

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T.A. No.40/Asr/2023
Assessment Year: 2018-19**

Sparrow Security Services Hall No. 106 (A1) First Floor, North block Bahu Plaza, Jammu, Jammu & Kashmir. [PAN:ABGFS3356J] (Appellant)	Vs.	ITO, Ward 1(1) Jammu. (Respondent)
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Appellant by	Sh. Rohit Kapoor, CA.
Respondent by	Smt.Rajinder Kaur, CIT. DR

Date of Hearing	12.04.2023
Date of Pronouncement	24.04.2023

ORDER

Per:Anikesh Banerjee, JM:

The instant appeal of the assessee was filed against the order of the Id.
Commissioner of Income Tax (Appeals), NFAC, Delhi,[in brevity the ‘CIT (A)’]

order passed u/s 250 of the Income Tax Act 1961 [in brevity the Act], for A.Y. 2018-19. The impugned order was emanated from the order of the NAC Delhi, order passed u/s 143(3) r.w.s. 143(3A) & 143(3B) of the Act date of order 19.01.2021.

The assessee has taken the following grounds: -

“1. That the Ld. CIT(A) has erred in dismissing the appeal by passing order u/s 250(6) and sustaining the addition made by the AO.

2. That the order passed u/s 250(6) of the Income Tax Act, is bad in law as the same has been disposed off without examining the merits of the case.

3. That the CIT(A) has erred in confirming the addition of Rs. 4807613/- on account of employer and employee contribution paid after the due date as per statute by not appreciating that the same was duly deposited before the due date of filing of return of income.

4. That the Ld. CIT(A) has erred in not appreciating that the addition of Rs. 4807613/- includes employer contribution of Rs. 2891068/- and employee contribution of Rs. 1916345/- and by placing reliance upon

the judgement of apex court in the case of Checkmate Services Pvt. Ltd. Without appreciating that before the said judgement, the same issue was decided in favour of the assessee by Hon'ble high Court wherein, the adjustment/disallowance made on account of ESI and EPF constituted mistake apparent from record (being in contravention to jurisdictional high court). That the Ld. CIT(A) has erred in ignoring the judgement of Hon'ble Supreme Court in the case of M/s MEPCO INDUSTRIES LIMITED, in which it has been stated that prior mistake apparent from record cannot be rectified/obliterated by subsequent adverse SC JUDGMENT on the same issue. .

5. That the CIT(A) has wrongly placed reliance upon the judgement of apex court in the case of Checkmate Services Pvt. Ltd by not appreciating that the issue involved in this case is only with respect to employees contribution and as such cannot be applied on employer contribution of Rs. 2891068/- made by the assessee firm. That the CIT(A) has erred in not appreciating that employer's contribution is covered by section 43B clause (b)

6. That the CIT(A) has erred in not appreciating that the CPC has duly allowed the rectification in subsequent AY 2019-20 by wrongfully

stating that each assessment year is distinct since apart from the yearly amendments, the income tax act does not discriminate between different assessment years and the decision in one assessment is applied consistently to another assessment year.

7. That the appellant craves leave to add or amend the grounds of appeal before the appeal is heard and disposed off.”

2. Brief fact of the case is that the assessee has filed return u/s 139(1) for the impugned assessment year. By passing the audit report of the assessee the return was processed by CPC u/s 143(1) and addition was made Rs.48,07,613/- for late deposit of contribution made in respect of PF & ESI u/s 36 (1)(va) of the Act. Aggrieved assessee filed an appeal before the Id. CIT(A) against the order of the Id. AO. The assessee placed that the entire amount of late contribution of PF & ESI is not the point of addition for violation of section 36. The entire amount is mixed in three parts. The assessee segregated the additions in three parts which are amount to Rs.28,91,068/- is related to employer contribution and the rest amount Rs.19,16,345/- Rs. 837424.90 was related to the late credit of cheque which was

produced in the bank within the time limit. So, there is no violation for late payment of the employee contribution. The rest amount Rs.10,79,120/- is well accepted by the Id. AR of the assessee for addition with the total income by respectfully relying on the order of the Hon'ble Supreme Court in the case of **Checkmate Services P. Ltd. Vs CIT (Civil Appeal No.2833 of 2016 dated 12.10.2022), [2022] 143 taxmann.com 178 (SC).**

The Id. AR placed that all the details were submitted before the Id. CIT(A). But without considering the assessee's submission the order was passed and confirmed the assessment order. Being dissatisfied with the order of the CIT(A) the assessee filed an appeal before us.

3. Considering the grounds of the assessee, the Id. AR has argued ground wise before the bench.

Ground No.1, is general in nature. As such no additional comments are being given.

Submission in Ground No. 2 to 5

3.1 The Id. AR combined grounds in argument and placed that the nature of the payment of the PF & ESI is combined with employer and employee contribution.

The relevant part of the submission is extracted as below:

Submissions for Ground No 2-5

a) That the CIT(A) has erred in confirming the addition of Rs. 4807613/- without going through the facts of the case. The CIT(A) has erred in applying the judgement of apex court in the case of Checkmate Services Pvt. Ltd. In which it was held that the deduction u/s 36(1)(va) cannot be allowed if the employees' contribution to PF/ESI was not deposited before the due date as per the respective statute. In the extent case, the addition of Rs. 4807613/- comprises of both employer contribution amounting to Rs. 2891068/- and employee contribution amounting to Rs. 1916345/-. The month wise bifurcation for the same has duly been submitted before the CIT(A) and the CIT(A) ignoring the submissions has confirmed the addition of total contribution which includes employer contribution. Even otherwise, the CIT(A) has erred in not appreciating the fact that some of the payments were made on due date but the cheque clearance for the same was made on subsequent dates.

b) The details of payment made by the appellant for PF and ESI which includes employer contribution and employee contribution are as under: -

Provident Fund						
Month	Date of clearance	Total Challan	Employee	Employer	Charges	Page No
May	19.06.2017	325958	149294	149294	27371	70-72
June	20.07.2017	737678	337868	337868	61942	67-69
July	17.08.2017	790867	362229	362229	66409	61-63
August	15.09.2017	807127	369677	369677	67773	58-60

September	12.10.2017	795320	364268	364268	66784	55-57
October	15.11.2017	800602	366688	366688	67226	52-54
November	14.12.2017	800913	366830	366830	67253	49-51
December	11.01.2018	821266	376152	376152	68962	46-48
January	14.02.2018	821423	376224	376224	68975	43-45
February	16.03.2018	764677	350263	350263	64150	37-42
March	23.04.2018	816245	373888	373888	68469	31-36
		8282075.79	3793381	3793381	695314	

ESI					
April	Date of clearance	Total	Employee	Employer	Page No
May	18.07.2017	75111	20251	54860	83
June	18.07.2017	146826	39591	107235	82
July	13.09.2017	167769	45240	122529	81
August	13.09.2017	173639	46800	126839	80
September	20.10.2017	171325	46176	125149	79
October	21.11.2017	180496	48672	131824	78
November	25.01.2018	181653	48984	132669	77
December	07.02.2018	181653	48984	132669	76
January	15.02.2018	189754	51169	138585	75
	15.02.2018	4124	0	4124	75
February	13.03.2018	194381	52416	141965	74
March	26.04.2018	167353	45105	122248	73
			493388	1340696	

c) It is pertinent to mention here that the due date of deposit of provident fund as per The Provident Funds Act, 1925 is 15th of next month and for any fund set up as per EMPLOYEES' STATE INSURANCE ACT, 1948, the due date is 21st of next month up to June 2017. However, there was an amendment in ESI act whereby, the due date was changed from 21st to 15th of next month w.e.f July 2017. **That the details of late deposit of PF/ ESI contribution of employee is being segregated from the information tabulated in para no 'b' above and the same is only covered as per the provisions of section 36(1)(va).** The late deposit of employee's contribution to PF and ESI works out to Rs. 1079120/- as per the following details:

PF			
Month	Date of Deposit	Date of clearance	Employee
July	17.08.2017	17.08.2017	362229
March	18.04.2018	23.04.2018	373888
			736117

ESI			
Month	Date of Deposit	Date of clearance	Employee
May	18.07.2017	18.07.2017	20251
June	18.07.2017	18.07.2017	39591
July	13.09.2017	13.09.2017	45240
September	20.10.2017	20.10.2017	46176
October	21.11.2017	21.11.2017	48672
November	25.01.2018	25.01.2018	48984
December	07.02.2018	07.02.2018	48984
March	29.04.2018	29.04.2018	45105
			343003

3.2 The Id. AR placed that the employer contribution is related to section 43B which is covered by the **CBDT Circular No. 22/2015 dated 17.12.2015**. The employer contribution should be allowed if the payment is done before the filing of return u/s 139(1). The extract of the Circular No. is below:

“Circular No. 22/2015

F.No.279/Misc./140/2015-ITJ

Government of India Ministry of Finance Department of Revenue

Central Board of Direct Taxes

New Delhi, 17th December, 2015

Subject:- Allowability of employer's contribution to funds for the welfare of employees in terms of section 43B(b) of the Income Tax Act.

As per section 43B of the Act certain deductions are admissible only on payment basis. It is observed by the Board that some field officers disallow employer's contributions to provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, by invoking the provisions of section 43B of the Act, if it has been paid after the 'due dates', as per the relevant Acts.

2. *The matter has been examined in light of the judicial decisions on this issue. In the case of Commissioner vs. Alom Extrusions Ltd, [2009] 185 TAXMAN 416 (SC), the Apex Court held that the amendments made in section 43B of the Act i.e. deletion of second proviso and amendment in the first proviso, being curative in nature are retrospectively applicable from 1.04.1988. It further held that by deleting the second proviso to section 43B of the Act and amending the first proviso, the contribution to welfare funds have been brought at par with the other duty, cess, fee, etc. Thus, the proviso is equally applicable to the welfare funds also. Therefore the deduction is allowable to the employer assessee if he deposits the contributions to welfare funds on or before the 'due date' of filing of return of income."*

3.3 The ld. counsel fully relied on this Circular and placed that the employer contribution amount to Rs.28,91,068/- would not be attracted under the purview of taxable income and the entire amount was paid before the filing the return u/s 139(1). Prayed that the addition amount to Rs. 28,91,068/- should be quashed.

3.4 Further, issue was placed by the ld. AR of the assessee that the amount of Rs.8,37,424.90 is related to employer contribution. The ld. AR explained that the

said amount was paid by cheque within the time limit as per the stipulated due date of relevant Acts. But the cheque was cleared after the due date of the relevant act. The Id. AR invited our attention in **APB page 122** related to confirmation from the bank for presenting the cheque in the relevant dates and also, the certificate of auditor **APB page no. 123** is placed. The Id. AR respectfully placed catena of judgment which is reproduced as below:

1. **P.L. Haulwel Trailers Ltd.v.Deputy Commissioner of Income-tax, Special Range V. II. [2006] 100 ITD 485 (CHENNAI)**

“Section 234C of the Income-tax Act, 1961 - Interest chargeable - Assessment year 1996-97 - Whether where assessee-company deposited its cheques with authorized banker within due date for payment of advance tax but same were encashed after due date, date of presentation of those cheques should be taken as date of payment and no interest was leviable on assessee under section 234C - Held, yes Circular & Notification : CBDT's Circular No. 261, dated 8-8-1979.”

2. **Moody's Analytics Knowledge Services (India) (P.) Ltd. v.Income-tax Officer (TDS), Circle- 2(1), [2020] 113 taxmann.com 448 (Bangalore - Trib.)**

Section 201 of the Income-tax Act, 1961 - Deduction of tax at source - Consequence of failure to deduct or pay (Interest under section 201(1A)) - Assessment years 2009-10 to 2012-13 - Assessee-company remitted tax in Online Tax Accounting System(OLTAS) on 7th day of next month which was prescribed date for remittance of tax deducted at source - In OLTAS date of remittance was shown as 8th/9th of succeeding month - Assessing Officer as well as Commissioner(Appeals) were of view that it was only payment as shown in OLTAS that was to be considered and therefore, assessee was liable to pay interest under section 201(1)(1A) for having made payment after prescribed date - However, as held by Tribunal in case of P.L. Haulwel Trailers Ltd. v. Dy. CIT [2006] 100 ITD 485 (Chennai), date of presentation of cheques before authorised banker for payment of advance tax should be taken as date of payment - In instant case it was found that credit to Government's account was

instant as payment was made online - Whether therefore, date of payment to Government was to be regarded as date of payment of tax - Held, yes - Whether thus, payment of tax being within prescribed date, levy of interest under section 201(1A) was not justified”

3. Natma Securities Ltd. v. ACIT, [2022] 145 taxmann.com 291 (Delhi - Trib.)

Section 201 of the Income-tax Act, 1961 - Deduction of tax at source - Consequence of failure to deduct or pay (Illustrations) - Assessment year 2012-13 - Whether for purpose of levy of interest under section 201(1A) for late deposit of TDS, payment of TDS by assessee to bank would relate to date of presentation of cheque by assessee to banker - Held, yes - Whether where assessee had admittedly tendered cheque for TDS payment with bank, well within stipulated 'due date', however, there was one day delay in debiting amount from assessee's bank account which was apparently due to mistake of banker, no interest could have been levied under section 201(1A) on assessee; interest levied by revenue authorities was to be waived off”

3.5 The Id. AR further relied on the **CBDT Circular No. 261 dated 08.08.1979**, relevant paragraph of the Circular is extracted as below:

“166. Recording date of tender of cheque and date of its realisation on challans for payment of direct taxes is to be done by branch of authorised public sector bank where it is tendered for payment

1. In terms of rule 80 of the Compilation of the Treasury Rules, if a cheque or draft tendered in payment of Government dues and accepted under the provisions of rule 79 is honoured on presentation, the payment is deemed to have been made on the date on which it was handed over to the Government bankers. The need to indicate on the challan the date of tender of the cheque/draft with the authorised public sector bank, was duly taken notice of by the Central Board of Direct Taxes and at the request of the Board, the Reserve Bank issued instructions to all the authorised public sector banks in November 1977 stipulating that the receiving branch should brand either an inward stamp of receipt as soon as the challan is tendered over the counter, or a date stamped with

provision for two dates, i.e., the date of tender and the date of the realisation of the cheque. The specimen of the date stamp is as under:

"Date of tender.....

Received payment Rs.....

Rupees.....

Date of realisation.....

For.....Bank

Authorised Signatory"

2. Apart from the above procedure, the Central Board of Direct Taxes has revised the proformae of the various challans and new challan forms with colour bands are being progressively used to replace the existing ones. The new challans for the payment of self-assessment tax have already been introduced from 1979 and it will be noticed there from that the counterfoils of the challans meant both for the Income-tax Officer and the taxpayer contain separate columns for recording the date of tender of the cheque and date of its realisation. The other challan forms which are being introduced shortly, also contain similar columns.

3. In view of the foregoing, it is hoped that there will be no difficulty in recording, on the challan, the date of tender of the cheque/draft by the branch of the authorised public sector bank where it is tendered for payment of any of the direct taxes. Circular No. 261 [F.No.385/61/79-IT(B)], dated 08.08.1979. Clarification No.2”

4. The Id. AR placed that the amount Rs.837424.90 was paid by cheque within due date but the clearance was made after the due date of the relevant act. Accordingly, considering the Board Circular, addition the amount to Rs.837424.90 should be quashed.

5. The Id. DR fully relied on the order of the revenue authorities and not able to produce any contrary orders or Circular against the submission of the assessee.

6. We heard the rival submission and considered the documents available on the record. The Id. AR first dissected the addition in two parts that is employer contribution & employee contribution of PF & ESI. The employee contribution is further dissected in two parts; i) the amount paid after the due date and ii) second part amount is paid by cheque before due date. The Id. AR placed a summary related the cheque deposited within due dates but debited after the due date as stipulated under relevant Acts which is extracted as below:

g) That the Ld. CIT(A) has erred in not providing the benefit of employee contribution to PF and ESI in the cases where the cheque has been presented by the assessee and the clearance was made after the due date mentioned in the respective act. The details of the same are being produced hereunder: -

<i>PF</i>						
<i>Month</i>	<i>Date of Deposit</i>	<i>Date of clearance</i>	<i>Total Challan</i>	<i>Employee</i>	<i>Employer</i>	<i>Charges</i>
<i>May</i>	<i>14.06.2017</i>	<i>19.06.2017</i>	<i>325957.56</i>	<i>149293.5</i>	<i>149293.5</i>	<i>27370.48</i>
<i>June</i>	<i>15.07.2017</i>	<i>20.07.2017</i>	<i>737678.23</i>	<i>337868</i>	<i>337868</i>	<i>61942.23</i>
<i>February</i>	<i>14.03.2018</i>	<i>16.03.2018</i>	<i>764677</i>	<i>350263.4</i>	<i>350263.4</i>	<i>64150.2</i>
			<i>1828312.79</i>	<i>837424.9</i>	<i>837424.9</i>	<i>153462.91</i>

7. Related to addition amount to Rs.10,79,120/-, the ld. AR already accepted the addition during the hearing in light of order of Hon'able Apex Court. The issue is already dealt by the same bench in the case of **Royal Furnishers Residency vs. CIT(A), in ITA No. 54/Asr/2022 date of order 20/12/2022** and order is favour of revenue. So, the entire addition amount to Rs.10,79,120/- is upheld.

7.1 Related to addition Rs.28,91,068/- and Rs.8,37,424.90, we fully relied on the Circulars of the CBDT. The employer contribution is not under the purview of the order of the Hon'ble Apex Court in the case of Checkmate Service Pvt. Ltd (supra). The Hon'ble Apex Court has only dealt with the delay payment of contribution related to employee's contribution. Further the payment by cheque within due date is squarely covered by the Board Circular and the order of the ITAT, Bangalore Bench in the case of Moody's Analytics Knowledge Services

(India) (P.) Ltd. vs. ITO, *supra*. Therefore, the addition of Rs.28,91,068/- and Rs.8,37,424.9 are liable to be quashed.

8. In the result, the appeal of the assessee bearing **ITA No. 40/Asr/2023** is partly allowed.

Order pronounced in the open court on 24.04.2023

Sd/-

(Dr. M. L. Meena)
Accountant Member

Sd/-

(ANIKESH BANERJEE)
Judicial Member

AKV

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

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