

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-PATNA 'e-COURT', KOLKATA
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 88/PAT/2021
Assessment Year: 2019-2020**

***Sona Gold Agrochem Pvt. Limited,.....Appellant
Karmali Chak Mohali Riad,
Patna-800008, Bihar
[PAN: AAJCS0688L]***

-Vs.-

***ADCIR, CPC,.....Respondent
Bengaluru-560500,
Karnataka***

Appearances by:

Shri Rakesh Kumar, Advocate, appeared on behalf of the assessee

Shri Rupesh Agrawal, Sr. D.R., appeared on behalf of the Revenue

Date of concluding the hearing : May 29, 2023

Date of pronouncing the order : May 31, 2023

ORDER

Per Dr. Manish Borad, Accountant Member:-

This appeal at the instance of assessee for assessment year 2019-20 is directed against the order of ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 15.09.2021, which is arising out of the order under section 143(1) of

the Act dated 01.05.2020 framed by DCIT, CPC, Bangalore.

2. We have heard the rival contentions and gone through the record carefully. A perusal of the record would reveal that the dispute involved in the appeal is that the revenue authorities have erred in confirming the disallowance of employees' contribution in P.F. and ESI amounting to Rs.1,97,000/-. The case of the assessee is that it has made the payment before the due date of filing of the return, though it was not paid within the due date of these Acts. After going through the record, we are of the view that Hon'ble Apex Court in the case of Checkmate Services Pvt. Limited -vs.- CIT (2022) 143 taxman.com 178 (SC) has held that if payments are not made within the due date provided under P.F. & ESI Acts, then employees' contribution cannot be claimed as deduction. The assessee has made a reference to the decisions of ITAT in ITA Nos.359/Bang/2021, 1892/DEL/2020, 1609/DEL/2020, 244/KOL/2021. The ld. Counsel for the assessee also supported the judgment of the Hon'ble Jurisdictional Patna High Court in the case of Bihar State Warehousing Corporation Limited -vs. CIT reported in (2016) 386 ITR 410. We have gone through these decisions, but it is not applicable in the present case. Recently ITAT, Kolkata in ITA No. 61/KOL/2023 vide order dated 16th May, 2023 in the case of Siddhi Vinayaka Graphics Pvt. Limited -vs.- ADIT, CPC, Bengaluru has considered this judgment and

also other orders of the Tribunal on this point and whereby Tribunal has held as under:-

“21. So far as the reliance of the Mumbai Bench of the Tribunal in the case of ‘Kalpesh Synthetics Pvt. Ltd. vs. DCIT’ (supra) is concerned, I find that the observations made by the Coordinate Mumbai Bench are not relevant in any manner for the purpose of adjudication of the issue under consideration. In the case of ‘Kalpesh Synthetics Pvt. Ltd. vs. DCIT’ (supra), the Tribunal has held that before making adjustments u/s 143(1) of the Act, the CPC/Assessing Officer should give opportunity to the assessee to file objections against such adjustments and the Assessing Officer/CPC has to depose of such objections before proceeding further in the matter. Thereafter, the Tribunal goes on to hold that the views expressed by the tax auditor may not be binding on the auditee; that the tax audit reports are mere opinions and these opinions flag the issues which are required to be considered by the stakeholders; that these audit reports are inherently even less relevant, more so, when the reports require reporting of a factual position rather than express an opinion about legal implication of that position. The Coordinate Mumbai Bench further goes on to hold that when the law enacted by the legislature has been construed in a particular manner by the Hon’ble Jurisdictional High Court, it cannot be open to anyone in the jurisdiction of that Hon’ble High Court to read it in any other manner than as read by the Hon’ble Jurisdictional High Court. That, hence, the views expressed by the tax auditor in such a situation, cannot be the reason enough to disregard the binding views of the Jurisdictional High Court. The Coordinate bench, therefore, goes on to read down provisions to section 143(1)(a)(iv) and to hold that “what essentially follows is the adjustments under section 143(1)(a) in respect of “disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return” is to be read as, for example, subject to the rider “except in a situation in which the audit report has taken a stand contrary to the law laid down by Hon’ble Courts above”.

22. The crux of the entire decision of the Tribunal in the case of ‘Kalpesh Synthetics Pvt. Ltd. vs. DCIT’ (supra) is that even when the factual information given in the audit report indicates the disallowance u/s 36(1)(va), however, that is subject to the law laid down by the courts and if the Jurisdictional High Court has interpreted the provisions in

any other manner then the decision of the Hon'ble High Court would prevail over the indication given in the tax audit report. The above views of the Coordinate bench of the Tribunal in 'Kalpesh Synthetics Pvt. Ltd. vs. DCIT' (supra) in no manner is suggestive that the adjustment u/s 36(1)(va) cannot be made while processing the return u/s 143(1) of the Act, rather, the above view is limited to the proposition that if the law laid down by the High Court/Supreme Court is otherwise as compared to the factual information given in the audit report, then the law laid down by the Hon'ble High Court/Supreme Court would prevail over the tax audit report. Therefore, the Coordinate Mumbai Bench in the said case of "Kalpesh Synthetics Pvt. Ltd. vs. DCIT" (supra) has also mentioned time and again that in the audit report factual information is given, whereupon the Assessing Officer has to apply the prevailing law. As observed above, the law has been settled by the Hon'ble Supreme Court on the issue in the case of Checkmate Services Pvt. Ltd. (supra). The law declared by the Hon'ble Supreme Court is to be treated as if the same was the right interpretation since the date of the inception of the relevant provision and, therefore, even as per the decision of the Coordinate Bench of the Tribunal in 'Kalpesh Synthetics Pvt. Ltd. vs. DCIT' (supra), the issue is required to be decided in favour of the Revenue and against the assessee.

23. Contention – 3

An amending provision can certainly give guidance to interpretation of the existing old provisions. Accordingly, the application of rigour of section 36(1)(va) of the Act w.e.f. asst. yr. 2021-22 (as so held by various benches of Hon'ble Income tax Appellate Tribunal) by Finance Act, 2021 even after recognizing the position of law as per section 36(1)(va) from beginning being similar to that now held by Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. Vs. CIT (2022) 448 ITR 518 (SC), the base of Checkmate's case is changed and disallowance u/s. 36(1)(va) is not warranted upto asst. yr. 2020-21 even in case of belated deposit of employees' contribution if the same is deposited within due date of filing ITR which in the instant case for asst. yr. 2020-21 was 15.02.2021.

a) V.M. Salgaocar & Bros (P) Ltd. Vs. CIT (2000) 243 ITR 383 (SC) (2000) 110 Taxmann 67 (SC)

b) Goa Glass Fibre Limited Vs. State of Goa and another (2010) 6 Supreme Court Cases 499

c) *Easland Combines, Coimbatore Vs. CCE, Coimbatore (2003) 3 Supreme Court Cases 410*

d) *Lumino Industries Ltd. Vs. ACIT (2022) 94 ITR (Trib) 0675 (Kolkata) (2021) 63 CCH 0510 Kol.Trib*

24. *The Parliament, by way of amendment of 2021, has inserted Explanation 2 to section 36(1)(va) which reads as under:*

‘Explanation 2 – For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the “due date” under this clause.’

25. *Similarly, amendment has been made to section 43B by way of insertion of Explanation 5 which reads as under:*

“Explanation 5 – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of this employees to which the provisions of sub-clause (x) of clause 24 of section 2 applies.”

