

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.1647/Mum/2021
(Assessment Year :2019-20)**

&

**ITA No.1648/Mum/2021
(Assessment Year :2017-18)**

Excellent Projects India Private Limited Office No. 2, 1 st Floor, Ellora, Plot no. 27, Sector 11,CBD Belapur, Navi Mumbai- 400614	Vs.	Asst. Director of Income Tax, CPC Bangalore Karnataka- 560500
PAN/GIR No.AACE3421E		
(Appellant)	..	(Respondent)

Assessee by	Aniket Namdeo
Revenue by	H M Bhatt
Date of Hearing	04/07/2023
Date of Pronouncement	10/07/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the assessee against the separate impugned orders of even date, 26/07/2021, passed by

NFAC Delhi for A.Y. 2017-18 against order passed u/s 143(3); and A.Y. 2018-19 against intimation u/s. 143(1) of the Act.

2. In both the years the common grounds has been raised in addition u/s 36(1)(va) on account of delayed payment of employees contribution of PF/ESIC made beyond the due date.

3. From the perusal of the impugned order we find that in AY 2017-18, Assessee has challenged and disallowance of employees contribution of Provident Fund amounting to Rs. 18,91,740/- which admittedly was deposited after the due date prescribed under that Act, but before the due date of filing of return of income u/s 139(1) of the Act. Similarly, in AY 2019-20 on disallowance of Rs. 12,07,310/- was made u/s 36(1)(va) in the intimation u/s 143(1) of the Act. Assessee has relied upon the various judgements of the Tribunal as well as Hon'ble Bombay High Court, wherein it has been held that, if employee's contribution to PF/ESIC has been made beyond the due date another prescribed that on before the due date of filling of return of income is allowed u/s 143(3) of the Act.

4. However, now this proposition has been reversed by the judgment of Hon'ble Supreme Court in the case of **Checkmate Services (P) Ltd. Vs. CIT reported in (2022) 448 ITR 518 (SC)**, wherein it has been held as under:-

“52. When Parliament introduced section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there

was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting section 36(1)(va) and simultaneously inserting the second proviso of section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions - especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time - by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessee's liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of section 43B is to ensure that if assessee is following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

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.*

55. *In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the*

other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.

5. The Hon'ble Supreme Court has considered the judgments of various High Court and analyzed the provisions of the law contained in section 2(24)(x), 36(1)(va) and 43B, and had come to the conclusion that if the deposit has been made after the due date prescribed under respective Acts, the same is not allowable. It is a trite law that once the Hon'ble Supreme Court has decided and settled the issue, then it becomes the law of the land and it has to be interpreted and understood as if it was from the date of the enactment of the statute/provisions. Once the delayed payment of employee's contribution to PF and ESI beyond the due date of respective Acts, then the same is not allowable claim, therefore no such deduction of claim can be allowed. Even while making prima facie adjustment under Section 143(1)(a), it tantamount to incorrect claim made in the return of income. The scope of adjustment under Section 143(1)(a) reads as under:-

143. (1) *Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—*

(a) the total income or loss shall be computed after making the following adjustments, namely:—

(i) any arithmetical error in the return;

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;

(iv) disallowance of expenditure ⁶⁸[or increase in income] indicated in the audit report but not taken into account in computing the total income in the return;

(v) disallowance of deduction claimed under ⁶⁹[section 10AA or under any of the provisions of Chapter VI-A under the heading "C.—Deductions in respect of certain incomes", if] the return is furnished beyond the due date specified under sub-section (1) of section 139; or

(vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:

Provided that no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode:

Provided further that the response received from the assessee, if any, shall be considered before making any adjustment, and in a case where no response is received within thirty days of the issue of such intimation, such adjustments shall be made:

6. Thus, once there is incorrect claim apparent from the return of income, then the section provides that adjustment has to be made. The Auditor in the audited accounts only points out the date of payment and the due date prescribed under the respective Act (PF and ESI Act) and it is incumbent upon the assessee that, while computing the income he has to disallow the said payment, if it has been made beyond the due date. Thus, in view of the judgment of Hon'ble Apex Court, such claim cannot be allowed and therefore, it falls within *prima facie* adjustment u/s. 143(1). Accordingly, we confirm the order of the Id. CIT (A) holding that once the Hon'ble

Apex Court has settled the issue, then that is the law which is applicable retrospectively and therefore, any such claim of payment on account of employees' contribution to PF & ESI beyond the due dates given in the respective acts as given in 36(1)(va) is incorrect claim which needs to be disallowed / adjusted even within the scope of *prima facie* dispute u/s.143(1). Therefore, disallowance has rightly been made by CPC, Bangalore.

7. Now since the issues have been settled by the Hon'ble Supreme Court wherein has been capability that as the payment on employee's contribution PF/ESIC has been made beyond the due dates prescribed under the relevant act same has to be disallowed u/s 36(1)(va) r.w.s. 2(24)(x).

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

Order pronounced on 10th July, 2023

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

Mumbai; Dated 10/07/2023

Shubham P.Lohar

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

ITA NOs. 1647 & 1648/Mum/2021
AYs. 2019-20 & 2017-18
M/s Excellent Project India Pvt Ltd

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai