

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI**

**BEFORE PRASHANT MAHARISHI, AM &
SHRI N. K. CHOUDHRY, JM**

I.T.A. No.911/Mum/2022
(Assessment Year 2019-20)
and

I.T.A. No.910/Mum/2022
(Assessment Year 2018-19)

**Anchor Offshore Services
Ltd.** 771 Hico House,
Ground Floor, Pt.
Satavalkar Marg Mahim
Mumbai- 400016

**बनाम/
Vs**

**The DY. Commissioner Of
Income Tax Circle- 6(1)(1)
Mumbai. Room No. 563,
5th Floor, Aayakar Bhavan,
Mumbai- 400020**

PAN No **AAACA3529R**

(अपीलार्थी/**Appellant**) : (प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by** : Sh. Rahul Hakani, Ld. CA
प्रत्यर्थीकीओरसे/**Respondent by** : Sh. Sh. Ashol Kr. Ambastha,
Ld. DR

Date of Hearing : 12.07.2023
Date of Pronouncement : 27.07.2023

आदेश / O R D E R

Per N K Choudhry, Judicial Member:

These appeals have been preferred by the Assessee/Appellant herein against the orders dated 16-03-2022 and 15-03-2022, passed by the Ld. Commissioner of income Tax (Appeal)/NFAC Delhi, (in short

'Ld. Commissioner') under section 250 of the Income Tax Act 1961 (in short the 'Act') for the A.Ys. 2018-19 & 2019-10.

2. This are recalled matter, vide order dated 23-05-2023 passed in Miscellaneous Application (MA) Nos. 136 & 137/Mum/2023 by the Hon'ble Co-ordinate Bench of the Tribunal at Mumbai.

3. Admittedly in the cases under consideration, the Employees' contributions for Provident Fund & ESIC, have been deposited in the respective funds, after the last date, as prescribed in the respective statutes, which resulted into making the disallowances/additions of Rs. 20,05,859/- and 20,93,854/- u/s 36(1)(va) of the Act respectively for the AYs 2018-19 & 2019-20 by the AO, which stands affirmed by the Id. Commissioner.

4. The Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT (2022) 448 ITR 518 (SC) has laid down the dictum that Employees' contributions on account of PF/ESIC deducted but deposited in respective funds, after the due date as prescribed under the relevant statutes, are not allowable as deductions under section 36(1)(va) of the Act, by concluding 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 outgoings 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 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.

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. Hence, respectfully following the dictum laid down by the Hon'ble Apex Court, we do not have any hesitation to affirm the additions under consideration made by the AO and confirmed by the Ld. Commissioner.

6. In the result, appeals filed by the Assessee stands dismissed.

Orders pronounced in the open court on 27.07.2023.

Sd/-
(PRASHANT MAHARISHI)
Accountant Member

Sd/-
(N. K. CHOUDHRY)
Judicial Member

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai