

IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2075/Mum./2021

(Assessment Year : 2018-19)

Graviss Hospitality Ltd.

135-B, Intercontinental Marine Drive

Netaji Subhash Marg, marine Drive

Mumbai 400 020 PAN – AAAC0048E

..... Appellant

v/s

Dy. Commissioner of Income Tax

Centralized Processing Centre

Bengaluru 560 500

..... Respondent

Assessee by : None

Revenue by : Shri Ram Krishna Kedia

Date of Hearing – 05/10/2023

Date of Order – 06/10/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 24/09/2021, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2018-19.

2. The present appeal has been listed for hearing before us pursuant to the order dated 24/08/2023, passed by the Co-ordinate Bench of the Tribunal in ACIT v/s M/s. Graviss Hospitality Ltd., M.A. no.199/Mum./2023 (in ITA no.2075/Mum./2021, for the assessment year 2018-19), whereby, the earlier order dated 28/07/2022, passed under section 254(1) of the Act was recalled and the appeal was directed to be re-fixed for hearing.

3. When this appeal was called for hearing neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed despite service of notice. Therefore, in view of the above, we proceed to dispose off the present appeal ex-parte, qua the assessee after hearing the learned Departmental Representative ("*learned DR*") and on the basis of material available on record.

4. In its appeal, the assessee has raised the following grounds:-

"1. a) The Commissioner of Income Tax(Appeals), National Faceless Appeal Centre, Delhi [CIT(A)] erred in confirming disallowance of Rs.19 57.906/- u/s 36(1)(va) of the I.T Act out of Employees Contribution to PF & ESIC, made by the Deputy Commissioner of Income Tax(CPC), Banglore(AO) holding it as disallowance of expenditure indicated in the tax audit report but not taken into account in computing the total income in the return of income.

The Appellant submits that the contribution to PF & ESIC is not shown as disallowance in Tax Audit Report and is merely a reporting clause in tax audit with dates of deposit in the respective funds and hence same is correctly not been disallowed while computing total income in the return of income; thus the AO shall be directed to delete the addition.

(b) The CIT(A) erred in confirming disallowance of Rs. 19,57,906/- made by the AO out of employees contribution to PF & ESIC to the extent not credited to the respective funds on or before the due date specified in the respective Acts.

The Appellant submits that the payment of employees contribution to PF & ESIC of Rs.19,57,906/- is made during the year under consideration itself and/or before the due date of filing return of income and same shall be allowed as deduction u/s 43B r.w.s. 36(1)(va) of the Act.

(c) The CIT(A) erred in not following the binding decision of Hon'ble Jurisdictional Bombay High Court in the case of CIT Vs. M/s Hindustan Organics Chemicals Ltd [366 ITR 1] and CIT Vs. Ghatge Patil Transports Ltd [368 ITR 749] while deciding the issue in appeal."

5. The only grievance of the assessee is against the disallowance on account of delayed payment of employees' contribution to Provident Fund (P.F) and Employees State Insurance Corporation (E.S.I.C) under section 36(1)(va) of the Act.

6. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee filed its return of income on 31/10/2018,

declaring a total loss of Rs.75,62,138. The return filed by the assessee was processed vide intimation dated 16/11/2019, issued under section 143(1) of the Act, determining the total loss of Rs.49,99,145, inter-alia, after making disallowance of Rs.19,57,906, on account of delayed payment of employees' contribution to P.F. and E.S.I.C. under section 36(1)(va) of the Act. Vide impugned order, the learned CIT(A) dismissed the ground raised by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

7. The learned DR submitted that the issue arising in the present appeal is squarely covered in favour of the Revenue by the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. v/s CIT, [2022] 448 ITR 518 (SC).

8. We have considered the submissions of the learned DR and perused the material available on record. We find that the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra) held that the payment towards employees' contribution to P.F. and E.S.I.C., after the due date prescribed under the relevant statute is not allowable as a deduction under section 36(1)(va) of the Act. The relevant findings of the Hon'ble Supreme Court, in the aforesaid decision, are as under:-

"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."

9. In the present case, from the record, it is evident that the employees' contributions to P.F. and E.S.I.C. were deposited after the due date prescribed under the relevant statute. Thus, respectfully following the aforesaid decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra), the grounds raised by the assessee are dismissed.

10. In the result, the appeal by the assessee is dismissed.

Order pronounced in the open Court on 06/10/2023

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 06/10/2023

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai