

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "S.M.C." : DELHI]

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER,
S.M.C.

आ.अ.सं./I.T.A No. 972/Del/2023
निर्धारणवर्ष /Assessment Year: 2020-21.

Reloy Shield Private Limited, 506/2, 1 st Floor, Deoli, New Delhi - 110 062.	बनाम Vs.	DCIT, Circle : 19 (1), New Delhi.
PAN No. AAGCR6006E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारितकीओरसे /Assessee by :	Shri Anshul Rana, C. A.;
राजस्वकीओरसे / Department by :	Shri Om Parkash, Sr. D. R.;

सुनवाईकीतारीख/ Date of hearing :	13/07/2023
उद्घोषणाकीतारीख/Pronouncement on :	27/07/2023

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. This appeal is filed by the assessee against the order of the
ld. Commissioner of Income Tax (Appeals) [hereinafter referred

to CIT (Appeals)]/National Faceless Appeal Centre (NFAC) dated 18.01.2023 for assessment year 2020-21.

2. The assessee has raised the following substantive ground of appeal :-

“1. The Learned CIT (A) has erred in law and on facts of the appellant's case in confirming an adjustment of Rs.26,04,546/- under section 143(1)(a)(iv) of the Act made by Learned Assessing Officer.

2. The Learned CIT (A) has erred in law and on facts of the appellant's case in confirming an addition of Rs.26,04,546/- being employees contribution under PF and ESI Act made by Learned A.O. on the erroneous ground that it is not deposited within the due date as per the respective Act and the same is disallowable U/s 36(1)(va) of the Act.

3. Both the lower authorities have erred in law and on facts and circumstances of the appellant's case in not appreciating the fact that neither such adjustment nor addition can be made to the returned income.

4. Further it is already clearly mentioned in the Finance Act 2021 that The Memorandum explaining the provision of Finance Act 2021" inserted was prospective in nature and hence the amendment should be prospectively applied in all the cases. The amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.”

3. The ld. Counsel for the assessee made the following submissions:-

“1. Intimation was issued by CPC vide DIN CPC/2021/A6/195449699 dated 24.12.2021 u/s 143(1)(a) of the Act on the basis of tax audit report filed under section 44AB of the Act in the respect of PF not having been paid

before the due date under the respective Act amounting to Rs.26,04,546/-.

2. The Learned Assessing Officer has erred in law and on facts of our case in making an addition of Rs.26,04,546/- being employees contribution under PF and ESI on the erroneous ground that it is not deposited within the due date as per the respective Act and the same is disallowable u/s 36(1)(va) of the Act.

3. We place our reliance on:-

a) CIT Vs. AIMIL Ltd. reported in 321 ITR 508 (Del), where the Hon'ble Delhi High Court has held that the assessee can get the benefit of deduction if the payment is made before the due date of filing of return.

b) DCIT, New Delhi Vs. M/s. Pro Interactive Services Pvt. Ltd. (ITAT Delhi) reported in ITA No. 5027/Del/2016, where the Bench in view of the fact of the case and the settled judicial precedent they found no reason to interfere with the finding of Ld. CIT (A) in this regard and hence they dismissed the ground raised by the department. In the above case CIT (A) has already followed the judgement laid down by the Hon'ble Apex Court in the case of CIT Vs. Vinay Cement Ltd. reported in 213 ITR 268 (Supreme Court) and judgement laid down by the Hon'ble Delhi High Court in the case of CIT Vs. AMIL Ltd. while giving relief to the assessee.

c) Star Facilities Management Limited Vs. ITO (ITAT Delhi) reported in ITA No. 1755/Del/2020 where the Bench held that no disallowance u/s 36(1)(va) r.w.s 2(24)(x) can be made in case payment has been deposited before the due date of filing of income tax return.

4. Moreover, in order to provide certainty and rationalize the above provision, following amendment has been made in the Act through Finance Act 2021:

a. Explanation to section 36(1)(va) has been added to clarify that the provision of section 43B does not apply and

deemed to never have been applied for the purposes of determining the due date - under this clause; and

b. Explanation to section 43B has been inserted to clarify that provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

c. However, the above insertion of explanation was prospective and not retrospective. Hence the above explanation will be applicable only from Assessment Year 2021-22 and onwards.

5. We have deposited all the dues to the concerned body before filing of the income tax return. The details of which are produced as Annexure-I.

6. On merit that both on the facts and in law, no part of the said amount is disallowable under section 36(1)(va) r.w.s 43B of the Act as a same has been paid before due date of filing return of income.

7. We carve leave to add, amend, altered it, delete, modify or change all or any of the grounds of appeal at the time of or before hearing of the appeal.”

4. The Ld. DR relied on the order of the Ld. CIT (Appeals).

5. Heard rival submissions perused the orders of the authorities below. The issue of whether the employees' contribution to PF/ESI is allowable expenditure under section 36(1)(va) of the Act if it is paid beyond the due date specified under PF/ESI Act came up before the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. Vs. CIT [143 taxmann.com 178] and the Hon'ble Supreme Court decided the issue against the assessee, holding as under:-

“51. The analysis of the various judgments cited on behalf of the assessee i.e., *Commissioner of Income-Tax v. Aimil Ltd.*²⁴; *Commissioner of Income-Tax and another v. Sabari Enterprises*²⁵; *Commissioner of Income Tax v. Pamwi Tissues Ltd.*²⁶; *Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd.*²⁷ and *Nipso Polyfabriks* (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in *Alom Extrusions*. As noticed previously, *Alom Extrusions* did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.

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.

24 *Commissioner of Income-Tax Vs. Aimil Ltd.*, [2010] 321 ITR 508 (Delhi High Court).

25 *Commissioner of Income-Tax and another Vs. Sabari Enterprises*, [2008] 298 ITR 141 (Karnataka High Court).

26 *Commissioner of Income Tax Vs. Pamwi Tissues Ltd.*, [2009] 313 ITR 137 (Bombay High Court).

27 *Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd.*, [2013] 35 taxmann.com 616 (Rajasthan High Court).

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 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 assessee is 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.”

6. The decision of the Hon'ble Supreme Court applies to the facts of the case. Following the decision of the Hon'ble Supreme Court in Checkmate Services P. Ltd. Vs. CIT (supra) the co-ordinate bench of Delhi Tribunal in the case of Savleen Kaur Vs. ITO in ITA. No. 2249/Del/2022 dated 9.01.2023 held that Employee's contribution to PF remitted beyond the due dates specified under that Act are not allowable deduction while processing the return under section 143(1) of the Act. It is also observed that various benches of the Tribunal as referred to in the Ld. CIT (Appeals)'s order have held that the amendments to section 43B and 36(1)(va) by way of Explanations are retrospective. Thus the contention of the Ld. Counsel that the amendments to section 43B and 36(1)(va) are prospective is rejected. Respectfully following the above decisions, we hold

that the employee's contribution to PF/ESI remitted beyond the due date specified under PF/ESI Act are not allowable as deduction under section 36(1)(va) of the Act. The order of the Id. CIT (Appeals) is a well reasoned order and no infirmity is seen. Therefore, we see no merit in the grounds of appeal of the assessee and the same are rejected.

7. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on : 27/07/2023.

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 27/07/2023.

MEHTA

Copy forwarded to :-

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

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	26.07.2023
Date on which the typed draft is placed before the dictating member	26.07.2023

Date on which the typed draft is placed before the other member	27.07.2023
Date on which the approved draft comes to the Sr. PS/ PS	27.07.2023
Date on which the fair order is placed before the dictating member for pronouncement	27.07.2023
Date on which the fair order comes back to the Sr. PS/ PS	27.07.2023
Date on which the final order is uploaded on the website	27.07.2023
Date on which the file goes to the Bench Clerk	27.07.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	