

**IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH 'DB', JABALPUR**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 31/JAB/2021 : Asstt. Year: 2017-18

M/s Gour Road Tar Coat P. Ltd., 2283, Madan Mahal, Jabalpur- 482001 (MP)	Vs	The ACIT, Circle 2(1), Jabalpur 482001 (MP)
(APPELLANT)		(RESPONDENT)
PAN No. AADCM 2654 G		

**Assessee by : Sh. Sachin Kumar Bajpai, CA
Revenue by : Sh. Shraavan Kumar Gotru, CIT- DR**

Date of Hearing: 29.11.2023	Date of Pronouncement: 30.11.2023
------------------------------------	--

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by assessee against the order of Id.NFAC/CIT(A), New Delhi dated 28.07.2021. The Id. AR sought adjournment. Since the grounds involved stand settled by the order of the Hon'ble Apex Court, the adjournment is rejected and the matter is being adjudicated placing reliance on the judgment of the Hon'ble Supreme Court.

2. The assessee has raised the following grounds of appeal are as under:-

1. AO has made addition of 19,49,442 by disallowing the amount of employee contribution towards EFP and ESI. Assessee has deducted amount of employee contribution of EPF and ESI from salary on monthly basis and paid the amount after the due date as fixed by the concerning departments. Assessee has filed his return under section 139(1) and paid this amount before filing ITR i.e. assessee has filed ITR on 16.08.2017 and paid these amount to the concerning departments on 09.06.2017, 19.05.2017 and 22.06.2017. The addition made by AO was confirmed by CIT (A) on the basis of Explanation 5 to sec 43B and Explanation 2 to sec 36(1)(va) inserted by Finance Act 2021. It is submitted that this explanation has to come in force with prospective effect from 01.04.2021. Confirmation of addition by CIT (A) is not correct and

the returned income as declared by the assessee may kindly be accepted.

2. Keeping the above facts the addition confirmed by the CIT (A) may be deleted and appeal be allowed.

2. The issue of ESI/PF payment has attained finality by the order of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-I, vide order dated 12th October, 2022 wherein it was observed that employers have to deposit the employee's contribution towards EPF/ESI on or before the due date for availing deduction. In the cases before the Hon'ble Apex Court, the employers had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant provisions of the Act. The Assessing Officer ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". It was held that those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective acts. The Income Tax Appellate Tribunal and later the Gujarat High Court dismissed the challenge against this order of AO. In appeal, the court noted that the Hon'ble Kerala High Court has also ruled in favour of revenue on this issue whereas the Hon'ble High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi have favoured the interpretation beneficial to the assessee. The Hon'ble Apex Bench effectively reversed the judgment in Commissioner of Income Tax vs. Alom Extrusions Ltd. (1 SCC 489) relied upon by the assessee.

3. The Hon'ble Apex Court in the case of Checkmate Services P. Ltd. vs. Commissioner Of Income Tax-I in CA No. 2833/2016 vide order dated 12.10.2022 observed that there is a marked distinction between the nature and character of the two amounts viz., the employers' contribution and employees' contribution required to be deposited by the employer. The first one is 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. The Hon'ble Apex Court held as under:

"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 43 B 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 43 B 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."

4. As the issue of payment of employees contribution towards the PF has been ruled against the assessee by the Hon'ble Supreme Court, the appeal of the assessee on this ground is liable to be dismissed.

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

Order Pronounced in the Open Court on 30/11/2023.

Sd/-
(Yogesh Kumar U.S)
Judicial Member

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Jabalpur Dated: 30/11/2023

NV, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT JABALPUR