

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI**

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No. 2862/DEL/2023
Assessment Year: 2020-21**

Javi Systems India Private Limited. H. No. A1/45, Sushant Lok-2, Sector-55, Gurgaon, Haryana-122011. PAN- AABCJ7817L	<u>Vs</u>	ACIT, Circle-1(1), Gurgaon.
APPELLANT		RESPONDENT
Assessee represented by	Shri Deepak Chopra, CA	
Department represented by	Shri Sandeep Kumar Mishra, Sr. DR	
Date of hearing	12.02.2024	
Date of pronouncement	14.02.2024	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Addl./JCIT (A), Thane, dated 21.09.2023, pertaining to the assessment year 2020-21. The assessee has raised following grounds of appeal:

“1. The learned Assessing Officer has erred in passing the intimation in the manner passed and the learned Commissioner of Income tax (Appeals) has erred in confirming the same. The learned assessing officer having not considered the binding precedents by jurisdictional High Court, makes the intimation violative of doctrine of judicial discipline and bad in law. The impugned intimation is therefore liable to be quashed or atleast the additions made are liable to be deleted. [Tax effect of above ground: Rs 11,23,346/-]

Without prejudice:

2.1. The lower authorities have erred in not appreciating the fact that the tax auditor of the company had categorically reported that no disallowance is called for u/s 36(1)(va) of the Act.

2.2. No disallowance having been reported in the tax audit report, the disallowance as made in the intimation is beyond of the scope of adjustments permissible u/s 143(1) of the Act and is therefore liable to be deleted.

[Tax effect of above ground: Rs 11,23,346/-]

3 In view of the above and on other grounds to be adduced at the time of hearing, it is requested that impugned intimation be quashed or atleast disallowance u / s 36(1)(va) be deleted.”

2. The facts giving rise to the present appeal are that for the assessment year in question the assessee filed its return of income u/s 139(1) of the Income-tax Act, 1961 (the “Act”) on 28.12.2020, declaring total taxable income of Rs. 7,33,95,170/-. The CPC in intimation u/s 143(1) of the Act made disallowance of Rs. 29,27,388/- in respect of employees’ contribution towards ESI and Provident Fund. Aggrieved against this the assessee preferred appeal before the learned CIT(Appeals), who affirmed the action of the assessing authority. Aggrieved against this the assessee is in appeal before this Tribunal.

3. Apropos to the grounds of appeal learned counsel for the assessee submitted that the authorities below failed to appreciate the fact that the adjustment could not have been made u/s 143(1) of the Act as the issue was debatable. Moreover, the amendment was made w.e.f. 1.4.2021 in Section 36(1)(va) and 43B of the Act. In support of his contention the learned counsel for the assessee placed reliance on various judicial pronouncements. He submitted that the issue for computation of delay in depositing employees’ contribution towards PF & ESI needs to be reckoned from the date when the actual salary has been paid. Learned counsel has also placed reliance on the decision of coordinate Bench.

4. On the other hand, learned DR opposed the submissions and submitted that the issue is now squarely covered against the assessee by the recent judgment of the Hon'ble Supreme Court dated 12.10.2022 rendered in the case of Checkmate Services P Ltd. vs. CIT (along with batch of appeals) and the issue whether such adjustment could have been made u/s 143(1) has been considered by the coordinate Benches of this Tribunal at Delhi.

5. We have heard rival submissions and perused the material available on record. We do not see any merit into the contention of the assessee. Section 6 of EPF Act, 1952 speaks about the contribution payable by the employer. It does not speak about the payment when it is actually made. Therefore, liability of the employer would be when such amount is payable and there is no quarrel that such becomes payable when the salary becomes due. It is not the case that the salary was not due to employees. Merely because such salary is paid subsequently would not absolve the employer from its statutory obligation. We find that the Hon'ble Supreme Court in the case of Checkmate Services P Ltd. vs. CIT (supra), on the issue relating to payment of employees' contribution towards PF and ESI, has ruled against the assessee, inter alia, by observing as under:

“52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(l)(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 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 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 assesseees 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."

5.1 In view of the above binding precedent we do not see any reason to interfere in the conclusion arrived at by the lower authorities. The same is hereby affirmed. Grounds of appeal of the assessee are dismissed.

6. Appeal of the assessee is dismissed.

Order pronounced in open court on 14th February, 2024.

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

MP

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI