

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

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 1661/MUM/2021
(Assessment Year: 2017-18)**

&

**ITA No. 1662/MUM/2021
(Assessment Year: 2018-19)**

**Umberto Ceramics International
Private Limited,**

302, Mannav Mansion Mc. Donald,
Sarojini Road, Vile Parle(West),
Mumbai - 400058

[PAN: AABCU2672E]

..... **Appellant**

Commissioner of Income-tax (Appeals)

National Faceless Appeal Centre,
Delhi

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee

: None

For the Respondent/Department

: Shri Sridhar Govind Menon

Date

: 16.05.2023

Conclusion of hearing

: 24.05.2023

Pronouncement of order

ORDER

Per Rahul Chaudhary, Judicial Member:

1. These are 2 appeals pertaining to Assessment Year 2017-18 and 2018-19 preferred by the Assessee against the orders passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, (NFAC), Delhi [hereinafter referred to as 'the CIT(A)']. The appeals were disposed off vide order, dated 29/03/2022. However, on a Miscellaneous Application filed by the Revenue (MA No. 440/Mum/2022), the order was recalled vide

order, dated 03.03.2023, and therefore, the appeals were listed for hearing. Since the appeals involve identical issues the same were heard together and are being disposed by way of a common order.

2. When the appeals were taken up for hearing, none appeared on behalf of the Appellant, the Ld. Departmental Representative submitted that the issue raised in the present appeal stand covered by the decision of Hon'ble Supreme Court in the case of Checkmate Services Private Ltd. v. CIT (2022) 448 ITR 518 (SC).

ITA No. 1661/MUM/2021 (Assessment Year: 2017-18)

3. We would first take up appeal preferred by the Assessee challenging the order, dated 28.07.2021, passed by the CIT(A) for the Assessment Year 2017-18, whereby the Ld. CIT(A) had dismissed the appeal of the Appellant against the Order, dated 17.12.2019, passed under Section 154 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

Ground No 1 to 2

4. On perusal of Ground No. 1 and 2 raised in the present appeal we find that the Appellant is aggrieved by the order, dated 28.07.2021, passed by the CIT(A) whereby the CIT(A) confirmed the addition of INR.22,37,745/- made under Section 36(1)(va) of the Act while processing of return of income in respect of Employees' Contribution to Provident Fund deposited belatedly but before the due date of filing return of income for the relevant assessment year.
5. The Appellant had preferred an Application under Section 154 of the Act for rectification of the intimation/order issued under Section 143(1) of the Act which was rejected by the Assessing Officer vide

order, dated 17.12.2019. The Appellant challenged aforesaid order in appeal before CIT(A). The Appellant contended that since the Employees' Contribution to Provident Fund was deposited before the due date of filing return of income for the relevant assessment year, and therefore, the deduction for the same was allowable under Section 43B of the Act. Without prejudice to the aforesaid, the Appellant sought set-off of the additional made, if any, with the unabsorbed brought forward depreciation. However, the CIT(A) declined to grant any relief and dismissed the appeal vide order, dated 28/07/2021.

6. The Appellant is now in appeal before us on this issue.
7. We find that the issue under consideration stands decided in favour of the Revenue and against the Appellant by the judgment of Hon'ble Supreme Court in the case of Checkmate Services Private Ltd (supra) wherein it has been held as under:

"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 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 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." (Emphasis Supplied)

8. Thus, as per the above judgment of the Hon'ble Supreme Court deduction respect of Employees' Contribution to Provident Fund would only be allowed in case the same is deposited within the due date prescribed under the concerned statute, and a default would result in disallowance under Section 36(1)(va) of the Act even if the

deposit is made before the due date of filing return of income as the provisions of Section 43B of the Act do not apply in case of Employee's Contribution to Provident Fund. In view of the aforesaid, the judgments of the Hon'ble Bombay High Court in the case of CIT Vs. Hindustan Organics Chemicals Limited: 366 ITR 1, and CIT Vs. Ghatge Patil Transport Limited: 228 Taxmann 340, on which reliance has been placed by the Appellant in the grounds of appeal, would no longer advance the case of the Appellant. Accordingly, Ground No. 1 & 2 raised in the present appeal are dismissed.

Ground No. 3

9. Before the CIT(A) the Appellant had, on a without prejudice basis, claimed that the addition to income, if any, should be set off against brought forward unabsorbed depreciation. However, CIT(A) did not deal with the same. Therefore, the Appellant has again reiterated the same claim in Ground No. 3 raised in the present appeal.
10. On perusal of the extract of the return of income for the Assessment Year 2017-18, we find that the Appellant had brought forward unabsorbed depreciation. Accordingly, we direct the Assessing Officer to verify the records and grant benefit of set-off of the addition with the brought forward unabsorbed depreciation as per law. In terms of the aforesaid, Ground No. 3 raised by the Appellant is allowed for statistical purposes.

Ground No. 4

11. Ground No. 4 raised by the Appellant is directed against the levy of interest under Section 234B of the Act. According to the Appellant interest under Section 234B of Act has been incorrectly been

computed and charged at INR 16,07,557/- instead of INR 13,75,038/-. The Assessing Officer is directed to re-compute interest under Section 234B of the Act as per law after taking into account the impact of adjudication of Ground No. 3 above. In terms of the aforesaid directions, Ground No. 4 raised by the Appellant is allowed for statistical purposes.

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12. We would now take up appeal preferred by the Assessee challenging the order, dated 28.07.2021, passed by the CIT(A) for the Assessment Year 2018-19, whereby the Ld. CIT(A) had dismissed the appeal of the Appellant against the intimation/order, dated 16.10.2019, passed under Section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
13. Appellant is aggrieved by the order, dated 28.07.2021, passed by the CIT(A) whereby the CIT(A) confirmed the addition of INR.18,50,079/- made under Section 36(1)(va) of the Act while processing of return of income in respect of Employees' Contribution to Provident Fund deposited belatedly but before the due date of filing return of income for the relevant assessment year.
14. We find that all the grounds raised in the present appeal are identical to the respective grounds raised in appeal for the Assessment Year 2017-18. Therefore, our findings/adjudication on grounds in appeal for the Assessment Year 2017-18 shall apply mutatis mutandis to the respective grounds raised in appeal for the Assessment Year 2018-19. Accordingly, in view of paragraph 7 and 8 above, Ground No. 1 and 2 raised by the Assessee in the present appeal are dismissed. Ground No. 3 raised by the Assessee is

allowed for statistical purposes in terms of paragraph 10 above.
Ground No. 4 raised by the Assessee is also allowed for statistical purposes in terms of the directions given in paragraph 11 above.

15. In result, both the appeals preferred by the Assessee are partly allowed.

Order pronounced on 24.05.2023.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 24.05.2023
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai