

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

**BEFORE SHRI N. K. CHOUDHRY, JM &
MS. PADMAVATHY S, AM**

I.T.A. No. 1748/Mum/2021
Assessment Year: 2018-19)

And

I.T.A. No. 1749/Mum/2021
Assessment Year: 2019-20)

**Ashish Dyechem & Textile
Processors Pvt. Ltd.**
420, Laxmi Plaza, Laxmi
Industrial Estate, Link Road,
Andheri (W), Mumbai-400053.

Vs.

DCIT, 4(1)(1),
Aayakar Bhavan, New Marine
Lines, Churchgate,
Mumbai-400020.

PAN No. **AAACA3928N**

Appellant) : Respondent)

Appellant/Assessee by : None
Respondent/Department by : Shri Raghuv eer Madanappa, Ld.
DR

Date of Hearing : 27.09.2023
Date of Pronouncement : 27.09.2023

ORDER

Per Bench:

The Assessee/Appellant herein has preferred these appeals against the orders even dated 16.09.2021 impugned herein passed by Ld. Commissioner of Income Tax (Appeals)-9, Mumbai / National Faceless Appeal Centre- Delhi {in short 'Ld. Commissioner'} under section 250 of the Income Tax Act 1961 (in short 'the Act').

2. These are recalled matters. As the issues involved in these appeals are similar therefore the same are disposed off by this Composite order and I.T.A. No. 1748/Mum/2021 as a lead case.

3. In **I.T.A. No. 1748/Mum/2021**, the Assessing Officer (AO) vide Intimation/Order dated 05.12.2019 under section 143(1) of the Act, made the disallowance/addition of Rs. 7,72,467/- in total { Rs. 625,702/- for PF and 1,46,765/- for ESI) qua late deposit of employee's contribution towards EPF & ESI.

4. The Assessee being aggrieved challenged the said disallowance/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. The Assessee's first contention as appears in grounds of appeal is that the debatable adjustment made by way of addition is beyond the scope of section 143(1)(a) of the Act meaning thereby addition/adjustment could not have been made by the CPC by taking refuge of the provisions of section 143(1)(a) of the Act. We observe that Pune Bench of Tribunal in the case of Cemetile Industries vs. ITO in ITA No.693/PUN/2022 and others decided on 23.11.2022, also dealt with the identical issue and upheld the adjustment/addition/disallowance made u/s 143(1) of the Act qua late deposit of employees' share to the relevant funds beyond the date prescribed under the respective Acts, by observing as under:

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.....It was argued that no prima facie adjustment can be made in the Intimation issued u/s 143(1) of the Act unless a case is covered within the specific four corners of the provision. It was stressed that the action of the AO in making the extant disallowance does not fall in any of the clauses of section 143(1).

7. We fully agree with the proposition bolstered by the Id. AR that adjustment to the total income or loss can be made only in the terms indicated specifically u/s.143(1) of the Act. Now, we proceed to examine if the case falls under any of the clauses. The rival parties are consensus ad idem that the case can be considered as falling either under clause (ii) or (iv) of section 143(1). For ready reference, we are extracting the relevant provision as under: '143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:— (a) the total income or loss shall be computed after making the following adjustments, namely:— (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return; (iv) disallowance of expenditure or increase in income indicated in the audit report but not taken into account in computing the total income in the return'

8. Sub-section (1) of section 143 states that a return shall be processed to compute total income by making six types of 'adjustments' as set out in sub-clauses (i) to (vi). As noted supra, we are concerned only with the examination of two sub-clauses, viz., (ii) and (iv). Sub-clause (ii) talks of 'an incorrect claim, if such incorrect claim is apparent from any information in the return". The expression "an incorrect claim apparent from any information in the return" has not been generally used in the provision. Rather, it has been specifically defined in Explanation (a) to section 143(1) as under: 'Explanation.— For the purposes of this sub-section,— (a) "an incorrect claim apparent from any information in the return" shall mean a claim, on the basis of an entry, in the return,— (i) of an item, which is inconsistent with another entry of the same or some other item in such return; (ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or (iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction;'

9. Clause (i) of Explanation (a) refers to a situation in which there is a claim of income or expenditure at two places in the return of income and there is inconsistency in them. For example, if deduction is claimed under a specific section for a sum of Rs.100/- in the Profit and loss account accompanying the return, but in the computation of income, the amount has been taken as Rs.110/-, leading to inconsistency, requiring an adjustment. Clause (ii) of Explanation (a) covers a situation in which claim is made, say, for a deduction u/s.80IA for which audit report is required to be furnished, but such report has not been furnished along with the return. Clause (iii) contemplates a situation in which deduction exceeds specified statutory limit. For example, section 24(a) provides for a standard deduction for a sum equal to 30% of the ITA No.1242/Del/2022 National Housing Bank vs. ADIT 9 annual value, but the assessee has claimed deduction at 40%. These situations warrant an adjustment. It is obvious that none of the three clauses of Explanation (a), defining an incorrect claim apparent from any information in the return, gets magnetized to the facts of the present case.

10. Now we turn to clause (iv) of section 143(1)(a) which provides for 'disallowance of expenditure or increase in income indicated in the audit report but not taken into account in computing the total income in the return'. The words "or increase in income" in the above provision were inserted by the Finance Act, 2021 w.e.f. 01-04-2021. As such, this part of the provision cannot be considered for application during the years under consideration, which are anterior to the amendment. We are left with ascertaining if the disallowance made u/s 36(1)(va) in the Intimation under section 143(1)(a) can be construed as a 'disallowance of expenditure indicated in the audit report not taken into account in computing the total income in the return'. Point 20(b) of the audit report in Form 3CA has columns – Serial number; Nature of fund; Sum received from employees; Due date for payment; The actual amount paid; and The actual date of payment to the concerned authorities. A copy of audit report in one of the cases under consideration, namely, S.M. Auto Stamping Pvt. Ltd. (ITA No.521/PUN/2022) has been placed on record. Point 20(b) of the audit report gives the 'Sum received from employees' at Rs.21,800/-. 'Due date for payment' has been reported as 15-07-2017 and 'The actual date of payment to the concerned authorities' has been given as 20-07-2017. Similar is the position regarding other items disallowed u/s.36(1)(va) having 'The actual date of payment' after the 'Due date for payment'. Thus, it is manifest that the audit report clearly points out that as against the due date of payment of the employees' share in the relevant fund on 15.7.2017 for deduction u/s 36(1)(va), the actual payment is delayed and deposited on 20.7.2017. The legislature, for the disallowance under sub-clause (iv) of section 143(1)(a), has used the expression 'indicated in the audit report'. The word 'indicated' is wider in amplitude than the word 'reported', which envelopes both the direct and indirect reporting. Even if there is some

indication of disallowance in the audit report, which is short of direct reporting of the disallowance, the case gets covered within the purview of the provision warranting the disallowance. However, the indication must be clear and not vague. If the indication in the audit report gives a clear picture of the violation of a provision, there can be no escape from disallowance. Turning to the facts of the case, it is clear from the mandate of section 36(1)(va) that the employees' share in the relevant funds must be deposited before the due date under the respective Acts. If the audit report mentions the due date of payment and also the actual date of payment with specific reference in column no. 20(b) having heading: 'Details of contributions received from employees for various funds as referred to in section 36(1)(va)', it is an apparent indication of the disallowance of expenditure u/s 36(1)(va) in the audit report in a case where the actual date of payment is beyond the due date. Though the audit report clearly indicated that there was a delay in the deposit of the employees' share in the relevant funds, which was in contravention of the prescription of u/s.36(1)(va), the assessee chose not to offer the disallowance in computing the total income in the return, which rightly called for the disallowance in terms of section 143(1)(a) of the Act.

11. *The ld. AR vehemently argued that it was a case of "increase in income" which has been enshrined in clause (iv) of section 143(1)(a) w.e.f. 01-04-2021 and hence cannot be take note of for the year under consideration. In our considered opinion, the contention is ill-founded. We have noted above that clause (iv) of section 143(1)(a) talks of two different limbs, namely, 'disallowance of expenditure' and 'increase in income' by means of indication in the audit report. Both the limbs are independent of each other. The indication in the audit report for 'Increase of income' should be qua some item of income and not increase of income because of the 'disallowance of expenditure'. Every disallowance of expenditure leads to increase of income. If the contention of the ld. AR is taken to a logical conclusion, then the second expression 'or increase in income' inserted by the Finance Act, 2021 would be rendered a redundant piece of legislation. It is trite interpretation has to be given to the statutory provisions in such a manner that no part of the Act is rendered nugatory. Distinction in the scope of the two aspects can be understood with the help of the present context only. We have noted that point no. 20(b) of the audit report, dealing with section 36(1)(va), has columns, inter alia, (i) 'Sum received from employees'; (ii) 'Due date for payment'; and (iii) 'The actual date of payment to the concerned authorities'. The column (i) having details of the amounts received from employees indicates about the 'increase in income' as per sub-clause (iv) of section 143(1)(a) if the assessee does not take this sum in computing total income. The columns (ii) and (iii) having details of due date for payment and the actual date of payment indicate about 'disallowance of expenditure' if the assessee does not make suo motu disallowance in computing total income. Right now, there is no case of*

'increase in income' because the AO did not make adjustment for non-offering of income of the 'Sums received from employees', but made the adjustment for 'disallowance of expenditure' with the remarks that : 'Amounts debited to the profit and loss account, to the extent disallowance under section 36 due to non-fulfillment of conditions specified in relevant clauses'. Thus, it is evident that it is a case of 'disallowance of expenditure' and not 'increase of income'. Further, the entire challenge by the assessee throughout has been to the disallowance of expenditure made by the AO. It set up a case before the authorities below, including the ld. CIT(A), taking shelter of section 43B of the Act by arguing that the disallowance cannot be made because such payment was made before the due date u/s.139(1) of the Act. As such, the contention of adjustment u/s 143(1)(a)(iv) due to 'increase in income' is jettisoned.

12. *Another argument point was put forth on behalf of the assessee that the assessee did not claim any deduction in the Profit and loss account of the amount under consideration and hence no disallowance should have been made. This argument is again bereft of force. The assessee claimed deduction for salary on gross basis, inclusive of the employees' share to the relevant funds. To put it simply, if gross salary is of Rs.100, out of which a sum of Rs.10 has been deducted as contribution to relevant fund, then the debit of Rs.100 in the Profit and loss account means deduction has been claimed for Rs.10 as well. Ex consequenti, if deduction of Rs.10 is not allowed u/s 36(1)(va) for late deposit of the amount before the due date under the respective Act, it would mean that the claim of Rs.10 included in Rs.100 is not allowed deduction.*

13. *The ld. AR referred to section 5 of the Payment of Wages Act, 1936, to contend that deduction made from an employee's salary for the month of October should suffer disallowance only if it is not paid by 15th December. This argument was premised on the language of section 5, which says that the wages of every person employed upon or in any railway, factory or industrial or other ITA No.1242/Del/2022 National Housing Bank vs. ADIT 12 establishment upon or in which less than one thousand persons are employed, shall be paid before expiry of the seventh day, after the last day of the wage-period in respect of which the wages are payable. It was contended that salary for the month of October, 2022 will be paid before the 7th of November, which will result into income of the employer only at the time of payment, making the due date of payment into relevant fund as on or before 15th December and not 15th November.*

14. *There is no merit in the contention of linking the date of deposit of the employees' share in the relevant funds with the date of payment of wages. Section 5 of the Payment of Wages Act simply deals with the 'Time of*

payment of wages'. It does not stipulate any time limit for deposit of the employees share in the relevant funds. For that purpose, the relevant Acts give a window for depositing the contribution within 15 days of the last month's salary. Thus, contribution to the relevant fund towards the salary for the month of October-ending should be deposited before 15th November.

15. In view of the foregoing discussion, we are satisfied that the ld. CIT(A) was justified in sustaining the adjustment u/s 143(1)(a) by means of disallowance made in these cases for late deposit of employees' share to the relevant funds beyond the date prescribed under the respective Acts.

Respectfully following the judgment of Hon'ble Bench of the Tribunal in Cematile Industries (supra), the said contention raised by the Assessee to the effect that addition involved is beyond the scope of section 143(1)(a) of the Act is untenable, hence the same is rejected.

6. Now coming to meritS of the case, admittedly in the case under consideration, the Employees' contributions for Provident Fund and ESI has been deposited after the last date, as prescribed in the respective statutes, which resulted into making the disallowance/addition of Rs.7,72,467/- u/s 36(1) (va) read with section 2(24)(x) of the Act.

7. 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 payment towards Employees' contribution on account of PF/ESIC made after the due dates, 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 assessee is 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 assessee 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.*

7.1 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 confirmed by the Ld. Commissioner.

8. The Assessee by way of ground no. 3 claimed that the Ld. CIT(A) legally erred in not disposing the additional ground of appeal filed by the Assessee on 07-09-2021 regarding the deduction of Education Cess charged by the AO under the head "Income from Business" in view of judgment of jurisdictional Bombay high Court in the case of Sea Goa Ltd. {423 ITR 436} which was followed by the Hon'ble ITAT, Mumbai in the case of UHDE India (P) Ltd Vs ACIT (211 TTJ 0339). We for just decision of issue and for the ends of justice, deem it appropriate to remand this issue to the file of the Ld. Commissioner for decision, however subject to verification of filling of such additional ground of appeal by the Assessee on 07-09-2021 before the Id. Commissioner.

9. In view of aforesaid analyzations, both the appeals filed by the Assessee stands partly allowed on same terms.

Order pronounced in the open court on 27-09-2023.

Sd/-

(PADMAVATHY S)
Accountant Member

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