

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'A': NEW DELHI**

**BEFORE,  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER  
AND  
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.90/Del/2023  
(ASSESSMENT YEAR 2018-19)**

**ITA No.91/Del/2023  
(ASSESSMENT YEAR 2019-20)**

M/s Aroon Aviation Services Pvt. Ltd. A-113, Road No.2 Mahipalpur Exten. New Delhi-110 037 PAN-AAFCA 1395Q	Vs.	Dy.CIT Circle-3(1) Delhi
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA No.151/Del/2023  
(ASSESSMENT YEAR 2020-21)**

Sh. Anangpal Jawla Plot No.14B, Road No.1 Saroorpur Industrial Area, Sohna Road Ballabgarh- 121 004 PAN-AQAPJ 1168Q	Vs.	ITO NWR-C-[51][1] Circle-1, Faridabad
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Mr. Vijay Kumar Gupta, Advocate
Respondent by	Mr. Kanv Bali, Sr.DR

Date of Hearing	03/07/2023
Date of Pronouncement	06/07/2023

**ORDER**

**PER BENCH:**

These three appeals have been filed by the Assessee against the separate orders passed by the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [Ld. CIT(A)", for short], dated 08/12/2022, 15/12/2022 & 25/11/2022 for Assessment Years: 2018-19, 2019-20 & 2020-21 respectively.

2. Since, the issues involved in all these appeals are common in nature; hence, they are clubbed together heard together and disposed-off by this common and consolidate order for the sake of convenience.

3. The grounds raised by assesseees are as under:

**ITA No.90/Del/2023**

*"1. That in the present case, employees, contribution Rs.1,60,54,659=00 towards ESIC and EPF was paid after due dates prescribed under the respective Acts of ESIC and EPF. In the impugned order u/s 143(1) of the I.T. Act, 1961 the said amount Rs.1,60,54,659=00 has been added back in the income declared in the return of income filed for the present period without any prior intimation to the appellant assessee to establish its claim.*

*2. That the issue involved in the present case being debatable/controversial and having conflicting judicial opinions as on 15/11/2019 the day the impugned intimation order u/s 143(1) was passed, no addition on such issue could be made u/s 143(1) of the I.T. Act,*

1961 in the return income. Such addition could be made only by issuing notice u/s 143(2) for framing of scrutiny assessment u/s 143(3) of the I.T. Act, 1961.

3. That the appellant craves leave to add, amend, revise, modify, substitute or deletes any or all grounds of appeal or/and prayer made.

**PRAYER:**

*In view of the above, it is, therefore, prayed that the impugned assessment order as well appeal order disallowing the payments Rs.1,60,54,659=00 towards ESIC and EPF being illegal, arbitrary, beyond jurisdiction and in utter disregards of the true facts and in the circumstances of the case may kindly be quashed. In the interest of justice and fair play.*

**ITA No.91/Del/2023**

“1. That in the present case, employees, contribution Rs.2,75,73,938=00 towards ESIC and EPF was paid after due dates prescribed under the respective Acts of ESIC and EPF. In the impugned order u/s 143(1) of the I.T. Act, 1961 the said amount Rs.2,75,73,938=00 has been added back in the income declared in the return of income filed for the present period without any prior intimation to the appellant assessee to establish its claim.

2. That the issue involved in the present case being debatable/controversial and having conflicting judicial opinions as on 11/05/2020 the day the impugned intimation order u/s 143(1) was passed, no addition on such issue could be made u/s 143(1) of the I.T. Act, 1961 in the return income. Such addition could be made only by issuing notice u/s 143(2) for framing of scrutiny assessment u/s 143(3) of the I.T. Act, 1961.

3. That in the present case the appellant made a request for allowing an additional ground vide application submitted on 20/11/2022. In the impugned order the Ld. First Appellate Authority has neither considered nor allowed the said additional ground.

4. That the appellant craves leave to add, amend, revise, modify, substitute or delete any or all grounds of appeal or/and prayer made.

**PRAYER:**

*In view of the above, it is, therefore, prayed that the impugned assessment order as well appeal order disallowing the payments Rs.1,60,54,659=00 towards ESIC and EPF being illegal, arbitrary, beyond jurisdiction and in utter disregards of the true facts and in the circumstances of the case may kindly be quashed. In the interest of justice and fair play.”*

**ITA No.151/Del/2023**

*“1. That in the present case, employees, contribution Rs.10,06,161=00 towards ESIC and EPF was paid after due dates prescribed under the respective Acts of ESIC and EPF. In the impugned order u/s 143(1) of the I.T. Act, 1961 the said amount Rs.10,06,161=00 has been added back in the income declared in the return of income filed for the present period without any prior intimation to the appellant assessee to establish its claim.*

*2. That the issue involved in the present case being debatable/controversial and having conflicting judicial opinions as on 08/12/2021 the day the impugned intimation order u/s 143(1) was passed, no addition on such issue could be made u/s 143(1) of the I.T. Act, 1961 in the return income. Such addition could be made only by issuing notice u/s 143(2) for framing of scrutiny assessment u/s 143(3) of the I.T. Act, 1961.*

*3. That in the present case the appellant made a request for allowing an additional ground vide application submitted on 20/11/2022. In the impugned order the Ld. First Appellate Authority has neither considered nor allowed the said additional ground.*

*4. That the appellant craves leave to add, amend, revise, modify, substitute or delete any or all grounds of appeal or/and prayer made.*

**PRAYER:**

*In view of the above, it is, therefore, prayed that the impugned assessment order as well appeal order disallowing the payments Rs.10,06,161=00 towards ESIC and EPF being illegal, arbitrary, beyond jurisdiction and in utter disregards of the true facts and in the circumstances of the case may kindly be quashed. In the interest of justice and fair play.”*

4. The issue involved in the captioned appeals are being identical, therefore, the brief facts of the case of Assessment Year 2018-19 are considered for the sake of convenience which are as follows:- During the year under consideration Employees Contribution of Rs. 1,60,54,659/- towards ESIC & EPF was paid belatedly by the employer as per the due dates prescribed under the retrospective Act of ESIC & EPF but the same were paid prior to filing the return of income u/s 139(1) of the Income Tax Act ('Act' for short). The assessment order came to be passed u/s 143(1) of the Act wherein the said amount of Rs. 1,60,54,659/- was added back to the income of the assessee. Aggrieved by the same, the assessee preferred an Appeal before the CIT(A), the ld. CIT(A) vide order dated 08/12/2022, dismissed the Appeal filed by the assessee by following the ratio laid down 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. Aggrieved by the order dated 08/12/2022 the assessee preferred the present appeal on the grounds mentioned above.

5. In all the above appeals, the assesseees have admitted that the Employees Contribution towards ESIC & EPF was paid after due dates prescribed in the respective Acts of ESIC & EPF, but the only grievance of the assessee that the said amount has been added back in the income declared in the return of income of the assessee without any prior intimation to the assessee.

6. It is the contention of the Ld. DR that the notice as required under the Act was issued to the assessee and the dispute in the present Appeals is regarding allowability of late payment of ESIC & EPF Contribution has been settled by the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (Supra), therefore, the Grounds of Appeals are deserves to be dismissed.

7. We have heard both the parties and perused the material available on record. As per the grounds of appeals admittedly the amount being Employees Contribution towards ESIC & EPF was paid after the due dates prescribed under the respective Act of the ESIC & EPF. But only grievance of the assessees that the amount has been added back to the income of the Assessee without any prior intimation. 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 Enterprises<sup>25</sup>; 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 Extrusions 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 assessee’s 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.”*

8. Thus, following the above ratio laid down by the Hon'ble Supreme Court we find no merits in the Grounds of Appeal of the assessee. Though the assessee claimed that the order impugned u/s 143(1) of the Act passed without prior intimation, the assessee did not produce any material/documents before us to contradict on merit of the addition made u/s 143(1) of the Act, the Tribunal being last fact finding authority could have exercised its discretionary power to examine material/documents to contradict the addition made u/s 143 of the Act if at all produced. Thus, in the absence of any such material/document on record, in our opinion even though the assessee is given an opportunity by remanding the matter to the file of A.O., the same will be a futile exercise as the law has been settled by the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (supra). Thus, in

view of the above, we find no error or infirmity in the order of the Ld. CIT(A) and find no merit in the Grounds of Appeals of the Assessees.

9. In the result, the Appeals filed by the assesseees in ITA No. 90/Del/2023, 91/Del/2023 and 151/Del/2023 are dismissed.

Order pronounced in the open Court on 06<sup>th</sup> July, 2023.

Sd/-  
**(M. BALAGANESH)**  
**ACCOUNTANT MEMBER**

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

Dated: 06/07/2023

*Pk/R.N, Sr. PS*

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT, NEW DELHI