

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

BEFORE SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No.150/Bang/2024
Assessment year : 2018-19

Global Security Services, 322/2, 1 st Floor, Hosur Main Road, Bengaluru South, Madivala, Bengalure – 560 068. PAN : AAJFG 0206B	Vs.	The Deputy Commissioner of Income Tax, Circle 4(3)(1), Bengalure.
APPELLANT		RESPONDENT

Appellant by	:	Shri Akshaya K.S., CA
Respondent by	:	Shri Subramanian S., Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	19.06.2024
Date of Pronouncement	:	28.06.2024

ORDER

Per Laxmi Prasad Sahu, Accountant Member

This appeal is filed by the assessee against the order dated 23.11.2023 of the Addl.Jt.CIT(Appeals), Thane, for the AY 2018-19.

2. The sole and substantive issue raised in this appeal is addition made u/s. 36(1)(va) of Rs.41,26,546. Briefly stated the facts of the case are that the assessee filed return of income on 25.10.2018 declaring total income of Rs.45,58,624 and it was processed on

10.12.2019 by disallowing Rs.41,26,546 towards belated remittance of employees' contribution to PF/ESI under the respective Act.

3. The assessee filed appeal before the First Appellate Authority (FAA) and written submissions. The ld. FAA after considering the entire submissions and case laws and relied on the Apex Court judgment in the case of Checkmate Services P. Ltd. reported in [2022] 143 taxmann.com 178 (SC). He also relied on the Apex Court judgment in the case of Ajmera Housing Corporation [2010] 193 Taxman 193 (SC) / [2010] 326 ITR 642 (SC) regarding principle of interpretation of tax statute in which it has been held as under:-

“ 27. It is trite law that a taxing statute is to be construed strictly. In a taxing Act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. (See: Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 and Federation of A.P. Chambers of Commerce & Industry v. State of A.P. [2001] 247 ITR 36 (SC). In interpreting a taxing statute, the Court must look squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute. (Also see: CST v. Modi Sugar Mills Ltd. AIR 1961 SC 1047.”

4. Accordingly, the ld. FAA dismissed the appeal of the assessee. Aggrieved, the assessee is in appeal before the ITAT.

5. The ld. AR reiterated the submissions made before the lower authorities and filed written submissions and paperbook containing pages 1 to 204. He further submitted that the case of Kanoi Paper & Industries Ltd. [2002] 75 TTJ 448 (CAL Trib.) it has been held that

due date should be reckoned from the date of disbursement of salary and not from the end of the month in which the concerned employee has done his work. He relied on the following judgments:-

- MTR Maiya's v. ITO [223] 152 taxmann.com 189 (Bang. Trib.)
- Bettamalenahalli Jawaregowda Basavaraju (ITA No.464/Bang/2023)
- Prabhakar Somappa Pujari (ITA No.345 & 346/Bang/2023)

6. On the other hand, the ld. DR relies on the order of lower authorities and submitted that the assessee had not deposited payments towards employees' contribution to PF and ESI within due date as prescribed under PF and ESI Act. Accordingly, CPC disallowed said payment made by assessee under section 36(1)(va) by passing intimation order under section 143(1)(a)(iv). It was noted that tax auditor had clearly indicated in his audit report that employees' contribution towards PF and ESI were not paid within due date. Such clear indication called for suo motu disallowance of such amount paid beyond due date as it was in contravention of section 36(1)(va), therefore, adjustment with respect to impugned deduction fell within ambit of section 143(1)(a)(iv). The ld. DR further submitted that the case law relied on by the ld. AR of assessee is not applicable in the present facts of the case since the Hon'ble Apex Court has decided the issue in favour of the revenue.

7. Considering the rival submissions, we note that the CPC has made disallowance on the basis of tax audit report at Sl.no. 20(b) that

assessee has deposited PF/ESI belatedly as per the respective Act. Since the claim of the assessee is not in conformity with the Apex Court judgment in the case of Checkmate Services P. Ltd. (supra) the Id. FAA has rightly dismissed the appeal of the assessee. Further in the decision of the coordinate Bench of Jodhpur in the case of Tarun Construction Co. vs. ITO in ITA No. 108 & 109/JODH./2023 dated 21.09.2023 for the assessment year 2018-19 & 2019-20, the entire objections raised by the assessee has been dealt as under:-

“5. We have given a thoughtful consideration to rival submissions and perused materials on record. We have also applied our mind to various decisions cited before us.

6. In so far as factual aspect of the issue is concerned, there is no dispute between the parties that the employees' contribution to PF and ESI were not deposited within the due date prescribed under the PF and ESI Acts in terms of Explanation-1 to section 36(1)(va) of the Act. The said provision makes it clear that if employees' contribution to PF and ESI is not paid within due date provided under the respective statutes, it has to be treated as income of the concerned assessee under section 2(24)(x) of the Act. In accordance with the statutory provision, the departmental authorities have made the disallowances.

7. The assessee has contested the disallowance broadly on the following grounds:

In the tax audit report, the auditor has only mentioned the details of contribution received from employees for various funds and has not indicated these disallowances expressly so as to attract adjustment under section 143(1)(a)(iv) of the Act.

The disallowances made are beyond the scope and ambit of adjustment provided under section 143(1)(a) while processing the returns of income.

At the time of filing of returns of income by the assessee for the respective assessment years, the law prevailing on the said date allowed the assessee to claim deduction of employees' contribution to PF and ESI, if deposited on or before due date of filing of income-tax return. In that scenario, the CPC could not have made adjustment under section 143(1)(a)(iv) of the Act.

Amendment to section 36(1)(va) introducing Explanation-2, which clarifies that the provisions of section 43B shall not apply for the purpose of

determining the due date, vis a vis, section 36(1)(va), will apply prospectively.

Without prejudice, even if it is not allowable under section 36(1)(va), alternatively, it has to be allowed under section 37 of the Act in the year of actual payment.

8. *In our considered opinion, none of these submissions of the assessee are acceptable for the reasons to be discussed by us in ensuing paragraphs.*

9. *Section 36 is a deduction provision under the Act. A reading of section 36(1)(va) makes it clear that in respect of any sum received by an assessee from his employees, to which section 2(24)(x) applies, the assessee can get deduction only if such sum is credited to the employees' accounts in the relevant fund or funds on or before due date. Explanation-1 to section 36(1)(va) clarifies the meaning of expression "due date" by stating that it means the date, by which the assessee is required as an employer to credit employees' contribution to the employees' account in the relevant funds under any Act, Rule or Order or Notification issued thereunder. Section 2(24)(x) provides that any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of the Employees State Insurance Act, or any other fund for the welfare of such employees, has to be treated as income of the assessee. It is relevant to observe, both section 36(1)(va) and section 2(24)(x) co-exist in the statute w.e.f. 1-4-1988.*

10. *Thus, from the very inception of the provisions in the statute, the intention of the legislature, as could be gathered from the language used in the provisions, is quite clear that unless employees' contribution to certain funds such as PF or ESI are not remitted to the accounts of the concerned employees within the due date provided under the relevant Acts and Rules, such contribution has to be treated as the income of the assessee in terms of section 2(24)(x) of the Act. Thus, to that extent, there is no ambiguity in the statutory provisions. While interpreting the true meaning and import of the provisions contained under section 36(1)(va) and 2(24)(x) of the Act, the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. (supra) has held as under :*

"32. The scheme of the provisions relating to deductions, such as Sections 32 - 37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are 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: failure by the

assessee to comply with those conditions, would render the claim vulnerable to rejection. In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of Section 36 (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 1-04-1988. Through the same amendment, by Section 3(b), Section 2(24) - which defines various kinds of "income" - inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

33. The significance of this is that Parliament treated contributions under section 36(1)(va) differently from those under section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

34. It is therefore, manifest that the definition of contribution in Section 2 (c) is used in entirely different senses, in the relevant

deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

35. It is instructive in this context to note that the Finance Act, 1987, introduced to Section 2(24), the definition clause (x), with effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill, 1987, presented to the Parliament, is extracted below:

"Measures of penalising employers mis-utilising contributions to the provident fund or any funds set up under the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees."

12.1 The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section 43B). The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. "Due date" means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise.

(Explanation to Section 36 (1) of the Finance Act)

12.2 In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due date. Where such income is not chargeable to tax under the head "profits and gains of business or profession" it will be assessed under the head "income from other sources."

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44. *There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available.*

45. *A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed. The court observed inter alia, that:*

"15. ...It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in Allied Motors (P) Limited (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003 will operate retrospectively with effect from 1st April, 1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year] but before filing of the Returns under the Income-tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under section 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated

above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003".

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48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. Eagle Flask Industries Ltd v. Commissioner of Central Exercise 2004 Supp (4) SCR 35. This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations.

49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in State of Jharkhand v. Ambay Cements as follows:

"23.... In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining

prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

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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.

54. 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."

II. *The aforesaid observations of Hon'ble Supreme Court would leave no room for doubt or ambiguity regarding the real intent and purport of section 36(1)(va) read with section 2(24)(x) of the Act. Thus, as per the clear language of the aforesaid provisions, unless employees' contribution to PF and ESI are deposited within the due date prescribed under the PF and ESI Acts, not only the assessee would get no deduction under section 36(1)(va), but the amount in question has to be treated as assessee's income under section 2(24)(x) of the Act. To that extent, the issue stands squarely settled by the ratio laid down by Hon'ble Supreme Court in case of Checkmate Services (P.) Ltd. (supra).*

12. *Now reverting back to the contention of the assessee that the adjustment made is not within the scope and ambit of section 143(1)(a)(iv) of the Act, it is necessary to look into the said provision, which reads as under :*

"143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—

(a) the total income or loss shall be computed after making the following adjustments, namely:—

*(i) to (iii) ** ***

(iv) disallowance of expenditure or increase in income indicated in the audit report but not taken into account in computing the total income in the return"

13. *As could be seen from the provision reproduced herein above, in its earlier form, the provision was little different from the present one, as the words "or increase in income" appearing in the provision was inserted by Finance Act, 2021 w.e.f. 1-4-2021. However, without taking note of the said amendment, the provision states that disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return, can be the subject matter of adjustment under section 143(1)(a) of the Act. In this regard, assessee's contention is that in the tax audit report, the auditor has not indicated about any disallowance, but has merely furnished the details of contribution received from employees for various funds as contemplated under section 36(1)(va) of the Act.*

14. *On an examination of column 20b of the tax audit report, it is quite clear that it provides for furnishing details relating to nature of fund, sum received from employees, due date for payment, the actual amount paid and the actual date of payment. If we keep the format in column 20b in juxtaposition to the provisions contained in section 36(1)(va) of the Act, it will be quite evident that there is a clear indication by the auditor that the employees' contribution to various funds were not paid within due date, but were paid beyond the due date. Thus, such clear indication by the auditor in the audit report calls for suo motu disallowance of such amount paid beyond the due date, as it is in contravention of section 36(1)(va) of the Act, while computing the total income in the return of income. Instead of doing that, the assessee has claimed deduction of the amount under section 36(1)(va) of the Act. Thus, in our considered opinion, the adjustment clearly falls within the ambit of section 143(1)(a)(iv) read with Explanation (a). Therefore, we reject assessee's contention in this regard.*

15. Further, in our view, the concept of prima facie adjustment under section 143(1)(a) has long been obliterated, as, after the amendment of section 143(1), first and second proviso to section 143(1)(a) provide for complying with the requirements of rule of natural justice in case of any adjustment. Thus, we do not find any merit in the submissions of the assessee contesting the adjustment made under section 143(1)(a) of the Act.

16. Another contention of the assessee is to the effect that the amendment to section 36(1)(va) by introducing Explanation-2 will apply prospectively. Even, accepting assessee's aforesaid contention, as we have already discussed earlier in the order, section 36(1)(va) in its original form, sans the amendment, had no ambiguity, as it clearly provided that no deduction in respect of employees' contribution to PF and ESI can be granted unless such contribution is remitted within the due date prescribed under the relevant Acts. Therefore, retrospective or prospective application of the amendment to section 36(1)(va) would be of no help to the assessee.

17. Lastly, the assessee has made an alternative claim that the deduction can be allowed under section 37 of the Act. In this regard, we do not find any convincing reason to allow assessee's claim. The decisions cited by the assessee, in no way, advance its case. It is relevant to observe, though the assessee has cited a number of decisions to canvass its claim of deduction under section 36(1)(va) of the Act and has also made an attempt to persuade us to deviate from the decision of Hon'ble Supreme Court in case of Checkmate Services (P.) Ltd. (supra), however, we are not impressed. Though, after the decision of Hon'ble Supreme Court in case of Checkmate Services (P.) Ltd. (supra), there are plethora of judicial precedents not only by different Benches of Tribunal but Hon'ble High Courts following the ratio laid down by the Hon'ble Supreme Court in case of Checkmate Services (P.) Ltd. (supra), surprisingly, learned counsel for the assessee has not referred to even a single contrary decision in his submissions.

18. Be that as it may, in our view, the issues arising in the present appeal are no more res integra in view of clear ratio laid down by Hon'ble Supreme Court in case of Checkmate Services (P.) Ltd. (supra), which is declaratory in nature and is the law of the land in terms of Article 141 of the Constitution of India. Therefore, it is binding not only on us, but all other courts, tribunals and authorities. In our view, the various submissions made by learned counsel for the assessee in support of its claim are mere subterfuges to circumvent the ratio laid down by the Hon'ble Supreme Court in case of Checkmate Services (P.) Ltd. (supra), hence, not acceptable. Accordingly, we uphold the decision of the first appellate authority in sustaining the disputed disallowances. Grounds are dismissed.

8. The objections raised by the assessee in its grounds have been dealt properly in the above judgement. There are inconsistencies noted by the CPC while processing the return which were communicated to the assessee and payments towards PF/ESI were not in conformity with the provisions of section 36(1)(va) of the Act. Further in respect of the CPC communication dated 21.01.2019, the ld. AR referred to the ITR form filed by the assessee, but the assessee has not considered the figures reported by the tax auditor in sl.no.20(b) of the tax audit report. Therefore we reject the argument of the ld. AR.. Further the co-ordinate bench of the ITAT, Bangalore has decided the similar issue in ITA No. 841/Bang/2024 order dated 19.06.2024 for the AY 2019-20 in the case of Muniyallappa Bharathi vs ITO. Both the parties have relied on the judgement of co-ordinate bench of the ITAT Bangalore in ITA NO. 01/Bang/2024 in the case of Bulk Liquid Solutions Pvt. Ltd. vs DCIT order dated 27.03.2024. Considering the entire judgments quoted above and respectfully following the judgements, we dismiss the appeal of the assessee.

9. In the result, the appeal of the assessee is dismissed.

Pronounced in the open court on this 28th day of June, 2024.

Sd/-
(KESHAV DUBEY)
JUDICIAL MEMBER

Sd/-
(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 28th June, 2024.

/Desai S Murthy/

Copy to:

1. Appellant
2. Respondent
3. Pr.CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.