**IN THE INCOME TAX APPELLATE TRIBUNAL, 'E' BENCH MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER**
**&**
**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.1947/Mum/2021**
(**Assessment Year :2018-19**)

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| M/s. Salasar Balaji Ship Breakers Pvt. Ltd.<br>34, Quay Street<br>Darukhana, Reay Road<br>Opp. Britania<br>Mumbai | Vs. | ACIT, Circle 4(3)(2)<br>Mumbai<br>Aaykar Bhavan<br>Maharashi Karve Road<br>Mumbai |
| **PAN/GIR No.AAECS5872M** | | |
| **(Appellant)** | .. | **(Respondent)** |

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| Assessee by | Shri C.V. Jain |
| Revenue by | Ms. Richa Gulati |
| **Date of Hearing** | **27/03/2023** |
| **Date of Pronouncement** | **12/04/2023** |
| | |

**आदेश / O R D E R**

**PER AMIT SHUKLA (J.M):**

The aforesaid appeal has been filed by the assessee against the impugned order dated 23/09/2021, passed by NFAC, Delhi for the quantum of assessment passed u/s.143(1) of the IT Act for the A.Y.2018-19.

2. The following grounds have been raised by the assessee:-

*"1. In view of the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeal) (Ld. CIT-A) has erred in upholding the impugned assessment order, passed u/s 143(1) of the IT Act, where disputed additions have been made without affording opportunity of being heard.*

*2. On the facts, in the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the disallowances of payment of employers and employees contribution to ESIC and PF amounting to Rs.1,00,240/- which were made before the due date of filing of the Return.*

*3. The appellant therefore prays your honour to be kind enough to -*

*1. Admit the appeal and grant stay against the recovery of demand,*

*2. Set aside the order of A.O.,*

*3. Delete all illegal additions. and disallowances made by A.O.*

*4. Grant justice.*

*4. The appellant craves leave to add, amend, alter, delete, change or modify all or any of the above grounds of appeal which are independent & without prejudice to each other."*

3. Facts in brief are that assessee company e-filed the Return of Income for the AY 2018-19 on 16-08-2018 declaring the total income of Rs. 1,61,50,980/-. The said return was processed u/s. 143(1) of the Act vide intimation dated 16-10-2019 at a total income of Rs 1,62,51,220/- as against income of Rs. 1,61,50,980/ declared in the return of income by making an addition of Rs.1,00,240/- on account of disallowance of late payment of PF/ESI u/s. 36(1)(va) of the

Act as mentioned in Para 2 above. Aggrieved, the assessee filed the present appeal

4. The only issue is with regard the CPC's action in making a disallowance of 1,00,240/- u/s 36(1)(va) of the Act on account of late deposit of Provident Fund / ESI.

5. The ld. CIT(A) after considering the submissions as well as various case laws, held that, now in light of judgment of **Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd vs CIT reported in 448 ITR 518** have settled this issue wherein it has been held that the due dates mentioned in Section 36(1)(va) and 43B is deemed income held in trust have to be deposited by the due dates mentioned in the respective welfare acts and that was always the intention of the legislature while enacting the provisions.

5.1. Before us the ld. Counsel for the assessee submitted that the judgment of the Hon'ble Supreme Court was rendered in the assessment proceedings passed u/s.143(3) and not u/s.143(1), where the scope of adjustment is very limited. In its support, he relied upon the decision of the ITAT Mumbai 'SMC' Bench in the case of M/s. P R Packaging Services vs. CIT in ITA No.2376/Mum/2022 order dated 07/12/2022.

5.2. After considering the submissions made by the assessee as well as the findings given in the impugned orders, we find that there is no dispute that employees' contribution towards PF and ESI has been made late and beyond the due date

prescribed u/s.36(1)(va) of the respective acts. The issue whether, employees' contribution of PF & ESI which has not been deposited before the due date under the relevant acts and regulations, can it be treated as deemed income u/s. 2(24)(x) r.w.s. 36(1)(va). There were various sets of judgments in favour of the assessee including the judgment of Hon'ble jurisdictional High Court. r.w.s. 36(1)(va), wherein it was held that if employee's contribution towards PF and ESI has been deposited on or before due date of filing of return u/s 139(1), the same has to be allowed. However, the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. Vs. CIT reported in (2022) 448 ITR 518 (SC) held as under:-

> ***"52.*** *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 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 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.*

***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. This marked distinction has to be borne while interpreting the obligation of every assessee under section 43B.*

***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 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.*

6. The Hon'ble Supreme Court has considered the judgments of the High Court and analyzed the provisions of the law contained in section 2(24)(x), 36(1)(va) and 43B, and had come to the conclusion that if the deposit has been made after the due date prescribed under respective Acts, the same is not allowable. It is a trite law that once the Hon'ble Supreme Court has decided and settled the issue, then it becomes the law of the land and it has to be interpreted and understood as if it was from the date of the enactment of the statute/provisions. Once the delayed payment of employee's contribution to PF and ESI beyond the due date of respective Acts, has been interpreted to be deemed income, then the same is not allowable claim, therefore no such deduction of claim can be allowed. In fact, it tantamount to incorrect claim made in the return of income, which can be adjusted or disallowed. The scope of adjustments under Section 143(1)(a) 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) any arithmetical error in the return;*
>
> ***(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;***
>
> *(iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;*

*(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;*

*(v) disallowance of deduction claimed under [section 10AA or under any of the provisions of Chapter VI-A under the heading "C.—Deductions in respect of certain incomes", if] the return is furnished beyond the due date specified under sub-section (1) of section 139; or*

*(vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:*

***Provided** that no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode:*

***Provided further** that the response received from the assessee, if any, shall be considered before making any adjustment, and in a case where no response is received within thirty days of the issue of such intimation, such adjustments shall be made:*

7. Ergo, once there is incorrect claim apparent from the return of income, then the section provides that adjustment has to be made. The Auditor in the audited accounts only points out the date of payment and the due date prescribed under the respective Act (PF and ESI Act) and it is incumbent upon the assessee that, while computing the income he has to disallow the said payment, if it has been made beyond the due date. Thus, in view of the judgment of Hon'ble Apex Court, such claim cannot be allowed as it is an incorrect claim and therefore, it falls within scope of *prima facie* adjustment u/s.143(1). Accordingly, we confirm the order of the ld. CIT (A) holding that once the Hon'ble Apex Court has settled the issue, then that is the law which is applicable retrospectively and therefore, any such claim

of payment on account of employees' contribution to PF & ESI beyond the due dates given in the respective acts as given in 36(1)(va) is incorrect claim which needs to be disallowed / adjusted even within the scope of *prima facie* dispute u/s.143(1). Therefore, disallowance has rightly been made by CPC, Bangalore.

**8. In the result, appeal of the assessee is dismissed.**

Order pronounced on 12/04/2023 by way of proper mentioning in the notice board.

| **Sd/-** | **Sd/-** |
|---|---|
| **(PRASHANT MAHARISHI)** | **(AMIT SHUKLA)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Mumbai; Dated 12/04/2023
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
**ITAT, Mumbai**