IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H': NEW DELHI

BEFORE,
SHRI G. S. PANNU, VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.3711/Del/2023
(ASSESSMENT YEAR 2019-20)

VPSSR Facilities 124, First Floor Jaina Tower-I District Centre Janak Puri Delhi-110058 PAN-AAKFV8046K	Vs.	Income Tax Officer Ward-49(4) New Delhi
(Appellant)		**(Respondent)**

Assessee by	Shri Manpreet Singh Kapoor, CA & Sh. Rajendra Singh Rathore, Adv.
Department by	Shri Amit Katoch, Sr. DR

Date of Hearing	18/03/2024
Date of Pronouncement	31/05/2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal of the Assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals)-2, Vadodra [hereinafter referred to as 'Ld. CIT(A)'] in DIN & Order No. ITBA/APL/S/250/2023-24/1057602496(1) dated 01/11/2023 against the order dated 10/04/2020 passed by Asst. Director of

Income Tax, CPC Bengaluru (hereinafter referred to as the 'Ld. AO') u/s 143 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Brief facts of the case are that assessee is engaged in the business of providing facilities management services. The appellant filed its return declaring an income of Rs.1,37,40,682/- for the A.Y.2019-20 on 20/12/2019. The return was verified and intimation U/s 143(1) was issued on 10/04/2020 by the CPC Bangalore making a disallowance amounting to Rs.6,81,295/- on account of Employee's Provident Fund (Employee's contribution) amount paid and a disallowance amounting to Rs.1,00,612/- on account of Employee's State Insurance (Employee's contribution) amounting paid. Thus total disallowance of Rs.7,81,907/- was made.

3. Being aggrieved the appellant assessee preferred first appeal before CIT(A) when discussed the same by applying the judgment of Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. vs. CIT-1, in Civil Appeal No.2833 of 2016 & Ors.

4. Being aggrieved appellant assessee preferred present appeal raising following grounds:

"1.The CIT(A) is erred in law by confirming the order u/s 143(1) of Assessing Officer, which is bad in law on facts and circumstances of the case.

2. That the CIT (A) is erred in law by conferring the order of Assessing officer which is in violation of principle of natural justice and against the rule of audi alteram partem.

3. That the CIT (A) is erred in law by not providing the opportunity of Virtual Hearing as requested by the appellate, which is against the principal of natural justice as per law.

4. The CIT (A) is erred in law by applying the judgment of Hon'ble Supreme Court of Checkmate Services Pvt. Ltd. Vs. Commissioner of Income Tax, which is distinguish to the facts of the appellate case.

5. That the disallowance made on account of EPF amount paid amounting to Rs.6,81,295/- is bad in law as per the details facts and circumstances of the case and hence, the disallowance made is liable to be deleted.

6. That the disallowance made on account of ESI amount paid amounting to Rs.1,00,612/- is bad in law as per the details facts and circumstances of the case and hence, the disallowance made is liable to be deleted.

WITHOUT PREJUDICE TO ABOVE

7. That the Ld. AO has erred in facts and law by passing an order without considering the decisions of Hon'ble High Courts & Tribunals, which is bad in law.

8. The CIT (A) is erred in law by confirming the order of Assessing Officer without considering the real income theory, which is the principle of computation of taxable income as per provision of Income Tax law.

9. The CIT (A) is erred in law by confirming the order of Assessing Officer without considering the expenditure incurred of Rs.7,81,907/- u/s 37(1) of Income Tax Act, which is bad in law.

10. The appellant prays for leave to add, alter, modify and withdraw any of the grounds either before or at the time of hearing."

5. Heard and perused the record.

6. Ld. AR has submitted that the Assessing Officer has made a disallowance u/s 2(24) (x) r.w.s 36(1) (va) amounting to Rs.6,81,295/- of EPF (Employee's contribution). Whereas salary for the month of August was paid in September and EPF paid on 25/09/2018, which is before the due date prescribed as per EPF Act, 1952. Hence, there is no delay in deposit of EPF of Employee's Contribution as per EPF Act. Therefore, no disallowance can be made as per provisions of Income Tax Act. It was further submitted that the Assessing officer has made a disallowance u/s 2(24)(x) r.w.s 36(1)(va) amounting to Rs.1,00,612/- of ESI (Employee's Contribution) whereas salary paid for the month of August was paid in September and ESI paid on 25.09.2018, which is paid before the due date as per regulation 31 of ESI Act.1948. Hence there is no delay in deposit of ESI of Employee's contribution as per ESI Act. Therefore, no disallowance shall be made as per provisions of Income Tax Act.

