आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRIB.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 258/Ind/2023
Assessment Year : 2018-19

Indiyaa Distribution Network LLP, 11D, Sampat Farm, Opp.Agrawal Public School, Bicholi Mardana Road, Indore.	**बनाम/** Vs.	Dy. CIT, 1(1), Indore.
(Assessee / Appellant)		(Revenue / Respondent)
PAN: AARFG1302N		
Assessee by	Ms.Ruchira Singhal, AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	21.05.2024	
Date of Pronouncement	21.06.2024	

आदेश/O R D E R

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the order dated 23rd February, 2023, of Ld. CIT(A, NFAC, Delhi, for the assessment year 2018-19.

2. The assessee has raised following grounds of appeal :-

1. That the Ld. CIT(A) erred in upholding the disallowance of a sum of Rs. 27,91,386/- made u/s 36(1)(va) qua late payment

ESIC/PF. It is prayed that the disallowance u/s 36(1)(va) is uncalled for and hence may very kindly be deleted.

2. That the Ld. CIT(A) erred in upholding the disallowance made u/s 36(1)(va) by relying on the amendments introduced by the Finance Act, 2021, and ignoring the fact and such amendments shall not have any retrospective applicability.

3. That the Ld. CIT(A) erred in confirming the disallowance made u/s 143(1) and confirmed by the ld. AO in the assessment order passed u/s 143(3) r.w.s. 143(3A) and 143(3B). As there was ambiguity of late payment of ESIC/PF, the same falls out of purview of section 143(1).

4. The appellant craves leave to add, to alter, amend, modify, sub statute, delete and or rescind all or any of the grounds of appeal on or before final hearing, if necessity so arises.

3. Ground Nos. 1 & 2 are regarding disallowance made u/s 36(1)(va) of the Income-tax Act, 1961, on account of belated payment for Employees' contribution to P. F. and ESIC.

4. We have heard the Ld. Authorized Representative of the assessee as well as Ld. Departmental Representative and have perused the relevant material on record. This issue of addition made on account of belated payment of employees' contribution to P. F. and ESIC is now covered by the decision of Hon'ble Supreme Court in the case of Checkmate Services P.Ltd. vs. CIT-I, 448 ITR 518, and the relevant part of the decision in paras 51 to 55 are as under :-

> *"**51.** The analysis of the various judgments cited on behalf of the assessee i.e.,CIT v. Aimil Ltd. [2010] 188 Taxman 265/321 ITR 508 (Delhi); CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.); CIT v. Pamwi Tissues Ltd. [2009] 313 ITR 137 (Bom.); CIT v. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. [2013] 35 taxmann.com 616/217 Taxman 64 (Mag.)/[2014] 366 ITR 163 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 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 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 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 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 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 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."*

Accordingly, following the judgement of Hon'ble Supreme Court Ground Nos. 1 & 2 of the assessee's appeal stand dismissed.

5. Ground No. 3 is regarding jurisdiction of CPC while processing the return of income u/s 143(1) for making the disallowance/adjustment on account of belated payment to P. F & ESIC.

6. We have heard the Ld. Authorized Representative of the assessee as well as the Ld. Departmental Representative and carefully perused the orders of the authorities below. The assessee filed return of income for the year under consideration on 30th September, 2018 declaring total income of Rs. 6,12,59,330/-. The case of the assessee was selected for complete scrutiny assessment under e-Assessment Scheme 2019. In para no. 2 of the assessment order, the AO has given the details of the reply of the assessee to the notice issued u/s 142(1) and considered this issue in para nos. 3 & 4 of his order. For the sake of completeness para nos. 2 to 4.1 are scanned as under :-

2. The detail filed have been examined. The assessee vide letter dated 01.01.2021 has stated that the assessee's income has been assessed u/s 143(1) of the IT Act, 1961 by the CPC Bangalore, at Rs.6,40,50,710/- against the returned income of Rs.6,12,59,330/-. The disallowance made is of Rs. 27,91,386/- which is reflected as 'Amounts debited to the Profit & Loss account, to the extent disallowable u/s 36 (6s of Part-OI) in the variance column at Sl No. A I4- Annexure - Business and Profession'. It is stated by the assessee that this amount relates to contribution received from Employees towards EPF / ESI. The payments made after the due date are as under:

S.No.	Particulars	Amount	Due Date	Actual date of payment
1	EPF(July 2017)	Rs. 5,63,180/-	15.08.2017	15.09.2017
2	EPF(July 2017)	Rs. 1,068/-	15.08.2017	14.10.2017
3	EPF(Aug 2017)	Rs. 7,050/-	15.09.2017	20.02.2018
4	EPF(Aug 2017)	Rs. 5,57,564/-	15.09.2017	16.09.2017
5	EPF(Sept 2017)	Rs. 3,792/-	16.10.2017	20.02.2018
6	EPF(Oct 2017)	Rs. 5,98,189/-	15.11.2017	18.11.2017
7	EPF(Oct 2017)	Rs. 386/-	15.11.2017	20.02.2018
8	EPF(March 2017)	Rs. 6,42,090/-	16.04.2018	03.05.2018
9	ESI (July 2017)	Rs. 88,428/-	15.08.2017	25.09.2017
10	ESI (Aug 2017)	Rs. 94,013/-	15.09.2017	25.09.2017
11	ESI (Oct 2017)	Rs. 1,04,870/-	15.11.2018	18.11.2017

For Indiyaa Distribution Network LLP
Partner

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12	ESI (March 2017)	RS. 1,30,756/-	16.04.2018	07.05.2018
	Total	**Rs. 27,91,386/-**		

However, the above payments have been duly made before the due date of filing the return, and hence, the provisions of section 43B of the IT Act, 1961 are not applicable in its case.

3. The assessee firm filed a request for rectification with the CPC against the said intimation on 02.12.2019 but the same was rejected on 12.12.2019 vide DIN CPC/1819/TI3/1918529294 stating that the rectification request could not be considered at the CPC and the rectification rights are transferred to Assessing Officer. Now, since the case is under scrutiny, the assessee has requested for deleting the disallowance made of Rs. 27,91,386/-. In support of its contention the assessee has submitted copies of challans as proof of having made the above payments before the due date of filing the return.

4. On verification of the details submitted and the Audit Report it is seen that the above payments represent Employees Contribution to EPF and ESI which have been made after the due date as laid down in the respective statutes. The assessee's contention that since the above payments have been made before due date of filing return of income and hence allowable u/s.43B is not tenable. It is important to note that provisions of section 43B of the I.T.Act deals with Employers contribution to EPF/ESI etc and not Employees Contribution to the above funds. Employees contribution is covered by provisions of section 36(1)(va) r.w.s section 2(24)(x) of the I.T.Act. Considering the same if Employees Contribution is deposited after the due dates as laid down in the respective statutes, as is in the case of the assessee. as shown in para 2 above, the provisions of section 36(1)(va) r.w.s section 2(24)(x) of the I.T.Act 1961 are attracted and such amount is to be added to the total income of the assessee. Reliance is also placed on Circular No.22 of 2015 dated 17.12.2015 of CBDT which deals with the of allowability u/s.43B of Employers contribution to provident fund/superannuation fund or gratuity fund or any other fund for welfare of employees, if paid by before due date of filing of return u/s.139(1). It is specifically clarified in para 5 of the said circular that this circular does not apply to Employees contribution which are covered by section 36(1)(va) of the I.T.Act,1961.

For Indiyaa Distribution Network LLP
Partner

> *4.1 Considering the above, no change is made in the adjustment made in intimation u/s 143(1) dated 01.10.2019, in the above matter. "*

Thus, it is clear that against the adjustment made by the CPC while processing the return of income u/s 143(1), the assessee filed an application for rectification. However, the case of the assessee was taken up for complete scrutiny, therefore, the said application of the assessee was also directed to the AO for consideration and disposal. The AO has considered the claim of the assessee for allowing the belated payment towards employees' contribution to P.F. and ESIC u/s 43-B, but the same has been decided by the AO by holding that no change is made in the adjustment made in the intimation issued u/s 143(1) of the Act. Therefore, this issue is very much subject matter of the assessment framed u/s 143(3) of the Act and hence, no issue arises qua the jurisdiction of CPC while processing the return of income u/s 143(1) for making such adjustment, when the case of the assessee was taken up for complete scrutiny and the assessment was framed u/s 143(3) read with sections 143(3A) and 143(3B) of the Income-tax Act, 1961. Even otherwise once scrutiny assessment was completed subsequent to processing of return u/s 143(1), the order of CPC merges with the assessment order passed u/s 143(3) and only in case when the assessment order is quashed being invalid or void ab initio, the order of CPC u/s 143(1) would revive and assessee would be at liberty to take the remedial steps under the law. Therefore, we do not find any merit or substance in the ground no. 3. The same is dismissed.

7. The assessee has also raised an objection against the validity of the assessment order on the ground that the AO has not issued a draft order mandatory as per the e-Assessment Scheme, 2019. The Ld. Authorized Representative of the assessee has submitted that the assessment order was passed by the AO after the case of the assessee was selected for complete scrutiny in e-Assessment Scheme 2019. However, the AO has not issued the draft assessment order as well as the show cause notice to the assessee before finalizing the assessment. Thus, the Ld. Authorized Representative of the assessee has submitted that the impugned order passed by the AO is invalid and liable to be quashed, when it is not in the conformity of the e-Assessment Scheme, 2019. The Ld. Authorized Representative of the assessee has submitted that the CBDT vide notification dated 1st November, 2019, has notified the procedure for completion of Faceless Assessment and as per sub clause (xiv) and (xvi) of the Clause 2 of the said Notification, the AO is required to issue a draft assessment order and an opportunity is required to be given to the assessee in case any variation prejudicial to the interests of the assessee is proposed in the draft assessment order by serving a notice calling upon him to show cause as to why the proposed variation should not be made. Thus, the Ld. Authorized Representative of the assessee has submitted that when the AO has made a variation to the returned income of the assessee and the disallowance made was prejudicial to the interests of the assessee, then the AO ought to have issued a draft assessment order alongwith show cause notice to the assessee as to why the proposed addition should not be made in its case, therefore, making the

addition directly without any show cause notice to the assessee and without giving any opportunity to explain its case, the order passed by the AO would become bad in law and liable to be quashed. The Ld. Authorized Representative of the assessee has relied upon the decision of Hon'ble Bombay High Court in the case of Chander Arjan Das Manwani vs. NFAC and Others, 283 Taxman 380 (Bom).

8. On the other hand, the Ld. Departmental Representative has submitted that when the AO has made no variation in the returned income ,but assessed the income as it was assessed by the CPC while processing the return u/s 143(1), then there was no requirement of issuing any show cause notice to the assessee. He has referred to e-Assessment Scheme 2019 and submitted that only in case the AO has proposed any addition or variation, which is prejudicial to the interests of the assessee, a show cause notice is required to be given to the assessee before passing final assessment order. He has further submitted that the Ld. CIT(A) has dismissed this ground of appeal as the assessee did not press the same and, therefore, the assessee cannot agitate this issue before the Tribunal.

9. We have considered the rival submissions as well as relevant material placed on record. There is no dispute that as per the e-Assessment Scheme, 2019, notified by the CBDT by Notification dated 1st November, 2019, the scrutiny is undertaken by National e-Assessment Centre by issuing a notice u/s 143(2) of the Act specifying the issues of selection of the case for scrutiny assessment. After receiving the response from the assessee to the notice u/s 143(2), the case shall be assigned by the National e-Assessment

Centre to specific assessment unit in any one regional e-Assessment Centre through an automatic allocation system. Thus, under the e-Assessment Scheme, no direct correspondence is done between the assessment Unit or the regional assessment Centre and the assessee, but all the correspondences are made through National e-Assessment Centre. Therefore, all the notices issued are routed through the National e-Assessment Centre and all reply from the assessee are also routed through National e-Assessment Centre. After considering the relevant material available on record, assessment unit makes a draft assessment order in writing. A copy of such draft assessment shall be sent to the National e-Assessment Centre, which after examination of the draft assessment may decide to finalize the assessment as per the draft assessment order, if there is no variation proposed by the AO to the returned income and where a modification is proposed, which is prejudicial to the interests of the assessee, National e-Assessment Centre provides an opportunity to the assessee by serving a notice calling upon him to show cause as to why the assessment should not be completed as per the draft assessment order. There is a third option also with National e-Assessment Centre for assigning the draft assessment order to review units to any other regional e-Assessment Centre through an automatic allocation system for conducting a review of such order. After receiving a response from the assessee to the Show Cause Notice, the National e-Assessment Centre forward the same to the assessment unit and consequently the assessment unit shall make revised draft assessment order by considering the response furnished by the

assessee and forward it to the National e-Assessment Centre. The National e-Assessment Centre after receiving the revised draft assessment order shall finalize the same, if the matter proposed is not prejudicial to the interests of assessee or give further opportunity of hearing to the assessee on revised draft assessment order before the same is finalized. Though the assessee has raised this issue before the Ld. CIT(A) in ground nos. 2 & 3, however, the Ld. CIT(A) has dismissed these grounds in para no.6 of the impugned order as under :-

> "*6. Ground no. 2, 3 & 5 are general in nature and were not pressed by the appellant during the appellant proceedings. Hence, these grounds do not require any adjudication. Accordingly, Ground Nos. 2, 3 & 5 are dismissed.* "

10. Since this is a very serious objection raised by the assessee which ought to have been decided by the Ld. CIT(A), instead of dismissing on the ground of general in nature and not pressed. The Ld. CIT(A) ought to have decided this issue by considering the fact regarding issuance of draft assessment and procedure as per e-Assessment Scheme, 2019. The assessee is seeking quashing of the assessment order being invalid on the strength of judgement of Hon'ble Mumbai High Court in the case of Chander Arjan Das vs. NFAC and Others, (supra). However, it is pertinent to note that the said decision of Hon'ble Bombay High Court has been set-aside by the Hon'ble Supreme Court reported in 293 Taxman 296 (S.C.) in the case of National Faceless Assessment Centre vs. Mantra Industries Limited in para 2 to 7, as under :-

> ***"2.** Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Judicature at Bombay in Chander Arjandas Manwani v. National Faceless Assessment Centre [2021] 130 taxmann.com 445/283 Taxman 380/[2022] 442 ITR 197, by which the High Court has allowed the said writ petition and has quashed the Assessment Order, the Revenue has preferred the present appeal.*

3. *From the impugned judgment and order passed by the High Court, it appears that while quashing and setting aside the Assessment Order, the High Court has heavily relied upon the CBDT Circular dated 13-8-2020 issued under section 119 of the Income-tax Act, 1961 (for short "the Act"), more particularly, para 3 of the said CBDT Circular which reads as under:-*

"3. Any assessment order which is not in conformity with Para-2 above, shall be treated as non-est and shall be deemed to have never been passed."

4. *Shri Balbir Singh, learned ASG, appearing for the Revenue has submitted that para 3 of the CBDT Circular is similar to/pari materia to sub-section (9) of section 144B of the Act, which was earlier brought into statute with effect from 1-4-2021. However, the very pari materia provision has been omitted subsequently w.e.f. 1-4-2021. It is submitted that omission of section 144B (9) of the Act would have a direct bearing on the merits of the impugned judgment and order passed by the High Court.*

5. *Learned counsel appearing on behalf of the assessee disputes the above and has submitted that even Section 144B(9) of the Act was brought into statute w.e.f. 1-4-2021 and, in the present case, the Assessment Order was passed prior to 1-4-2021 and even the CBDT Circular was issued prior to 1-4-2021.*

6. *Having heard learned counsel appearing for the respective parties and in view of the subsequent development of omitting Section 144B (9) of the Act, which is pari materia to para 3 of the CBDT Circular dated 13-8-2020, which has been relied upon by the High Court, we deem it appropriate to set aside the impugned judgment and order passed by the High Court and remand the matter to the High Court to consider the effect of omission of Section 144B (9) of the Act, which has been omitted w.e.f 1-4-2021 on para 3 of the CBDT Circular dated 13-8-2020.*

7. *In view of the above and for the reasons stated above and without further expressing anything on merits in favour of either parties on the omission of section 144B(9) of the Act w.e.f. 1-4-2021, the impugned judgment and order passed by the High Court is set aside. The matter is remitted back to the High Court to consider the same afresh in accordance with law and on merits and the High Court to consider the effect of the omission of section 144B(9) of the Act, which has been omitted w.e.f. 01-4-2021 and the effect of such omission on para 3 of the CBDT Circular dated 13-8-2020 which, as such, prima facie seems to be pari materia to section 144B(9) of the Act."*

11. Accordingly, following the judgement of Hon'ble Supreme Court, this issue is remanded to the record of the AO to pass a fresh assessment order after following due process in accordance with law.

12. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 21.06.2024.

Sd/-	sd/-
B.M.BIYANI	VIJAY PAL RAO
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Indore
दिनांक/Dated : 21.06.2024
CPU/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore