

आयकर अपीलीय अधिकरण
कोलकाता 'एसएमसी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA

श्री राजेश कुमार, लेखा सदस्य
एवं

श्री अनिकेश बनर्जी, न्यायिक सदस्य
के समक्ष

Before
SRI RAJESH KUMAR, ACCOUNTANT MEMBER
&
SRI ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. No.: 1073/KOL/2023
Assessment Year: 2019-20

Kamakshi Jute Industries Ltd.....Appellant
[PAN: AACCK 4928 Q]

Vs.

DCIT, CPC.....Respondent

Appearances:

Assessee represented by: None.

Department represented by: Sh. P.P. Barman, Addl. CIT, Sr. D/R.

Date of concluding the hearing : February 15th, 2024

Date of pronouncing the order : February 22nd, 2024

ORDER

Per Anikesh Banerjee, Judicial Member:

The instant appeal of the assessee was filed against the order of Ld. Commissioner of Income-tax (appeals)-NFAC, Delhi [in brevity ld. 'CIT(A)'] dated 07.08.2023 passed u/s 250 of the Income Tax Act, 1961 (in brevity the 'Act') for assessment year 2019-20. The impugned order was emanated from the order of the ld. CPC. Bangalore (in brevity the 'AO') passed u/s 143(1) of the Act dated 28.04.2020.

2. The assessee has taken the following grounds of appeal:

"1. That the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre erred in facts and on law in confirming the addition made in

the intimation U/s 143(1) issued by the Ld. DCIT when the same was unlawful and arbitrary as the issue involved was debatable on facts and law.

2. That the Ld. CIT (Appeals), NFAC erred in facts and on law in confirming the addition of Rs. 40,91,341/- made by the CPC, Bangalore invoking the provisions of section 43B of the Income Tax Act, 1961 read with sections 2(24)(x) and 36(1)(va) for the alleged delay in depositing the Employees Contribution to Provident Fund and Employees State Insurance under the relevant Act.

3. That the Ld. CIT(A) erred in facts and on law in confirming the addition of employee contribution to PF/ESI U/s 36(1)(va) when the due date of making payment from 15 days from the close of the month is to be reckoned from the date of payment of salary/wages to employees and not from the date when salaries become due.

4. For that in the Assessment order passed was in violation of principles of natural justice and hence the entire proceeding was bad in law and thus the assessment order be cancelled/ quashed.

5. The appellant craves leave to produce additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules 1963.

6. That the assessee craves leave to add, amend, alter, vary or withdraw any or all the grounds of appeal before or at the time of hearing of appeal.”

3. When the appeal was called for hearing, none was present on behalf of the assessee. No adjournment petition was filed on behalf for appellant. The ld. D/R pointed out that the issue is already covered by the order of the Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd. vs. CIT reported in [2022] 143 taxmann.com 178 (SC)**. The matter was pending from long back before the Bench. Considering the merit of the case, we proceed to dispose of the matter on *ex-parte qua* for assessee after hearing the ld. D/R.

4. Brief fact of the case is that the assessee filed the return of income u/s 139(1) of the Act. The return was processed and from the Tax Audit Report it was found that the assessee has violated the provisions of Section 36(1)(va) read with Section 43B(b) of the Act for delay in payment of PF&ESI amounting to Rs. 40,91,370/-. During the processing of the return, the entire amount was disallowed and added back with total income which was mentioned in the Tax Audit Report on account of disallowance u/s 36(1)(va) read with

Section 2(24)(x) of the Act for delayed payments towards employees' contribution to PF&ESI. The employees' contribution to PF&ESI was made before due date of filing return of income but after the due date of the mentioned in the specific Act.

5. Being aggrieved, the assessee filed an appeal before Id. CIT(A) with a delay. The assessee filed a condonation petition and there was sufficient cause for delay in filing the appeal. Accordingly, the delay is condoned by the Id. CIT(A). But after considering the submission of the assessee, Id. CIT(A) had passed a speaking order and upheld the assessment order. Being aggrieved, assessee filed an appeal before us.

6. Ld. D/R vehemently argued and invited our attention to page no. 9-12 of the appeal order which is reproduced as below:

“The language of newly proposed explanation 2 to section 36(1)(va) and explanation 5 to section 43B makes it clear that the amendment is retrospective.

Recently Apex Court has settled the issue in the case Checkmate Services P. Ltd. (Taxpayer) v. CIT [TS-791-SC-2022], The issue before the SC was interpretation of due date for payment of employees' contribution to Social Security Schemes (SSS) like Provident Fund, Employees' State Insurance, etc. to qualify for tax deduction under Indian Tax Law (ITL). There was judicial conflict of view between different High Courts (HC) on the issue. Majority of the HCs (majority view) held in favour of taxpayers that the due date for deposit of employees' contribution is same as due date for deposit of employer's contribution i.e., the contributions are eligible for deduction in the relevant tax year itself if they are actually paid before the due date of filing return of income (ROI) for the relevant tax year; else, they are allowable in the year of actual payment. On the other hand, Gujarat and Kerala HCs took contrary view (minority view) favouring tax authority that the due date for deposit for employees' contribution is the statutory due date under the relevant statutes governing the SSS (statutory due date) and thus, if not paid within statutory due date, the taxpayer permanently forfeits the deduction.

Upholding the minority view, the Supreme Court, in the present case, ruled in favour of the tax authority and held that employees' contributions are deductible if paid before the statutory due date. Supreme Court resolves judicial conflict on the due date of payment of employees' contributions to Social Security Schemes for tax deduction. The Supreme Court ruling effectively endorses the amendments made by Finance Act (FA) 2021 with

effect from tax year 2020-21 in line with the minority view and makes it clarificatory in nature having retrospective effect to all past tax years.

The SC held that the due date for claiming tax deduction for employees' contribution as per S.36(1)(va) is statutory due date and not ROI due date. It adopted the following reasoning for its conclusion:

► There is distinction between provisions like Section 43B on one hand and Section 36(1)(va) on the other. Section 43B and similar provisions are concerned with and enact different conditions, that the tax authority has to enforce, and the taxpayer has to comply with, to secure a valid deduction. On the other hand, provisions like Section 36(1)(va) deal primarily with business, commercial or professional expenditure under various heads along with conditions to be met. It is, therefore, necessary to bear in mind that specific enumeration of deductions, dependent upon fulfilment of particular conditions, would qualify as allowable deductions whereas taxpayer's failure to comply with those conditions would render the claim vulnerable to rejection.

► In the light of the above scheme of the ITL, the provisions of Section 36(1)(va) have remained unaltered since the inception from 1987 whereas provisions of Section 43B have undergone changes from time to time. There is significant difference between nature of contributions covered by S.36(1)(va) and S.43B and conditions for deduction thereof.

► By inserting Section 36(1)(va) and amending definition of "income", the Parliament intended that amounts not earned by the taxpayer, but received by it - whether in the form of deductions or otherwise, as receipts, were to be treated as income. Since these receipts did not belong to taxpayer but were held by them as trustees, Section 36(1)(va) was inserted to ensure that if these receipts are deposited in the relevant SSS on or before the "due date", they could be treated as deductions. The "due date" is specifically defined as the date by which the amounts have to be credited by the employer, in the concerned SSS. Most importantly, this condition does not apply to employer's contribution which is covered by separate provision. The essential character of employees' contribution is that it is part of employees' income, held in trust by the employer and has to be deposited by the statutory due date.

► On the other hand, the object of Section 43B, as noted in a series of earlier SC rulings in *Allied Motors (P.) Ltd. vs Commissioner of Income-tax* [(1997) 224 ITR 677], *Exide Industries* [(2020) 425 ITR 1], *M. M. Aqua Technologies* [(2021) 436 ITR 582] is to curb the practice of taxpayers who did not discharge their statutory liabilities (including employer's contributions to SSS) for long periods but claimed deductions in that regard from their income on the ground that the liability to pay these amounts was incurred by them in the relevant tax year.

► The HCs, laying down the majority view, principally relied upon the amendment in 2003 to Section 43B held by *Alom Extrusions* ruling to be curative in nature. No doubt, many of these rulings also dealt with S.36(1)(va), but they primarily adopted the approach set out in *Alom Extrusions* ruling which did not consider the provisions relating to employees' contributions.

► The legislative development since 1984 clearly shows that Parliament has treated employer's contributions and employees' contributions separately. Section 43B and Section 36(1)(va) have differing objectives. Employer's contributions are to be paid out of employer's income and allowed as deduction if paid by ROI due date. Employees' contributions, deducted from employees' income and held in trust by the employer, are artificially treated as employer's income unless paid by statutory due date. The marked distinction between nature and character of two amounts has to be borne in mind while interpreting the two provisions. Hence, the HCs taking minority view were correct in holding that "non-obstante clause" in Section 43B does not dilute or override employer's obligation to deposit employees' contribution by statutory due date.

The present SC ruling in favour of the tax authority effectively endorses Finance Act, 2021 amendment and makes it clarificatory in nature. Since the present SC ruling is of Three-Judge Bench while the earlier *Alom Extrusions* ruling was of Two-Judge Bench, the present ruling will supersede any contrary observations in the earlier ruling.

The present SC ruling highlights the distinction in the nature and tax treatment of employer's contributions and employees' contributions to SSS having regard to the legislative development. It upholds strict interpretation of taxing law.

The case laws mentioned by the assessee in their appeal has no force as they has been superseded by the amendment made in Finance Act, 2021 and the decision of Apex Court in the case of *Checkmate Services P. Ltd. (Taxpayer) v. CIT [TS-791-SC-2022]*, In the instant case, the appellant has failed to deposit entire amount towards employees' contribution on account of PF and ESI on or before prescribed due date. Therefore, the appellant is not entitled to deduction u/s 36(1)(va) of the Act. Accordingly, the appeal is dismissed on merits."

7. Ld. D/R specifically mentioned that the issue is covered by the decision of the Hon'ble Supreme Court in the case of *Checkmate Services Pvt. Ltd. (supra)*. Accordingly, the entire amount will be disallowed.

8. We heard the rival submissions and considered the documents available in the record. The issue was already adjudicated in different

occasion by the ITAT, Kolkata Bench and the Benches have a same view related to disallowance of delayed payment of PF&ESI which is against the assessee. We also respectfully follow the order of the Hon'ble Apex Court in the case of *Checkmate Services Pvt. Ltd (supra)*.

9. In our considered view that It has finally been held by Hon'ble Apex Court there is clear distinction between 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 from its employees' in terms of Sec. 36(1)(va). The former part is the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) and therefore, subjected to conditions spelt out by Explanation to Section 36(1)(va) 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 contributions – the employer's liability is to be paid out of its income whereas the second is deemed to be an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has been clarified while interpreting the obligation of every assessee under Section 43B. If the same is not deposited as per mandate of Sec.36(1)(va), the deduction of the same would not be available to the assessee. Thus, this issue stands in favor of revenue and we respectfully follow the same.

10. We are not interfering in the order of the ld. CIT(A). Accordingly, the appeal of the assessee is dismissed.

11. In the result, **ITA No. 1073/KOL/2023** is dismissed.

Order pronounced in the open Court on 22nd February, 2024.

Sd/-

[Rajesh Kumar]

Accountant Member

Sd/-

[Anikesh Banerjee]

Judicial Member

Dated: 22.02.2024

Bidhan (P.S.)

Copy of the order forwarded to:

1. **Kamakshi Jute Industries Ltd., 16A, Brabourne Road, Tea Board, Dalhousie, Kolkata-700 001.**
2. **DCIT, CPC.**
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata