

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.98/Ind/2023**  
**(Assessment Years:2018-19 )**

Shri Kamlesh Sen 55, Saluja Complex M.P. Nagar-1 Bhopal	Vs.	NFAC Delhi
(Appellant / Assessee)		(Revenue)
<b>PAN: BEJPS 5672C</b>		
Assessee by	Shri Ashish Goyal & Shri N.D. Patwa, ARs	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	04.09.2023	
Date of Pronouncement	05.09.2023	

**O R D E R**

**Per Vijay Pal Rao, JM:**

This appeal by the assessee is directed against the order dated 21.02.2023 of Commissioner of Income Tax(Appeal), National Faceless Appeal Centre, Delhi for Assessment Year 2018-19. Present appeal was filed on 24.03.2023 against the order dated 21.02.2023 therefore, this appeal is filed within the period of limitation. The assessee has raised following grounds of appeal:

*“1. That on the Facts and Circumstances, Appellant Authority has not considered the Judgements & Verdicts passed by the various Tribunals & High Courts of the country, that the said appeal is filed both on the basis of Question of Law & Facts as various High Courts of the country has passed the verdict in favour of assessee by overruling the judgements of lower Appellant Authorities and thus*

considered the same. Therefore, it is prayed to the Appellant Authority to kindly consider the same and look into the matter.

2. That on the Facts and Circumstances, CIT (Appeals) erred in passing the order u/s 250 of the Income Tax Act, 1961 as there is no loss to the revenue in any sense, as actual payment was made on or before due date of filing Income Tax Return u/s 139(1) of the Income Tax Act, 1961. Therefore, considering the merits of the case and judgements of various Judicial Authorities, the same should be allowed.

3. That on the Facts and Circumstances, Learned A.O. has made addition to the total income of the assessee by passing the intimation order u/s 143(1) of the Income Tax Act, 1961 which is confirmed by the Honourable CIT (Appeals) vide order passed u/s 250 of the Income Tax Act, 1961 dated 21/02/2023. Ld. CIT(Appeals) was of the view that the said matter is not covered under the order appealed against, but aggrieved assessee has duly disputed the said addition vide Ground No. 02 in the duly filed Form No. 35 u/s 246A of the Income Tax Act, 1961 but the Ld. CIT (Appeals) has not considered the same and thus not commented on the said matter. A.O. has disallowed the expenses by invoking the provisions of Section 36(1)(va), but the same provisions as contained in that section i.e. 36(1)(va) was amended by the Finance Act, 2021 by inserting explanation-2 which reads thus: "Explanation 2. -For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply."

2. The solitary issue arises from this appeal of the assessee is regarding the disallowance made by AO in assessment order passed u/s 143(3) on account of belated payment of Employees Contribution towards EPF and ESIC.

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 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 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 pronounced in the open court on 05.09.2023

**Sd/-**  
**(B.M. BIYANI)**  
Accountant Member

**Sd/-**  
**(VIJAY PAL RAO)**  
Judicial Member

**Indore, 05 .09.2023**

**Patel/Sr. PS**

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

*By order*

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