

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI
BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 2402/Mum/2022 (A.Y. 2019-20)

Mehk Chemicals Private Ltd.,
Shed No. W6, TTC Industrial Area,
Behind Hico Products, Pawane,
Thane (West)-400705.
PAN: AABCM0329E

..... Appellant

Vs.

Assistant Director of Income Tax, CPC,
Post Bag No.2, Electronic City Post Office,
Bangalore-560500

..... Respondent

Appellant by	:	Sh. Tanmay Phadke, Adv.
Respondent by	:	Smt. Mahita Nair, DR
Date of hearing	:	17/11/2022
Date of pronouncement	:	26/12/2022

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of National Faceless Appeal Centre (for short 'NFAC'), Delhi dated 02.08.2021 under section 250 of the

Income Tax Act, 1961 (for short 'the Act') for A.Y. 2019-20. The assessee has raised the following grounds of appeal:

	<i>Ground of appeal</i>	<i>Tax effect relating to each Ground of appeal</i>
1.	<i>On the facts and circumstances of the case and in law, the National Faceless Appeal Centre (NFAC) erred in confirming the adjustment made in the intimation and consequently, upholding the disallowance of Rs. 22,44,527/- pertaining to the employees' contributions of ESIC and PF made by the Appellant before the due date of filing of the return of income. The said adjustment does not fall within the ambit of the provisions of Section 143(1) of the Act. Thus, the disallowance of Rs. 22, 44,527/- as made by the learned. Assistant Director of the Income Tax, CPC may be deleted as without jurisdiction and bad in law.</i>	<i>Rs. 6,24,427/-</i>
2.	<i>On the facts and circumstances of the case and in law, the NFAC failed to appreciate that the disallowance Rs. 22, 44,527/- is governed by the ratio laid down by the Hon'ble Jurisdictional Bombay High Court in "CIT vs. Ghatge Patil Transports Ltd (2014) 368 ITR 749 (Bombay) and Geekay Security Services (P.) Ltd. vs. DCIT (2019) 101 taxmann.com 192 (Bombay)". Thus, the disallowance of Rs. 22, 44,527/ may be deleted.</i>	<i>Rs. 6,24,427/-</i>
3.	<i>On the facts and circumstances of the case and in law, the NFAC erred in holding that</i>	<i>Rs. 6,24,427/-</i>

	<i>the explanations 2 and 5 to Sections 36(1) (va) and 43B of the Act are retrospective in nature and applicable to the present assessment year. Thus, the said observation may be reversed and the disallowance of Rs. 22, 44,527/- may be deleted.</i>	
4.	<i>The Appellant craves leave to add, alter, rescind or amend any of the above grounds of appeal.</i>	
<i>Total tax effect (see note below)</i>		

2. Brief facts of the case are that assessee filed its return of income on 30-10-2019 u/s 139(1) of the act. Assessee filed income of Rs 1, 04, 22,114/-. Thereafter assessee's case was processed u/s 143(1)(a) (ii) vide dated 01-05-2020 and CPC Bangalore disallowed an amount of Rs 22,44,527/- pertaining to employees' contribution towards PF and ESIC.

3. Aggrieved by this order assessee preferred an appeal before Ld. CIT(A) (NFAC, Delhi) NFAC Delhi also confirmed the view taken by CPC Bangalore and sustained the additions/disallowance made by CPC Bangalore vide its order dated 02-08-2021.

4. Assessee being not satisfied with the order of NFAC, Delhi passed u/s 250, preferred this appeal before ITAT. Assessee raised total 4 grounds first 3 grounds are effective, required our adjudication and ground no.4 is general in nature.

5. Ground no.1 pertains to the jurisdiction of CPC Bangalore u/s 143(1). In this regard we have gone through the provisions of sec 143(1a) (ii) R.W. Column 20(b) of tax audit report in form no 3CD. In column no 20(b) the tax auditor clearly reported amount of employees share of PF and ESIC received, **due date in respect**

of filing of return u/s 139(1) and the date of actual payment to the concerned authorities. Nowhere in the tax audit report tax auditor mentioned the due date of deposit under the relevant statutes, he simply mentioned the actual date of payment vis-a-vis the due date of filing of return u/s. 139(1) of the Income Tax Act.

6. In view of above facts the applicability of section 143(1)(a)(ii) can't be challenged as the statute authorise the CPC Bangalore to make adjustment of an incorrect claim if such incorrect claim is apparent from any information in the return. In the result Ground no.1 raised by assessee is dismissed. Although assessee has an option to substantiate its claim by filing accurate information before the concerned AO wherein he may prove the actual due date of payment in relevant statutes vis-a vis actual date of payment.

7. In Ground no. 2 assessee relied upon the decision of Honorable Jurisdictional High Court in the case of CIT vs Ghatge Patil Transports Ltd (2014) 368 ITR 749 and Geekay Securities Services Pvt. Ltd. vs DCIT 2019 101 Taxxmann.com 192 and challenged this disallowance. Till now this issue was being decided in assessee's favor inter-alia by relying upon the decisions of jurisdictional high court and other high courts. However, the positions on this issue had been decided by the Honourable Supreme Court in favour of revenue in its recent decision in bunch of appeals titled as Checkmate Services Pvt Ltd Vs CIT (civil appeal no 2833 of 2016 dated 12-10-2022. In this decision the honourable court taking note of legislative intent and history, finally decided in favour of revenue and put to rest the controversy and different views taken by various honourable High courts.

8. The Hon'ble Supreme Court held there is a clear distinction between employer contribution and employee's share. The employee's share retains its character as an income by virtue of sec. 2(24)(x) if not deposited before the due date as prescribed under the relevant statute, whereas the employer share of contribution can be deposited before due date of filing of return as defined in sec 139(1). It is further clarified that the payment of employers shares even if deposited after the due date as prescribed in sec 139(1) the same will be available for deduction in next year but as far as employee's share is concerned it is treated to be lapsed until unless paid before the due date as prescribed under the relevant statutes.

9. Respectfully following the recent decision of honourable Supreme Court in bunch of appeal titled as Checkmate Services Pvt. Ltd. Vs CIT (civil appeal no. 2833 of 2016 dated 12-10-2022 and considering our findings and adjudication in preceding paragraph the impugned disallowance stands confirmed. In the result Ground no. 2 raised by the assessee is dismissed.

10. Through Ground no. 3 assessee challenged the retrospectivity of sec. 43B and sec. 36(1) (va). This issue had also been considered by the honourable Supreme Court in the matter of Checkmate Services Pvt. Ltd. (supra) wherein this issue has been categorically discussed and decided and the same is against the assessee's contention and in favor of revenue. In view of this decision of honorable supreme court we are of the considered opinion that this decision of honourable supreme court would relate back to the date of consequential amendment brought in by the legislation in respective provision of the act and it

was to be presumed that the legal position was always like that in terms of this Ground no.3 raised by the assessee is dismissed.

11. In the result appeal filed by the **assessee is dismissed**

Order pronounced in the open court on 26th day of December, 2022.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 26/12/2022

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai