IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "SMC", MUMBAI

SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.1742/M/2021
Assessment Year: 2018-19

M/s. Starline Workshop, 1 C/o Sterling Motor Compound, Old Agra Road, Gadkari Chowk, Nashik-422001 **PAN: ACBFS2289L**	Vs.	Income Tax Officer, Ward 1(1), Kendriya Rajaswa Bhavan, Gadkari Chowk, Old Agra Road, Mumbai- 422002
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Ryan Saldanha, A.R.
Revenue by : Shri B. Laxmi Kanth, D.R.

Date of Hearing : 13.07. 2023
Date of Pronouncement : 25.07. 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. Starline Workshop (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 01.09.2021 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)] qua the assessment year 2018-19 on the grounds inter-alia that :-

> *"1. The Id CIT(A) erred in not appreciating the fact that the intimation issued by the Id AO CPC Bangalore u/s 143(1) of the Income Tax Act, 1961 is erroneous / without jurisdiction since additions on issues where two views are possible cannot be made.*

2. The Id CIT(A) erred in confirming addition of Rs.4,26,005/- u/s 36(1)(va) of the Act without appreciating the fact that the employees contribution to PF and ESIC was deposited before the due date of filing of return.

3. The appellant prays that the adjustment made in the intimation order u/s 143(1) of the Act may be deleted. 4. The appellant craves your honour's leave to add, alter or amend any ground of appeal at the time of hearing or before."

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : assessee's return of income for the year under consideration declaring total income of Rs.8,480/- was processed under section 143(1) of the Income Tax Act, 1961 (for short 'the Act') making adjustment of Rs.4,26,005/- to the return of income on account of income under section 36(1)(va) read with section 2(24)(x) of the Act.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the appeal. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

4. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

5. Undisputedly the assessee made late payment of employees' contribution on account of Provident Fund (PF), Employee's State Insurance Corporation (ESIC) contribution after due date prescribed under the Act under section 36(1)(va) read with section

2(24)(x) of the Act but certainly before the due date of filing the return.

6. The Ld. A.R. for the assessee company challenging the impugned order passed by the Ld. CIT(A) contended that disallowing employees' contribution to PF & ESIC while processing the return under section 143(1) is against the provision of the Act as it would not fall within the ambit of prima-facie adjustment, hence liable to be allowed and that when the issue in question is a debatable one view taken in favour of the assessee company is to prevail and relied upon plethora of orders passed by the Hon'ble High Court of Gujarat, Hon'ble High Court of Madras and co-ordinate Bench of the Tribunal cited as (2023) 148 taxmann.com 153 (Mumbai-Trib.) in case of P.R. Packaging Service vs. ACIT, Income Tax Officer vs. Gujarat Power Corpn. Ltd. (2002) 122 Taxman 367 (Gujarat) and CIT vs. Nameel Leathers & Uppers (2005) 273 ITR 350 (Madras).

7. However, on the other hand, the Ld. D.R. for the Revenue by relying upon the order passed by the Ld. CIT(A) contended that when the employees' contribution of PF & ESIC has not been deposited by the employer before the due date prescribed under the Act the assessee company is not entitled for any deduction and relied upon the decision rendered by the Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. vs. CIT order dated 12.10.2022 which supported the order passed by the Ld. CIT(A).

8. We have perused the order passed by the Ld. CIT(A) who has disallowed the deduction claimed by the assessee qua the Employees' contribution on account of PF & ESIC deposited after

the due date prescribed under the relevant Act by relying upon the provisions contained under section 36(1)(va) and 43B of the Act having been amended vide Finance Act, 2021 wherein explanation 2 and explanation 5 have been inserted.

9. Now the issue raised before the Bench "as to whether payment by the employers qua PF contribution of employees after due date prescribed under the relevant Act is an allowable deduction under section 36(1)(va) read with section 43B?" has been decided against the assessee by the Hon'ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT (supra), the operative findings of the Hon'ble Supreme Court are as under:

> *"51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd.; Commissioner of Income-Tax and another v. Sabari Enterprises; Commissioner of Income Tax v. Pamwi Tissues Ltd.; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. 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 Extrutions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.*
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> *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 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.

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."

10. We are of the considered view that when the issue in question has been settled by the Hon'ble Supreme Court of India in case of Checkmate Services Pvt. Ltd. (supra) once for all the case law relied upon by the assessee is not applicable to the facts and circumstances of the case. Moreover, when the assessee has apparently made incorrect claim in its return of income which is against the provisions contained under PF & ESIC as to depositing the employees' contribution on account of PF & ESIC within a particular time frame, any deposit thereafter would not be entitled for deductions as has been held by the Hon'ble Supreme Court. Moreover, in view of the law laid down by the Hon'ble Supreme

Court in case of Checkmate Services Pvt. Ltd. (supra), which is law of the land from the date of inception of the Act, the issue raised by the Ld. A.R. for the assessee that it is a debatable issue is misconceived contention as the debate on the issue has been set at rest. So since the assessee has failed to comply with the condition precedent for depositing the employees' contribution on account of PF & ESIC before the due date prescribed under the Act the same has been rightly disallowed by the Ld. CIT(A). So in these circumstances, we find no illegality or perversity in the impugned orders passed by the Ld. CIT(A), hence hereby confirmed.

11. Resultantly the appeal filed by the assessee is hereby dismissed.

Order pronounced in the open court on 25.07.2023.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 25.07.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.