

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI**

**BEFORE,
SHRI S. RIFAUH RAHMAN, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.2104/Del/2023
(ASSESSMENT YEAR 2019-20)**

Simbhaoli Sugars Ltd. Kothi No. 1, Simbhaoli, Hapur, Uttar Pradesh PAN-AAPCS7569A (Appellant)	Vs.	ACIT Circle-2(3) (1) Bulandshahar (Respondent)
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Appellant by	Sh. Subhash Kumar, CA
Respondent by	Sh. Anuj Garg, Sr. DR

Date of Hearing	09/05/2024
Date of Pronouncement	10/05/2024

ORDER

PER YOGESH KUMAR U.S.JM:

This appeal is filed by the Assessee against the order of Income Tax Department/National Faceless Appeal Centre ["NFAC" for short], dated 30/05/2022 for the Assessment Year 2019-20.

2. The Grounds of Appeal are as under:-

"1. On the facts and circumstances of the case the learned CIT (Appeals)/National Faceless Appcal Centre

(NFAC) and the CPC, erred in law in disallowing a claim u/s 143(1) which is debatable in respect of belated remittance of Employee's provident fund and ESI Contribution of Rs. 2,98,41,746/- for the assessment year 2019-20. After the omission of the second proviso to section 43B w.e.f. 01-04-2004, the deduction is allowable under the first proviso, if the payment is made on or before the "due date" for furnishing the return of income under I. Tax Act.

2. On the facts and circumstances of the case the learned CIT (Appeals)/National Faceless Appeal Centre (NFAC) and the CPC, erred in law in disallowing the claim in respect of belated remittance of Employee's provident fund based on the insertion to explanation to section 36 of Income Tax Act, 1961 by the Finance Act, 2021, stating it to be retrospective in nature. The Assessee believes that explanation to section 36 by Finance Act, 2021 has prospective effect and not retrospective effect. Hence, not applicable for assessment year 2019-20, thus, the addition of Rs. 2,98,41.746/-, needs to be deleted.

3. On the facts and circumstances of the case the learned CIT (Appeals)/National Faceless Appeal Centre (NFAC), erred in law in disallowing the claim ex-parte which is against the principal of Natural Justice. the Appellant was not even aware of the appeal filed as the manager taxation has resigned during Covid and the New Manager taxation has registered during covid and the New Manager has updated the email ID on portal in March, 2022 which prevented the Appellant to comply with the notices.

3. The grievance of the Assessee in the above appeal against the Revenue in disallowing claim in respect of belated remittance of Employees Provident Fund. The Ld. Counsel for the Assessee

vehemently submitted that the Ld. CIT(A) committed error in confirming the disallowance of Rs. 2,98,41,746/-.

4. Per contra, the Departmental Representative relying on the orders of the Lower Authorities and submitted that as per the ratio laid down by the Hon'ble Supreme Court of India in the case of Checkmate Services Pvt. Ltd. Vs. CIT-1 in Civil Appeal No. 2833 of 2016, vide order dated 12/10/2022, the present Appeal filed by the Assessee is liable to be dismissed.

5. We have heard both the parties and perused the material available on record. The Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-1 in Civil Appeal No. 2833 of 2016, vide order dated 12/10/2022 held that delayed deposit of the contribution EPF & ESIC beyond the stipulated period prescribed in the respective Acts are not allowable in following manners:-

“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 Court’s 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 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 isto 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 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 33 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 34 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."

6. Since, the Hon'ble Supreme Court has laid down the ratio that the Employee's Contribution not paid within the due date specified under the relevant act is not allowable. Thus, following the ratio

laid down in the case of Checkmate (supra), we find no merits in the Grounds of Appeal of the assessee.

7. The Ld. Counsel for the Assessee alternatively submitted that the Employees Contribution has been paid well within time considering the due dates as per Section 38 of EPF Scheme 1952, therefore, the addition/disallowance u/s 2(24)(x) is not warranted. Further submitted that as per Clause 38 of the Employees' Provident Fund Scheme, 1952, fixes the time limit for making payment in respect of contribution to the provident fund to be 15 days from the close of the month concerned. However, the issue here is whether the "month" should be considered to be the month to which the wages relate or the month in which the actual disbursement of the wages is made irrespective of month to which it same relates.

8. Considering the alternative submission of the the Assessee's Representative and in view of the above facts and circumstances, we remand the matter to the file of the A.O. to verify '*the due date*' as prescribed by the EPF Scheme, 1952 and examine the issue of

allowability afresh in accordance with law. Accordingly, the Appeal of the Assessee is partly allowed for statistical purpose.

9. In the result, the Appeal of the Assessee is partly allowed for statistical purpose.

Order pronounced in open Court on 10th MAY, 2024

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Dated: 10/05/2024

R.N, Sr.ps

Copy forwarded to:

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

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI