

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

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

I.T.A. No. 1935/Mum/2021
Assessment Year: 2017-18)

**M/s Intellect Bizware
Services Pvt. Ltd.,**
Technocity, 6th Floor, Plot No.
X-5/3, Opp. MBP Mahape Road,
MIDC, Navi Mumbai-400710.

Vs.

**CIT (Appeals) / National
Faceless Appeal Centre,
Delhi.**

PAN No. **AACCI1519B**

Appellant)

:

Respondent)

**Appellant/Assessee by
Respondent/Department by**

:

None
Sh. H.M. Bhatt, Sr. DR

**Date of Hearing
Date of Pronouncement**

:

10.08.2023
29.08.2023

:

ORDER

Per N. K. Choudhry, JM:

The Assessee/Appellant herein has preferred this appeal against the order dated 25.08.2021 impugned herein passed by Ld. Commissioner of Income Tax (Appeals)/ National Faceless Appeal Centre, Delhi {in short 'Ld. Commissioner'} under section 250 of the Income Tax Act 1961 (in short 'the Act').

2. In spite of sending notice directly as well as through Revenue Department which has been claimed as served upon the Assessee at its postal address as well as on email of the Assessee, the Assessee neither appeared nor filed any adjournment application, hence, we are constrained to decide this appeal as ex-parte.

3. In the instant case, the Assessing Officer (AO) vide assessment order dated 23.05.2020 under section 143(1) of the Act made the disallowance of Rs. 15,05,508/- with regard to the late deposit of Employee's Contribution qua EPF & ESI.

4. The Assessee being aggrieved challenged the said addition before the Ld. Commissioner, who while taking into consideration the amendment brought in section 36 & 43 of the Act in 2021 by Finance Act, 2021, affirmed the said disallowance. The Assessee being aggrieved is in appeal before us.

5. Admittedly in the case under consideration, the Employees' contributions for Provident Fund and ESI, have been deposited after the last date, as prescribed in the respective statutes, which resulted into making the disallowance/addition of Rs. 15,05,508/- u/s 36(1)(va) read with section 2(24)(x) of the Act.

6. 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 payments towards Employees' contribution on account of PF/ESIC made after the due date as prescribed under the relevant statutes, is not allowable as deduction 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 assesseees 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 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 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.*

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

8. In the result, appeal filed by the Assessee stands dismissed.

Order pronounced in the open court on 29-08-2023.

Sd/-

(PRASHANT MAHARISHI)
Accountant Member

Dated: 29/08/2023

SK, Sr.PS.

Copy of the Order forwarded to :

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

Sd/-

(N. K. CHOUDHRY)
Judicial Member

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai