**IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'A', KOLKATA**
[Before Dr. Manish Borad, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

**I.T.A. Nos. 46 & 47/Kol/2023**
**Assessment Year : 2018-19 2020-21**

| | | |
|---|---|---|
| Agarpara Jute Mills Ltd.<br><br>28, B.T. Road, Kamarhati, Kolkata-700058.<br><br>PAN: AACCA 4864 H | Vs. | DCIT, Central Circle-1(1), Kolkata |
| Appellant | | Respondent |

| | |
|---|---|
| Date of Hearing | 17.05.2023 |
| Date of Pronouncement | 24.07.2023 |
| For the Assessee | Shri Miraj D. Shah, AR |
| For the Revenue | Shri Vijay Kumar, Addl. CIT |

**ORDER**

**PER SHRI SONJOY SARMA, JM:**

The captioned appeals are against the order passed by the ld. CIT(A)-20, Kolkata vide separate order dated 14.12.2023 for A.Y. 2018-19 and 2020-21. The assessee has raised following grounds of appeal for A.Y. 2018-19 & 2020-21:

## A.Y. 2018-19

*"i. For that on the facts and circumstances of the case, ld. CIT(A) was grossly erred in confirming the addition of Rs. 1,21,39,700/- treating the payments made as delayed deposit of employees contribution to P.F. and E.S.I.*

*ii. For that on the facts and circumstances of the case action of ld. CIT(A) in confirming the addition of Rs. 1,21,39,700/- u/s 36(1)(va) read with section 2(24)(x) is highly arbitrary, unjustified, unwarranted to the facts of the case and untenable in law.*

*iii. For that on the facts and circumstances of the case, action of ld. CIT(A) in confirming the addition of Rs. 1,21,39,700/- be reversed and appellant be allowed the relief.*

*iv. We may add, alter, amend or withdraw any grounds of appeal on or before the date of hearing."*

**A.Y. 2020-21**

*"i. For that on the facts and circumstances of the case, ld. CIT(A) was grossly erred in confirming the addition of Rs. 1,22,48,863/- treating the payments made as delayed deposit of employees contribution to P.F. and E.S.I.*

*ii. For that on the facts and circumstances of the case action of ld. CIT(A) in confirming the addition of Rs. 1,22,48,863/- u/s 36(1)(va) read with section 2(24)(x) is highly arbitrary, unjustified, unwarranted to the facts of the case and untenable in law.*

*iii. For that on the facts and circumstances of the case, action of ld. CIT(A) in confirming the addition of Rs. 1,22,48,863/- be reversed and appellant be allowed the relief.*

*iv. We may add, alter, amend or withdraw any grounds of appeal on or before the date of hearing."*

2. Since facts and issues in both the appeals are identical, hence these have been heard together and have disposed of by this common order.

3. First we take up the issue involved in ITA No. 46/Kol/2023 for A.Y. 2018-19.

4. At the outset, we note that the ground of appeal relate to disallowance made u/s. 36(1)(va) of the Act in respect of delay in deposit of Employees' Contribution of Provident Fund and

Employees State Insurance (PF & ESI) totaling to Rs.1,21,39,7/-. The issue relating to ground taken by the assessee have come to rest by the recent verdict of the *Hon'ble Supreme Court in Chekmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC) dated 12.10.2022* 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."* Relevant extract of the said judgment is reproduced as under:

> *"• The deduction made by employers to approved provident fund schemes, is the subject matter of Section 36(1) (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of "income" – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).*
>
> *• The significance of this is that Parliament treated contributions under Section 36(1)(va) from those under Section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section*

*36(1)(va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.*

*• The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.*

*• There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed.*

*• When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 36(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 assessees' 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 assessees are 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.*

*• 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.*

*• The non-obstante clause in section 43B would not in any manner dilute or override the employer's obligation under section 36(1)(va) 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."*

5. We, respectfully following the decision of Hon'ble Supreme Court rendered in *Chekmate Services Pvt. Ltd.* (*supra*) which squarely covers against the assessee therefore the grounds taken by the assessee, in ITA No. 46/Kol/2023 are hereby dismissed. Similarly, in ITA No. 47/Kol/2023 filed by the assessee is on the identical facts and issues involved. Therefore, we following the same grounds taken by the assessee in ITA No. 47/Kol/2023 are also hereby dismissed.

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

Order pronounced in the open court on 24.07.2023.

Sd/- Sd/-

(Manish Borad)
Accountant Member

(Sonjoy Sarma)
Judicial Member

Dated: 24.07.2023
*Biswajit, Sr. PS*

Copy of the order forwarded to:

1. Appellant- Agarpara Jute Mills Ltd.
2. Respondent – DCIT, Central Circle-1(1), Kolkata.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata