

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH :H: DELHI)**

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT &
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA Nos.265 & 266/Del/2023
Assessment Years: 2018-19 & 2019-20**

Weltech Facility Management Services (P) Ltd., A-7/29, Ground Floor, Kh. No. 774/3, Aya Nagar Extension, Phase-5, New Delhi (PAN:AABCW3558R)	Vs.	ACIT, CPC, Bangaluru.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Rajiv Kumar Jain, CA
Respondent by : Shri Ramdhan Meena, Sr. DR

Date of Hearing : 05.07.2023
Date of Pronouncement : 07.07.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

These two appeals filed by the assessee are against the two separate orders of National Faceless Appeal Centre (NFAC)/learned Commissioner of Income-tax(Appeals), Delhi vide Order Nos. ITBA/NFAC/S/250/2022-23/1047806428(1) and ITBA/NFAC/S/250/2022-23/1047806160(1) both dated 05.12.2022 against the intimations under Section 143(1) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 18.03.2020 and 26.08.2020

respectively, passed by CPC, Bengaluru for the assessment years 2018-19 and 2019-20.

2. The sole issue raised by the assessee in the present two appeals is in respect of disallowance made towards delay in deposit of Employees Contribution to Provident Fund (PF) and Employees State Insurance Fund (ESI) of Rs.29,41,260 for assessment year 2018-19 and Rs.68,62,220 for assessment year 2019-20 (now rectified amount being Rs.21,22,270).

3. Brief facts for assessment years 2018-19 are that assessee filed its return of income on 25.09.2018 reporting total income at Rs.76,35,520. Return of the assessee was processed by CPC under Section 143(1) of the Act whereby a disallowance of Rs.29,41,253 as made on account of delay in deposit of employees contribution towards PF and ESI. For assessment years 2019-20, assessee filed its return of income on 22.10.2019 reporting total income at Rs.63,87,680. Return of the assessee was processed by CPC under Section 143(1) of the Act whereby a disallowance of Rs.89,84,490 was made on account of delay in deposit of employees contribution towards PF and ESI. Subsequently, rectification order was passed on 26.08.2020 whereby the disallowance was reduced to Rs.21,22,269. However, learned Commissioner of Income-Tax(Appeals) while disposing the first appeal sustained the

additions towards the initial disallowance of Rs.89,84,490 instead of taking the rectified amount of Rs.21,22,269 for which also the assessee has raised a ground. Assessee not finding favour in the first appeal is now before the Tribunal.

4. Before us, learned counsel for the assessee has placed on record written submission along with synopsis. Learned counsel has pleaded on the applicability of amendment brought in by Finance Act, 2021 to explanation 2 to section 36(1)(va) and explanation 5 to section 43B which is effective from 01.04.2021, i.e. prospectively. On this contention, he submitted that the controversy on the limitation of due date under Section 139(1) vis-a-vis proviso of section 43B prevailed since 1988 and, therefore, according to him, the provisions of section 43B were never to be applied for the purpose of section 2(24)(x) and section 36(1)(va) from the date when they came into force. Since, the amendments have been specifically made effective from 01.04.2021 brought in by Finance Act, 2021, these cannot be applied in the case of the assessee.

4.1 Per contra, learned Sr. DR placed reliance on the decision of Hon'ble Supreme Court in the *Chekmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC)* and submitted that the issues raised in the two appeals are squarely covered by the decision of Hon'ble Supreme Court.

5. On the aforesaid issue relating to disallowance in respect of delay in deposit of employees' contribution to Provident Fund, the issue is squarely covered against the assessee by the decision of Hon'ble Supreme Court in the case of *Chekmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC)* wherein it has been held that "*deduction u/s 36(1)(va) in respect of delayed deposit of amount collected towards employees' contribution to PF cannot be claimed when deposited within the due date of filing of return even when read with Section 43B of the Income-tax Act, 1961.*" Hon'ble Supreme Court has held that by virtue of section 2 (24) (x) of the Act, the amounts received or deducted by an employer u/s 36(1)(va), it retains its character as an income (albeit deemed) by virtue of section 2 (24)(x) , unless the condition stipulated 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. It is further held that 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 employee's income and held in trust by the employer. The Hon'ble Supreme Court thus held that the conditions of section 43B prescribing the due date as the date of filing of return of income in case the employers' contribution towards ESI/PF would not be applicable in case the employees' contribution as provided u/s 36(1)(va)

of the Act and that the due date in respect of deposit of employees' contribution would be such as prescribed u/s 36(1)(va) of the Act.

6. On the contentions raised by the learned counsel as stated above, the Co-ordinate Bench of the ITAT, Kolkata in the case of Siddhi Vinayak Graphic (P) Ltd. Vs. ADIT in ITA No. 143/Kol/2023 dated 23.06.2023 had addressed the same in details. The relevant extracts from the said decision are reproduced for ready reference:

“2. The sole issue raised by the assessee in this appeal is relating to the disallowance/adjustment made of Rs.12,96,380/- by the Ld. AO on account of delayed deposit of employees' contribution to PF/ESI u/s. 36(1)(va) read with section 2(24)(x) of the Act in the processing of return carried out u/s. 143(1) of the Act by the Centralised Processing Centre (CPC), Bengaluru.

3. We have heard the rival contentions and perused the material available on record. We note that the instant issue is squarely covered against the assessee by assessee's own case in AY 2020-21 vide order dated 16.05.2023. Ground of appeal taken by the assessee in AY 2020-21 and in the present appeal are identical except for difference in quantum of disallowance which is Rs.7,92,872/- in AY 2020-21. The contentions raised by the Ld. Counsel in the present appeal are same as in the other year. The observations and findings given by the Coordinate Bench in the assessee's own case for AY 2020-21 are reproduced hereunder:

“4. Apart from oral arguments, the assessee has also furnished written submissions, whereby, the assessee in this appeal has raised four contentions in support of his grounds of appeal. Now, I proceed to deal with each of the contention raised by the assessee in support of his grounds of appeal.

5. Contention -1:

The prima facie adjustment u/s. 143(1)(a) of the Income tax Act, 1961 (Act) in respect of an issue is allowable with reference to the interpretation of law which was prevailing as on the date of filing of subject Income tax Return (ITR) and any subsequent pronouncement of law or retrospective amendment on the concerned issue is not to be considered for such purpose. Accordingly, the subsequent pronouncement of law by Hon'ble Supreme Court judgement in Checkmate Services (P) Ltd. Vs. CIT (2022) 448 ITR 518 (SC) is not to be considered for prima facie adjustment u/s. 143(1)(a) for asst. yr. 2020-21 for disallowing payment of employees' contribution to PF/ESI beyond the due date prescribed in respective statute because on the date of filing of ITR by appellant on 30.03.2021, Hon'ble Calcutta High Court (Jurisdictional High Court) judgement in the case of CIT Vs. Vijay Shree Ltd. (2014) 43 taxmann.Com 396 (Calcutta High Court) was holding field which held that such employees' contribution, if deposited within due date of filing ITR (which in the instant case of appellant was 15.02.2021) is not to be disallowed u/s. 36(1)(va) of the Act.

- a) *CIT Vs. Hindustan Electrographite Ltd. (2000) 243 ITR 48 (SC) (2000) 109 Taxman 342 (SC)*
- b) *Modern Fibotex India Ltd. Vs. DCIT (1995) 212 ITR 496 (Cal)*
- c) *Samtel Color Ltd. Vs. UOI (2002) 258 ITR 1 (Del) (2002) 125 Taxman 1002 (Delhi)*
- d) *ITO Vs. Gujarat Power Corpn. Ltd. (2002) 254 ITR 217 (Gujarat) (2002) 122 Taxman 367 (Gujarat)*
- e) *CIT Vs. Vijayshree Ltd. (2014) 43 taxmann.com 396 (Calcutta High Court)*

6. Admittedly, the issue on merits has been set at rest by the recent decision of the Hon'ble Supreme Court in bunch of appeals with the lead case in 'Checkmate Services Pvt. Ltd vs. CIT' in Civil Appeal No.2833 of 2016 dated 12.10.2022. Earlier, there were divergent opinions of various High Courts. The High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi were of the view that if the employer's as well as employee's contribution to PF/ESI is deposited before the due date of filing of Income Tax Return, the same was an allowable expenditure u/s 36(1)(va) of the Act taking the due date as per the provisions of section 43B of the Act, whereas, the High Courts of Kerala and Gujarat ruled in favour of the Revenue holding that the due date of filing of return u/s 43B would be applicable in respect of employer's contribution only and not in respect of failure of the employer to deposit the funds deducted/collected from the employees, to say it in other words, the benefit of extended date i.e. last date of filing of return, would not be available in respect of employees' contribution and the same will not be allowed as deduction of expenditure if deposited after due date as prescribed by the relevant statutes irrespective of the fact that the same was deposited by the employer before the due date of filing of return of income u/s 139(1) of the Income Tax Act. The Hon'ble High Courts which ruled in favour of the assessee held that the provisions of section 43B(b) prescribing the due date as the last date for furnishing of return of income will not only apply to employers' contribution towards ESI/PF of employee but also to the employees' contribution which have been deducted by the employer and deposited by the employer as prescribed u/s 36(1)(va) of the Act. However, the Hon'ble Supreme Court in the case of 'Checkmate Services Pvt. Ltd vs. CIT' (supra) has held that by virtue of section 2(24)(x) of the Act, the amounts received or deducted by an employer u/s 36(1)(va), it retains its character as an income (albeit deemed) by virtue of section 2(24)(x), unless the condition stipulated 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. The Hon'ble Supreme Court held that 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 employee's income and held in trust by the employer. The Hon'ble Supreme Court thus held that the conditions of section 43B prescribing the due date as the date of filing of return of income in case the employers' contribution towards ESI/PF would not be applicable in case the employees' contribution as provided u/s 36(1)(va) of the Act and that the due date in respect of deposit of employees' contribution would be such as prescribed u/s 36(1)(va) of the Act.

7. Now the contention raised by the ld. counsel for the assessee is that before the decision of the Hon'ble Supreme Court in the case of 'Checkmate Services (P) Ltd. vs.

CIT' (supra), the judgement of the jurisdictional Calcutta High Court in CIT vs. Vijayshree Ltd. (supra) was holding field which held that employees' contribution if deposited within the due date of filing of ITR is not to be disallowed u/s 36(1)(va) of the Act. Therefore, the Assessing Officer was not justified in making adjustment u/s 143(1)(a) of the Act. Before proceeding further, it will be relevant to mention here that under section 43B(b) of the Income Tax Act, the following amount is allowable as deduction if paid by the assessee before due date of furnishing of return u/s 139(1) of the Act.

“43B(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees”

It has to be noted here that under the statutory provisions of section 43B(b) of the Income Tax Act, the due date being the last date of filing of ITR was applicable only in respect of employer's contribution towards ESI/PF etc. There is no mention in the aforesaid statutory provision of section 43B regarding the due date of deposit of employees' contribution to ESI/PF, which is prescribed in the provisions of section 36(1)(va) only.

It will be also relevant to reproduce here the relevant part of the judgment of the Hon'ble Calcutta High Court in the case of CIT vs. Vijayshree Ltd. (supra):

“2. The only issue involved in this appeal is as to whether the deletion of the addition by the Assessing Officer on account of Employees ' Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.

3. It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.

4. Being dissatisfied, the Revenue has come up with the present appeal.

5. After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.

6. Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

7. We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal.”

A perusal of the above observations of the hon'ble Calcutta High Court would reveal that in the case of 'CIT vs. Vijayshree Ltd.' (supra), though the issues before the Hon'ble

Calcutta High Court was relating to the disallowance on account of delayed deposit of employees' contribution to ESI and PF, however, the aforesaid decision would show that the Hon'ble Calcutta High Court referred to the provisions of section 43B of the Act to hold that the said section 43B introduced by Finance Act 2003, was curative in nature and was required to be applied retrospectively w.e.f. 01.04.1988. It was not brought to knowledge of the Hon'ble High Court that the provisions of section 43B do not prescribe the due date of deposit of employees' contribution, rather, the same refers to only the employer's contribution. There is no discussion in the said decision of the Hon'ble Calcutta High Court that the provisions of section 43B would also include employees' contribution along with employer's contribution. However, since the hon'ble High Court in the concluding para mentioned Employees' contribution, while holding about the retrospective application of section 43B of the Act, therefore, it was taken that the aforesaid decision of Calcutta High Court in the case of CIT vs. Vijayshree Ltd. (supra) was applicable on Employees' contribution also.

8. *However, as observed above, the issue has been settled by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. (supra) wherein the Hon'ble Supreme Court has dealt with the law/provisions as applicable prior to the amendment brought by Finance Act 2021 w.e.f. 01.04.21.*

9. *It has been held time and again that law declared by a court will have retrospective effect, if not otherwise stated to be so specifically. It is also well settled proposition that whenever, a previous decision is overruled by a larger bench of the Supreme Court, the previous decision is completely wiped out and Article 141 will have no application to the decision which has already been overruled and the court would have to decide the cases according to the law laid down by the latest decision of the Hon'ble Supreme Court and not by the decision which has been expressly overruled. The above reasoning stems from the principle that when a court decides a matter, it is not as if it is making any new law but it is as if it is only restating what the law has always been. The reliance in this respect can be placed on the decision of the Hon'ble Supreme Court in the case of "Ramdas Bhikaji and Choudhary vs. Sadananda" (1980) 1 SCC 550 and on the recent decision of the Hon'ble Supreme Court in the case of "Manoj Parihar and Ors. Vs. State of Jammu & Kashmir and Ors" SLP(C) No.11039 of 2022 vide order dated 27.06.2022; "PV Goerge vs. State of Kerala" (2007) 3 SCC 557; Assistant Commissioner vs. Saurashtra Kutch Stock Exchange Ltd. (2008) 14 SCC 171, wherein, the Hon'ble Supreme Court has held that judges do not make law, they only discover and find the correct law. Even, that where an earlier decision of the court operate for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which were earlier not correctly understood.*

In view of the above stated legal position, the law declared by the Hon'ble Supreme Court will be retrospectively applicable and it will be treated that earlier decisions of different High Court favouring the assessee would be of no benefit of assessee at this stage as the said decisions of the High Courts are treated to be never existed or to say are wiped out by the aforesaid decision of the Hon'ble Supreme Court. Therefore, I do not find any merit in the first contention raised by the assessee. Even otherwise, it was not a case of amendment of provisions, the assessee was banking upon the interpretation given by the hon'ble High Court on the already existing provisions, which were subject to appeal to hon'ble Supreme Court. If the assessee has chosen to reap the fruits of the

interpretation given by the hon'ble High Court, the assessee is also liable to face the consequences, if such an interpretation given by the hon'ble High Court is reversed or modified by the Apex Court of the country.

So far as the reliance of the ld. counsel on the decision of the Hon'ble Supreme Court in the case of 'CIT vs. Hindustan Electrographite Ltd.' (supra) is concerned, I find that the said decision is not applicable to the facts and circumstances of the present case. The said decision deals with the retrospective amendment of the statutory provision, and not relating to the interpretation of the provisions already existing in the Statute. The facts of the said case were that the assessee had received during the prevision year relevant to assessment year 1988-89 certain amount by way of cash compensatory support. It did not include this income in its return which was filed on 29.12.1989. the Assessing Officer treated cash compensatory support receipt as additional income u/s 143(1A) in view of insertion of clause (iiib) to section 28 by the Finance Act, 1990 with retrospective effect from 1.4.1967 and levied tax at higher rate and also charged interest u/s 234. The Hon'ble Supreme Court in the aforesaid facts and circumstances held that in view of the law on the date of filing of the return, there was neither a bona fide mistake on the part of the assessee nor there was any mistaken belief. That, though, the amendment to section 28 was made with retrospective effect but the said amendment could not have been known to the assessee before the Finance Act came into force. The Hon'ble Supreme Court further observed that levy of additional tax bears all the characteristic of penalty and when the additional tax was imprint of penalty and that it would be punishing the assessee for no fault of it. However, the facts and circumstances of the present case as observed are quite distinguishable. In the present case as observed there is no change of law. the statutory provisions have not been amended retrospectively, rather, it was a question only of interpretation of statutory provisions. Moreover, as noted above, provision in the decision of the Hon'ble Calcutta High Court in the case of 'CIT vs. Vijayshree Ltd.' (supra), the sole issue raised before the Hon'ble Calcutta High Court was as to whether the provisions of section 43B will have to be applied retrospectively or prospectively without any discussion on the issue whether the employer's contribution mentioned in section 43 would also include employees' contribution. It was not the case that the assessee was not aware that the decision of the hon'ble High Court was subject to appeal before the hon'ble Supreme Court and that the decision of the Hon'ble High Court could be reversed by the Hon'ble Supreme Court. Similarly, the case law cited by

the ld. counsel in the case of Modern Fibotex India Ltd. vs. DCIT (supra), the other case laws of different High Courts relied by the ld. counsel, are not applicable in view of the settled proposition of law by the Hon'ble Supreme Court in the various case laws as discussed above."

7. In view of above discussion, we do not find any merit in the two appeals of the assessee and the same are hereby dismissed. For assessment year 2019-20, the correct amount of disallowance is to be considered pursuant to rectification order passed under Section 154 which is Rs.21,22,269.

8. In the result, both the appeals of the assessee stand dismissed.

Order is pronounced in the open court on 07.07.2023.

**Sd/(Saktijit Dey)
Vice-President**

**Sd/-(Girish Agrawal)
Accountant Member**

**Dated: 07 July, 2023
*Mohan Lal***

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR: ITAT

By Order

Assistant Registrar
ITAT, Delhi Benches, New Delhi