IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "G" BENCH: NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

M.A.No.22/Del/2023
[In ITA No.1700/Del/2022]
[Assessment Year : 2018-19]

ACIT, Circle-10(1), New Delhi.	vs	Garg Heart Centre & Nursing Home Pvt.Ltd., 8-AGCR Enclave, Delhi-110092. ***PAN-AAACG0063C***
APPELLANT		**RESPONDENT**
Appellant by		Shri Om Parkash, Sr.DR
Respondent by		Shri Mohd. Faiz, AR
Date of Hearing		31.05.2024
Date of Pronouncement		28.08.2024

ORDER

PER KUL BHARAT, JM :

By way of this Miscellaneous application, the Revenue is seeking rectification of order dated 25.08.2022 on the grounds that the Hon'ble Supreme Court vide its judgement dated 12.10.2022 in Civil Appeal No.2833 of 2016 has decided the issue of deposit of employees PF & ESI contributions by the employer in favour of the Revenue therefore, the order dated 25.08.2022 requires to be recalled and modified.

2. Ld. Sr. DR for the Revenue reiterated the submissions as made in the application as well as to the written note. For the sake of clarity, the relevant contents of the application are reproduced as under:-

1. *"The above appeal was disposed off by the Hon'ble Tribunal vide its order dated 25.08.2022. The above named appellant begs to present this application for rectification of the Hon'ble tribunal order in light of the Hon'ble Supreme Court Judgement dated 12.10.2022 (Civil*

Appeal No. 2833 of 2016) wherein the Hon'ble Supreme Court has held that employees contribution shall be deposited before the statutory due date and therefore has confirmed all the disallowances made us 36(1) (va) of the Income Tax.

2. *The brief background of the case is as under:-*

   (a) *The assessee had filed its return of income for the A.Y 2018-19 on 26.10.2018. The return of the assessee was processed u/s 143(1) of the Income Tax Act on 17.10.2019 after making an addition of Rs. 3,54,883/- on account of late deposit of employees contribution to PF & ESI.*

   (b) *Being aggrieved with the order dated 17.10.2019 passed u/s 143(1) of the Act, the assessee filed an appeal before the NFAC which vide its order NFAC/2017-18/10078136, dated 08.07.2022 has confirmed the addition made u/s 36(1)(va) of the Act.*

   (c) *Being aggrieved with the order of NFAC order dated 08.07.2022, the assessee filed an appeal before the Hon'ble ITAT which vide its order dated 25.08.2022 in ITA No. 1.T.A. No. 1700/Del/2022 has allowed the appeal of the assesssee and therefore, deleted the addition made u/s 36(1)(va) of the Act.*

3. *However, in light of the Hon'ble Supreme Court Judgement dated 12.10.2022 (Civil Appeal No. 2833 of 2016) wherein the Hon'ble Supreme Court has held that employees contribution shall be deposited before the statutory due date, the above order passed by the Hon'ble ITAT needs to be rectified. The relevant portion of the judgment of the Hon'ble Supreme Court is reproduced as under:-*

   "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 llability. 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."

4. Hence, the undersigned is directed to file a miscellaneous application on the basis of the aforesaid judgment of the Hon'ble Supreme Court so that the order of the Hon'ble ITAT passed in the case of M/s. Garg Heart Centre & Nursing Home Pvt. Ltd. for the 2018-19 be rectified and thereby, protect the interest of the Revenue."

3. Further, Ld. Sr. DR for the Revenue filed Argument note. For the sake of clarity, the relevant contents of the Argument Note are reproduced as under:-

"The issue involved in the subject Misc. Application is related to the disallowance made by CPC u/s 36[1][va], in respect of the claim of belated payments employees' contribution of ESI/PF, while processing the return of the assessee u/s 143[1] of the Income Tax Act 1961. Vide impugned order dated 25.08.2022 the Hon'ble Tribunal allowed appeal of the assessee deleting the addition.

That the Hon'ble Supreme court Judgement dated 12.10.2022 (Civil Appeal No. 2833 of 2016) in the case of Checkmate Services P Ltd, has finally laid down the correct legal position on this issue, holding that employees contribution shall be deposited before the statutory due date.

Thus, the above order passed by the Hon'ble ITAT needs to be rectified. The relevant portion of the judgment of the Hon'ble Supreme Court is reproduced as under:-

> *"54. In the opinion of this Court, the reasoning in the impugned judgment that the non- obstante clause would not in any matter 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."*

In view of final and correct legal position having been laid down by the Hon'ble Supreme Court [supra] the impugned order passed in the case of the assessee M/s Garg Heart Centre & Nursing Home P Ltd in ITA No.1700/Del/2022 for A.Y. 2018-19 carries a mistake apparent within the meaning of Sub-section [2] of Section 254 of the Income Tax Act 1961.

It is worthwhile to mention here that the co-ordinate Benches of this Hon'ble Tribunal have already adjudicated appeals on this issue following the law laid down by the Hon'ble Apex Court in the case of Checkmate Services P Ltd [supra] in many cases. One of such decision was recently passed by the Hon'ble 'G' Bench in ITA No.2249/Del/2022 in the case of Savleen Kaur on 09.01.2023.

It is further submitted that the Hon'ble Raipur Division Bench of the Tribunal, on the identical issue, has observed while disposing Misc. Applications filed by the Department vide its order dated 29.5.2023 in MA No.01/RPR/2023, has observed that there was no rider found in the judgment of the Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd. Vs. Commissioner of Income Tax-I (supra), that it would be applicable prospectively which means that the same would have a retrospective effect. It was thus observed, "We, thus, considering the facts involved in

the case before us r.w the aforesaid settled position of law, are of the considered view, that as stated by the department in its miscellaneous application and, rightly so, as the view taken by the Tribunal in the captioned appeals is not found to be in conformity with the judgment of the Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd. Vs. Commissioner of Income Tax-1 (supra), therefore, the same had rendered the orders passed while disposing off the respective appeals as suffering from a mistake, which being apparent from record had therein made those amenable for rectification under sub-section (2) to Section 254 of the Act.36. We, thus, in terms of our aforesaid observations allow the respective miscellaneous applications filed by the department u/s. 254(2) of the Act, and recall the respective orders that were passed by the Tribunal while disposing off the aforementioned appeals."

The Hon'ble Raipur Bench of the Tribunal even went further directing the registry to fix the respective appeals for hearing for the limited purpose of giving effect to the judgment of the Hon'ble Apex Court in the case of Checkmate Services P. Ltd. Vs. Commissioner of Income Tax-I. [Ref. Para 38 and 39 of the said order].

Accordingly, this Hon'ble Bench is prayed to consider this miscellaneous application filed on 11.01.2023 [within time] for recalling the impugned order for necessary rectification/re-adjudication as deem proper.

The petitioner shall ever be grateful for this act of kindness."

4. Ld. Counsel for the assessee contended that at the time of passing of the order sought to be rectified. The Hon'ble Supreme Court has not decided the issue and appeal was pending for adjudication. The judgements of Hon'ble Delhi High Court were holding the field. Therefore, there was no mistake apparent from the records. He contended that under the identical facts, the Co-ordinate Bench of the Tribunal decided the issue in favour of the assessee.

Moreover, the tax effect of such addition is less than prescribed monetary limit.

5. We have heard both the parties and perused the material available on records. The Revenue by way of this application seeking to recall the order dated 25.08.2022 wherein the appeal of the assessee was partly allowed and the impugned additions were directed to be deleted following the judgment of the Hon'ble Delhi High Court in the case of ***CIT vs AIMIL Ltd. [2010] 321 ITR 508 (Del.)*** and ***CIT vs P.M Electronics Ltd. [2009]*** **313 ITR 161** *(***Delhi***)*. Thereafter, the Hon'ble Supreme Court in the case of ***Checkmate Services P.Ltd. vs CIT in Civil Appeal No.2833 of 2016 dated 12.10.2022*** in effect over-ruled the judgemnet of the Hon'ble Delhi High Court. The Revenue has therefore insisting for recalling of the order passed by the Tribunal on the basis that the contrary subsequent judgement of the Hon'ble Apex Court would constitute mistake apparent from records and such mistake would be amenable to the provision of section 254 of the Act. However, this issue has been examined by the Co-ordinate Bench of this Tribunal in the case of ***DCIT vs Ani Integrated Services Ltd. in M.A. No.167/Mum/2023*** vide order dated **29.05.2024** wherein the Tribunal has decided the issue by observing as under:-

> 22. *"Even otherwise also once in the latest decision in the case of CIT vs. Reliance Telecom Ltd. (supra) the Hon'ble Supreme Court have clearly held that the powers u/s. 254(2) of the Income Tax are akin to Order XLVII Rule 1 CPC, then it cannot be held that scope of power u/s.254(2) is beyond and much larger than scope of review as given in the Order XLVII Rule 1 of CPC. In fact, the scope of*

Section 254(2) is much limited and the scope of review is much wider. Accordingly, in view of the law laid down by the Hon'ble Constitutional Bench of the Hon'ble Supreme Court and several other judgments of Hon'ble Supreme Court cited supra, we hold that order of the Tribunal cannot be recalled based on the subsequent judgment of the Hon'ble Supreme Court when the order of the Tribunal had attained finality between the parties. Consequently, the Miscellaneous Application filed by the department is dismissed."

6. The facts are identical in the present case as the Revenue in the present case also, seeking for recalling of the order dated 25.08.2022 in ITA No.1700/Del/2022. In the light of above binding precedents, the prayer of the Revenue cannot be allowed. Hence, Miscellaneous Application filed by the Revenue is hereby, dismissed.

7. In the result, the Miscellaneous application of the Revenue is dismissed.

Order pronounced in the open Court on 28th August, 2024.

Sd/-	***Sd/-***
(M.BALAGANESH)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI