

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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.971/Mum./2023
(Assessment Year : 2019-20)

Calyx Chemicals And Pharmaceuticals Ltd.
1408, 14th Floor, Real Tech Park
Sector-30A, Near Inorbit Mall, Vashi
Navi Mumbai 400 703 PAN – AABCC1457B

..... Appellant

v/s

Asstt. Director of Income Tax
Central Processing Centre
Bengaluru 500 560

..... Respondent

Assessee by : None
Revenue by : Shri Prasoon Kabra

Date of Hearing – 21/06/2023

Date of Order – 27/06/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 30/01/2023, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2019-20.

2. When this appeal was called for hearing neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed. Therefore, in view of the above, we proceed to dispose off the present appeal

ex-parte, qua the assessee after hearing the learned Departmental Representative ("*learned DR*") and on the basis of material available on record.

3. In its appeal, the assessee has raised the following grounds:-

"1. On the facts and the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) was not justified in upholding the disallowance of Rs.45,16,939/- made u/s 36(1)(va) of the Act, based upon the details in the Tax Audit Report in Form 3CD, in an intimation determining the total income of the appellant u/s 143(1) of the I.T. Act.

2. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC was not justified in upholding the action of the ADIT-CPC Bangalore in making disallowance of employees contribution to Provident Fund and ESI based on the details furnished in the Tax Audit Report while processing the return under section 143(1) of the Act.

3. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC failed to appreciate that the disallowance under section 143(1)(a)(iv) on the basis of Tax Audit Report is against the provisions of the Income Tax Act, as the Auditor had merely stated facts about payment details of employees contribution to Provident Fund and ESI and did not disallow the expense and as such the same did not fall within the ambit of prima-facie adjustments.

4. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC failed to consider the fact that the proceedings u/s.143(1) permits only prima-facie adjustments and a debatable issues fall outside the ambit of adjustment contemplated u/s. 143(1).

5. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC failed to consider the fact that the day on which the impugned intimation was passed (i.e. 11.10.2021) there were divergent views taken by different High Courts thus resulting in such an issue to be a debatable one and therefore falls outside the scope of adjustments u/s.143(1).

6. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC errd in merely placed reliance on the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. to hold that the belated payment of employees contribution to PF & ESI has to be disallowed though paid before the due date of the filing of the return without adverting to specific grounds raised before him pertaining to the assumption of jurisdiction to make such adjustments u/s.143(1).

7. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC failed to appreciate the fact till 12.10.2022 (the day on which the Hon'ble Supreme court passed the order in

the case of Checkmate Services Pvt. Ltd. v. Commissioner of Income Tax-12.) the disallowance of belated employees contribution was a debatable issue and as such no adjustments could be made u/s.143(1).

8. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC failed to appreciate the fact that the enabling provision has been given effect only from 01.04.2021 by way of amendment of sub-clause (iv) of Sec. 143(1) and is not made retrospective, hence the adjustment u/s 143(1) prior to A.Y.2020-21 on account of increase in income is not in accordance with law as it then stood.

9. On the facts and the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC is not justified in holding that the amendment made by insertion of Explanation 2 to the provisions of section 36(1)(va) of the Act and the insertion of Explanation 5 to section 43B of the Act by the Finance Act, 2021 with effect from 01.04.2021 was clarificatory in nature and therefore, these amendments were retrospective in operation ignoring the fact that the same was not on the statue book at the time of the filing of the return on 30.10.2019.

10. On the facts and the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals), NFAC ought to have appreciated that the aforesaid amendments by the Finance Act, 2021 cannot be regarded as retrospective in nature as they were not in the nature of a beneficial legislation to remove intended hardships cast on the assessee and therefore, the disallowance sustained on this basis is opposed to law and facts of the appellant's case."

4. The only grievance of the assessee is against the disallowance on account of delayed payment of employees' contribution to Provident Fund (P.F) and Employees State Insurance Corporation (E.S.I.C) under section 36(1)(va) of the Act.

5. The brief facts of the case as emanating from the record, are: The assessee is a closely held public limited company and is engaged in the business of manufacturing and dealing in Active Pharmaceutical Ingredients. For the year under consideration, the assessee filed its return of income on 30/10/2019, declaring a loss of Rs. 7,62,69,148. The said return of income was processed vide intimation dated 17/05/2020 issued under section 143(1) of the Act computing the total income of the assessee at Rs.23,45,67,040,

inter-alia, after making disallowance of Rs.45,16,939, on account of delayed payment of employees' contribution to P.F. and E.S.I.C. under section 36(1)(va) of the Act. Vide impugned order, the learned CIT(A) dismissed the appeal filed by the assessee following the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. v/s CIT, [2022] 448 ITR 518 (SC). Being aggrieved, the assessee is in appeal before us.

6. The learned DR submitted that the issue arising in the present appeal is squarely covered in favour of the Revenue by the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra).

7. We have considered the submissions of the learned DR and perused the material available on record. 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."

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

9. In the result, the appeal by the assessee is dismissed.

Order pronounced in the open Court on 27/06/2023

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 27/06/2023

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