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

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

AND

SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 2162/DEL/2022 (A.Y. 2019-20)

Ram Civil India Construction B P-22, West Patel Nagar, New Delhi **PAN: AAICR4940H** **(APPELLANT)**	Vs.	ACIT Circle-19(1), Second Floor, ARA Centre Jhandewalan Extension New Delhi **(RESPONDENT)**

Assessee by :	**Ms. Himanshi Mittal, CA**
Department by:	**Ms. Beenu, Sr. DR**

Date of Hearing	**19.06.2023**
Date of Pronouncement	**21.06.2023**

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the assessee against the order dated 26.07.2022 passed by the ld. Commissioner of Income Tax (Appeals)-30 (hereinafter referred to CIT (A), for assessment year 2019-20.

2. The grounds of Appeal are as under:-

"1. The order of the ld. Commissioner of Income-tax (Appeals) dated 26.07.2022 is bad in law and on facts.

2. That on facts and in law, the assessment made under section 143(1) of the Act is bad in law.

3. The disallowance on account of late payment of ESI of Rs.1,09,598/- and PF of Rs.25,98,429/- made by the AO in the order be allowed and addition be deleted.

4. Any other relief as your good self think fit may be provided. 5. That the assessee reserves the right to make any addition/deletion in the grounds of appeal at the time of hearing."

3. Brief facts of the case are that, an assessment order came to be passed u/s 143(1) of the Act by the DCIT, CPC, Bangalore on 31/03/2021 wherein the A.O. disallowed an amount of Rs.27,08,027/- on account of late payment of EPF/ESI beyond the due date stipulated in the respective Act. As against the assessment order, the assessee preferred an appeal before the CIT(A) and the CIT(A) vide order dated 26/07/2022 dismissed the Appeal filed by the assessee. Aggrieved by the order of the CIT(A) dated 26/07/2022, the assessee preferred the present appeal on the grounds mentioned above.

4. The Ld. Counsel for the assessee vehemently submitted that the impugned order of the CIT(A) is bad in law and the CIT(A) has committed error in upholding disallowance of late payment of ESI & PF made by the A.O., the

delay in payment was due to technical reason i.e. online payment and non availability of staff, delay in checking of sheet by PF Consultant, therefore, submitted that the appeal of the assessee deserves to be allowed.

5. Per contra, the Ld. Ld. Departmental Representative submitted that the issue regarding belated deposit of EPF & ESIC has been decided in favour of the Revenue 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 Grounds of Appeal of the assessee deserves to be dismissed.

6. We have heard the Ld. DR and perused the material on record. The issue involved in the present Appeal is regarding delayed deposit of amount collected towards employees' contribution but the same is claimed to be 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."

7. 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 Grounds of Appeal of the Assessee and we find no infirmity in the order of the CIT(A) in confirming the disallowance on account of delayed deposit of EPF & ESIC. Accordingly, Grounds of the Assessee's Appeal are dismissed.

8. In the result, the Appeal filed by the assessee is dismissed.

Order pronounced in the open court on : **21/06/2023.**

Sd/-	**Sd/-**
(SHAMIM YAHYA)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 21/06/2023

R.N, Sr. PS

Copy forwarded to :-

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

ASSISTANT REGISTRAR
ITAT NEW DELHI