

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)

ITA No. 2363/MUM/2021
Assessment Year: 2018-19

Central Investigation and
Security Services Ltd.,
Block Q, Dalal Estate,
Mumbai Central 400 008.

PAN No. AAACC 6145 P
Appellant

Dy. CIT, CPC
Bangalore-565050.

Vs.

Respondent

Assessee by : Mr. Adiya Sharma
Revenue by : Mr. H M Bhatt, DR

Date of Hearing : 25/10/2023
Date of pronouncement : 02/11/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee against the order dated 15/11/2021 passed by the Ld Commissioner of Income-tax (Appeals)- National Faceless Appeal Centre, Delhi [in short the 'ld CIT(A)'] was heard and pronounced by the Income-tax Appellate Tribunal (in short 'the Tribunal') on 28.07.2022. But, subsequently recalled by way of order of the Tribunal dated 26.07.2023 passed in Miscellaneous Application No. 158/Mum/2023, which was filed by the Income-tax Department.



2. The grounds raised by the assessee in its appeal are reproduced as under:

The Ld. CIT (Appeals), NFAC has erred in upholding the decision of addition of Rs. 54,10,915/- being the amount of employee's contribution to PF and ESIC paid belatedly. Taking view of the law as explained by the insertion of Explanation to Section 36(1)(va) and Section 43B of the Income Tax Act, 1961 inserted by the Finance Act 2021, considering the applicability of the explanation retrospectively. As per the recent judgement of Hble ITAT Hyderabad on 15th June, 2021 in the case of Salzgitter Hydraulics (P.) Ltd Vs. Income Tax Officer and Hble ITAT on 13th October, 2021 in the case of Bangalore in case of Gopalakrishna Aswini Kumar Vs Assistant Director of Income Tax has allowed the appeal of the assessee. Also to this effect the Memorandum of Explanation to the Budget issued by the CBDT for the amendments in section 36(va) as well as 43B vide Finance Act, 2021, specifies that the amendments will be applicable w.e.f. 01-04-2021 and will be prospective.

3. We have heard rival submission of the parties and perused the relevant material on record. Before us, the Ld. Counsel of the assessee has filed a compilation of cases containing pages 1 to 93. The issue in dispute involved in the appeal is whether the employee's contribution to Employees State Insurance)/Provident Fund (ESI/PF) paid/deposited beyond due date prescribed under relevant Act(s) could be allowed to the assessee as deduction u/s 36(1)(va) of the Income-tax Act, 1961 (in short the 'Act'). The Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd. in Civil Appeal No. 2833 of 2016 dated 12.10.2022** has held that said deduction for employee's contribution to PF/ESI paid/deposited beyond due date prescribed under relevant Act is not allowable in terms of section 36(1)(va) of the Act. The Hon'ble Supreme Court has interpreted the provisions of section 36(1)(va) of



the Act from the date when same have been introduced in the Act therefore the decision of the Hon'ble Supreme Court is effective from the date of the inception of the relevant section in the Act. The decision of Hon'ble Supreme Court is always effective retrospectively unless it is specifically mentioned by the Hon'ble Supreme Court that said decision will act prospectively. In the case of Checkmate Services Pvt. Ltd. (supra), Hon'ble Supreme Court has not specified that said decision shall be effective prospectively and therefore, it is undisputedly effective retrospectively from the date on which introduced in the Act i.e. 1-4-1988.

4. Before us, the Ld. Counsel of the assessee **firstly**, submitted that ruling of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (supra) shall not be operative in view of the amendment brought by the Parliament to section 36(1)(va) and section 43B of the Act, which would take effect from 01.04.2021 i.e for assessment year 2021-22 and subsequent assessment years. The relevant memorandum of amendment is reproduced as under:

“Accordingly, in order to provide certainty, it is proposed to -

- (i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the "due date" under this clause; and*
- (ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.*



These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.”

4.1 This argument of the Ld. Counsel of the assessee is not acceptable as the Hon’ble Supreme Court has explained the law which came into existence at the time of the inception of the relevant section 36(1)(va) of the Act and accordingly any payment made for employees contribution to PF/ESI beyond due date prescribed under the relevant act is not allowable as deduction u/s 36(1)(va) of the Act for the year under consideration . In the case of the assessee, the assessment year involved is AY 2018-19, which is prior to AY 2021-22 i.e the AY for which amendment is effective. There is no conflict in the law declared by the Hon’ble Supreme Court and the amendment introduced by the Hon’ble Parliament.

4.2 **Secondly**, the Ld. Counsel for the assessee submitted that no adjustment for said deduction could be made u/s 143(1)(a) of the Act as the issue was of debatable nature. The Ld. Counsel relied on the decision of the Co-ordinate Bench of the Tribunal in the case of **Chintoo Creation v. Dy. CIT, CPC Bangalore in ITA No. 1772/Del/2021** wherein the Tribunal has relied on the decision of the Hon’ble Supreme Court in the case of *Kvaverner John Brown Enng. (India) Pvt. Ltd. v. Asstt. CIT* [2008] 170 Taxman 304/305 ITR 103 (SC). The Co-ordinate Bench in the said decision held that addition by way of intimation u/s 143(1) of the Act on debatable and controversial issues and on the basis of the retrospective



amendment of the Act is beyond the scope of section 143(1) of the Act. But we find that in the instant case after the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (supra), the issue is no longer debatable and the claim of the deduction is in the nature of incorrect claim and therefore same is liable to be adjusted while processing invoking section 143(1)(a)(ii) of the Act.

4.3 **Thirdly**, the Ld. Counsel submitted that in view of the decision of the Hon'ble Bombay High Court in the case of **Ghadge Patil Transport Limited 368 ITR 749 (Bombay)**, which being jurisdiction High Court, no adjustment could have been possible for the cases falling into the jurisdictional of the Hon'ble Bombay High Court. In our opinion, this argument of the Ld. Counsel of the assessee is also no longer valid, in view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (supra), wherein any such PF/ESI paid after due date under the relevant Act is not permissible for deduction under the provisions of the Act.

4.2 In view of the aforesaid discussion, the claim of deduction of Rs.54,10,915/- being amount of employee's contribution to PF/ESI paid beyond the due date prescribed under the relevant Act, which has been added by the Ld. Central Processing Centre (CPC), Bangalore and sustained by the Ld. CIT(A), is upheld. The ground raised by the assessee is accordingly dismissed.



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

Order pronounced in the open Court on 02/11/2023.

**Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;

Dated: 02/11/2023

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai