

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE N. TUKARAMJI

I.T.T.A.No.325 of 2006

JUDGMENT: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. K.Govinda Rao, learned counsel for the appellant and Mr. J.V.Prasad, learned Standing Counsel for Income Tax Department for the respondent.

2. This appeal has been preferred by the assessee as the appellant under Section 260A of the Income Tax Act, 1961, against the order dated 31.01.2002 passed by the Income Tax Appellate Tribunal, Hyderabad Bench 'B', Hyderabad, in I.T.A.No.1919/Hyd/1996 for the assessment year 1994-95.

3. Learned counsel for the parties submit that issue raised in this appeal is squarely covered by a recent decision of this Court in I.T.T.A.No.296 of 2006 and batch **(M/s. Shriram Chits Private Limited v. Deputy Commissioner of Income Tax)** decided on 30.11.2022 against the assessee and in favour of the revenue.

4. Relevant portion of the aforesaid order dated 30.11.2022 reads as follows:

3. These appeals under Section 260A of the Income Tax Act, 1961 (briefly 'the Act' hereinafter) arise out of the orders dated 31.01.2022, 26.07.2004 and 30.07.2004 passed by the Income Tax Appellate Tribunal, Hyderabad Bench 'B', Hyderabad (briefly 'the Tribunal' hereinafter) in I.T.A.No.1916/Hyd/1996 for the assessment year 1991-92; I.T.A.Nos.506/Hyd/1999, 327/Hyd/2001, 471 & 1049/Hyd/2002 for the assessment years 1995-96, 1997-98, 1998-99 & 1999-2000; and I.T.A.No.1175/Hyd/2003 for the assessment year 2000-01.

4. Though at the time of filing appeal, substantial questions of law were not framed, appellant has proposed the following two questions as substantial questions of law.

"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in rejecting the appellant's claim for exemption of the chit fund income on the principal of mutuality, on the ground that appellant is a business concern ?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in ignoring the fact that when the appellant subscribed to a chit, it does so in its character as a subscriber ?

5. The two questions raise only one issue *i.e.*, whether appellant's claim to exemption of the chit fund income on the principle of mutuality was justified. We may mention that Tribunal had rejected the claim of the appellant for exemption of its income from chit fund business on the principle of mutuality holding that appellant is a business concern.

6. This question has already been decided by this Court in **Commissioner of Income-Tax v. Kovur Textiles** ((1982) 136 ITR 61 AP) holding that principle of mutuality cannot be extended to income earned by a chit fund company.

7. Appellant has proposed two more questions as substantial questions of law in I.T.T.A.No.316 of 2006, which are as under:

1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in not considering the appellant's submissions that the retrospective amendment to Section 43B of the Income Tax Act, 1961 by Finance Act, 2003 was clarificatory, and hence retrospective ?

2. Whether the Tribunal on the facts and in the circumstances of the case, erred in holding that the payments to ESI & PF Corporations made after the due dates under the respective statutes but before the due date for filing of the return of income was inadmissible as an expenditure ?

8. Though two questions have been proposed, the issue is basically one and the same. The question is whether payments made on account of employees' contribution to ESI and PF Corporations after the due date under the respective statutes but before the due date of filing of return of income was inadmissible as an expenditure.

9. This issue is also no longer *res integra* in view of the decision rendered by the Supreme Court in **Checkmate Services P. Limited v. Commissioner of Income Tax-1** (2022 SCC Online SC 1423). In the said decision, Supreme Court has held as follows :

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 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)(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.

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.

10. In view of above, all the questions proposed are answered against the appellant/assessee and in favour of the revenue/respondent.

5. Following the above, the present appeal is also dismissed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

UJJAL BHUYAN, CJ

N. TUKARAMJI, J

01.02.2023
vs