

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “E”,MUMBAI**

**BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)**

I.T.A. No.1915/Mum/2021
(Assessment year : 2017-18)

Tex-Styles International Pvt Ltd 215, Sun Industrial Estate Sun Mill Compound, Lower Parel Mumbai-400 023 PAN : AACCT8940D	vs	Deputy Commissioner of Income-tax, CPC, Bangaluru -560 500
APPELLANT		RESPONDENT

Present for the Assessee	Vimal Punmiya
Present for the Department	Shri P.D. Chogule (Addl.CIT) SR AR

Date of hearing	13/09/2023
Date of pronouncement	19/10/2023

ORDER

Per Padmavathy S (AM):

This appeal is against the order of the Commissioner of Income-tax, National Faceless Appeal Centre, Delhi [in short, ‘CIT(A)’] dated 16/09/2021 for A.Y. 2017-18.

2. The assessee filed a return of income on 23/10/2017 for the assessment year 2018-19 declaring a total income of Rs.60,97,317/-. The return was processed by

CPC and a notice under section 143(1). Subsequently, a rectification order under section 154 was passed by CPC where an amount of Rs.8,20,130/- was disallowed under section 36(1)(va) read with section 2(24)(x) of the Income-tax Act, 1961 (in short, 'the Act') towards delayed remittance of employees' contribution to PF / ESI. The assessee filed an appeal before the CIT(A), who confirmed the disallowance. Aggrieved, the assessee filed appeal before the Tribunal. The Tribunal vide order dated 07/07/2022 (ITA No.1915/Mum/2021) allowed the appeal in favour of the assessee by relying on the decision of the jurisdictional High Court in the case of Hindustan Organics Chemicals Ltd 366 ITR 1 (Bom).

3. In view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd in Civil Appeal No.2833 of 2016 passed on 12/10/2022, the revenue moved a miscellaneous application. The Tribunal vide order dated 09/08/2023 (MA No.172/Mum/2023) has recalled the order passed on 07/07/2022 and directed the registry to fix the appeal for fresh hearing. Accordingly, this appeal has again come up for hearing.

4. The Ld.AR submitted that at the time of filing the return of income, the assessee was under the bona fide belief that no disallowance under section 36(1)(va) is warranted based on the decision of the jurisdictional High Court on the issue. The Ld.AR also submitted that the law at the point in time when the return of income was filed was in favour of the assessee based on jurisdictional High Court and the subsequent decision of the Supreme Court cannot result rendering the claim of the assessee bad in law. In this regard, the Ld.AR relied on the decision of the co-ordinate bench in the case of Rockline Developers P. Ltd vs ITO (ITA No.6382/Mum/2013) A.Y. 2010-11 order dated 01/01/2016.

5. The Ld.DR submitted that the issue is now settled in view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd in Civil Appeal No.2833 of 2016.

6. We heard the parties and perused the materials on record. We notice that the co-ordinate bench while recalling the order had considered the submission of the Ld.AR made in this regard and held that –

“6. On perusal of above, it is clear that the Hon'ble Supreme Court has held that deduction for Employees' Contribution to PF/ESI shall be allowed only if the deposit is made by the employer on or before the due date specified in the applicable statute in view of Section 2(24)(x) read with Section 36(1)(va) of the Act. Further, the Hon'ble Supreme Court also clarified that in the case of Alom Extrusions Ltd. (supra) the provisions contained in Sections 2(24)(x) and 36(1)(va) of the Act were not considered. Thus, there was no judgment by the Hon'ble Supreme Court wherein the issue related to allowability of deduction for Employees' Contribution for PF and ESI deposited after the due date but before the expiry of times specified under Section 139(1) of the Act for filing return of income as per the provisions of Section 2(24)(x) read with Section 36(1)(va) and Section 43B of the Act stood decided in the favour of the Assessee. Though there were favourable judgment on the issue by the Hon'ble jurisdictional High Court in the case of Ghatge Patil Transporters Ltd., (supra), there were also judgments to the contrary in the favour of Revenue by the other High Courts such as CIT Vs. Gujarat-State Road Transport Corporation: 366 ITR 170 (Guj). Therefore, decisions of the Tribunal in the case of M/s Rockline Developers Pvt. Ltd. Vs. Income Tax Officer-9(3)(4), Mumbai for the Assessment Year 2010-11 and 2011- 12 [ITA No. 6595/Mum/2014, dated 01/01/2016 and ITA No. 6382/Mum/2013, dated 21/02/2014, respectively] relied upon by the Learned Authorised Representative for the Assessee during the course of hearing, does not advance the case of the Assessee. On the other hand, Explanation 2 inserted by way of Finance Act, 2021 (with effect from 01/04/2021) providing that the provisions of Section 43B of the Act shall be deemed never to have been applied for the purpose of determining the 'due date' under Section 36(1)(va) of the Act is now stands aligned with the position of law as declared by the Hon'ble Supreme Court.”

7. Therefore, in our considered view, the decision of the Hon'ble Supreme Court declaring the position of the law is clearly applicable in assessee's case and, therefore, the employees' contribution towards ESI /PF paid beyond the due date as per the respective Acts cannot be claimed as a deduction. We have extracted below the relevant observations of the Hon'ble Supreme Court in this regard:-

“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 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.”*

8. Respectfully following the decision rendered by Hon’ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT (supra), we are of the considered view that Ld. CIT(A) has rightly decided the issue against the assessee as the employees contribution on account of ESI / PF lying deposited with the employers has to be deposited before the due date prescribed under the Act. Since the assessee has failed to comply with the condition precedent for depositing the employees contribution on account of PF & ESI before the due date prescribed under the Act, the assessee is not entitled for any deduction. So finding no illegality or perversity in the impugned order passed by the Ld. CIT(A).

9. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 19/10/2023

Sd/-

sd/-

(AMIT SHUKLA)	PADMAVATHY S.
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt :19th October, 2023

Pavanan

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai