

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

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

M.A. no.96/Mum./2023
(Arising out of ITA no.211/Mum./2022)
(Assessment Year : 2019-20)

Income Tax Officer
Ward-41(1)(3), Mumbai

..... Applicant
(Original Respondent)

v/s

M/s. Sharda Silicate & Chemical Industries
33, Tenerife, Little Gibbs Road
Hanging Garden, Malabar Hill
Mumbai 400 006 PAN – ABIFS0177P

..... Respondent
(Original Appellant)

ITA no.211/Mum./2022
(Assessment Year : 2019-20)

M/s. Sharda Silicate & Chemical Industries
33, Tenerife, Little Gibbs Road
Hanging Garden, Malabar Hill
Mumbai 400 006 PAN – ABIFS0177P

..... Appellant

v/s

Income Tax Officer
Ward-41(1)(3), Mumbai

..... Respondent

Assessee by : None
Revenue by : Ms. Richa Gulati

Date of Hearing – 09/06/2023

Date of Order – 15/06/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present Miscellaneous Application ("M.A.") has been filed by the Revenue seeking recall of the order dated 25/05/2022, passed under section 254(1) of the Income Tax Act,1961 ("the Act") by the Co-ordinate Bench of

the Tribunal in assessee's appeal being ITA no.211/Mum./2022, for the assessment year 2019-20.

2. When the present M.A. was called for hearing neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed, despite service of notice through the learned Departmental Representative ("*learned D.R.*"). In this regard, the service report dated 08/05/2023 was also placed on record by the learned D.R. Therefore, in view of the above, we proceed to dispose off the present M.A. ex-parte qua the assessee, after hearing the learned D.R.

3. During the hearing, the learned D.R. submitted that the Co-ordinate Bench of the Tribunal allowed the appeal filed by the assessee following its earlier decision rendered in Kalpesh Synthetics Pvt. Ltd. v/s DCIT, in ITA no.1785/Mum./2021, order dated 27/04/2022. The learned D.R. further submitted that the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. v/s CIT, [2022] 448 ITR 518 (SC) upheld the disallowance made under section 36(1)(va) of the Act due to delayed payment towards employee's contribution to Provident Fund (P.F) / Employees State Insurance Corporation (E.S.I.C.). Therefore, it was submitted that in light of the aforesaid decision of the Hon'ble Supreme Court, the order passed by the Tribunal may be recalled under section 254(2) of the Act for a fresh hearing on the merits of the case.

4. We have considered the submissions of the learned D.R. and perused the material available on record. We find that the issue on merit before the Co-ordinate Bench of the Tribunal in assessee's appeal was regarding the

disallowance on account of alleged delay in payment of P.F. / E.S.I.C. under section 36(1)(va) r/w section 2(24) of the Act. While deciding the aforesaid issue, the Co-ordinate Bench of the Tribunal following its earlier decision rendered in Kalpesh Synthetics Pvt. Ltd. (supra) allowed the appeal filed by the assessee. Subsequently, the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra) held that payment towards employee's contribution to P.F. / E.S.I.C. after the due date prescribed under the relevant statute is not allowable as a deduction under section 36(1)(va) of the Act. On the basis of this decision rendered by the Hon'ble Supreme Court, the Revenue has preferred the present M.A. under section 254(2) of the Act.

5. We find that the Hon'ble Supreme Court in ACIT v/s Saurashtra Kutch Stock Exchange, [2008] 305 ITR 227 (SC) held that non-consideration of the decision of the Hon'ble Jurisdictional High Court or the Hon'ble Supreme Court can be said to be a "*mistake apparent from record*" which can be rectified under section 254(2) of the Act. We further find that the Hon'ble Supreme Court in Saurashtra Kutch Stock Exchange (supra) also held that the judicial decision acts retrospectively and it is not the function of the Court to pronounce a "*new rule*", but to maintain and expound the "*old one*". Thus, it was held that the Judges do not make a law, they only discover or find the correct law. The relevant findings of the Hon'ble Supreme Court, in this regard, are as under:—

"42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a 'new rule' but to maintain and expound the 'old one'. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied

retrospectively. To put it differently, even where an earlier decision of the Court operated for quite sometime, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

43. *Salmond in his well-known work states:*

". . . (T)he theory of case law is that a judge does not make law; he merely declares it, and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicata or accounts that have been settled in the meantime." [Emphasis supplied]

44. *It is no doubt true that after a historic decision in Golak Nath v. State of Punjab AIR 1967 SC 1643, this Court has accepted the doctrine of 'prospective overruling'. It is based on the philosophy: "The past cannot always be erased by a new judicial declaration". It may, however, be stated that this is an exception to the general rule of the doctrine of precedent."*

6. The facts before the Hon'ble Supreme Court in Saurashtra Kutch Stock Exchange (supra) were that the decision of the Hon'ble Jurisdictional High Court was available, however, the attention of the Tribunal was not invited to the said decision at the time of the disposal of the appeal. Thus, in these circumstances, the aforesaid findings were rendered by the Hon'ble Supreme Court and the decision of the Tribunal under section 254(2) of the Act, in recalling its earlier order, was affirmed.

7. The issue now arises whether even a subsequent decision of the Hon'ble Supreme Court, which is binding as per Article 141 of the Constitution of India, can be a basis for rectifying the order under section 254(2) of the Act. We are of the considered opinion that in view of the aforesaid findings of the Hon'ble Supreme Court in Saurashtra Kutch Stock Exchange (supra), as noted in para 42-44 of the judgment, the answer to this issue is affirmative. We find that the Hon'ble Delhi High Court in Lakshmi Sugar Mills Co. Ltd. v/s CIT, [2012] 22 taxmann.com 300 (Del.) held that where the Larger Bench of the Hon'ble Supreme Court overrules its earlier decision on which the Tribunal relied on,

the said decision of the Tribunal can be rectified under section 254(2) of the Act since the decision of the Hon'ble Supreme Court operates retrospectively.

8. Therefore, respectfully following the aforesaid judicial pronouncements, we find merit in the present M.A. filed by the Revenue seeking recall of the Tribunal's order on the basis of the subsequent decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra). Accordingly, the order dated 25/05/2022, passed by the Co-ordinate Bench of the Tribunal in assessee's appeal for the assessment year 2019-20 is hereby recalled.

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9. With the consent of the learned D.R., the corresponding appeal being ITA no. 211/Mum./2022, was taken up for hearing. We find that the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra) held that the payment towards employees' contribution to P.F. and E.S.I.C., after the due date prescribed under the relevant statute is not allowable as a deduction under section 36(1)(va) of the Act. The relevant findings of the Hon'ble Supreme Court, in the aforesaid decision, are 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 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 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."

10. In the present case, from the record, it is evident that the employees' contribution to P.F. and E.S.I.C. was deposited after the due date prescribed under the relevant statute. Thus, respectfully following the aforesaid decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra), the grounds raised by the assessee in its appeal are dismissed.

11. In the result, Miscellaneous Application filed by the Revenue is allowed, while the appeal by the assessee is dismissed.

Order pronounced in the open Court on 15/06/2023

Sd/-
B.R. BASKARAN
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 15/06/2023

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai