

**IN THE INCOME TAX APPELLATE TRIBUNAL, ' D' BENCH
MUMBAI**

BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER

&

MS. PADMAVATHY S., ACCOUNTANT MEMBER

**ITA No.510/Mum/2023
(Assessment Year :2018-19)**

M/s Mantra Exports Pvt. Ltd. 91 Mantra House, Marol Maroshi Road, Andheri (East) Mumbai.	Vs.	Dy. Commissioner of Income Tax-CPC, Mumbai.
PAN/GIR No.AAACM 7287J		
(Appellant)	..	(Respondent)

Assessee by	None
Revenue by	Mahita Nair, Sr. AR
Date of Hearing	01/05/2023
Date of Pronouncement	08/05/2023

आदेश / ORDER

PER PADMAVATHY S. (A.M.):

This appeal is against the order of Id. CIT(A), National Faceless Appeal Centre, Delhi dated 23.01.2023 for the assessment year 2018-19.

2. The assessee has raised following grounds of appeal:-

"1. On the facts and circumstances of the case and in law the Learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of Rs. 7,20,116/- claimed u/s 2(24)(x) r.w.s 36(1)(va) in respect of employees contribution towards Provident fund amounting to Rs. 4,20,873/- and ESIC amounting to Rs 2,99,293/- as the payment was made after the due date prescribed

under Provident Fund Act and ESIC Act without appreciating that the said amount was paid within an average period of two days from the due dates prescribed under the relevant act and was paid in the same financial year and hence allowable.

2. On the facts and under the circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) erred in not adjudicating ground number 2 as raised by the appellant in Form 35.

Ground 2 is reproduced as follows:

On the facts and circumstances of the case and in law the Ld. A.O erred in disallowing reversal of provision of leave encashment amounting to Rs 16,05,319/- claimed as deduction u/s 43B even though such provision was already disallowed u/s 438 during A.Y 2017-18 when it was actually made.

The appellant craves for leave to add to alter and/or withdraw the above ground of appeal, if necessary."

3. The assessee is a private limited company. For the year under consideration the assessee filed a return of income on 19.10.2018 declaring total income of Rs. 20,87,68,270/-. The return was processed u/s 143(1)(a) of the Act proposing the disallowances towards provision for leave encashment of Rs. 16,05,319/- and disallowance on account of delay in depositing employees contribution to Provident Funds. The assessee filed a response by disagreeing to the proposed assessment stating that disallowance of provision of leave encashment should not be made as it was already disallowed u/s 43B in the earlier years return of income when the provisions of originally made. With regard to disallowance u/s 36(1)(v) made towards delay in depositing employees contribution to PF, the assessee relied on the decision of Hon'ble Bombay High Court in the case of Pr. CIT 14 vs. Gopinath Engineering Pvt. Ltd. ITA No. 1181 of 2016 and submitted that since the amount is deposited before the due date in filing the tax return the same should not be disallowed. The AO did not accept the submissions and proceeded to

process the return u/s 143(1) of the Act where both these disallowances were retained. The assessee filed an appeal before the Id. CIT(A), the Id. CIT(A) with regard to disallowance made u/s 36(1)(v) of the Act, relied on the decision of **Hon'ble Supreme Court in the case of Chechmate Services P. Ltd. vs. CIT in Civil Appeal No. 2833 of 2016 dated 12th October, 2022** and upheld the disallowance. The Id. CIT(A) did not give in finding with regard to ground No. 2 raised for disallowance of provision made towards leave encashment. Aggrieved the assessee in appeal before the Tribunal.

4. Before us, none appeared on behalf of the assessee. The Id. DR submitted that the issue of delayed remittance the employees contribution to PF is now settled by the Hon'ble Supreme Court in the case of Chechmate Services P. Ltd. vs. CIT (supra) with regard to the issue of disallowance of leave encashment the Id. DR submitted that the issue may go back to the Id. CIT(A) since the same has not been adjudicated.

5. We have heard the Id. DR and perused the material available on record. The Hon'ble Supreme Court in the case Chechmate Services P. Ltd. vs. CIT (supra) has considered the issue of delay in remittance of employees contribution to PF and held 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 UtpadakSahakari Sandh Ltd. 27 and Nipso Poly fabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 438 (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 438, 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 24 Commissioner of Income-Tax Vs. Aimil Ltd., [2010] 321 ITR 508 (Delhi High Court). 25 Commissioner of Income-Tax and another Vs. Sabari Enterprises, [2008] 298 ITR 141 (Karnataka High Court). 26 Commissioner of Income Tax Vs. Pamwi Tissues Ltd., [2009] 313 ITR 137 (Bombay High Court). 27 Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh UtpadakSahakar iSandh Ltd., [2013] 35 taxmann.com 616 (Rajasthan High Court). 32 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 employer's income, and the latter 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 employee's 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 assesseees 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 34 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."

Respectfully following decision of Hon'ble Supreme Court, we see no reasons to interfere with the decision of the Id. CIT(A) accordingly, this ground is dismissed.

6. With regard to disallowance of leave encashment it was the submissions of the assessee that the amount had already been disallowed u/s 43B of the Act in the earlier years in the return of income when the provision of originally made and therefore disallowance the same again would result in amount getting disallowed twice. In this regard we notice that the assessee raised this ground before the Id. CIT(A) and that the Id. CIT(A) has not adjudicated the same. The claim of the assessee that the impugned amount is already disallowed in the year in which the provision was originally made needs to be factually verified. We therefore remit the issue back to the Id. CIT(A) with a direction to verified the claim of the assessee based on evidences and decide in accordance with law. The assessee is directed to submit the relevant details before the Id. CIT(A) and cooperate with the proceedings. This ground is allowed for statistical purposes.

7. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 08/05 /2023 in the open court.

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-

(PADMAVATHY S.)
ACCOUNTANT MEMBER

Mumbai; Dated 08/05/2023
Santosh, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai

		Date	Initial	
1.	Draft dictated on	02/05/2022		Sr.PS
2.	Draft placed before author	03/05/2023		Sr.PS
3.	Draft proposed & placed before the second member	04/05/2023		JM/AM
4.	Draft discussed/approved by Second Member.	04/05/2023		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	08/05/2023		Sr.PS/PS
6.	Kept for pronouncement on	08/05/2023		Sr.PS
7.	File sent to the Bench Clerk	08/05/2023		Sr.PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed	Yes		