

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"D" BENCH, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.2325/Mum./2021**  
**(Assessment Year : 2017-18)**

Millennium Herbal Care Ltd.  
12-B, Nirmal Building  
241/242, Backbay Reclamation  
Nariman Point, Mumbai 400 021  
PAN - AACCM1117D

..... Appellant

v/s

Asstt. Commissioner of Income Tax  
Circle-3(2)(1), Mumbai

..... Respondent

Assessee by : None  
Revenue by : Smt. Riddhi Mishra

Date of Hearing - 03/07/2023

Date of Order - 04/07/2023

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 02/12/2021, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2017-18.

2. When this appeal was called for hearing neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed. Therefore, in view of the above, we proceed to dispose off the present appeal

ex-parte, qua the assessee after hearing the learned Departmental Representative ("*learned DR*") and on the basis of material available on record.

3. The present appeal has been listed for hearing before us pursuant to the order dated 17/05/2023, passed by the coordinate bench of the Tribunal in ACIT v/s Millennium Herbal Care Ltd., M.A. no. 17/Mum./2023, whereby, the earlier order dated 19/05/2022, passed under section 254(1) of the Act was recalled and the appeal was directed to be re-fixed for hearing.

4. In its appeal, the assessee has raised the following ground:-

*"1. The learned CIT(A) has erred in law and on the facts of the case in sustaining the disallowance of Rs.2,38,889, under section 36 of the Act.*

*2. The assessee craves leave to add, alter or amend the above ground of appeal."*

5. The only dispute raised by the assessee is against the disallowance on account of delayed payment of employees' contribution to Provident Fund (P.F)/Employees State Insurance Corporation (E.S.I.C) under section 36(1)(va) of the Act.

6. The brief facts of the case as emanating from the record, are: The assessee is a private limited company. For the year under consideration, the assessee filed its return of income declaring a total income of Rs.75,40,880. The said return of income was processed vide intimation dated 18/03/2019 issued under section 143(1) of the Act computing the total income of the assessee at Rs.78,05,620, inter-alia, after making disallowance of Rs.2,38,889, on account of delayed payment of employees' contribution to P.F./ E.S.I.C. under section 36(1)(va) of the Act. Vide impugned order, the

learned CIT(A) dismissed the appeal filed by the assessee and upheld the disallowance made under section 36(1)(va) of the Act. Being aggrieved, the assessee is in appeal before us.

7. The learned DR submitted that the issue arising in the present appeal is squarely covered in favour of the Revenue by the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. v/s CIT, [2022] 448 ITR 518 (SC).

8. We have considered the submissions of the learned DR and perused the material available on record. We find that the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra) held that the payment towards employees' contribution to P.F./E.S.I.C., after the due date prescribed under the relevant statute is not allowable as a deduction under section 36(1)(va) of the Act. The relevant findings of the Hon'ble Supreme Court, in the aforesaid decision, are as under:–

*"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 latter 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 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 assesseees 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 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."*

9. In the present case, from the record, it is evident that the employees' contributions to P.F./E.S.I.C. were deposited after the due date prescribed under the relevant statute. Thus, respectfully following the aforesaid decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra), the sole ground raised by the assessee is dismissed.

10. In the result, the appeal by the assessee is dismissed.

Order pronounced in the open Court on 04/07/2023

**Sd/-**  
**OM PRAKASH KANT**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 04/07/2023**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai