heir), A-1/69, Janakpuri, New Delhi. PAN-AGPPK0810R	Vs	DCIT, Circle-5(1), New Delhi.
APPELLANT		**RESPONDENT**
Assessee represented by	None	
Department represented by	Shri Om Parkash, Sr. DR	
Date of hearing	27.04.2023	
Date of pronouncement	27.04.2023	

O R D E R

PER KUL BHARAT, JM:

These appeals, by the assessee, are directed against separate orders of the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre

(NFAC), New Delhi, dated 21.11.2022 pertaining to the assessment years 2018-19 & 2019-20. Since common issue is involved for adjudication in both the appeals, the same were heard together and are being disposed of by this common order for the sake of convenience.

2. The common ground (excepting quantum) raised by the assessee is as under:

> *"That the Ld. AO has grossly erred in making a disallowance of Rs. 9,68,712/- (A.Y. 2018-19) & Rs. 5,53,866/- (A.Y. 2019-20) on account of the employee's contribution to PF & ESI, deposited beyond the prescribed due date under such resp. acts but deposited before the due date of filing the return of income. Which act of disallowance of AO is against the findings of various higher authorities including the Hon'ble Apex Court in the matters of CIT Vs. Alom Extrusions Limited (2009) 319 ITR 306 (SC) and CIT Vs. Vinay Cement Ltd. (2007) 213 CTR (SC) 268. Hence the addition is bad in law and the facts of the case."*

3. At the time of hearing no one attended the proceedings on behalf of the assessee. These appeals were earlier fixed for hearing on 20.04.2023, when the hearing was adjourned at the written request of the authorized representative of the assessee. This time the assessee has not cared even to apply for adjournment. Therefore, these appeals are taken up for hearing in the absence of the assessee and are being decided after hearing the learned DR and on the basis of material available on record.

4. The learned DR submitted that the issue involved in the instant appeals is squarely covered against the assessee by the recent judgment of the Hon'ble Supreme Court dated 12.10.2022 in a batch of appeals, with Checkmate Services P. Ltd. vs. CIT. He submitted that the orders of the authorities below being in consonance with the aforementioned judgment of the Hon'ble Supreme Court, the appeals preferred by the assessee have no force and are liable to be dismissed accordingly.

5. We have heard the learned DR and perused the material available on record. We find that the Hon'ble Supreme Court in a batch of appeals, with Checkmate Services P Ltd. vs. CIT (supra), on the issue relating to payment of employees' contribution towards PF and ESI, has ruled against the assessee, inter alia, by observing as under:

> *"52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(l)(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 bome 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 bome 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 temis 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 above binding precedent we do not see any reason to interfere in the finding of the lower authorities. The same is hereby affirmed. Ground of appeal is dismissed.

7. In the result, both the appeals filed by the assessee are dismissed.

Order pronounced in open court on 27th April, 2023.

Sd/-	**Sd/-**
(PRADIP KUMAR KEDIA)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI