

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA No. 1566/Del/2023
(Assessment Year: 2019-20)

| | | |
|--|-----|--|
| Bony Polymers Pvt. Ltd, Plot No. 77, Sector-6, Faridabad, Haryana (Appellant) PAN: AABCB1594N | Vs. | DCIT, Circle-5(1), Delhi (Respondent) |
|--|-----|--|

| | |
|---------------|--------------------------|
| Assessee by : | Shri Jitendra Jindal, CA |
| Revenue by: | Shri Kanv Bali, Sr. DR |

| | |
|-----------------------|------------|
| Date of Hearing | 16/10/2023 |
| Date of pronouncement | 18/10/2023 |

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.1566/Del/2023 for AY 2019-20, arises out of the order of National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal No. ITBA/NFAC/S/250/2022-23/1051294521(1) DATED 25.03.2023 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 07.01.2021 by the Assessing Officer, Asst. Director of Income Tax, CPC, Bengaluru (hereinafter referred to as 'Id. AO').

2. Though the assessee has raised several grounds, the only effective issue to be decided in this appeal is as to whether the Id CIT(A), NFAC was justified in upholding the disallowances made on account of employees contribution of Provident Fund/ ESI in the facts and circumstances of the case.

3. We have heard the rival submissions and based on materials available on record. It is not in dispute that the employees' contribution to provident

fund and ESI were deposited by the assessee to the Government account beyond the due dates prescribed under the respective acts but well before the date of filing the return of income. The Id. AR submitted that the amendment brought in by the Finance Act 2021 in section 36(1)(va) and Section 43B of the Act are to be construed only prospective in operation and cannot be given retrospective effect. The Id. AR relied on the decision of Hon'ble Supreme Court in the case of Vinay Cement reported in 213 ITR 268 (SC) and the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Hemla Embroidery Mills (P) Ltd reported in 366 ITR 167 (P&H) and further on the decision of Delhi Tribunal in the case of Anup Service Station vs DCIT in ITA Nos. 74 & 75 /Del/2022 dated 5.4.2022 in support of his contentions. We find that all these arguments of the assessee had been considered by the recent decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd Vs. CIT reported 448 ITR 518 (SC) which had settled the entire dispute to rest by deciding it in favour of the revenue by observing 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 assessee is 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."

4. In our considered opinion, pursuant to the aforesaid decision of the Hon'ble Supreme Court, the claim of deduction towards employee's contribution to PF & ESI made by the assessee becomes an incorrect claim warranting prima facie adjustment u/s.143(1) of the Act. Accordingly, the grounds raised by the assessee are dismissed.

5. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 18/10/2023.

-Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

-Sd/-
(M BALAGANESH)
ACCOUNTANT MEMBER

Dated:18/10/2023

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi