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

BEFORE SHRI B.M. BIYANI, ACCOUNTANT MEMBER
AND
SHRI PARESH M. JOSHI, JUDICIAL MEMBER

ITA Nos. 244/Ind/2023 (Assessment Year: 2019-20)

Daulat Ram Engineering Services Pvt. Ltd., Khasra No.10/2 NH-12, Village Simarai, Obaidullaganj, Mandideep, Bhopal	**बनाम/** Vs.	ADIT, CPC
(Assessee/Appellant)		(Revenue/Respondent)
PAN: AABCD3596Q		

Assessee by	Shri Vijay Bansal, AR
Revenue by	Shri Ashish Porwal, Sr. DR
Date of Hearing	05.05.2025
Date of Pronouncement	08.05.2025

आदेश / O R D E R

Per B.M. Biyani, AM:

Feeling aggrieved by order of first appeal dated 25.04.2023 passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi ["CIT(A)"] which in turn arises out of intimation of assessment dated 07.05.2020 passed by learned ADIT, CPC, Bangalore ["AO"] u/s 143(1) of Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2019-20, the assessee has filed this appeal on following grounds:

> *"1. That on the facts and in the circumstances of the case and in law, the learned CIT(A) erred and not justified in disallowing the*

expenditure of Rs. 38,70,983/- u/s 43B of the IT Act and therefore be kindly allowed.

2. That on the facts and in the circumstances of the case and in law, the learned CIT(A) erred and not justified in disallowing the expenditure of Rs. 51,07,903/- u/s 36(1)(va) and hence be kindly allowed.

3. That on the facts and in the circumstances of the case and in law the said disallowance do not fall under the purview of 143(1) of the IT Act and therefore be allowed.

4. That on the facts and in the circumstances of the case and in law, that the levy of interest u/s 234A, 234B and 234C is unlawful and, therefore, the said levy be kindly deleted."

Ground No. 1 and 2:

2. In these grounds, the assessee challenges the disallowances of Rs. 38,70,983/- (+) Rs. 51,07,903/- made by AO on account of employees' contributions received by assessee towards Provident Fund / Employees State Insurance Fund (PF/ESI) by way of deduction from salaries but not paid to relevant funds upto the due dates prescribed under PF/ESI laws.

3. Ld. AR instantly agrees that this issue stands decided against assessee in ***Checkmate Services (P) Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC)*** wherein the Hon'ble Apex Court has upheld the disallowance u/s 36(1)(va) r.w.s. 2(24)(x) of the Act. In view of such a confession, Ground No. 1 and 2 do not have any merit and are dismissed.

Ground No. 3:

4. This is a legal ground in which the assessee claims that the AO had no authority to make the impugned disallowances in the intimation passed u/s 143(1).

5. Having heard learned Representatives of both sides, we find that the issue raised in this ground has already been decided by Hon'ble High Courts in following cases against assessee and in favour of revenue:

(i) **Rohan Korgaonkar Vs. DCIT (2024) 159 taxmann.com 321 (Bombay HC):**

"2. This is an appeal under section 260A of the Income Tax Act, 1961 (IT Act) to challenge the orders made by the Assessing Officer, CIT (Appeals) and the ITAT, disallowing an adjustment under section 143(1)(a)(iv) read with section 36(1)(va) of the IT Act in respect of delayed remittance of employees' contributions to Employee State Insurance (ESI) and Provident Fund (PF) for the assessment year 2018-2019.

3. The ITAT, in this case, has noted that the Assessee failed to deposit contributions to ESI and PF in the employees' accounts for the relevant assessment year before the due date under the PF/ESI Acts. However, such contributions were deposited before the Assessee filed returns under Section 139(1) of the IT Act. The ITAT relying upon the decision of the Hon'ble Supreme Court in Checkmate Services (P) Ltd. v. CIT [2022] 143 taxmann.com 178 / [2023] 290 Taxman 19 / 448 ITR 518 (SC) held that based upon such delayed deposits, no adjustments or deductions could be claimed.

4. In Checkmate Services (P.) Ltd. (supra), the Hon'ble Supreme Court considered the conflicting decisions on the subject and finally held that deductions or adjustments could be claimed only when the Assessee deposits the contribution before the due date provided under the Employees Provident Fund/Employee State Insurance Act. If the employees' contributions are deposited after the due date set out under the said Act, there is no question of deduction or adjustment on the ground that such contributions were deposited before the filing of returns under section 139(1) of the IT Act.

5. The ITAT has relied upon Chekmate Services (P.) Ltd. (Supra), and its reasoning is entirely consistent with the law laid down in Checkmate Services

(P) Ltd. (supra). Therefore, no case is made to interfere with the AO, CIT (appeals), and ITAT decisions.

6. However, Ms Kamat submitted that Checkmate Services (P) Ltd. (Supra)was a matter where the assessment was made under section 143(3) of the IT Act and not under section 143(1)(a) as in the present case. She also relied upon P.R. Packaging Service v. Asstt. CIT [2023] 148 taxmann.com 153 / 199 ITD 724 (Mum. Trib) ITA No. 2376/MUM/2022, decided by the ITAT 07/12/2022 to support her contention.

7. Though the decision cited was that of the ITAT, we have considered the same. In our judgment, however, the fact that the assessment order in Checkmate Services (P) Ltd. (supra) was incidentally under section 143(3) and the assessment order in the present case is under section 143(1)(a) of the IT Act, makes no difference to the principle involved in this matter. The ITAT decision does not discuss why this circumstance constitutes a distinguishing feature based on which the ratio of Checkmate Services (P) Ltd. (supra) could be departed from.

8. Checkmate Services (P) Ltd. (Supra) holds that the deductions can be claimed or adjustments can be made under section 143(1)(a)(iv), read with section 36(1)(va) only when the employer deposits the contributions in the employees accounts on or before the due date prescribed under the Employees Provident Fund Employees State Insurance Act. In this case, admittedly, the contributions were deposited in the employees' accounts beyond the due date. The circumstance that the assessment order was made under section 143(1)(a) of the IT Act can make no difference.

9. Therefore, in our judgment, no substantial questions of law as proposed arise in this appeal. The concurrent decisions of the three authorities call for no interference.

10. This appeal is, accordingly, liable to be dismissed and is, hereby, dismissed with no order as to costs."

(ii) **Synergies Castings Ltd. Vs. Assistant Commissioner of Income-tax, 173 taxmann.com 503 (Telangana HC):**

"3. This appeal under Section 260A of the Income Tax Act, 1961 (for short the 'Act') has been filed against order dated 13.03.2024, passed by the Income Tax Appellate Tribunal, Hyderabad 'A' Bench, Hyderabad (for short 'the Tribunal').

4. The subject matter of the appeal pertains to the assessment year 2019-2020.

5. Facts giving rise to filing of this appeal in a nutshell are that the appellant (hereinafter referred to as 'the assessee') filed returns of income for the assessment year 2019-2020 on 22.11.2019. In the returns, the assessee disclosed the income as NIL after claiming set off and brought forward the loss of Rs.16,60,58,649/-. Notice under Section 143(1)(a) of the Act was issued to the assessee proposing to disallow the deduction of a sum of Rs.1,85,76,482/- towards delayed payment of employees contribution to Provident Fund (PF) and Employees' State Insurance (ESI). In response, the assessee filed a reply wherein it was stated that delay in depositing amounts within the due dates prescribed under the respective Acts is due to reasons beyond the control. It was further pointed out that the amount due was paid before the date of filing of the return of income and therefore, requested for deduction of the said expenditure.

6. An intimation under Section 143(1) of the Act was issued to the assessee on 18.05.2020 by which a sum of Rs.1,85,76,482/- was disallowed on account of assessee's contribution under the ESI and PF and the total income of the assessee was determined at Rs.1,85,76,482/- and the tax payable on this income was computed at Rs.55,72,944/-. The credit of TDS of Rs.72,87,370/- was allowed and the refund was determined at Rs.11,61,797/-.

7. Being aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) (hereinafter referred to as 'CIT(A)'). The CIT(A), by order dated 18.12.2023, dismissed the appeal. The assessee thereupon approached the Tribunal. The Tribunal, by the impugned order dated 13.03.2024, inter alia held that the issue involved in the appeal is covered by a decision of the Supreme Court in Checkmate Services (P) Ltd. v. CIT 1 and held that since the assessee had not remitted the employees' contribution to PF and ESI within the statutory dates, the amount cannot be claimed as a deduction. It was further held that, admittedly, the assessee had not deposited the employees' PF and ESI within the statutory dates but has deposited the same beyond the statutory dates. Accordingly, the Tribunal dismissed the appeal preferred by the assessee. Hence, this appeal.

8. Learned counsel for the assessee submitted that the issue involved in the appeal has not attained finality and is debatable. Therefore, the appeal should be admitted.

9. We have considered the submission made by learned counsel for the assessee and have perused the record.

10. The Supreme Court, in Checkmate Services (P) Ltd. (supra), in paragraph 52, has held as under:

> *"When Parliament introduced Section 43B of the Income Tax Act, 1961, 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 desperate 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 stature) 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."

11. The relevant portion of Para 54 is extracted below for the facility of reference:

"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."

12. Thus, from a perusal of the aforesaid relevant extracts of the decision of the Supreme Court in Checkmate Services (P) Ltd.(supra), it is evident that the

assessee has to make payment of the contribution to PF and ESI before the statutory dates in order to claim the amount as deduction. Admittedly, the assessee has not paid the aforesaid amount on or before the statutory dates. The findings of fact has been recorded by the assessing officer, CIT(A) as well as by the Tribunal. The aforesaid finding of fact cannot, by any stretch of imagination, be said to be perverse.

13. It is not the case of the assessee that the aforesaid finding of fact is perverse. It is well settled in law that this Court, in exercise of powers under Section 260A of the Act, cannot interfere with the finding of fact until and unless the same is demonstrated to be perverse. (see Syeda Rahimunnisa vs. Malan Bi by LRs (2016) 10 SCC 315 and Principal Commissioner of Income Tax, Bangalore vs. Softbrands India Private Limited (2018) 94 taxmann.com 426 / 406 ITR 513 (Karnataka).

14. In view of the preceding analysis, no substantial question of law arises for consideration in this appeal. The same fails and is, hereby, dismissed. No costs."

(iii) **Diversified Services Vs. Income-tax Officer, 50 taxmann.com 384 (Gujrat HC):**

"2.1 The appellant has framed and proposed following questions of law as substantial questions of law for this Appeal, urging to admit the Appeal for consideration of the said questions, reproduced below,

> *"(a) Whether the Income Tax Appellate Tribunal erred in law and in facts in not appreciating that payment of C/TAXAP/1/2023 ORDER DATED: 28/03/2023 employee's contribution to PF/ESI having already been done by the appellant before due date of filing of return, the same ought to have been allowed as deduction under Section 36(1)(va) read with Section 43B of the IT Act?*
>
> ***(b) Whether the Income Tax Appellate Tribunal erred in law and in facts in not appreciating that jurisdiction under Section 143(1)(a) of the IT Act is limited in nature and when different High Courts have taken different view on allowance of deduction under Section 36(1)(va) read with Section 43B of the IT Act with respect to payment of employee's contribution to PF/ESI having already been done by the appellant before due date of filing of return, the same cannot be termed as apparently incorrect claims from the information in the return?***
>
> *(c) Whether the Income Tax Appellate Tribunal erred in law and in facts in holding that amendment made Section 36(1)(va)and Section 43B of the Income Tax Act vide Finance Act, 2021 (No.13 of 2021) is applicable retrospectively?*

3. Stating the basic facts in the background of which the aforesaid questions are proposed to be claiming to be substantial questions of law, the appellant is a firm engaged in providing manpower. The appellant has been depositing provident fund (PF) and Employee State Insurance (ESI) regularly, as per its case. For the Assessment Year 2019-20, the appellant filed return of income on 30.9.2019 declaring total income of Rs.56,640/-. The return was processed under Section 143(1) on 6.3.2020. While processing the return, the Assessing Officer made addition in the income of the appellant on the count of delayed deposit of employees' contribution of the PF and ESI, total amounting to Rs.8,85,284/-.

3.1 The appellant preferred Appeal before the Commissioner of Income Tax (Appeals) which by order dated 7.12.2021 upheld the view of the Centralized Processing Center which had added the income as above. The Appeal was dismissed on 7.12.2021. When the appellant approached the Income Tax Appellate Tribunal, the Tribunal confirmed the order of the appellate authority as per its judgment dated 17.5.2022, impugned in the present Appeal.

4. The case of the appellant was that once the contribution amount was paid even if with delay, the same could not have been charged as income of the appellant since the amount was not retained by the appellant for its benefit. It was also the contention that the income tax authority including the appellate tribunal erred in appreciating the scope of Section 36(1)(va) and Section 43B of the Income Tax Act, 1961 introduced in the Finance Act, 2021.

4.1 On the other hand, the stand of the department was that in light of Section 36(1) read with Section 43B of the Act, the direction in respect of the employees' contribution should be allowed only the amount is paid within the rates prescribed in the relevant welfare funds. It has been the case of the department that once there is a delay in payment of the contribution beyond the rates prescribed in the concerned statutory funds, the same would cease to be allowable as deduction and is liable to be treated as income.

5. In course of hearing of the Appeal, learned advocate for the appellant was fair to invite attention of the Court to the decision of the Supreme Court in Checkmate Services (P) Ltd. v. Commissioner of Income Tax-1, [(2022) 448 ITR 518 (SC)]. The Supreme Court in the context of provisions of Section 36(1)(va) read with Section 2(24)(x) and Section 43B of the Income Tax Act, 1961, addressed the aspect whether there was marked difference between the nature and character of assessee - employer's contribution and amounts retained by assessee from out of employee's income by way of deduction, in which one was in the nature of liability to be paid by the employer and the second was deemed income as per Section 2(24)(x) of the Act to be treated as held in trust by the employer - assessee. It was held that the non obstante clause in Section 43B would not apply in case of amounts which were held in trust as was the case in employee's contribution which was deducted from their income and was not part of employer's income.

5.1. The Supreme Court analysed the relevant provisions in Para.30 to 34 and after noticing the attendant decisions, proceeded to observe, thus,

> *"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 Commissioner of Income-Tax Vs. Aimil Ltd., [2010] 321 ITR 508 (Delhi High Court). 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." (Para.52)*

5.1.1 It was further stated,

> *"... 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." (Para.52)*

5.1.2 The distinction between employers' contribution and liability to deposit the amount issued by it was explained as under:

> *"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." (Para.53)*

5.1.3 The Supreme Court finally held,

> *"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. (Para.54)*

5.1.4 It was added to observe,

> *"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." (Para.54)

6. In view of the law emerging from the decision of the Supreme Court in Checkmate Services (P) Ltd. (Supra), the contentions and the questions raised by the appellant could be said to be no longer res integra. The law as holding the field operates against the appellant.

6.1 Thus, no question of law much less any substantial question of law arises for consideration in this Appeal.

7. The Appeal is liable to be dismissed. It is accordingly dismissed summarily."

6. On a query by bench to the learned Representatives as to whether there is any contrary decision of any High Court holding in favour assessee, the learned Representatives replied in negative.

7. Thus, we find that as of now, the issue is decided by Hon'ble High Courts against assessee. Since the ITAT is a lower-level appellate forum to High Court, we are inclined to follow the view taken by Hon'ble Courts in above cases. Respectfully following same, we uphold the impugned disallowances made by AO in the intimation passed u/s 143(1). Accordingly, Ground No. 3 is also dismissed.

Ground No. 4:

8. In this ground, the assessee challenges the interest u/s 234A, 234B and 234C levied by AO. During hearing, this ground remains un-pleaded.

Further, the levy of interest is statutory and as per provisions of law. Therefore, Ground No. 4 does not have any merit and is dismissed.

9. In the result, this appeal is dismissed.

Order pronounced in open court on 08/05/2025

Sd/- sd/-

(PARESH M. JOSHI) (B.M. BIYANI)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 08/05/2025
Patel/Sr. PS

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

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore