IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH " SMC", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 614 & 615/M/2023
Assessment Year: 2018-19 & 2017-18

Shivam Packaging Industries Pvt. Ltd, Room No. 16, 1st Floor, Vidhya villa No. 2, Old Nagardas Road, Andheri East, Mumbai, Maharashtra-400069	Vs.	CIT(E), New Delhi-11001
(Appellant) (Respondent)		
PAN: AAECS7886F		

Present for:
Assessee by : Shri Vijay Beheti,
Revenue by : Shri Jogendra Singh, Sr. AR

Date of Hearing :11.05.2023
Date of Pronouncement :19.05.2023

O R D E R

Aforesaid appeals for AYs 2017-18 and 2018-19 bearing common questions of facts and law are being taken up for disposal by way of consolidated order to avoid repetition of discussion.

2. The appellant, Shivam Packaging Industries Pvt. Ltd (hereinafter referred to as the 'assessee') by filing the present appeal sought to set aside the impugned order dated 14.12.2022 passed by National Faceless Appeal Centre (NFAC), Delhi on the identical ground except difference in additions/ disallowances (grounds of assessment year 2017-18 are taken up for the sake of brevity) on the grounds inter alia that :-

> *"1. On the facts and circumstances of the case, Ld. CIT(A), erred in confirming the action of the CPC Bangalore in disallowing of contribution to ESIC and Provident fund of Rs.1,21,806/- based on statement made in the Tax Audit*

report while processing of return of income under section 143(1) of the Act.

2. On the facts and circumstances of the case, Ld. CIT (A), erred in confirming disallowance of contribution to ESIC and Provident Fund delayed just by just few days holding the same as prima facie adjustment while processing of return under section 143(1) of the Act.

3. Learned CIT(A) erred in confirming disallowance of Rs 1,21,806/- u/s 36(1)(va) of the Act being Employee's Contribution to ESIC/Provident Fund paid before due date of filing of income tax return."

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are: the return of income filed by the assessee for AY 2017-18 and 2018-19 claiming deduction of Rs. 2,62,683/- and Rs. 1,21,806/- respectively on account of Provident Fund and Employee State Insurance Corporation, was processed u/s 143(1) read with section 154 of the Act by making disallowance of deduction claimed by the assessee and CPC/ AO thereby framed the assessment u/s 143(1) and 154 of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the appeal. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way filing the present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and material available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. So far as disallowance made by the AO and confirmed by the ld CIT(A) to the tune of Rs. 2,64,683/- and Rs. 121806/- for AY 2017-18 and 2018-19 on account of late deposit of employees contribution of PF& ESI after due date prescribed under the

relevant act is concerned, undisputedly, the assessee has deposited payment of employee's contribution on account of PF & ESI after due date prescribed under section 36(1)(va) of the Act but before the due date of filing the return.

7. However, on the other hand, the Ld. D.R. for the Revenue by relying upon the order passed by the Ld. CIT(A) contended that when the employees contribution of PF has not been deposited by the employer before due date prescribed under the Act assessee is not entitled for any deduction and relied upon the decision of the Hon'ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT order dated 12.10.2022 which supported the order passed by the Ld. CIT(A)

8. We have perused the order passed by the Ld. CIT(A) who has disallowed the deduction claimed by the assessee qua the Employees' contribution on account of PF deposited after the due date prescribed under the relevant Act by relying upon the provisions contained under section 36(1)(va) and 43B of the Act having been amended vide Finance Act, 2021 wherein explanation 2 and explanation 5 have been inserted.

9. However, now the issue raised before the Bench is:

> *"as to whether payment by the employers qua PF contribution of employees after due date prescribed under the relevant Act is an allowable deduction under section 36(1)(va) read with section 43B"?*

Has been decided against the assessee by the Hon'ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT (supra), the operative findings of the Hon'ble Supreme Court are as under:

> *"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 Extrutions 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 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."

10. The Ld. A.R. for the assessee company challenging the impugned order passed by the Ld. CIT(A) contended that disallowing employees' contribution to PF & ESIC while processing the return under section 143(1) is against the provision of the Act as it would not fall within the ambit of prima-facie adjustment, hence liable to be allowed and that when the issue in question is a debatable one view taken in favour of the assessee company is to be prevailed and relied upon plethora of orders passed by the Hon'ble High Court of Gujarat, Hon'ble High Court of Madras and co-ordinate Bench of the Tribunal cited as (2023) 148 taxmann.com 153 (Mumbai-Trib.) in case of P.R. Packaging Service vs. ACIT, Income Tax Officer vs. Gujarat Power Corpn. Ltd. (2002) 122 Taxman 367 (Gujarat) and CIT vs. Nameel Leathers & Uppers (2005) 273 ITR 350 (Madras).

11. We are of the considered view that when the issue in question has been settled by the Hon'ble Supreme Court of India in case of Checkmate Services Pvt. Ltd. (supra) once for all the case law relied upon by the assessee is not applicable to the facts and circumstances of the case. Moreover, when the assessee has apparently made incorrect claim in its return of income which is against the provisions contained under PF & ESIC as to depositing the employees' contribution on account of PF & ESIC within a particular time frame, any deposit thereafter would not be entitled for deductions as has been held by the Hon'ble Supreme Court.

12. Moreover, in view of the law laid down by the Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. (supra), which is law of the land from the date of inception of the Act, the issue raised by the Ld. A.R. for the assessee that it is a debatable issue is misconceived contention as the debate on the issue has already been set at rest. So since the assessee has failed to comply with the condition precedent for depositing the employees' contribution on account of PF & ESIC before the due date prescribed under the Act the same has been rightly disallowed by the Ld. CIT(A).

13. Following the decision rendered by the Hon’ble Supreme Court in case of Checkmate Services P. ltd Vs. CIT(supra), I am of the considered view that that this issue has rightly been decided against the assessee by the ld CIT(A) to the extent that the actual amount deposited by the assessee on account of employees contribution on account of PF & ESI late as prescribed under the Act is to be disallowed.

14. However, at the same time, the ld AR for the assessee brought on record the fact that tax audit report contains the fact that aggregate amount of employees share as well as employer’s share and administrative charges mentioned in point 20(b) of the

Tax Audit Report has been disallowed by the ld CIT(A). The ld CIT(A) further contended for AY 2017-18 only employees share comes to Rs. 1,24,320/- whereas disallowances on account of PF & ESI was made at Rs. 2,64,683/- u/s 26(1)(va) of the Act.

15. I have perused Tax Audit Report and statement of disallowance u/s 36(1)(va) available at page No. 11 and 12 of the paper book/ written submission filed by the assessee wherein, employees share on account of PF&ESI comes to Rs. 1,24,320/- only. So, I am of the considered view that the AO is to disallow Rs. 124320/- which is employees share only and rest of the amount which is pertaining to employers share and administrative charges as mentioned in para 20(b) of the Tax Audit Report is allowable one and AO is directed to disallow the amount of employees share on account of PF & ESI only.

16. Similar are the arguments addressed by the ld AR for the assessee for AY 2018-19 that the correct disallowance on account of PF & ESI comes to Rs. 84244/- as against Rs. 1,21,806/- made by the AO and confirmed by the ld CIT(A), because due to typographical error in some cases amount of deduction has been taken wrongly and placed on record the tax audit report/statement of disallowance u/s 36(1)(va) which is as under:-

Month	Nature of Fund	Sum received from employees	Due Date for Payment	The actual date of payment to the concerned authorities	Total Disallowance as per Intimation	Employee share disallowable
Apr-16	PROVIDENT FUND	42550	15-May-17	16-May-17	42550	425
May-16	PROVIDENT FUND	41694	15-Jun-17	21-Jun-17	41694	4ie
Nov-16	ESIC	7254	21-Dec-17	9-Dec-17	7254	
Dec-16	ESIC	8183	21-Jan-18	12-Jan-18	8183	
Jan-17	ESIC	6748	21-Feb-18	10-Feb-18	6748	
Feb-17	ESIC	7636	21-Mar-18	14-Mar-18	7636	
Mar-17	ESIC	7741	21-Apr-18	14-Apr-18	7741	
		121806			121806	84244

17. I have perused the statement of ld AR for the assessee which appears to be correct because disallowable amount comes to Rs. 84244/- only but Rs. 121806/- has been disallowed by AO and confirmed by the ld CIT(A). However, this contention of the ld AR for the assessee required to be verified by the AO, who shall disallow the amount of Rs. 84244/- which is deposited after due date prescribed under the law and rest of the amount is liable to allowed.

18. In view of what has been discussed above, I am of the considered view that when the assessee has deposited employees contribution on account of PF&ESI after the due date prescribed under the Act the same has been rightly been disallowed by the ld CIT(A) qua which the assessee is not entitled for deduction. However, what has been wrongly disallowed due to error in the tax audit report as well as wrong mentioning of the date of depositing the employee's contribution is allowable, and directed to be allowed subject to verification.

19. Resultantly, both the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 19.05.2023.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 19.05.2023.

* Ajay Kumar Keot, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.