IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "A" : DELHI]

BEFORE SHRI G. S. PANNU, HON'BLE VICE-PRESIDENT
A N D
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं/.I.T.A Nos. 2978 & 2979/Del/2022
निर्धारणवर्ष/Assessment Years: 2018-19 & 2019-20

Bhim Singh, **C-80, Behind Sector : 9** **Petrol Pump, Surya Vihar,** **Gurgaon, Haryana.**	**बनाम** **Vs.**	CIT, Circle : 1, Gurgaon.
PAN No. AQIPS0773Q		
अपीलार्थी / Appellant		**प्रत्यर्थी/ Respondent**

निर्धारितीकीओरसे **/Assessee by :**	Shri Anuj Tiwari, C. A.
राजस्वकीओरसे **/ Department by :**	Shri Kanv Bali, Sr. D. R.

सुनवाईकीतारीख/ Date of hearing :	21/11/2023
उद्घोषणाकीतारीख/Pronouncement on :	29/11/2023

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. These two appeals are filed by the assessee against two separate orders of the ld. Commissioner of Income Tax (Appeals) [hereinafter referred to CIT (Appeals)]/National Faceless Appeal

Appeal Centre [NFAC] Delhi, both dated 18.11.2022 for assessment years 2018-19 and 2019-20.

2. The assessee has raised the following common substantive grounds in both the assessment years:-

> "1. In view of the facts and circumstances of the case, the order dated 18/11/2022 passed by the National Faceless Appeal Centre, Delhi ("NFAC/CIT(A)") is erroneous in confirming the order passed by Asst. Director of Income Tax, Centralized Processing Centre ("CPC")/NFAC under Section 143(1) of the Income Tax Act, 1961 ("the Act") as the disallowance made therein is illegal, bad in law, without jurisdiction and void ab-initio. The disallowance made is erroneous, unjustified and illegal.
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> 2. In view of the facts and in the circumstances of the case, the CIT(A) has erred in confirming addition/disallowance of Rs.45,88,351/- and assessing the total income of the Assessee at Rs.1,30,76,260/- as against the returned income of Rs.84,87,910/-.
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> 3. In view of the facts and circumstances of the case, the CIT(A) has failed to consider that the addition has been made under Section 143(1) of the Act and is beyond the scope of the said section and as such the CPC/NFAC had no power/authority/jurisdiction to make the said addition u/s 143(1) of the Act.
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> 4. In view of the facts and circumstances of the case and in law, the CIT(A) has failed to appreciate that no disallowance is called for where employee's share of contribution is paid before the due date of filing the return under Section 139(1) of the Act. Therefore, the disallowance amounting to Rs. 45,88,351/- made on this account is illegal, bad in law and liable to be deleted.
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> 5. In view of the facts and circumstances of the case CIT(A) has failed to consider that the CPC has erred in making

disallowance of Rs. 45,88,351/- u/s 36(1)(va) of the Act on account of contributions received from employees for funds referred in Section 36(1)(va) of the Act.

6. That the CIT(A)/CPC has failed to appreciate that the Finance Act, 2021 amendment is prospective in nature and are applicable from AY 2021-22 only and thus has no application to the facts under consideration for this AY.

7. In view of the facts and circumstances of the case, the CIT(A)/CPC has failed to appreciate that in the absence of issuance of any notice under Section 143(1) before making such an addition, the addition is illegal and bad in law. The same is against principles of natural justice and is in gross violation of the statutory mandate of Section 143(1). Hence, the addition is liable to be deleted.

8. That the CIT(A)/CPC has failed to consider the material placed and available on record and has failed to judicially interpret the same as the same do not justify the addition/ disallowance made."

3. The issue of whether the employees' contribution to PF/ESI is allowable expenditure under section 36(1)(va) of the Act if it is paid beyond the due date specified under PF/ESI Act came up befor the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. Vs. CIT in Civil Appeal No. 2833 of 2016 (dated October 12, 2022) and the Hon'ble Supreme Court decided the issue against the assessee, holding 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 Extrutions* 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.

24 *Commissioner of Income-Tax Vs. Aimil Ltd.,* [2010] 321 ITR 508 (Delhi High Court).
25 *Commissioner of Income-Tax and another Vs. Sabari Enterprises*, [2008] 298 ITR 141 (Karnataka High Court).
26 *Commissioner of Income Tax Vs. Pamwi Tissues Ltd.,* [2009] 313 ITR 137 (Bombay High Court).
27 *Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd.*, [2013] 35 taxmann.com 616 (Rajasthan High Court).

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 out-goings forming part of the assessees' 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."

4. The decision of the Hon'ble Supreme Court applies to the facts of the case. Respectfully following the above decision, we hold that the employees' contribution to PF/ESI remitted beyond the due date specified under PF/ESI Act are not allowable as deduction under section 36(1)(va) of the Act. Therefore, we see no merit in the grounds of appeal of the assessee for both the years and the same are rejected.

5. In the result, both the appeals of the assessee are dismissed.

Order pronounced in the open court on : **29/11/2023**.

Sd/-	**Sd/-**
(G. S. PANNU)	**(C. N. PRASAD)**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Dated : 29/11/2023.

MEHTA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक / Assessee
2. राजस्व / Revenue

3. संबंधित आयकर आयुक्त / Concerned CIT

4. आयकर आयुक्त- अपील / CIT (A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, DELHI /
   DR, ITAT, DELHI

6. गार्ड फाइल / Guard file.

By order

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	21.11.2023
Date on which the typed draft is placed before the dictating Member	28.11.2023
Date on which the typed draft is placed before the Other Member	29.11.2023
Date on which the approved draft comes to the Sr. PS/PS	29.11.2023
Date on which the fair order is placed before the Dictating Member for pronouncement	29.11.2023
Date on which the fair order comes back to the Sr. PS/PS	29.11.2023
Date on which the final order is uploaded on the website of ITAT	29.11.2023
Date on which the file goes to the Bench Clerk	29.11.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	