आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "बी" , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH

HEARING THROUGH: PHYSICAL HEARING

श्री विक्रम सिंह यादव, लेखा सदस्य एवं श्री परेश एम. जोशी, न्यायिक सदस्य
BEFORE: SHRI. VIKRAM SINGH YADAV, AM & SHRI. PARESH M. JOSHI, JUDICIAL MEMBER

आयकर अपील सं./ ITA NO. 413/Chd/2023
निर्धारण वर्ष / Assessment Year : 2018-19

The Dy. CIT Circle, Patiala	बनाम	The British Co. Ed. School, Patiala- 147001
स्थायी लेखा सं./PAN NO: AAMFT2676D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by : Shri Dharamvir, JCIT, Sr. DR
निर्धारिती की ओर से/Assessee by : None

सुनवाई की तारीख/Date of Hearing : 19/06/2024
उदघोषणा की तारीख/Date of Pronouncement : 21/06/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M :

This is an appeal filed by the Revenue against the order of the Ld. CIT(A)/NFAC Delhi dt. 08/11/2021 pertaining to Assessment Year 2018-19.

2. In the present appeal, the Revenue has raised the following grounds of appeal:

1. Whether on the facts & in the circumstances of the case, the Ld. CIT(A) was right in law in holding that the amendment which has been brought in by the Finance Act, 2021 shall apply w.e.f. assessment year 2021-22 and subsequent assessment years.

2. Whether on the facts & in the circumstances of the case, the Ld. CIT(A) has fallen into error while not noticing that Finance Act, 2021 also inserted a second Explanation to section 36(1)(va) wherein it was clarified that provisions of section 43B shall be deemed to never have been applied for the purposes of determining the "due date" under section 36(1)(va)

3. Whether on the facts & in the circumstances of the case, the Ld. CIT(A) was right in law in deleting the addition made by way of adjustment while processing the return of income u/s 143(1) of the Act so made by the CPC towards the deposit of employees' contribution towards ESI and PF, paid after the due date

under the relevant Act but before the due date of filing of the return of income u/s 139(1) of the Act.

4. Whether on the facts & in the circumstances of the case, the order of Ld. CIT(A) is legally unsustainable now that the Hon'ble Supreme Court vide its judgment in the case of Checkmate Services Pvt. Ltd. vs CIT, Civil Appeal No. 2383 of 2016 has brought finality to the issue of 'due date' as per the explanation to section 36(1)(va) vis-a-vis that in the second proviso to section 43B.

5. The appellant craves leave to add, amend or delete any of the grounds of appeal during the appellate proceedings.

3. At the outset, it is noticed that the appeal of the Revenue is barred by limitation by 537 days as pointed out by the Registry.

4. In this regard, during the course of hearing, the Ld. DR submitted that the AO has moved a condonation application alongwith an affidavit. It was submitted that the return of income e-filed by the assessee was processed by CPC u/s 143 (1) of the Act vide order dated 22/10/2019 by making an addition of Rs. 9,73,615/- on account of disallowance of employee's share of ESI and PF which was deposited late i.e., after the due date and added it to the income of the assessee. Aggrieved with order of the CPC, the assessee filed an appeal before the Id. CIT(A).

4.1 The Id. CIT(A), vide his order dated 08/11/2021 deleted the disallowance so made by the CPC and allowed the appeal so filed by the assessee. The Id. CIT(A) held that the amendment which has been brought in by the Finance Act, 2021 shall apply we.f. assessment year 2021-22 and subsequent assessment years and the impugned assessment year being assessment year 2018-19, the said amendment cannot be applied in the instant case. The Id. CIT(A) further directed that the addition made by way of adjustment while processing the return of income us 143(1) of the Act so made by the CPC towards the deposit

of employees' contribution towards ESI and PF, paid before the due date of filing of the return of income u/s 139(1) of the Act be deleted after due verification.

4.2 It was submitted that on a similar issue, the Hon'ble Supreme Court in the case of M/s. Checkmate Services Pvt. Ltd. Vs. CIT, Civil Appeal No. 2833 of 2016 has held that if an assessee deposits amounts held/retained by him as employee's contribution to EPF/ESI etc. after the due date (i.e. the date as per the relevant Act), disallowance u/s 36(l)(va) would be attracted and provisions of Section 43B, where due date is taken as date of filing of ITR, would not come to the rescue of the assessee.

4.3 It was further submitted that since the tax effect involved in this case was less than the prescribed monetary limit, for filing of further appeal before the ITAT, the appeal was not filed at initial stage. Further, the impact of the decision in Checkmate Services (supra) was not considered. It was submitted that in the light of decision of Hon'ble Supreme Court in Checkmate Services, its impact on such similar cases has been considered and the instant case falls under the category to which the decision in Checkmate Services applies.

4.4 It was further submitted that since the order of Ld. CIT(A) was passed on 21.09.2022 & it was received on the same date in the PCIT office through ITBA, hence the due date for filing appeal before the ITAT had expired. In this case, there was sufficient cause for delay since the decision of the Hon'ble Supreme Court in the case Checkmate Services (supra) has now been considered which is squarely applicable to the instant case.

4.5 It was submitted that the Hon'ble Calcutta High Court in case PCIT Vs. M/s. Organon India Pvt. Ltd. *(ITAT/16/2020 dated 15/06/2022)* has held in its order

dated 15.06.2022 that where there is a substantial question of law involved, appeal should not be rejected on technical ground of delay. The High Court in this case condoned a delay of 314 days in filing appeal by Revenue.

4.6 In view of the above facts, it was submitted that delay of 536 days may kindly be condoned in this case and the appeal of the Revenue be accepted and be decided taking into consideration the decision of the Hon'ble Supreme Court referred supra.

5. None appeared on behalf of the assessee nor any adjournment application was filed.

6. We have heard the Ld. DR and perused the material available on the record. The Hon'ble Calcutta High Court in PCIT Vs. M/s. Organon India Pvt. Ltd. (supra) while condoning the delay of 314 days in filing the appeal by the Revenue has held that where the Court is required to examine as to whether any substantial question of law would arise for consideration, the appeal should not be dismissed on technical ground and the relevant findings read as under:

> *"This application has been filed by the revenue to condone the delay of 314 days in filing the appeal. The respondent/assessee has filed affidavit-in-opposition to which an affidavit-in-reply has been filed by the appellant. Mr. Paras 2 Salva, learned Advocate assisted by Mr. A. K. Dey, learned Advocate would vehemently contend that the affidavit filed in support of the condone delay petition, does not give any reason for the inordinate delay of 314 days in filing the appeal and the respondent has clearly mentioned about the various period during which there has been no explanation for the delay. In support of his contention, the learned Advocate has referred to the decision of the Hon'ble Supreme Court in the case of Union of India vs. Central Tibetian School Administration & Ors. reported in 2020 (21) SCC Online SC 119 as also the celebrated decision of the Hon'ble Supreme Court in the case of Post Master General vs. Living Media India Ltd. reported in 2012 (3) SCC 563. These decisions have been pressed into service to support the contention that when no explanation is offered, the Courts should not condone the delay and a separate law of limitation is not available for the Government and Governmental authorities and they are also to be treated in the same yardstick. In Living Media India Limited the Hon'ble Supreme Court took note of the decision in the case of Collector (LA) Vs. Katiji [1987] 2 SCC 107 where the Hon'ble Supreme Court*

pointed out various principles while considering the expression "Sufficient Cause". Some of the relevant principles would be that ordinarily a litigant does not stand to benefit by lodging an appeal laid; refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and 3 cause of justice would be defeated; when substantial justice and technical consideration are pitted against each other because of substantial justice reserve to be deferred for the other side cannot claim to have vested right if injustice being done because of non deliberate delay. As pointed out earlier, there is a delay of 314 days in filing the appeal. The learned Advocate appearing for the respondent/assessee is right in submission of certain period of the delay remains unexplained. However, bearing in mind the legal principles which has been laid down by the Hon'ble Supreme Court if we examine the matter, we are of the view that since the present appeal has been filed under Section 260A of the Income Tax Act, 1961 and the Court is required to examine as to whether any substantial question of law would arise for consideration we are of the view that the appeal should not be thrown out on technical ground. That apart we find that Tribunal had referred to a decision of the Co-ordinate Bench in the case of Philips India Ltd. Vs. ACIT in ITA/2489/Kol/2017 dated 4.4.2018. We are informed that as against the said order appeal has been preferred before this Court at the instance of the department and the same is pending. If such is the case, we are of the view that ends of justice would be met if we exercise discretion and condone the delay in filing the appeal. For such reason, the application is allowed and the delay in filing the appeal is condoned."

7. In the instant case, we find that the matter is on a different footing. The matter is not about examining any question of law and rather, the matter is where a substantial question of law has subsequently been decided by the Hon'ble Supreme Court in Checkmate Services *(supra)* after passing of the order of the ld CIT(A) and the Revenue has initially decided not to file appeal before this Tribunal due to low tax effect following the mandate of the CBDT Instructions/Circulars and which subsist as on date, whether the subsequent decision of the Hon'ble Supreme Court forms the reasonable basis for condonation of delay in filing the present appeal and seeking hearing on merits of the case as the same is the only reason which has been canvassed by the ld DR before us in terms of explaining the delay in filing the present appeal.

8. In this regard, we refer to CBDT Circular no. 3/2018 dated 11/07/2018 and subsequent amendment to the said Circular vide F. No. 279/Misc. 142/2007-ITJ(Pt) dated 20/08/2018 brought to our notice by the ld DR during the course of

hearing. In paragraph 2, it has been stated that the Board has decided that the departmental appeals may be filed on merits before the ITAT and other higher forums keeping in view the monetary limits and conditions specified in subsequent paragraph. In paragraph 3, monetary limits have been specified and it has been provided that the appeals shall not be filed in cases where the tax effect doesn't exceed the monetary limits. It has been clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed and the filing of the appeal is to be decided on merits of the case. Similarly, in paragraph 5, it has been provided that no appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the prescribed threshold and appeals can be filed only with reference to the tax effect in the relevant assessment year. We therefore find that the CBDT instructions are clear and unambiguous that the tax effect is critical in the sense that no appeal shall be filed where the tax effect is below the prescribed threshold and even in cases where the tax effect exceeds the prescribed threshold, the appeal has to be filed basis the merits of the case and not necessarily in all cases.

9. In paragraph 10, certain specific exceptions have been carved out by the CBDT and it has been provided that notwithstanding the fact that the tax effect is less than the monetary limits or involves no tax effect, the matter need to be contested on merits and such issues are as follows:

> *"10. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect:*
>
> *[a] Where the Constitutional validity of the provisions of an Act or Rule is under challenge, or*
>
> *(b) Where Board's order, Notification, Instruction or Circular has been, held to be illegal or ultra vires, or*

(c) Where Revenue Audit objection in the case has been accepted by the Department, or

(d) Where the addition relates lo undisclosed foreign assets/ bank accounts."

10. The aforesaid exceptions have been expanded subsequently vide amendment dated 20/08/2018 and the contents thereof read as under:

"3. Para 10 of the said Circular provides that adverse judgments relating to the issues enumerated in the said para should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 thereof or there is no tax effect Para 10 of the Circular No. 3 of 2018 dated 11.07.2018 is hereby amended as under:

"10, Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect-

(a) Where the Constitutional validity of the provisions of an Act or Rule is under challenge, or

(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires. or

(c) Where Revenue Audit objection in the case has been accepted by the Department, or

(d) Where addition relates to undisclosed foreign income/undisclosed foreign assets (including financial assets)/ undisclosed foreign bank account.

(e) Where addition is based on information received from external sources in the nature of law enforcement agencies such as CBI/ ED/ DRI/ SFIO/ Directorate General of GST Intelligence (DGG1).

(f) Cases where prosecution has been filed by the Department and is pending in the Court."

11. In paragraph 13, it has been provided that this circular will apply to SLPs/appeals/cross objections/references to be filed henceforth in SC/HC/Tribunal and it shall apply retrospectively to pending SLPs/appeals/Cross objections/references and the pending appeals below the specified tax limits may be withdrawn/not pressed. We therefore find that even where the appeals have been filed before the Hon'ble High Courts and Hon'ble Supreme Court

and which have been admitted as involving substantial question of law, the CBDT instructions provides that such matters should be withdrawn/not pressed and only criteria for such a decision is that such matters should be involving tax effect below the prescribed limits.

12. In the instant case, it is an admitted and undisputed position that the tax effect involved in the present appeal is Rs. 3,00,848/- well below the prescribed threshold. Further, the matter doesn't fall under any of the exceptions so carved out in terms of the aforesaid CBDT Circular as amended.

13. In particular, the exceptions so carved out doesn't provide that where a substantial question of law has been decided by the Hon'ble Supreme Court in a particular case and where the same is applicable in the facts of the case of the assessee, the Revenue is at liberty to file an appeal in case of the assessee before the Tribunal on merits even though the tax effect is below the prescribed limits.

14. We therefore find that CBDT Circular continues to bind the Revenue even after the decision of the Hon'ble Supreme Court in the case of the Checkmate Services *(Supra)* and therefore, the same cannot come to the aid of the Revenue to file the present appeal much less explain the substantial delay of 537 days given that the tax effect involved is well below the prescribed threshold and the matter doesn't fall in any of the exceptions as so prescribed in the CBDT Circular which bind the Revenue authorities.

15. In view of the above facts and circumstances, the present appeal filed by the Department is not maintainable and is hereby dismissed.

16. It is hereby clarified that the dismissal of the above appeal shall not be taken to be affirmation of the order of the CIT(A) on merits and the Revenue is not precluded from filing appeal against the disputed issue in case of the

assessee for any other assessment year(s) where the tax effect exceeds the specified monetary limits for filing the appeal before this Tribunal.

17. In the result the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 21/06/2024

Sd/-	**Sd/-**
परेश एम. जोशी	**विक्रम सिंह यादव**
(PARESH M. JOSHI)	**(VIKRAM SINGH YADAV)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य/ ACCOUNTANT MEMBER**

AG

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar