IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : B : NEW DELHI

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

ITA No.1022/Del/2023
Assessment Year: 2020-21

Guljeet Singh Saroya, B8/504, 5th Floor, The Heartsong, Sector 108, Gurugram, Haryana – 122 006.	Vs	ITO, Ward 1(4), Gurugram.
PAN: ADIPS9101M		
(Appellant)		(Respondent)

Assessee by : Shri Hemant Jain, Advocate
Revenue by : Shri Vivek Kumar Upadhyaya, Sr.DR

Date of Hearing : 22.05.2024
Date of Pronouncement : 11.06.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the Assessee against the order dated 07.02.2023 of the Commissioner of Income Tax (Appeals), NFAC, Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.NFAC/2019-20/10159476 arising out of the appeal before it against the order dated 07.07.2022 passed u/s 154 of the Income Tax Act, 1961

(hereinafter referred as 'the Act'), by the ACIT, CPC, Bangalore (hereinafter referred to as the Ld. AO).

2. The appellant is an individual engaged in the business of operating security agency and the return of the assessee was processed u/s 143(1) generating an intimation dated 28.10.2021 which was rectified u/s 154 of the Act by order dated 07.07.2022. There was a disallowance of Rs.7,21,423/- towards late payment of employees contribution to ESIC/EPF which was challenged before the CIT(A) wherein relying the judgement of the Hon'ble Supreme Court in the case of ***Checkmate Services (P.) Ltd. vs CIT (2022) 143 taxmann.com 178 (SC)***, the appeal was dismissed. The assessee has raised the following grounds of appeal:-

> *"1. The ld. CIT(A) grossly erred both on facts and in law in confirming the intimation u/s 143(1) sent by CPC whereby it processed the return of income of appellant for AY 2020-21 at Rs.69,63,745/-.*
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> *2. The ld. CIT(A) grossly erred on facts and in law in misreading the provisions of Section 36(1)(va) r.w. Section 2(24)(x) r.w. Section 43B r.w. various legal decisions, as applicable for AY 2020-21 and upholding the disallowance of Rs.7,21,423/- on account of late payment of employee contribution to ESIC/EPF."*

3. The ld. AR has primarily submitted that the addition could not have been made u/s 143(1) of the Act by way of an intimation and on facts it was submitted that due date has to be reckoned from as per the respective statutes under which ESIC/EPF payments are to be deposited. It was submitted that the ld. tax authorities have failed to appreciate the same.

4. As with regard to first plea of Ld. AR that CPC could not have made disputed disallowance u/s 143(1) of the Act, the issue has been dealt and decided against the taxpayer, by this very bench in the case of ***Akriti Jewelcraftz (P) Ltd., Delhi vs Acit, Circle-1(1), New Delhi decided on 14 December, 2023, vide ITA No.190/Del/2023,*** by following findings;

> *"4.1 The ld. AR has submitted that the ld.CIT(A) has fallen in error in following the judgment of the Hon'ble Supreme Court in the case of 'Checkmate Services Case' while the facts of the assessee's case were different because in the case of 'Checkmate Services Case' the addition was sustained in an assessment order framed u/s 143(3) of the Act while in the case of the assessee the addition is in intimation u/s 143(1)(a) of the Act. He relied on the order of the Mumbai Bench in M/s P.R. Packaging Service vs. ACIT, taking into consideration the judgement of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. (supra) observed that disallowance cannot be made in the processing intimation u/s 143(1)(a) of the Act. He also relied on the order of Cuttack Bench in the case of Nirakar Security & Consultancy Services (P) Ltd. in ITA No.98/CTK/2022 to submit that the matter was remanded to the file of the AO to adjudicate the grounds of the assessee relating to claim of the said employee's contribution as business expenditure u/s 37 of the Act.*
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> *4.2 The ld. DR, however, relied on the findings of the ld. tax authorities below.*
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> *5. After giving thoughtful consideration to the matter on record and the admitted facts of late deposit of the contributions, the Bench is of the considered view that there is no force in the contention of the ld. AR as that the judgement of the Hon'ble Supreme Court in the case of 'Checkmate Services Case' has settled the issue against the tax payers by holding that the payments towards employee's contribution to Provident Fund after the due date prescribed under the relevant statute is not allowable as deduction u/s 36(1)(va) of the Act. The Mumbai Bench order in the case of M/s P.R. Packaging Service (supra) has been considered in*

another order in the case Deutsche India Pvt. Ltd. vs. ACIT in ITA No.2842/Mum/2022, order dated 22.02.2023 and relying another order in the case of Nissan Enterprises Ltd. vs. DCIT, ITA No.3270/Mum/2022, order dated 17.02.2023 the Co-0rdinate bench has held as under:-

> *"9. We find that, recently, in Nissan Enterprise Ltd. vs DCIT-CPC, in ITA No.3270/Mum/2022, the Tribunal vide order dated 17/02/2023, after considering the aforesaid decision in P.R. Packaging Service (supra) held that pursuant to the decision of the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. (supra), the claim of deduction towards employee's contribution to PF & ESI made by the taxpayer becomes an incorrect claim warranting prima facie adjustment under section 143(1) of the Act. The relevant findings in the aforesaid decision are as under:-*
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> *"3.1. The ld. AR vehemently relied on the decision of the Co-ordinate Bench of this Tribunal in the case of P.R. Packaging Services in ITA No.2376/Mum/2022 dated 07/12/22 (authored by the undersigned) wherein this issue has been decided in favour of the assessee. We find that the said decision was rendered by applying the provisions of Section 143(1)(iv) of the Act. Pursuant to the aforesaid decision of the Hon'ble Supreme Court, the claim of deduction towards employee's contribution to PF & ESI made by the assessee becomes an incorrect claim warranting prima facie adjustment u/s.143(1) of the Act. Hence, the decision relied by the ld. AR would not advance the case of the assessee.*
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> *3.2. In view of the aforesaid observations and respectfully following the decision of the Hon'ble Supreme Court referred to supra, the grounds raised by the assessee are hereby dismissed"*

6. Further, the coordinate Benches of ITAT Delhi in Aroma Aromatics and Flavours vs. CIT(A) in ITA No.1646/Del/2021, order dated 30.11.2022 and in Savleen Kaur & Ors., ITA No.2249/Del/2022, order dated 09.01.2023, have held that the Hon'ble Supreme Court judgement in the case of 'Checkmate Services Case' is applicable also to the cases of adjustment done by the CPC u/s 143(1) of the Act. Thus, this Bench is not inclined to entertain the plea as raised by the ld. AR and there was no error in the findings of the ld.CIT(A) in following the judgement of the

Hon'ble Supreme Court in the case of 'Checkmate Services Case'. The grounds have no substance."

5. As to second, limb of contention, after taking into consideration, the material placed before us and submissions also, we are of the considered view that the material 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.

6. 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).*** In regard to the issue raised, Hon'ble Supreme Court in ***Checkmate Services Pvt. Ltd. (supra)*** after considering the legislative history of Section 36(1) (va) and 43B of the Act, 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:

"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."***

7. 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".

8. Ostensibly, both the authorities below have proceeded to apply the judgement of the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. vs. CIT (Supra) on the ground that the employees contribution on account of ESI/EPF have been made beyond the due date, as understood, for the purposes of Section 36(1)(va) read with Section 2(24)(x) of the Act. Before us, an oral argument was made as to the ascertainment of 'due date' for the purpose of the present disallowance as according to the Ld. Representative the 'due date' has not been correctly considered by the lower authorities. Be that as it may, we find that the authorities below have proceeded to go by the due date as stated in the Tax Audit Report and another document accompanying the return of income and that even the Assessee, at no stage before the lower

authorities has taken a position to re-visit the 'due date' as considered in the return of income itself. Therefore, the plea of the assessee is quite belated and is devoid of any factual support.

9. In the light of aforesaid discussion, we find no error in the impugned order of NFAC and grounds raised have no substance. The appeal of the assessee is dismissed.

Order pronounced in the open court on 11.06.2024.

(G.S. PANNU)
VICE PRESIDENT

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 11 June, 2024.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR