

**IN THE INCOME TAX APPELLATE TRIBUNAL
CIRCUIT 'SMC' BENCH, VARANASI**

**BEFORE SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No. 19/VNS/2023
Assessment Year: 2019-2020**

M/s Jai Ambe Agricultural Industries, Plot No. 211, Churamanpur, Varanasi-221108,U.P.	v.	The DCIT, Circle-2(1), Aayakar Bhawan, M A Marg, Varanasi-221002,U.P. (The ADI, CPC, Bengaluru)
PAN:AAHFJ9428N		
(Appellant)		(Respondent)

Assessee by:	Sh. R.K.N. Jaiswal, Advocate
Revenue by:	Sh. A.K. Singh, Sr. DR
Date of hearing:	12.04.2023
Date of pronouncement:	05.06.2023

ORDER

PER SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal, filed by assessee, arising out of the appellate order, dated 23.12.2022 passed by the learned CIT(A), National Faceless Appeal Centre, Delhi (DIN & Order No. ITBA/NFAC/S/250/2022-23/1048192998(1)) in Appeal No. CIT(A), Varanasi/10002/2020-21, for assessment year 2019-20, which in turn has arisen out of the intimation dated 29.02.2020 passed u/s 143(1) by CPC, Bengaluru vide Document Identification No. CPC/1920/A5/1975401671. The above appeal was heard in physical hearing mode in Open Court proceedings.

2. The assessee has raised following grounds of appeal in memo of appeal filed with the Income Tax Appellate Tribunal (hereinafter called "the tribunal"), Circuit Bench, Varanasi, U.P. :-

"1. Because, the learned 1 A. A. failed to appreciate the basic issue: "whether income of the nature defined u/s. 2(24)x of the I.T. Act falls u/s.28 (Profits and gains from

business or profession)" being still 'res-integra' and re-framed that to suit with the "obiter-dicta" of Checkmates services (P) LTD. Vs. CIT so putting sec. 56(2)ic to "random-loci.

2. Because, term 'Recovery' as used in Para-32(1) of the EPF and Misc. provision Scheme as well as in sec. 40(2) of ESI Act can not be equated either with the term "deduction or receipt" which the learned 1st A. A. failed to appreciate.

3. Because, the learned 1st A. A. failed to appreciate that non-abstante clause used in Para- 32(1) of EPF Scheme modified the term "Shall" used in Para-38(1) to "may".

4. Because, the EPF Act as well as ESI Act are self-contained prescribing provision for Interest and penalty for defaults, addition of Rs. 1,28,680-00 in the guise of sec. 36(1)va still "res-integra", amounts to double jeopardy.

5. Because, responsibility to pay both part of the contributions are by Para - 30(1) EPF Scheme as well as sec. 40(1) of the ESI Act is over the Employer which the Ld. Ist A. A. failed to adjudicate.

6. Because, order is bad in law and against facts of the case."

3. The brief facts of the case are that the assessee filed its return of income on 27.10.2019 for assessment year 2019-20 returning income of Rs. 2,28,687/-. The said return of income was processed by Revenue under section 143(1) of the Act and addition of Rs. 1,28,680/- was made to the returned income by CPC, Bangalore, while processing the return of income on account of delayed deposit of EPF / ESI within the due date as prescribed under the relevant statute , which was in violation of provisions of Section 36(1)(va) r.w.s. 2(24)(x) of the Act.

4. The assessee filed first appeal before the learned CIT(A) who dismissed the appeal of the assessee by relying on the decision of Hon'ble Supreme Court in the case of ***Checkmate Services Pvt. Ltd. v. CIT (Civil Appeal No. 2833 of 2016, vide judgment and order dated 12.10.2022),reported in (2022) 143 taxmann.com 178(SC)*** .

5. Aggrieved by the appellate order passed by Id. CIT(A), the assessee filed second appeal with tribunal. The learned counsel for the assessee submitted that the additions are being made of Rs. 1,28,680/- for delayed deposit of EPF / ESI beyond

the time stipulated under section 36(1)(va) r.w.s. 2(24)(x) of the Act. The ld. Counsel for the assessee submitted that processing of return of income was done by CPC , Bengaluru under section 143(1). The ld. Counsel for the assessee drew our attention to provisions of Section 14 of the Income Tax Act,1961 which defines various heads of income under which income is chargeable to tax. The ld. Counsel for the assessee also drew our attention to provisions of Section 2(24)(x) and 28 of the Act , and it was submitted that section 2(24)(x) of the Act is not covered by section 28 , and the said employee contribution which is recovered by the employer is not covered under section 28 and it is not an income from Business or Profession under section 28. He drew our attention to section 36(1)(va) of the Act. The ld. Counsel for the assessee submitted that this income cannot be brought to tax under the head 'Profits and Gain of Business or Profession' as there is no reference to income u/s 2(24)(x) in Section 28, while it can be charged to tax as 'income from other sources' under section 56 of the Act. The ld. Counsel for the assessee drew our attention to Section 56 of the Act and submitted that it refers to income to be charged to tax u/s 2(24)(x), and hence the employee contribution recovered by employer is an income specifically brought to tax under the head 'Income from other sources' and then deduction is allowed u/s 57(ia) if the employee contribution recovered by the employer is deposited within the due date prescribed for deposit of PF / ESI under the relevant statute, as is referred to in Section 36(1)(va). The ld. Counsel for the assessee drew our attention to para 30 and 32 at page no. 9 and 10 of the paper book , and submitted that it is the employer's responsibility to deposit the employer contribution as well as employee contribution with the fund, within the due date. The employer is entitled to recover the employee contribution from the salary of the employee. He referred to provisions of Section 43B of the Act. The ld. Counsel for the assessee also referred to provisions of section 40 of the Employees State Insurance Act. He drew our attention to page no. 4 of the paper book where the complete detail of the PF / ESI payable by the assessee with respect to employees contribution as well as the actual date of payment is mentioned and was submitted

that it is an admitted position that the addition made was in respect to employees contribution of PF / ESI which was deposited late beyond the time prescribed for making payment under the relevant statute. It was submitted that Section 28 does not refer to income as stipulated under Section 2(24)(x) of the Act . It was submitted that there was an amendment to the Act , and there are Notes of clauses and Memorandum to Finance Bill, 2021 which clearly stipulates that the amended provisions are applicable from assessment year 2021-22 and hence the amendment is not applicable for earlier years. It was also submitted by Id. Counsel for the assessee that decision of Hon'ble Supreme Court in the case of ***Checkmate Services Pvt. Ltd.(supra)*** is not applicable in the instant case. However, the Id. Counsel for the assessee fairly admitted that assessee has deposited employees contribution of PF / ESI beyond the date prescribed under the relevant statute governing PF/ESI. It was submitted that it is covered under section 43B and hence the addition should be allowed.

4b. The learned Sr. DR, on the other hand submitted that the employees contribution of EPF / ESI is deemed as an income under 2(24)(x) of the Act irrespective of the head of the income. Section 56 refers to income chargeable as income from other sources. It is applicable to such as entity like school, college, Trust etc. where PF / ESI is applicable , but the income is not chargeable to tax under the head income from 'Profit and gain from business or profession' and such type of enterprises are covered under section 56 which are not business enterprises, and the income is chargeable to tax under the head 'Income from other sources'. Reference is drawn by Id. Sr. DR to provisions of section 57(ia) of the Act, and it was submitted that provisions of Section 36(1)(va) is referred to in Section 57(ia) and deduction shall be allowed only when the employee contribution towards PF/ESI are deposited within the due date as prescribed under the relevant statute. Section 2(24)(x) creates a deeming fiction wherein employee contribution towards PF/ESI constitute deemed income. The Id. SR DR submitted that the issue

is covered by the decision of Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd.(supra)**. The ld. Sr DR also submitted that ITAT Chennai Bench in ITA No. 789/Chn/2022 order dated 04.11.2022 in the case of **Electrical India v. ADIT, CPC** followed the decision of Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd.(supra)**.

5. We have considered rival contentions and perused the relevant material available on record. We have observed that the assessee filed his return of income on 27.10.2019 declaring income of Rs. 2,28,690/-. The return of income was processed by CPC under section 143(1) , wherein addition of Rs. 1,28,680/- was made while processing return of income under section 143(1) by disallowing the deduction under section 36(1)(va) r.w.s. 2(24)(x) of Rs. 1,28,680/- towards delayed deposit with relevant fund of employee contribution towards PF / ESI collected by the assessee from employees which stood deposited late beyond the time provided under the relevant statute. It is an admitted position that Rs. 1,28,680/- was deducted by the assessee as an employer from the salaries of employees contribution towards PF / ESI but the same was not deposited within due date as prescribed under the relevant statute concerning PF / ESI. The learned CIT(A) confirmed the additions by relying upon the decision of Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd.(supra)** The learned counsel for the assessee has submitted before the Bench that income by way of deeming fiction under section 2(24)(x) cannot be brought to tax under the head 'Profits and Gains from Business or Profession' , as Section 28 does not stipulate that deemed income u/s 2(24)(x) shall be brought to tax as Income from Business or Profession , while Section 56(1)(ic) clearly stipulates that such income covered u/s 2(24)(x) shall be brought to tax if the same is not brought to tax under the head 'Profits and Gains from Business or Profession'. There is no dispute that Section 2(24)(x) refers to any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of the

Employees' State insurance Act, 1948 , or any other fund welfare of such employees. This is a deeming fiction created by statute to treat employee contribution received by employer which shall be deemed as income of the assessee. There is no restriction imposed by this section 2(24)(x) as to the head of income under which it will fall for being taxed. Section 14 provides head of income , wherein the income shall fall for being taxed depending upon nature of income such as Salaries, Rent, Business/ Professional Income , Capital gains so and so forth. The assessee in the instant case is engaged in the business and has employed employees/ workers to whom salaries/wages are paid who are rendering their services in connection with the business activities of the assessee. The income earned by the assessee is from business which falls under the head 'Profits and Gains of Business or Profession' and shall be chargeable to tax under Chapter IV-D of the 1961 Act. Section 28 is relevant , wherein this deemed income u/s 2(24)(x) shall fall to be taxed u/s 28(i) of the 1961 Act keeping in view deeming fiction created by Section 2(24)(x). Chapter IV-D further provides for deduction u/s 36(1)(va) for depositing such employee contribution deducted by employer with the relevant fund concerning PF and ESI, within the stipulated time as prescribed under the relevant PF/ESI Act. So, once an receipt is treated as income by deeming fiction , then it has to be given full effect. Section 36(1)(va) clearly stipulates the conditions for allowing deduction and clearly stipulates that the deduction in respect to income as defined under section 2(24)(x) shall be allowed provided the said employee contribution is deposited by employer with the relevant fund governing PF/ESI within the time prescribed under relevant statute governing PF/ESI. Thus, this contention of the assessee is rejected that deemed income u/s 2(24)(x) cannot be brought to tax under Chapter IVD. We have also observed that this issue of delayed deposit of employee contribution towards PF/ESI beyond the time prescribed under the relevant statute governing PF/ESI is no more *res integra* as Hon'ble Supreme Court has already decided the issue in favour of Revenue in the case of **Checkmate Services Pvt. Ltd.**(supra), wherein Hon'ble Supreme Court has strictly construed the provisions of Section

36(1)(va) and has held that in case employee contribution of PF/ESI deducted by employer is deposited late beyond the time prescribed under the relevant statute governing PF/ESI, no deduction shall be allowed keeping in view provisions of Section 36(1)(va) of the 1961 Act. It will be relevant at this point of time to refer to decision of ITAT, Chennai Bench, in the case of M/s Electrical India(supra), in ITA No. 789/Chny/2022, wherein by order dated 04.11.2022, this issue is decided in favour of Revenue. Thus, this appeal filed by the assessee lacks merit and stand dismissed. We order accordingly.

6. In the result, the appeal filed by the assessee stands dismissed

Order pronounced on 05/06/2023 at Allahabad, U.P. in accordance with Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-

**[PAVAN KUMAR GADALE]
JUDICIAL MEMBER**

DATED:05/06/2023

Place: Varanasi/Allahabad/Mumbai
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Copy forwarded to:

1. Appellant – M/s Jai Ambe Agricultural Industries, Plot No. 211 , Churamanpur, Varanasi, U.P.
2. Respondent –DCIT, Circle-2(1), Aayakar Bhawan, M A Road,Varanasi-221002, U.P.
3. The ld. Sr. DR , ITAT, Varanasi, U.P.
4. CIT, Varanasi,U.P.
5. The Guard File

Sd/-

**[RAMIT KOCHAR]
ACCOUNTANT MEMBER**