6.1 It was contented that the CIT (A) did not adjudicate issue of due date as per EPF Act, whereas all detail, case law and relevant facts has been furnished by the appellant during proceeding.

6.2 It was submitted that the CIT(A) has not considered the principle of real income of assessee and confirmed the addition made by Assessing officer without considering the real income principle. The assessee has not earned any income by way of delay in deposit such EPF, which is actually not delayed as per clause 38 of EPF Act and regulation 31 of ESI Act. The assessee has already made payments for employee's contribution of ESI/EPF during the FY relevant to AY in question amounting to Rs. 7,81,907/-. The deemed income in respect of non-payment of such employee contribution can only arise if the such payment was not done by assessee during the AY in question. The CIT(A) has erred in law without considering what real income had been earned by assessee due to delay in deposit of such employee contributions in her hand.

6.3 It was further argued that the delay in deposit of Employee contribution has not effect on the benefit of employee. As per EPF

Act, in case of delay in deposit of EPF, the employee would get full amount of interest for such delay period and the same was recovered from employer as interest recoverable. The Employer is required to pay the interest at the time of deposit of the Challan of EPF.

7. Ld. DR has, however, relied on the order of the Ld. Tax Authorities below.

8. After taking into consideration, the material placed before us and submissions also, we are of the considered view that the only point required to be determined is whether the assessee had deposited the employee's contribution as per the due date to be determined according to respective ESI/EPF Acts.

9. In this regard, as we go through the facts stated before us it comes up that the order of Assessing Officer, on factual aspects is silent as assessment was completed by issuing intimation u/s 143(1). Before the CIT(A), the assessee had raised these factual aspects but were not considered sustainable in the light of judgment of Hon'ble Supreme Court in the case of Checkmate

Services Pvt. Ltd. (supra) as CIT(A) in para 7.40 has observed as follows:-

> *"7.40. All these controversies have now been laid to rest by the decision of Hon'ble Supreme Court in the case of Checkmate Services P Ltd vs Commissioner Of Income Tax-l, in CIVIL APPEAL NO. 2833 OF 2016 and others, rendered on 12 October, 2022. After considering the legislative history of Section 36(1) (va) and 43B. the amendments brought in over the years and the various interpretations adopted by different courts, the Hon'ble Supreme Court, had clearly held that provisions of Section 43B apply only for employers' contribution and not to employees' contribution to PF/ESI since it is money held in trust and has to be deposited within the due dates as prescribed under section 36(1)(va) of the Act, as evident from the concluding part of the decision is extracted herein:*
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> > *"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 employers contribution (Section 34(1)(iv)). At that point in time, there was no question of employees contribution being considered as part of the employers eaming. 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 provise of Section 438, 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 438 - 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 employees 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 employers 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 employers 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

bome while interpreting the obligation of every assessee under Section 438.

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 employers obligation to deposit the amounts retained by it or deducted by it from the employees 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 employers 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 employees 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."

7.41. Post the above decision of the Hon'ble Supreme Court, on a similar appeal before the Hon'ble Gujarat High Court in the case of Diversified

Services Vs Income Tax Officer [2023] 150 taxmann.com 384 (Gujarat), disallowance u/s.36(1)(va) made in the intimation issued u/s. 143(1) of the Act was upheld.

7.42. Similar decisions have been rendered by various Tribunals wherein it was held that disallowance u/s 36(1)(va) on the basis of Tax Audit Report in Form 3CD is a permissible adjustment under Section 143(1)(a)(iv) as well as under section 143(1)(a)(ii) of the Act. It is further held that the insertion of the words, "increase in income" in section 143(1)(a)(iv) w.e.f. 01.04.2021 will have no impact on such disallowance.

7.43. The disallowance made u/s.36(1(va) vide intimation u/s. 143(1) stand confirmed in the following cases, to mention a few:

(i) Pravin Malshi Shah Vs Circle-23(1) (ITAT Mumbai)
(ii) M/s. Salasar Balaji Ship Breakers Pvt. Ltd. ITA No. 1947/Mum/2021 [Mumbai]
(iii) M/s.Electrical India Vs ADIT, CPC, Bengaluru in ITA No.789/Chny/2022 [Chennai]
(iv) Savleen Kaur Vs ITO [2023] 147 taxmann.com 402 (Delhi - Trib.)
(v) Premier Irrigation Adritec (P.) Ltd. Vs ACIT [2023] 146 taxmann.com 389 (Kolkata - Trib.)
(vi) Ms.Nalina Dyave Gowda Vs Assistant Director of Income Tax [2023] 146 taxmann.com 420 (Bangalore - Trib.)
(vii) Cemetile Industries Vs ITO [2022] 145 taxmann.com 209 (Pune - Trib.)
(viii) Kwality Motel Shiraz 1 Vs ITO [2023] 149 taxmann.com 490 (Indore - Trib.)
(ix) Ocean Exim India (P) Ltd Vs ITO [2023] 148 taxmann.com 80 (Jaipur Trib.)
(x) Anjani Kumar Dwivedi Vs ADIT CPC [2023] 150 taxmann.com 144 (Raipur) Suresh Electricals Vs DCIT [2023] 146 taxmann.com 102 (Bangalore Trib.)

Thus the contention that the appellant had deposited the employee contribution of EPF & ESI on or before due date for furnishing of return of income u/s 139(1) of the Act but after the prescribed due dates as per section 36(1)(va) and therefore is entitled for deduction stand already decided against the appellant vide the decisions cited above.
7.44. In view of the facts of the case and the legal position as discussed above, it is held that the disallowance made u/s.36(1) (va) on account of appellant's failure to pay the employee's contribution of PF/ESI within the prescribed due dates as per section 36(1)(va) is strictly in accordance with law and tenable on facts. ***The appeal on this ground is therefore rejected."***

10. After taking into consideration, the judgment of Hon'ble Supreme Court in the case of *Checkmate Services Pvt. Ltd. (supra*) we are of the considered view that in para 52 to 54, the Hon'ble Supreme Court specifically observed that Section 43B is applicable to the amounts received or deducted from the employee and that *"in the case of these liabilities, what constitutes the due date is defined by the statute".*

11. It comes up that before CIT(A), it was submitted that Tax Auditor had not mentioned due dates as per respective Act while payments were actually made before the due date fixed in respective Acts.

12. We consider it expedient to reproduce the relevant part of submissions as available on page -5 of order of CIT(A) as follows:

> *"4 The Ld. AO has made a disallowance amounting to Rs.6,81,295/- on account of Employee's Provident fund (Employee's contribution) amount paid, which is allowed as per provision of Income Tax Act for the month of August 2018, which was deposited on 25.09.2018. The salary for the month of August 2018 was paid on 07.09.2018 and as per EPF Act, the EPF required to be deposit in following month of the month of salary paid. Hence, there is no delay in deposit the EPF as per EPF Act.*
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> *5. The Tax Auditor has mentioned the due date as 15.09.2018 for the salary paid in August, instead of 15.10.2018 as per EPF Act."*

13. Thus before CIT(A) the assessee had tried to demonstrate that in the Tax Audit Report the "due date" was wrongly mentioned by Auditors otherwise the payments were made within 'due dates' as per respective statues. However, CIT(A) has not shown any indulgence to the same and following *Checkmate Services Pvt. Ltd. (supra*), dismissed the grounds. We are of considered view that once before CIT(A), while pointing out mistake in Tax Audit Report, the assessee had pleaded new set of facts, the same should have been reasonably enquired into.

14. In the light of aforesaid discussion, we are inclined to restore the issue, if payments were made as per 'due dates' in respective statues, to the files of CIT(A). Ld. CIT(A) shall take the submissions of assessee in consideration and make further enquiry, if needed, and determine the issue afresh. **The appeal of the assessee is allowed for statistical purposes.**

Order pronounced in the Open Court on 31/05/2024.

Sd/-	Sd/-
(G.S.PANNU)	**(ANUBHAV SHARMA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 31/05/2024

PK/Ps
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI