

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : A : NEW DELHI

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER  
AND  
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.1735/Del/2020  
Assessment Year: 2018-19

Aircon Engineers Private Limited, Vs. ITO,  
276, Sultan Sadan-1, CPC,  
Lane No.3, Westend Marg, Bangalore.  
Saidulajaib,  
New Delhi – 110 030.

PAN: AAACA5824B

(Appellant)		(Respondent)
Assessee by	:	None
Revenue by	:	Shri Kanav Bali, Sr. DR
Date of Hearing	:	08.02.2023
Date of Pronouncement	:	15.02.2023

ORDER

This appeal filed by the assessee is directed against the order dated 28.08.2020 of the CIT(A)-1, New Delhi, relating to Assessment Year 2018-19.

2. The grounds raised by the assessee read as under:-

*"1. That the order of the Learned Commissioner of Income-tax (Appeals) is against facts and law.*

*2. That there is no justification to add Rs.21,00,593/- to the returned income on account of Employee share of Provident Fund & ESI under section 36 (1)(v) as it is not within the preview of the section 143 (1) of the Income- tax Act, 1961*

*3. That there is no justification to make the above said addition of Rs.21,00,593/- to income on account of Employee share of Provident Fund and ESI as the payments have been made before the due date of filing the return of income under section 139(1).*

*It is prayed that the Appellant may be permitted to add, to alter or to withdraw any of the grounds at the time of hearing."*

3. When the appeal was called for hearing, neither the assessee nor any authorized representative appeared nor any adjournment application has been filed. However, on perusal of record, we find that the appeal can be decided in absence of assessee after hearing the arguments of the Id. DR. Therefore, we proceed to adjudicate the appeal.

4. The matter has attained finality by the order of the Hon'ble Supreme Court wherein it was observed that employers have to deposit the employee's contribution towards EPF/ESI on or before the due date for availing deduction. In the cases before the Hon'ble Apex Court, the employers had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant provisions of the Act. The Assessing Officer ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". It was held that those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective acts. The Income Tax Appellate Tribunal and later the Hon'ble Gujarat High Court dismissed the challenge against this order of AO. In appeal, the court noted that the

Kerala High Court has also ruled in favour of revenue on this issue whereas the Hon'ble High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi have favoured the interpretation beneficial to the assessee.

5. The Hon'ble Apex Bench effectively reversed the judgment in *Commissioner of Income Tax vs. Alom Extrusions Ltd. (1 SCC 489)* relied upon by the assessee in its recent judgement in the case of Checkmate Services P. Ltd. vs. Commissioner Of Income Tax-I in CA No. 2833/2016 vide order dated 12.10.2022 and ruled in favour of the Department and against the assessee. The Hon'ble Apex Court observed that there is a marked distinction between the nature and character of the two amounts viz., the employers' contribution and employees' contribution required to be deposited by the employer. The first one is the employer's liability which 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. The Hon'ble Apex Court held as under:

*"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 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 assessee 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 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."*

6. As the issue of payment of employees' contribution towards the PF has been ruled against the assessee by the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. vs. Commissioner Of Income Tax-I in CA No. 2833/2016 vide order dated 12.10.2022, the appeal of the present assessee on this ground is liable to be dismissed.

7. In the result, the appeal of the assessee is dismissed.

Order Pronounced in the Open Court on 15/02/2023.

Sd/-

(B.R.R. KUMAR)  
ACCOUNTANT MEMBER

Sd/-

(C.M. GARG)  
JUDICIAL MEMBER

Dated: 15<sup>th</sup> February, 2023.

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi