

**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.45/DEL/2023
Assessment Year 2018-19

Dinesh Industrial Corporation, C-33, Sector 9, Gautam Buddha Nagar, Uttar Pradesh.	Vs.	DCIT, CPC-Banglore, Income Tax Officer, Ward 5(1)(1), Gautam Buddha Nagar, Uttar Pradesh.
TAN/PAN: AAFFC9282M		
(Appellant)		(Respondent)

Appellant by:	Shri Ramanand Roy, 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 14/11/2022 arising from intimation dated 17/12/2019 passed u/s 154 of the Income Tax Act, 1961 ("the Act") concerning Assessment Year 2018-19. The grounds of appeal raised by the Assessee read as under:

" 1. The Ld. Assessing Officer Circle 5(1) (1), has erred in law and on facts to disposed the application U/s 154 of the Income Tax Act, 1981 and disallow the

expenses a sum of Rs. 21,94,886/- on account of late deposit of PF, ESI and statutory dues but before filing of return without affording opportunity to the Assessee.

2. The Ld. Assessing Officer Circle 5(1)(1) has further failed to appreciate the submission made in the Application u/s 154 of Income Tax Act for rectification of records the Assessment order processed u/s 143(1) of the Income Tax Act, 1961. As per CPC having filed the application it was will within the jurisdiction of the AO to rectify and inform CPC portal.

3. The Ld. Officer Circle 5(1)(1), erred in law in invoking the provision for disallowing the claim under Section 36(1)(va) of the Income Tax Act 1961 and disallow the claim. Expenses an amount of Rs.21,94,886/- and considering the same for tax.

4. The Ld. Assessing Officer Circle 5(1)(1), has further erred in law on facts to appreciate that as per Settled law by the Hon'ble Supreme Court said amounts were paid after the due dates of payments under relevant Acts but has been paid before filing of the returns. Assessee is entitled to the deduction. The Assessing Officer is required to apply law as per provisions and clarification.

5. That the NFAC also failed to appreciate the facts and grounds and also to grant opportunity to the Assessee thereafter arbitrary upheld the addition in the appeal.

6. The CIT(A) having given directions by way of fresh examination and remand the matter whereas has no power to remand the case to the Assessing authority.

7. that the order passed by the CIT(A) in ex-party order without giving any opportunity to the appellant.

8. The order of the CIT(A) and AO are bad in law and against the facts of the case.”

2. The Id. Counsel for the assessee submitted that the assessee is a partnership Firm doing business in the field of construction as civil construction, supplies and providing services like manpower solutions etc. The deposit towards employees contribution was all made but however slightly late. It was contended that the disallowance of Rs. 21,94,886/- on account of belated deposit of employees contribution to PF / ESIC under S. 36(1)(va) of the Act, is not justifiable under Section 154 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, submitted that on the basis of information made available in the Tax Audit Report, the Central Processing Centre (“CPC”) has made additions of Rs. 21,94,886/- to the returned income of the assessee on account of late deposit of employees contribution to Provident Fund/ESIC while processing the return of income. As contended the action of the Revenue in making disallowance towards late deposit of employees contribution to Provident Fund/ESIC is 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 154 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 154 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 pass fresh order in accordance with law after giving proper opportunity.

7. 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

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER

DATED: **20/06/2023**

POOJA

Copy forwarded to:

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

Assistant Registrar

		Date
1.	Draft dictated on	20.06.2023
2.	Draft placed before author	20.06.2023
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.	