

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

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA No.3270/Mum/2022  
(Assessment Year :2018-19)**

M/s. Nissan Enterprises Ltd. B-41, Giriraj Industrial Estate Mahakali Cave Road Andheri (E) Mumbai – 400 093	Vs.	DCIT-CPC Bangalore
<b>PAN/GIR No.AAECN1958R</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Pradeep Chaturvedi
Revenue by	Ms. Indira Adakil
<b>Date of Hearing</b>	<b>16/02/2023</b>
<b>Date of Pronouncement</b>	<b>17 /02/2023</b>

**आदेश / O R D E R**

**PER M. BALAGANESH (A.M.):**

This appeal in ITA No. 3270/Mum/2022 for A.Y.2018-19 arises out of the order by the Id. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre in appeal No.CIT(A)-17, Mumbai/10177/2019-20 dated 31/10/2022 (Id. CIT(A) in short) against the order of assessment passed u/s.143(1) of the Income Tax Act, 1961 (hereinafter referred to as

Act) dated 13/11/2019 by the Id. Dy. Commissioner of Income Tax-CPC (hereinafter referred to as Id. AO).

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the disallowance made on account of employee's contribution of Provident Fund and Employee State Insurance in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. Since the issue is already covered in favour of the Revenue by the recent decision of the Hon'ble Supreme court in the case of Checkmate Services Pvt. Ltd vs CIT reported in 448 ITR 518, we proceed to dispose of this appeal by hearing the Id. DR and perusing the materials available on record. It is not in dispute that the employees contribution to PF and ESI were deposited by the assessee to the Government account beyond the due dates prescribed under the respective acts but well before the due date of filing of return of income u/s. 139(1) of the Act. We find that the recent decision of the Hon'ble Supreme Court had settled the entire dispute to rest by deciding it in favour of the Revenue by observing 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.*

*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."*

3.1. The Id. AR vehemently relied on the decision of the Co-ordinate Bench of this Tribunal in the case of P.R. Packaging Services in ITA No.2376/Mum/2022 dated 07/12/22 (authored by the undersigned) wherein this issue has been decided in favour of the assessee. We find that the said decision was rendered by applying the provisions of Section 143(1)(iv) of the Act. Pursuant to the aforesaid decision of the Hon'ble Supreme Court, the claim of deduction towards employee's contribution to PF & ESI made by the assessee becomes an incorrect claim warranting prima facie adjustment u/s.143(1) of the Act. Hence, the decision relied by the Id. AR would not advance the case of the assessee.

3.2. In view of the aforesaid observations and respectfully following the decision of the Hon'ble Supreme Court referred to supra, the grounds raised by the assessee are hereby dismissed.

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

Order pronounced on 17/02/2023 by way of proper mentioning in the notice board.

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

Mumbai; Dated 17/02/2023  
KARUNA, *sr.ps*

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai