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.12 & 13/Ind/2022
(Assessment Years:2016-17 & 2017-18)

On Door Concepts Pvt. Ltd. Survey No.352/9, Phoniex Corporate Park Hosshangabad Road Bhopal	Vs.	DCIT/ACIT 3(1) Bhopal
(Appellant / Assessee)		(Revenue)
PAN: AACCO0825C		

Assessee by	Ms. Nisha Lahoti, AR
Revenue by	None
Date of Hearing	13.09.2023
Date of Pronouncement	14.09.2023

O R D E R

Per Vijay Pal Rao, JM:

These two appeals by the Assesse are directed against two separate orders dated 26.11.2021 & 27.09.2021 of CIT(A) for A.Ys.2016-17 & 2017-18 respectively. The assesse has raised common grounds in these appeals and grounds raised for A.Y.2016-17 are reproduced as under:

> *"1.That the learned lower authorities were not justified in not allowing proper and meaningful opportunity of being heard. Also the Learned CIT (Appeals), National Faceless E-Appeal Centre, was also not justified in not allowing any opportunity of personal hearing through digital media before confirming the disallowance.*
>
> *2.That the various findings of the learned lower authorities are opposed to the facts hence the same may kindly be quashed.*

3.That on the facts and circumstances of the case the learned lower authorities erred and were not justified in making disallowance of Rs7,18,418/- on account of Employees Provident Fund and Rs.2,66,692/- on account of Employees State Insurance.

4.That the above grounds are independent to each other.

5.That on the facts and in the circumstances of the case the order of the learned lower authorities are vitiated on several grounds hence the same may kindly be quashed."

2. The solitary common issue arises in these appeals is regarding the disallowance made by the AO while framing assessment u/s 143(3) on account of delayed payment towards Employees Contribution to PF & ESI.

3. We have heard the Ld. AR and carefully perused the orders of the authorities below. At the outset we note that this issue is now covered by the judgment of Hon'ble Supreme Court in case of *Checkmate Services (P.) Ltd. v. CIT 448 ITR 518(SC)* wherein, it 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 Extrutions 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 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."

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

4. In the result, both appeals filed by the assesse in ITANo.12 & 13/Ind/2022 are dismissed.

Order pronounced in the open court on 14.09.2023

Sd/- **Sd/-**

(B.M. BIYANI) **(VIJAY PAL RAO)**
Accountant Member Judicial Member

Indore, 14 .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