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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 302/2024 & CM APPL. 31316/2024(Stay)

SAINATH SALES AND SERVICES PVT. LTD ..... Appellant

Through: Ms. Apoorva Bhumesh, Ms. Madhavi and Mr. Ankur Kr. Sharma, Advocates.

versus

ITO WARD -22(2), DELHI ..... Respondent

Through: Mr. Aseem Chawla, SSC along with Ms. Pratishtha Chaudhary, Mr. Naveen Rohila and Ms. Simran Jha, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE AMIT BANSAL

O R D E R

% 24.05.2024

CM APPL. 31317/2024 (Exemption)

Allowed, subject to all just exceptions.

The application stands disposed of.

CM APPL. 31318/2024 (205 Days Delay)

Bearing in the mind the disclosures made, the delay of 205 days in filing the appeal is condoned.

The application shall stand disposed of.

ITA 302/2024 & CM APPL. 31316/2024 (Stay)

1. The assessee has instituted the present appeal impugning the order of the **Income Tax Appellate Tribunal** [‘ITAT’] dated 21 June 2023 and has posited the following questions for our consideration:-

> “(A) Whether the Ld. ITAT is justified in law and facts and circumstances of the case in confirming order of CIT (Appeal) and Assessing Officer without appreciating the facts of the case?

(B) Whether the Ld. ITAT is justified in law and facts and circumstances of the case in making addition of Rs. 51,75,094/- on account of making payment of PF & ESI before filing return of income as prescribed in law?

(C) Whether the Ld. ITAT is justified in law and facts and circumstances of the case in making disallowance of payment of ESI & PF before filing Return which was duly covered u/s 43B of the Income Tax Act?

(D) Whether the Ld. ITAT is justified in law and facts and circumstances of the case in making disallowance based on change in law brought about by the Apex Court judgment in Checkmate Services Pvt. Ltd. & Ors. Vs. Commissioner of Income Tax & Ors (2022) 448 ITR 518 which was prospective in operation and not retrospective covering all previous years?

(E) Whether the Ld ITAT is justified in law and facts and circumstances of the case in not considering the cases decided in favour of Assessee by various ITAT benches across the country?

(F) Whether the impugned order is liable to be set aside due to non-compliance of principles of natural justice?

(G) Whether the impugned order can be sustained in facts and in law since it suffers from non-application of mind?

(H) Whether the Ld. ITAT failed to consider that the tax demand has to be adjudged as per the extant law and not as per the subsequent change in the legislation?

(I) Whether the Ld. ITAT failed to consider that if the amount is deposited into the relevant fund of PF /ESI, there is no income element at all therefore the same could not be subject to tax?

(J) Whether the Ld. ITAT failed to consider that disallowance even after deposit into relevant fund means collecting tax from the employer by way of disallowance/ addition when the same amount is also reported as income by the employee because the amount of contribution received by the employer and deposited into relevant fund is income of the employee, therefore the disallowance amounts to double taxation?

(K) Whether the Ld. ITAT has failed to apply its judicial mind by not considering any of the contentions raised by the Appellant in the Appeal and has not applied its mind?

(L) Whether the Ld. ITAT failed to consider that the amount of contribution received by the employer (the appellant assessee in this case) from salary paid to the employees is not a deemed income because there is no deeming fiction at all in the income tax law on this point?

(M) Whether the Ld. ITAT failed to consider that the deduction is

not deemed income at all because there is no income in commercial parlance and deemed income only where there is nature of income which could not be quantified or any doubt?

(N) Whether the Ld. ITAT failed to consider that once the amount is deposited there is no trust money left to the employer and therefore nothing could be taxed in his hand.

(O) Whether the Ld. ITAT failed to consider that income tax being a central legislation equal treatment must be given in the same facts across India otherwise it would be violation of Article 14 of Constitution of India?

(P) Whether the Ld. ITAT failed to consider that there was no loss to any one for late deposit because late deposit duly compensated by interest and penalty under respective Act?"

2. Having gone through the judgment rendered by the ITAT, we find that the view as expressed essentially flows from the judgment rendered by the Supreme Court in **Checkmate Services (P) Ltd. v. CIT** [(2023) 6 SCC 451].

3. Dealing with the impact of a delayed deposit and the ambit of Section 43B of the Income Tax Act, 1961 ['**Act**'], the Supreme Court in *Checkmate Services* has observed as follows:-

"62. 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)(*v-a*)] is, thus crucial. The former forms part of the employers' income, and the latter 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)(*v-a*) 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 43-B.

63. In the opinion of this Court, the reasoning in the impugned judgment [*CIT* v. *Checkmate Services (P) Ltd.*, 2014 SCC OnLine Guj 12521] 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 43-B 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 payout. 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 43-B 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."

4. In view of the above, we find no justification to interfere with the view as expressed.

5. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J

AMIT BANSAL, J

MAY 24, 2024/RW