

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER**  
**AND**  
**SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

**ITA No.24/Ind/2023**  
**(Assessment Years:2018-19 )**

Vishwaranjan Prasad Singh Prop World Wide Security ORG, H 203, Baghmugalia Extension Bhopal	Vs.	DCIT-CPC Bangalore
(Appellant / Assessee)		(Revenue)
<b>PAN: ACPPS 7520Q</b>		
Assessee by	Shri S.S. Deshpandey, AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	31.08.2023	
Date of Pronouncement	31.08.2023	

**ORDER**

**Per Vijay Pal Rao, JM:**

This appeal by the assessee is directed against the order dated 03.11.2022 of Commissioner of Income Tax(Appeal), National Faceless Appeal Centre, Delhi for Assessment Year 2020-21. The assessee has raised following grounds of appeal:

*“1.On the facts and in the circumstances of the case of the assessee the Ld. Commissioner of Income Tax Appeals NFAC, Delhi was not justified without adjudicating on the grounds of appeal raised contending that the disallowance could not have been made under section 143 (1).*

*2.On the facts and in the circumstances of the case of the assessee the Ld. Commissioner of Income Tax Appeals NFAC, Delhi was not justified in confirming addition of Rs29,76,110.00, received by the*

*assessee towards contribution to any provident fund or any fund set up for the welfare of employees and had paid all such sums before the time limit specified under section 139 of the Income Tax Act, 1961.*

*3. On the facts and in the circumstances of the case of the assessee the Ld. Commissioner of Income Tax Appeals NFAC, Delhi was not justified in confirming addition of Rs 29,76,110.00 under section 143 (1) of the act ignoring the fact that the disallowance is highly disputed and cannot be disallowed under section 143 (1).*

*4. The assessee craves leave to add, alter amend or withdraw any ground of appeal on or before the time of hearing..”*

2. The solitary issue arises from this appeal of the assessee is regarding the disallowance made on account of belated payment of Employees Contribution towards Provident Fund.

3. We have heard the Ld. AR as well as Ld. DR and carefully perused the orders of the authorities below. The Ld. CIT(A) has confirmed the disallowance by following the judgment of Hon'ble Supreme Court in case of *Checkmate Services (P.) Ltd. v. CIT 448 ITR 518(SC)* wherein, this issue has been decided in favour of the revenue in Para 51 to 55 as under:

*“51. The analysis of the various judgments cited on behalf of the assessee i.e., CIT v. Aimil Ltd. [2010] 188 Taxman 265/321 ITR 508 (Delhi); CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.); CIT v. Pamwi Tissues Ltd. [2009] 313 ITR 137 (Bom.); CIT v. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. [2013] 35 taxmann.com 616/217 Taxman 64 (Mag.)/[2014] 366 ITR 163 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. 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 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 assesseees 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.”*

Accordingly, we do not find any error or illegality in the impugned order of the CIT(A), qua this issue.

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

Order is pronounced in Open Court on conclusion of hearing on 31/ 08/2023.

**Sd/-**

**(B.M. BIYANI)**  
Accountant Member

**Indore, 31.08.2023**

**Patel/Sr. PS**

Copies to: (1) *The appellant*  
(2) *The respondent*  
(3) *CIT*  
(4) *CIT(A)*  
(5) *Departmental Representative*  
(6) *Guard File*

**Sd/-**

**(VIJAY PAL RAO)**  
Judicial Member

*By order*

*Sr. Private Secretary*  
*Income Tax Appellate Tribunal*  
*Indore Bench, Indore*