

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

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

I.T.A. No.2963/DEL/2022
Assessment Year 2020-21

Bimla Thakur, House No. 19C, Gali No. 3, Main Sagar Pur, New Delhi-110046.	Vs.	DCIT, Circle-43(1), New Delhi.
TAN/PAN: AFKPT3673H		
(Appellant)		(Respondent)

Appellant by:	Shri P.P. Singh, Adv.		
Respondent by:	Shri N.K. Bansal, Sr. DR		
Date of hearing:	20	06	2023
Date of pronouncement:	20	06	2023

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre ("NFAC"), Delhi dated 20/10/2022 arising from intimation dated 28/10/2021 passed u/s 143(1) of the Income Tax Act, 1961 ("the Act") concerning Assessment Year 2020-21.

The ground of appeal raised by the Assessee reads as under:

- 1. The order of the learned commissioner of income tax (appeal, National faceless appeal center (herein after referred as "Ld. CIT (A)") erred in law and facts while confirming disallowance by the learned Assistant director of Income Tax, CPC Bengaluru (herein after referred an Assessing*

officer) u/s 143(1) made while processing the return and consequential addition of Rs. 82,32,430/- to the business income by way of disallowance u/s 36(1)(va) to the extent of Rs. 82,32,430/- on account of employee's contribution to PP/ES expenses for late deposit of PF/ESI, as a result thereof total income increased by Rs 82,32,430/- to the returned income and total tax liability of Rs.33,86,520/- after adjustment of prepaid tax of Rs 12,81,078/- which assessee denies and seek relief by way of deletion of such addition made to the returned income and consequentially deletion of additional tax.

2. The learned Assessing office erred in law and facts while disallowing Rs 8,16,789/- u/s 43B on account of, employer contribution towards PF and ESI of Rs 8,16,789/- already paid before due date of return u/s 139(1) And CIT appeal faceless erred in law and facts in not deciding the issue of disallowance those it was subject matter of appeal before learned CIT appeal faceless. The aggrieved assess seek relief by way of deletion of disallowance made to the returned income.

3. The assessee craves leave to add or alter or delete any of the ground of appeal on or before the date of hearing.”

2. The Ld. Counsel for the assessee submitted that the assessee is running a proprietorship concern in the name of Jatayu Enterprises Services and is engaged in the business of provide security services. The deposit towards employees contribution was all made but however slightly late. It was contended that the disallowance of Rs. 63,83,313/- on account of belated deposit of employees contribution to PF / ESIC under S. 36(1)(va) of the Act is not justifiable under Section 143(1) of the Act, particularly where the auditor in the Tax Audit Report has never indicated any disallowance to be carried out under Section 36(1)(va) of the Act as required under Section 143(1)(a)(iv) of the Act.

3. The Ld. Sr. DR for the Revenue on its part, contended that Central Processing Centre (“CPC”) has made additions of Rs. 63,83,313/- to the returned income of the assessee on account of late deposit of employees contribution to Provident Fund/ESIC deferred while processing the return of income. In this regard, the action of the Revenue in making disallowance towards late deposit of employees contribution to Provident Fund/ESIC was supported by the judgement rendered in the case of *Checkmate Services (P.) Ltd. vs CIT (2022) 143 taxmann.com 178 (SC)*. Ld. Sr. DR for the Revenue thus submitted that belated deposit of employees contribution held in Trust by the employee Assessee are to be reckoned as taxable income of the assessee u/s. 2(24)(x) r.w. Section 43B of the Act and the deduction u/s 36(i)(va) of the Act would not be permissible thereon in case of belated payments. Ld. Sr. DR for the Revenue further contended that the delayed deposit of employees contribution indicated in the Audit Report is sufficient for adjustment under section 143(1) of the Act, as held by the Pune Bench of the Tribunal in the case of *Cemetile Industries vs ITO TS-933-ITAT-2022 (Pune)*.

4. The issue towards taxability of belated employees contribution to Provident Fund/ESIC is no longer *res integra* in the light of the judgement of the Hon’ble Supreme Court in the case of *Checkmate Services (P.) Ltd. vs CIT* (supra). The co-ordinate Bench of the Tribunal in *Cemetile Industries vs ITO* (supra) had expressed a view that such adjustment/disallowance is also permissible in the proceedings carried out u/s 143(1) of the Act. Very recently, the Co-ordinate Bench of the Tribunal in *Savleen Kaur & Others vs ITO in ITA No.2249/Del/2022 & Others for Assessment Year 2018-19 & Others vide order dated 09.01.2023* and in *BT Data and Surveying Services India Pvt. Ltd. vs. ITO in ITA No.1658/Del/2021 for Asy 2018-19 vide order dated 07.02.2023* has also taken a similar view and upheld the action of the Revenue.

In parity with the view taken by Co-ordinate Benches, we do not see any merit in this plea of the assessee on first principles.

5. 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.

6. 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 and consideration of the AO. The AO shall examine this aspect and fresh order in accordance with law after giving proper opportunity.

7. The Ground no. 1 of the assessee's appeal is thus allowed for statistical purpose.

8. The Ground no. 2 concerns the disallowance of Rs. 8,16,789/- under S. 43B of the Act on account of employer contribution towards PF/ ESIC. It is the case of the assessee that the employer contribution towards PF/ ESIC has been duly deposited before the due date of filing of return and therefore, there was no warrant for the Revenue Authorities to disallow such contribution under S. 43B of the Act. The issue requires factual verification. The matter is thus also remanded back to the file of the Assessing Officer. The assessee shall be at liberty to adduce such evidences, as it may deem expedient to justify its plea on law and facts. The Assessing Officer shall consider the evidences and all plea raised on the point and pass order in accordance with law. Needless to say, a reasonable opportunity shall be given to the assessee while determining the issue. The Ground no. 2 of the assessee's appeal is thus allowed for statistical purposes.

9. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 20/06/2023.

Sd/-

**[CHANDRA MOHAN GARG]
JUDICIAL MEMBER**

DATED: 20/06/2023

POOJA

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar

		Date
1.	Draft dictated on	22.06.2023
2.	Draft placed before author	26.06.2023
3.	Draft proposed & placed before the second member	
4.	Draft discussed/approved by Second Member.	
5.	Approved Draft comes to the Sr.PS/PS	
6.	Kept for pronouncement on	
7.	File comes back to PS/Sr. PS	
8.	Uploaded on	
9.	File sent to the Bench Clerk	
10.	Date on which file goes to the AR	
11.	Date on which file goes to the Head Clerk.	
12.	Date of dispatch of Order.	

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