26. *Now, the contention of the ld. counsel is that by introduction of the above Explanation, the law has been changed and therefore, the reasonable presumption would be that before amendment/introduction of the aforesaid Explanations to section 36(1)(va) and section 43B, the law was otherwise. In view of this, the law prior to amendment should be taken in favour of the assessee by taking the due date as mentioned u/s 43B of the Act. I am not convinced with the above submission of the ld. counsel for the assessee. As discussed above, there is no mention in 43B of the Income Tax Act regarding the due date of filing of return as due date of deposit of employees’ contribution to PF/ESI etc. Even the law as prevailing prior to amendment brought by Finance Act 2021 on this issue has been settled by the Hon’ble Supreme Court and it has been held by the Hon’ble Supreme Court that as per the statutory provision of section 43B of the Income Tax Act as prevailing prior to the amendment brought vide Finance Act 2021, non-obstante clause u/s 43B could not apply in case of amounts which were held in trust as was case of employee’s contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), thus, the said clause would not absolve assessee-employer from its*

liability to deposit employee's contribution on or before due date as prescribed u/s 36(1)(va) as a condition for deduction.

27. Contention -4

The later enactment must prevail over the earlier one. Accordingly, the application of rigour of section 36(1)(va) of the Act w.e.f. 2021-22 as provided by Finance Act, 2021 shall prevail over the interpretation of earlier provisions of said section by Hon'ble Supreme Court in Checkmate Services case.

a) Sarwan Singh (Shri) and Another Vs. Shri Kasturilal (1977) 1 Supreme Court cases 750

b) Ramkrishna Pillai Vs. State of Kerala 1988 SCC OnLine Ker 490

c) Jangali Singh Vs. The Sub-Divisional Officer and Another 1977 SCC OnLine All 181

d) Mathew Antony Vs. State of Kerala 1991 SCC OnLine Ker 361

e) Jwala Prasad Vs. Pargana Adhikari 1993 SCC OnLine All 714

28. I have considered the above contention raised by the ld. counsel. The ld. counsel has relied upon the case laws, wherein, it has been held that where due to new statute/amendment brought by new statute, there is some conflict with the other existing older provisions either in the same statute or any other Act, the new provisions will prevail over the existing old provisions in such scenario so that to bring rationale between the older and new provisions and since the new law has been enacted with the knowledge of the existing old law.

I have failed to understand that how this would help the assessee in this respect. Firstly there is no conflict between a prevailing old law or new law in this case, rather, the amendment has been brought to the relevant provisions with prospective effect and there is no conflict between any existing/unamended old provisions and the new provisions. Further even under the amended provisions, the application of section 43B to the provisions of section 36(1)(va) of the Income Tax Act has been done away with. Even if the contention of the ld. counsel is to be accepted, the new law is against the assessee even in respect of employer's contribution to ESI/PF what to say of, the employees' contribution. If the new law has to prevail then the provisions of section 43B will not have any application and therefore, this contention raised by the

counsel for the assessee is of no help to assessee but to Revenue. Therefore, there is no force in the above arguments of the ld. counsel. However, it is made clear that my above discussion in any manner does not hold that the amendment provisions will prevail over the old provisions to section 36(1)(va), rather, there is no conflict in the prevailing law with any of the existing provisions in the Income Tax Act after amendment brought by Finance Act, 2021 relating to the issue under consideration. The above contention of the ld. counsel is totally misconceived. In view of the above discussion, I find no force in the present appeal of the assessee and the same is accordingly dismissed.

29. In the result, the appeal of the assessee stands dismissed”.

3. In view of the latest decision dated 16.05.2023 of the ITAT, Kolkata, this ground of appeal is rejected and the disallowance is confirmed.

4. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on May 31st, 2023.

Sd/-
(Rajpal Yadav)
Vice-President(KZ)

Sd/-
(Manish Borad)
Accountant Member

Kolkata, the 31st day of May, 2023

*Copies to :(1) Sona Gold Agrochem Pvt. Limited,
Karmali Chak Mohali Riad,
Patna-800008, Bihar*

*(2) ADCIR, CPC,
Bengaluru-560500,
Karnataka*

- (3) *Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre (NFAC),
Delhi*
- (4) *Commissioner of Income Tax ,*
- (5) *The Departmental Representative*
- (6) *Guard File*
- TRUE COPY*

By order

*Assistant Registrar
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.