

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL

INDORE SMC BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No.161/Ind/2021
(Assessment Years:2019-20)

Shyam Sunder Trivedi Opp.-1 Vashundra State Bank Colony Bhopal (Appellant / Assessee)	Vs.	ITO1(4) Bhopal (Revenue)
PAN: ACTPT 3280G		
Assessee by	None	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	15.11.2023	
Date of Pronouncement	16.11.2023	

ORDER

Per Vijay Pal Rao, JM:

This appeal by the Assessee is directed against the order dated 14.07.2021 of Commissioner of Income Tax(Appeal), National Faceless Appeal Centre, Delhi for Assessment Year 2019-20. The assessee has raised following grounds of appeal:

“1.That on the facts and circumstances of the case and in law, the intimation u/s 143(1)(a) was without jurisdiction and bad in law.

2. That, on the facts and circumstances of the case and in law the CPC erred in disallowing and CIT(A) erred in confirming employees' contribution of ESI/EPF amounting to Rs.1,75,295/- though the same was paid before the due date of filing of return.”

2. Earlier this appeal of the assessee was decided by this Tribunal vide order dated 20.10.2022 and the issue of disallowance on account of belated payment of Employee's Contribution to PF & ESIC was decided in favour of the assessee. Thereafter the department filed a Misc. Application No.12 of 2023 for recalling of the earlier order of the Tribunal. This Tribunal vide order dated 3rd July 2023 in the MA of the department recalled the earlier order and the relevant finding in para 3 to 5 is as under:

*"3. On perusal of impugned order, it emerges that the issue involved was - whether or not the employee's contribution to PF/ESI paid after due date under the respective laws but before due date for filing return of income u/s 139(1) was allowable as deduction? While holding the same as an allowable deduction u/s 36(1)(via) read with section 43B of Income-tax Act, 1961, the ITAT followed certain decisions of Hon'ble Courts favouring the assessee. Now, the Hon'ble Supreme Court has settled this controversy in the case of Checkmat Services Private Limited vs. CIT, 448 ITR 518 against assessee and in favour of revenue by holding that the payment of employees' contribution to PF / ESI after due dates under their respective laws is not allowable as deduction u/s 36(1)(va) even if the payment is made on or before due date of filing the return of income u / s * 139(1) Hon'ble Supreme Court has also held that provisions of Section 43B does not cover the deduction in respect of employees' contribution to PF/ ESI.*

4. The Hon'ble Supreme Court in the case of ACIT, Rajkot vs. Saurashtra Kutch Stock Exchange Limited, Kutch, 173 Taxman 322, has held in para 39 to 42 as under:-

"39. As stated earlier, the decision was rendered in appeal by the Income-tax Appellate Tribunal, Rajkot. Miscellaneous Application came to be filed by the assessee under sub-section (2) of section 254 of the Act stating therein that a decision of the Jurisdictional Court', i.e., the High Court of Gujarat in Hiralal Bhagwati's case (supra) was not brought to the notice of the Tribunal and thus there was a "mistake apparent from record" which required rectification.

40. The core issue, therefore, is whether non-consideration of a decision of Jurisdictional Court (in this case a decision of the High Court of Gujarat) or of the Supreme Court can be said to be a "mistake apparent from the record"? In our opinion, both - the Tribunal and the High Court were right in holding that such a mistake can be said to be a "mistake apparent from the record" which could be rectified under section 254(2).

41. A similar question came up for consideration before the High Court of Gujarat in *Suhrid Geigy Ltd.'s case (supra)*. It was held by the Division Bench of the High Court that if the point is covered by a decision of the Jurisdictional Court rendered prior or even subsequent to the order of rectification, it could be said to be "mistake apparent from the record" under section 254(2) of the Act and could be corrected by the Tribunal.

42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a 'new rule' but to maintain and expound the 'old one'. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite sometime, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood."

5. Therefore, the judgment of the Hon'ble Supreme Court even if passed subsequent to the order of ITAT, amounts to laying down the correct principle of law which has to be applied retrospectively. Accordingly, in view of judgement in *Checkmat Services Private Limited vs. CIT (supra)* an apparent mistake has crept in the impugned order of ITAT taking a view which is contrary to the judgment of Hon'ble Supreme Court. Being so, we recall the impugned order of ITAT and restore the original appeal to be heard afresh. The Registry is directed to fix the original appeal for fresh hearing under intimation to parties."

3. Thus, this appeal of the assessee was again listed for hearing and adjudication of the solitary issue of disallowance of belated payment of PF & ESIC. None has appeared on behalf of the assessee despite repeated notices sent for last three dates. The notices sent through registered post have been received back with the postal remarks "addressee is not found at the given address". Accordingly the bench proposes to hear and disposed of this appeal *ex-parte*.

4. I have heard Ld. DR and carefully perused the orders of the authorities below. The Ld. DR has submitted that the issue is now covered by the judgment of Hon'ble Supreme Court in case of *Checkmate Services (P.) Ltd. vs. CIT-1 448 ITR 518* and therefore, the claim of deduction for

belated payment of employee's contribution to PF & ESIC is not allowable u/s 36(1)(va) of the Act. Earlier the Hon'ble High Courts have taken divergent view on this issue and the same is now finally settled by the Hon'ble Supreme Court in case of Checkmate Services (P.) Ltd. vs. CIT- (supra) wherein the Hon'ble Supreme Court has decided this issue in para 51 to 55 as under:

“51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd.²⁴; Commissioner of Income-Tax and another v. Sabari Enterprises²⁵; Commissioner of Income Tax v. Pamwi Tissues Ltd.²⁶; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd.²⁷ and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrusions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.

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 Commissioner of Income-Tax Vs. Aimil Ltd., [2010] 321 ITR 508 (Delhi High Court). Commissioner of Income-Tax and another Vs. Sabari Enterprises, [2008] 298 ITR 141 (Karnataka High Court). Commissioner of Income Tax Vs. Pamwi Tissues Ltd., [2009] 313 ITR 137 (Bombay High Court). Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd., [2013] 35 taxmann.com 616 (Rajasthan High Court). 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 out-goings 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 employer's 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 employee's 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.”

5. Accordingly in view of the judgment of Hon'ble Supreme Court deciding the issue against the assessee and in favour of the revenue this issue raised in assessee's appeal is decided against the assessee.

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

Order pronounced in the open court on 16.11.2023

Sd/-

(VIJAY PAL RAO)

JUDICIAL MEMBER

Indore; दिनांक Dated : 16/11/2023

Patel/Sr. P.S.

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Sr. Private Secretary

ITAT, Indore