**IN THE INCOME TAX APPELLATE TRIBUNAL**
**[ DELHI BENCH: 'F' NEW DELHI ]**

**BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER**

**AND**

**SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**I.T.A. No. 2981/DEL/2022 (A.Y. 2017-18)**

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| Parminder Kumar<br>s/o. Sh. Krishna Gopal, 423/8, Adarsh Nagar, Sonepat, Haryana<br>**PAN No. AGKPK8247K**<br>**( APPELLANT )** | Vs. | ITO<br>Ward-3<br>Sonepat, Haryana<br>**( RESPONDENT )** |

**I.T.A. No. 2982/DEL/2022 (A.Y. 2018-19)**

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| Parminder Kumar<br>s/o. Sh. Krishna Gopal, 423/8, Adarsh Nagar, Sonepat, Haryana<br>**PAN No. AGKPK8247K**<br>**( APPELLANT )** | Vs. | ITO<br>Ward-3<br>Sonepat, Haryana<br>**( RESPONDENT )** |

**I.T.A. No. 2983/DEL/2022 (A.Y. 2019-20)**

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| Parminder Kumar<br>s/o. Sh. Krishna Gopal, 423/8, Adarsh Nagar, Sonepat, Haryana<br>**PAN No. AGKPK8247K**<br>**( APPELLANT )** | Vs. | ITO<br>Ward-3<br>Sonepat, Haryana<br>**( RESPONDENT )** |

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| **Assessee by :** | **None** |
| **Department by:** | **Sh. Rajesh Dhanesta. Sr. DR** |

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| **Date of Hearing** | **05.06.2023** |
| **Date of Pronouncement** | **07.06.2023** |

**ORDER**

**PER YOGESH KUMAR U.S., JM**

These three appeals are filed by the assessee against the orders dated 27/10/2022, 28/10/2022 and 28/10/2022 passed by National Faceless Appeal Centre (hereinafter referred to 'NFAC') Delhi for assessment years 2017-18, 2018-19 & 2019-20 respectively.

2. Since, the issues involved in all these appeals are common in nature; hence, they are clubbed together heard together and disposed-off by this common and consolidate order for the sake of convenience.

3. The assessee has raised the following grounds of appeal:-

**I.T.A. No. 2981/DEL/2022 (A.Y. 2017-18)**

*"1. On the facts and in the circumstances of the case and also in let the Ld CIT (Appeals), NFAC, Delhi confirmed the addition of Rs. 44,03,794/- u/s 36 of the IT Act for delayed deposit of EPF & ESIC within stipulated time ignoring the fact that in of the cases the delay is of few days and the deposit has been made before the due date of filing the return of Income. So the addition of Rs. 44,03,794/- is liable to be quashed.*

*2. On the facts and in the circumstances of the case and also in law, the CIT(Appeals), NFAC, Delhi ignoring the facts in which confirmed the addition of Rs. 5,14,395/-u/s 43(B) of the IT Act for delayed deposit of EPF, ESIC Service Tax. The amount of EPF of Rs. 4,59,799/- ESIC of Rs 9,034/ was deposited the within stipulated*

*time and rest of Rs 45,562/- of Service Tax Payable was deposited in the FY 2017-18. This amount of Service Tax Payable was never a part Profit & Loss account and as such this section u/s 43(B) is not applicable on the s amount. So the addition of Rs 5,14,395/-is liable to be quashed."*

**I.T.A. No. 2982/DEL/2022 (A.Y. 2018-19)**

*1. On the facts and in the circumstances of the case and also in law, the Ld. Rs. CIT(Appeals), NFAC, Delhi ignoring the facts in which confirmed the addition of Rs. 37,69,476/- u/s 43(B) of the IT Act for delayed deposit of GST payable amount on services for the FY 2017-2018 basically this amount was paid in the FY 2018-2019 onwards and dismissed the appeal. This amount was never a part of Profit & Loss account and declared in his audit report point no. 26(1)B(b) of Chartered Account and as such this section u/s 43(B) is not applicable on the said amount. So the appellate order u/s 250 and intimation order u/s 143(1) is void ab initio and liable to be quashed.*

**I.T.A. No. 2983/DEL/2022 (A.Y. 2019-20)**

*"On the facts and in the circumstances of the case and also in law, the Ld. CIT(Appeals), NFAC, Delhi ignoring the facts in which confirmed the addition of Rs. 75,20,262/- u/s 43(B) of the IT Act for delayed deposit of GST payable amount on services for the FY 2018-2019 basically this amount was paid in the FY 2019-2020 onwards and dismissed the appeal. This amount was never a part of Profit & Loss account and declared in his audit report point no. 26(1)B(b) of Chartered Account and as such this section u/s 43(B) is not*

*applicable on the said amount. So the appellate order u/s 250 and intimation order u/s 143(1) is void ab initio and liable to be quashed."*

4. None appeared for the assessee and the notice issued by the registry to the registered address of the assessee returned with the acknowledgement ' no such person on this address'. Considering the issue involved in the present appeal, we deem it fit to hear the Ld. DR and decide the above Appeals.

**ITA No. 2981/Del/2022 (A.Y 2017-18)**

5. The issue involved in the captioned Appeals are being identical, therefore, the brief facts of the case of Assessment Year 2017-18 are considered for the sake of convenience which are as under:-

6. The assessee filed return of income for AY 2017-18 declaring total income of Rs. 12,39,720/- and claimed a refund of Rs. 6,72,080/-. The return of income was processed 143(1) of the Act by making disallowance of Rs. 44,03,784/- under section 36 of the Act and Rs.5,14,395/- on account of non-remittance of EPF & ESIC Service Tax within the due date of respective Act. Aggrieved by the intimation, the assessee filed a rectification request, the Assessing Officer vide rectification order dated 29/04/2022 passed order u/s 154 of the Income Tax Act. As against the intimation u/s 143(1) of the Act, the assessee preferred the Appeal before the CIT(A) and the CIT(A) vide order dated 19/01/2019 dismissed the Appeal filed by the assessee.

7. Aggrieved by the order of the CIT(A) dated 19/01/2019, the assessee preferred the present Appeal on the grounds mentioned above.

**Ground No.1**

8. The assessee pleaded in the Ground No.1 that the CIT(A) erred in confirming the addition u/s 36 of the Act for delayed deposit of EPF and ESIC which were paid within stipulated time ignoring the fact that in most of the cases delay is of few days and the deposit has been made before the due date of filing of the return of income. Thus, the addition of Rs.44,03,784/- is liable to be quashed.

9. The Ld. DR submitted that the issue regarding belated deposit of EPF & ESIC has been settled by the Hon'ble Supreme Court of India in the case of Checkmate Services Pvt. Ltd. vs. CIT-1 in Civil Appeal No. 2833 of 2016, vide order dated 12/10/2022, therefore, submitted that the Ground No. 1 of the Assessee deserves to be dismissed.

10. We have heard the Ld. DR and perused the material on record. The issue involved in Ground No. 1 regarding delayed deposit of amount collected towards employees' contribution but the same is paid before the due date of filing of return. The Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-1 in Civil Appeal No. 2833 of 2016, vide order dated 12/10/2022 held that delayed deposit of the contribution EPF & ESIC beyond the stipulated period prescribed in the respective Acts are not allowable in following manners:-

*"51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd. 24; Commissioner of Income-Tax and another v. Sabari Enterprises25; Commissioner of Income Tax v. Pamwi Tissues Ltd. 26; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. 27 and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Court's principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrutions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.*

*52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(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 isto 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 assessee 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 33 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 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 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 34 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."*

11. Thus, following the ratio laid down by the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (Supra), we find no merit in the Ground No 1 of the Assessee and we find no infirmity in the order of the CIT(A) in confirming the addition u/s 36 of the Act for delayed deposit of EPF & ESIC. Accordingly, Ground No. 1 in the Assessee's Appeal is hereby dismissed.

**GROUND No. 2**

12. In the Ground No. 2 assessee contended that 'the CIT(A) had ignored the fact in which confirmation of the addition of Rs. 5,14,395/- u/s 43(B )of the

Act for delay deposit of EPF, ESIC and service tax, further, the amount of EPF of Rs. 4,59,799/-, ESIC of Rs.9,034/- was deposited within stipulated time and rest of Rs.45,562/- of service tax payable was deposited in the Financial Year 2017-18, the said amount of service tax payable was never a part of profit and loss account and as such the Section 43(B) of the Act is not applicable on the said amount. Therefore, the amount of Rs.5,14,395/- is liable to be quashed'.

13. The Ld. DR vehemently argued that the CIT(A) has given a specific findings and made addition of Rs.5,14,395/-, therefore, the findings on the said issue requires no interference at the hands of the Tribunal.

14. We have heard the Ld. DR and perused the material available on record. It is the specific case of the assessee in Ground No. 2 that the amount of EPF of Rs. 4,59,799/-, ESIC of Rs.9,034/- was deposited within stipulated time and rest of Rs.45,562/- of service tax payable was deposited in the Financial Year 2017-18, the said amount of service tax payable was never a part of profit and loss account and as such the Section 43(B) of the Act is not applicable on the said amount. Considering the said claim of the Assessee and in the facts and circumstances, we deem it fit to restore the issue involved in Ground No. 2 to the file of CIT(A) for de-novo adjudication. Accordingly, without expressing any opinion on the merit, the issue in Ground No. 2 of the Assessee is remanded to the file of Ld. CIT(A) with a direction to the assessee to substantiate the claim made in Ground No. 2 and the Ld. CIT(A) is directed to decide the issue de-

novo in accordance with law. Accordingly, the Ground No. 2 is partly allowed for statistical purpose.

15. In the result, the Appeal of the assessee in ITA No. 2981/Del/2022 is partly allowed for statistical purpose.

**ITA No. 2982/Del/2022 (2018-19)**

16. In the present Appeal, the only grievance of the assessee is that the 'CIT(A) ignored the fact in confirming addition of Rs.37,69,476/- u/s 43(B) of the Act for delayed deposit of GST payable amount on service for the Assessment Year 2017-18 basically the said amount was paid in the Financial Year 2018-19 onwards and dismiss the Appeal. Further, the said amount was never a part of P & L account and declared in Assessee's audit report in Point No. 26 (i)B(b) of Chartered Accountant and such the Section 43(B) is not applicable. Therefore, order u/s 250 and the intimation under 143(1) is liable to be quashed.'

17. The Ld. DR vehemently argued that the Ground No. 1 urged by the assessee is devoid of merit which has been already considered and adjudicated by the CIT(A). Therefore, the same is liable to be dismissed.

18. We have heard the Ld. DR and perused the material available on record and gave our thoughtful consideration. It is the specific case of the assessee that the amount of Rs. 37,69,476/- has been added u/s 43(B) of the Act was never a part of profit and loss account and the same has been declared in audit

report Point No. 26(i)B(b) of the Chartered Accountant and such as Section 43(B) is not applicable. Considering the above ground raised by the assessee, since the CIT(A) has not considered the said issue and no specific finding given thereon, without expressing any opinion on the merit, we deem it fit to restore the issue to the file of the CIT(A) with a direction to the assessee to substantiate the said contention made in the Ground No. 1 and the Ld.CIT(A) is directed to dispose the same in accordance with law, accordingly, we partly allow Ground No. 1 of the assessee for statistical purpose.

19. In the result, Appeal in ITA No. 2982/Del/2022 of the assessee is partly allowed for statistical purpose.

**ITA No. 2983/Del/2022 (A.Y 2019-20)**

20. Even in the present Appeal, the assessee contended that the CIT(A) has erred in confirming the addition of Rs.75,20,262/- u/s 43(B) of the Act for delayed deposit of GST payable amount on service for Financial Year 2018-19 and contended that the said amount was never a part of profit and loss account and declared in the audit report Point No. 26(i)B(b) of Chartered Accountant and Section 43(B) is not applicable.

21. The Ld. DR vehemently argued that the Ground No. 1 urged by the assessee is devoid of merit which has been already considered and adjudicated by the CIT(A). Therefore, the same is liable to be dismissed.

22. We have heard the Ld. DR and perused the material available on record and gave our thoughtful consideration. It is the specific case of the assessee that the CIT(A) has erred in confirming the addition of Rs.75,20,262/- u/s 43(B) of the Act for delay deposit of GST payable amount on service for Financial Year 2018-19 and the said amount was never a part of profit and loss account and declared in the audit report Point No. 26(i)B(b) of Chartered Accountant and Section 43(B) is not applicable. Considering the above ground raised by the assessee, since the CIT(A) has not considered the said issue and no specific finding given thereon, without expressing any opinion on the merit, we deem it fit to restore the issue to the file of the CIT(A) with a direction to the assessee to substantiate the said contention made in the Ground No. 1 and the Ld.CIT(A) is directed to dispose the same in accordance with law, accordingly, we partly allow Ground No. 1 of the assessee for statistical purpose.

23. In the result, the Appeal in ITA No. 2983/Del/2022 is partly allowed for statistical purpose.

Order pronounced in the open court on : **07/06/2023.**

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| **Sd/-** | **Sd/-** |
| **( Dr. B. R. R. KUMAR )** | **(YOGESH KUMAR U.S.)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Dated : 07/06/2023

**R.N, Sr. PS**

Copy forwarded to :-

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

ASSISTANT REGISTRAR
ITAT NEW DELHI