

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"G" BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA No.1550/Mum./2022**  
**(Assessment Year : 2018-19)**

Sara Trans Industries  
202, Building no.3,  
Nav Jivan Commercial  
Lamington Road, Mumbai Central  
Mumbai 400 008 PAN – ABVFS9322B

..... Appellant

v/s

Addl. Commissioner of Income Tax  
National Faceless Appeal Centre, Delhi

.....Respondent

Assessee by : Shri Shiv P. Singh  
Revenue by : Smt. Mahita Nair

Date of Hearing – 30/08/2022

Date of Order – 20/10/2022

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 24/03/2022, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, (*"learned CIT(A)"*), for the assessment year 2018-19.

2. The sole ground raised by the assessee, in this appeal, is as under:

*"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in making an addition of Rs.2,85,799, being disallowance u/s 36(1)(va). Your Honour is requested to delete the said addition."*

3. The only grievance of the assessee is against disallowance on account of delayed payment of employee's contribution to provident fund under section 36(1)(va) of the Act.

4. The brief facts of the case, as emanating from the record, are: The assessee is a partnership firm engaged in the business of manufacturing of bags, cases, covers, musical instruments and accessories etc. During the course of assessment proceedings, upon perusal of audit report in Form 3 CD, it was observed that assessee has not complied to the provisions of section 36(1)(va) of the Act related to certain payments of contributions received from employees to provident fund. It was noticed that the assessee has failed to remit the contributions within the stipulated time to the government account. Accordingly, the Assessing Officer vide order dated 22/03/2021 passed under section 143(3) r/w sections 143(3A) and 143(3B) of the Act, inter-alia, disallowed the amount of Rs. 2,85,799 and added to the total income of the assessee under section 36(1)(va) of the Act.

5. The learned CIT(A) vide impugned order dated 24/03/2022 dismissed the appeal filed by the assessee on this issue and held that if the employer fails to deposit the entire amount towards employees' contribution on account of PF and ESI with concerned department on or before the due date under PF and ESI statute, the assessee shall not be entitled for deduction to that extent. Being aggrieved, the assessee is in appeal before us.

6. During the course of hearing, learned Authorised Representative submitted that though such contributions are not paid within the time prescribed under the relevant statute, if those contributions are paid before the due date prescribed under section 139(1) of the Act, the employer shall be entitled to deductions as provided under section 36(1) of the Act.

7. On the other hand, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

8. We have considered the rival submissions and perused the material available on record. We find that the issue arising in present appeal has been settled in favour of Revenue by the recent decision of Hon'ble Supreme Court in Checkmate Services (P.) Ltd. vs CIT, [2022] 143 taxmann.com 178 (SC). The relevant observations of Hon'ble Supreme Court in aforesaid decision, are as under:

*"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 assesseees 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."*

9. Thus, respectfully following the recent decision of Hon'ble Supreme Court in case cited supra, the sole ground raised by the assessee in the present appeal is dismissed.

10. In the result, appeal by the assessee is dismissed.

Order pronounced in the open Court on 20/10/2022

**Sd/-**  
**PRASHANT MAHARISHI**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 20/10/2022**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai