

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

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

ITA no.1206/Mum./2023
(Assessment Year : 2017-18)

Ciron Drugs & Pharmaceuticals Pvt. Ltd.
Lotus Corporate Park, C-1101/02
Jai Coach Junctions, Western Express
Highway, Goregaon (East)
Mumbai 400 063 PAN – AABCC0873D

..... Appellant

v/s

Commissioner of Income Tax (Appeals)
National Faceless Appeal Centre
Delhi

..... Respondent

Assessee by : Shri Raman S. Shah
Revenue by : Shri K.C. Selvamani

Date of Hearing – 04/07/2023

Date of Order – 05/07/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 31/03/2023, 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 2017-18.

2. In this appeal, the assessee has raised the following grounds:-

"a) On the facts and in the circumstances of the case and in law, the Hon'ble CIT(Appeals), NFAC erred in confirming addition of Payment made towards Employees Contribution to Provident Fund after specific due date of at Rs. 31,31,991/-.

b) On the facts and in the circumstances of the case and in law, the Hon'ble CIT(Appeals), NFAC failed to considered that addition was made u/s 143(1) of the Act, 1961 without giving an proper opportunity of hearing to the assessee.

c) Assessee has deposited the employee's contribution to provident fund beyond the time period allowed under the PF Act, however, the said amounts were paid before the "due date" of filing of the return of income by the assessee u/s 139(1) of the IT Act, 1961 which is in accordance to section 43B of the Act."

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

4. The brief facts of the case, as emanating from the record, are: The assessee is a private limited company and has filed its return of income, for the year under consideration, on 05/07/2018 declaring a total income of Rs. 17,28,87,776. The said return of income was processed vide intimation dated 03/04/2019 issued under section 143(1) of the Act computing the total income of the assessee at Rs.17,60,19,770, inter-alia, after making disallowance of Rs.31,31,991, on account of delayed payment of employees' contribution to P.F./E.S.I.C. under section 36(1)(va) of the Act. Subsequently, the assessee filed a rectification application under section 154 of the Act, which was disposed off vide order dated 03/07/2019 without granting any relief to the assessee. 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.

5. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the employee's contribution to P.F./E.S.I.C. has been paid after the due date provided in the respective statute but well before the due date of filing the return of income under section 139(1) of the Act. The learned AR further submitted that the amendment to section 143(1) of the Act, whereby disallowance is based on the basis of audit report, is effective from 01/04/2021 and therefore is not applicable to the present case. In the alternative, the learned AR submitted that the payment be directed to be allowed under section 37 of the Act.

6. On the contrary, the learned Departmental Representative ("*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 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 assessees 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, it is admitted that the employees' contribution to P.F./E.S.I.C. were deposited after the due date prescribed under the relevant statute. Further, it is pertinent to note that it is only against the order passed under section 154 of the Act, the assessee filed an appeal before the learned CIT(A), which was dismissed vide impugned order following the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra). Thus, the impugned order under challenge in the present appeal arose from the order passed under section 154 of the Act and not from the intimation issued under section 143(1) of the Act. The view taken vide order passed under section 154 of the Act is in consonance with the law laid down by the Hon'ble Supreme Court in the aforesaid decision and, hence, the claim of deduction towards

delayed payment of employee's contribution to P.F./E.S.I.C. becomes an incorrect claim under section 143(1) of the Act. Accordingly, we find no infirmity in the order passed by the learned CIT(A).

9. The learned AR placed reliance upon the decision of the Tribunal in P.R. Packaging Services Ltd. v/s ACIT, in ITA no. 2376/Mum./2022, to support his claim. We find that the Tribunal vide subsequent decision in Nissan Enterprises Ltd. v/s DCIT-CPC, in ITA no.3270/ Mum./2022, vide order dated 17/02/2023, after considering the aforesaid decision in P.R. Packaging Services Ltd. (supra) decided the similar issue in favour of the Revenue by following the aforesaid decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra). Since section 37(1) of the Act specifically excludes expenditure of the nature described in sections 30 to 36 of the Act, we find no merit in the alternative plea of the learned AR.

10. 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.

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

Order pronounced in the open Court on 05/07/2023

Sd/-
B.R. BASKARAN
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 05/07/2023

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