IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No. 2205/DEL/2022
[Assessment Year: 2018-19

Jagbir Singh Tewatia, C-11, 1st Floor, Adarsh Nagar, Uttam Nagar, New Delhi-110059 PAN- AAJPS4033N	Vs	ACIT, Circle-10(1), New Delhi.
APPELLANT		**RESPONDENT**
Assessee represented by	None	
Department represented by	Sh. Anuj Garg, Sr. DR	
Date of hearing	17.04.2023	
Date of pronouncement	17.04.2023	

O R D E R

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 28.10.2021, pertaining to the assessment year 2018-19. The assessee has raised following grounds of appeal:

"1) Ld. CIT(A) has erred in confirming the addition made by Ld. A.O of Rs. 87,620/- u/s 36(l)(va) of the Act by holding that there is delay in deposit of employee contribution within due date of relevant act without appreciating the fact and law that the due date referred to section 36(1)(va) must be read with section 43B of the Act, wherein it has been provided that if

the assessee has made the payment before the due date of filling of return, then same shall be allowed u/s 43B of the Act. Further reliance placed on the judgments of Hon'ble Supreme Court in cases of CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC), CIT v. Vinay Cement Ltd. [2007] 213 CTR 268 (SC) and Pr. CIT v. Raj. State Bev. Corpn. Ltd. [2017] 84 taxmann.com 185 (SC).

2) Ld. CIT(A) wrongly confirm the addition of Rs. 87,620/- u/s 36(l)(va) of the Act regarding delayed payment of employee contribution to PF and ESI by applying the amended provisions of section 36(1)(va) and 43B of the Act retrospectively without appreciating the facts and law that such amendment brought into the statute by Finance Act, 2021 w.e.f 1.4.202land accordingly applied prospectively w.e.f AY 2021-22. As matter is squarely covered in favour of the appellant company by the decision ***of*** *Hon'ble Delhi Tribunal in case of Mr.Vansh Jain vs DCIT ITA No. 1853/Del/2020, dated 13.10.2021and in case of Ms.Vandana Dubey vs ITD, CPC ITA No. 1199/Del/2021, dated 21.01.2022.*

3) The above grounds of appeal are independent and without prejudice to one another.

4) The detailed submission shall be filed at the time of hearing before your honor.

5) Your appellant craves leave to add, alter, amend, modify, rescind, supplement or alter any of the grounds of appeal stated herein above, either before or at the time of hearing of this appeal."

2. At the time of hearing no one attended the proceedings on behalf of the assessee. The notice of hearing sent through speed post at the address furnished by the assessee in form no. 36 has been returned unserved by the postal authorities. The assessee has not provided his current address. Therefore, under these facts, appeal is taken up for hearing in the absence of the assessee and is being decided

on the basis of material available on record.

3. As per office report, the present appeal is barred by 257 days. An application seeking condonation of delay on behalf of the assessee is on record, wherein it has been stated that the assessee was mentally disturbed owing to sudden death of his son-in-law during that time. However, no affidavit in support of such application has been filed by the assessee.

4. The learned DR opposed the contents of the application and submitted that even otherwise the issue in appeal is squarely covered against the assessee by the recent judgment of the Hon'ble Supreme Court dated 12.10.2022 in the case of Checkmate Services P. Ltd. vs. CIT (along with batch of appeals).

5. We have heard the learned DR and perused the material available on record. We find that the Hon'ble Supreme Court in the case of Checkmate Services P Ltd. vs. CIT (supra), on the issue relating to payment of employees' contribution towards PF and ESI, has ruled against the assessee, inter alia, by observing as under:

> *"52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(l)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section*

36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions - especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time - by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

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 bome 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 bome 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 temis 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."

6. In view of the above binding precedent we do not see any reason to interfere in the finding of the lower authorities. The same is hereby affirmed. Grounds of appeal of the assessee are dismissed.

7. In the result, assessee's appeal is dismissed.

Order pronounced in open court during the course of hearing on 17.04.2023.

Sd/-	**Sd/-**
(PRADIP KUMAR KEDIA)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MP
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI