

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.As. No.7 & 8/DEL/2023
Assessment Years 2018-19 & 2019-20

Sentinel Consultants P. Ltd. 504 Ashok Bhawan 93 Nehru Place New Delhi	Vs.	ACIT Circle-22(2) New Delhi
TAN/PAN: AAACS0396L		
(Appellant)		(Respondent)

Appellant by:	Shri Vijay Kumar Singla, CA		
Respondent by:	Shri S.L. Anuragi, Sr.DR		
Date of hearing:	01	06	2023
Date of pronouncement:	12	06	2023

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeals have been filed by the assessee against the separate orders of the Id. Commissioner of Income Tax (Appeals)-NFAC, Delhi ('CIT(A)' in short) dated 12.12.2022 and 07.12.2022 arising from the intimation orders dated 05.11.2019 & 18.09.2020 passed by the Assessing Officer (AO) under Section 143(1) of the Income Tax Act, 1961 (the Act) concerning AYs 2018-19 & 2019-20 respectively.

2. The captioned appeals relate to Assessment Years 2018-19 and 2019-20 involving identical issue of disallowance of expenditure towards employees contribution to ESIC/PF under Section 36(1)(va) of the Act.

3. Briefly stated, the assessee is engaged in the business of security

man power supply and has filed the return of income after getting its account audited under Section 44AB of the Act. An e-notice under Section 143(1)(a) was issued on the ROI as a show cause towards delay in deposit of PF and ESIC in relation to employees contribution. Thereafter, in the absence of any response from assessee thereon, an intimation under Section 143(1) was issued whereby disallowance under Section 36(1)(va) was carried out for delayed deposit of employees contribution to PF and ESIC on the basis of information available in the tax audit report. A disallowance of Rs.42,96,393/- was carried out on account of late deposit of employees' contribution to ESIC/PF and Rs.15 lakh on account of service tax payable for the Assessment Year 2018-19 in question.

4. Likewise, a disallowance of Rs.95,58,205/- was carried out on account of late deposit of employees contributions to ESIC/PF coupled with another disallowance of Rs.19,199/- under Section 40(a)(ia) on account of non deduction of TDS on interest paid for AY 2019-20.

5. The CIT(A) confirmed the action of the Assessing Officer in the respective assessment years.

6. Aggrieved, the assessee preferred appeal before the tribunal as per captioned appeals.

7. When the matter was called for hearing, the Id. counsel for the assessee submits at the outset that such adjustments/ disallowances for alleged delay in deposit of employees contribution to PF/ESIC is not permissible while drawing intimation under S. 143(1) of the Act having regard to several tribunal decisions.

7.1 The Id. Counsel next contends that the assessee in the instant case, is a labour contractor and engaged in profession of supply of security man powers to various factories where such security man power is employed. In the backdrop of nature of work, the Id. counsel

contends that the salary in such business is often disbursed to the employees as and when the funds are arranged from the clients. Owing to belated receipt of service charges from clients, the disbursement of salary are also, at times, paid late in tandem. The 'due date' for deposit of employees' contribution under the respective Acts should therefore be reckoned with reference to the month of actual salary payment and not when the liability to pay arises to an employer. It was further contended that when the due date under PF/ESIC Act is computed with reference to the month in which the salary has been actually paid, the alleged delay in payment of ESIC/PF would be substantially ironed out. The Id. counsel states that the Revenue has computed the delay with reference to the month in which the liability to pay salary has arisen to the employer rather than the month in which such salary has been actually paid resulting in alleged delay giving rise to impugned disallowance.

7.2 The Id. counsel, in the alternative, submits with reference to the additional ground that the expenditure incurred towards employees' contribution is, in any case, allowable deduction under Section 37(1) of the Act which has not weighed in the mind of the lower authorities. Certain Tribunal decisions were placed to support this alternate plea.

7.3 As regards other disallowances under Section 43B towards service tax payable, the Id. counsel submits that the payment has been made before the due date of filing of return and thus no default under S. 43B can be attributed. The impugned disallowance is thus not justified.

7.4 The disallowances of Rs. 19,199/- with the aid of S. 40(a)(ia) on account of non-deduction of TDS on interest was also assailed on the ground that the assessee cannot be treated as assessee in default in the facts of present case.

8. The Id. DR for the Revenue, on the other hand, relied upon the orders of the lower authorities.

9. We have carefully considered the rival submissions and perused the material available on record. The disallowance of employees' contribution to PF/ESIC for breach of condition under Section 36(1)(va) is in controversy.

9.1 We notice at the outset that an opportunity was given via electronic platform of the deptt. for the proposed adjustments and in the absence of e-response, the adjustments were carried out the CPC-Bengluru and intimation was issued enhancing the assessed income in the captioned assessment years. The CIT(A) in the first appeal has sustained the adjustments towards belated deposits of employees' contribution to PF/ESIC in the light of the judgment rendered by the Hon'ble Supreme Court in *Checkmate Pvt. Ltd. vs. CIT, (2022) 143 taxmann.com 178 (SC)*. The contention of the Assessee that such additions can not be made under the umbrella of S. 143(1) is covered against the assessee the decision of the co-ordinate bench in the case of *Weather Comfort Engineers Private Limited vs. ACIT-CPC ITA No. 959/Del/2021 order dated 15/02/2023*. The action of CPC and CIT(A) thus cannot be faulted where some opportunity was admittedly given for e-response.

9.2 We now turn to alternate plea on behalf of the assessee for grant of deduction under general provisions for deduction of expenditure under S. 37 of the Act. We do not see any merit in such plea that the belated deposit of employees contributions to PF/ESIC governed under Section 36(1)(va) is also simultaneously amenable to deduction under Section 37(1) of the Act. In terms of the provision, Section 37(1) permits deduction of expenditure which is not in the nature of expenditure prescribed in Sections 30 to 36 of the Act and also not being in the nature of capital expenditure or personal expenses of the

assessee. Thus, in view of such mandate of law, the deduction of expenditure under the general clause of Section 37(1) would not extend to expenditure specially covered within the ambit of Section 36(1)(va) of the Act. The Hon'ble Supreme Court in the case of *Checkmate Pvt. Ltd. (supra)* itself explains this position in Para 32 of the Judgment. Such view also draws support from the observations made in recent judgment of the Hon'ble Supreme Court in the case of *Pr.CIT vs. Khyati Realtors (P) Ltd. (2022) 141 taxmann.com 461 (SC)*. The alternate plea is thus without any merit.

9.3 We also take note of yet another plea made out on behalf the assessee towards methodology of calculation of default under the relevant PF/ESIC Act. The Ld. Counsel contends that the month during which the disbursement of salary is actually made would be relevant for the purposes of determination of due date of deposit under the respective statute. The accrual of liability towards payment of salary without actual disbursement would not fasten obligation for deposits of employees contribution in the labour Acts per se. as observed by the co-ordinate bench in *Kanoi Paper and Industries Ltd. vs. ACIT (2002) 75 TTJ 448 (Cal)*. This aspect has not been found to be examined by the Assessing Officer or CIT(A). Hence without expressing any opinion on merits on this aspect, we deem it expedient to restore the matter to the file of designated AO. It shall be open to the assessee to place factual matrix before the AO and take such plea for evaluation of the AO. The AO shall examine this aspect and fresh order in accordance with law after giving proper opportunity.

10. As regards the justifications advanced on behalf of the assessee towards improper disallowances under S. 43B and 40(a)(ia) in respect of service tax liability and non-deduction of TDS on interest etc. we are not in a position to express any view in the absence of requisite documentary evidences. These issues are also restored to the file of

AO. The assessee shall be at liberty to adduce all legal and factual arguments before the Assessing Officer for logical conclusion in the matter. The AO shall determine the issues involved in accordance with law after giving proper opportunity.

11. Hence, in terms of such observations, the intimations for both Assessment Years 2018-19 and 2019-20 are set aside and the issues in appeal are restored back to the file of the Assessing Officer for its fresh determination in accordance with law.

12. In the result, both the captioned appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open Court on 12/06/2023

Sd/-

**[CHANDRA MOHAN GARG]
JUDICIAL MEMBER**

DATED: **/06/2023**
prabhat

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**