

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: H: NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.2622/Del/2022
Assessment Year: 2019-20

The DCIT, CentralCircle-15, New Delhi 110055	vs.	M/s. B.L. Kashyap & Sons Ltd., 409, 4 th Floor, DLF Tower-A, Jasola, New Delhi 110025 PAN AAACB 0205 F
(Appellant)		(Respondent)

CO No. 174/Del/2022
In ITA No.2622/Del/2022
Assessment Year: 2019-20

M/s. B.L. Kashyap & Sons Ltd., 409, 4 th Floor, DLF Tower-A, Jasola, New Delhi 110025 PAN AAACB 0205 F	vs.	The DCIT, CentralCircle-15, New Delhi 110055
(Appellant)		(Respondent)

For Assessee :	Shri Sourav Rohtagi, CA Shri Jain, CA
Revenue For :	Ms. Sapna Bhatia, CIT(DR)

Date of Hearing :	12.07.2023
Date of Pronouncement :	18.07.2023

ORDER

PER CHANDRA MOHAN GARG, J.M.

Above captioned appeals of revenue and cross objection of assessee have been filed against the order of CIT(A)-28 New Delhi dated 29.08.2022 for AY 2019-20.

2. The grounds of revenue are as follows:-

1. Whether on the facts and circumstances of the case, the Ld. CIT(A) is correct on facts and in law in deleting the addition of Rs. 2,63,96,393/- on account of employees'

contribution to PF & ESI even when the same was deposited by the employer after the due date as specified in respective Statutes.

2. Whether the facts and circumstances of the case, the Ld. CIT(A) is correct in deleting the addition of Rs. 2,63,96,393/- on account of late deposit of employees' contribution to PF & ESI ignoring the provisions of section 2(24)(x) r.w. 36(1)(ra) of IT Act, 1961.

3. Whether on the facts and circumstances of the case, the Ld. CIT(A) is correct in deleting the addition on the issue of late deposit of employees' contribution of PF & ESI in view of the judgement of the Hon'ble Supreme Court in the case Checkmate Services Pvt. Ltd. Vs Commissioner of Income Tax-1 dated 13.10.2022 in Civil Appeal No. 2833 of 2016.

3. The grounds raised by assessee in cross objection are as follows:-

1. That the additions/disallowance made by the Assessing Officer by passing the order under Section 143(1) are illegal, bad in law & without jurisdiction.

2. That the Ld. A CPC erred in law as well as on merits in making addition / adjustment of Rs. 2,63,96,393/-for the PF and ESIC contribution of the employees deposited beyond the due date as per PF and ESIC Act but within the time allowed to file the IT Us. 139 (1) and deposited before filing I.T. return.

3. That under the facts and circumstances, the addition of Rs. 2,63,96,393/- for PF and ESIC contribution of employees deposited beyond the due date as per PF and ESIC Act but within the time allowed to file the IT is outside the scope of addition / adjustment while processing the IT Us. 143 (1) of the Act, also because, more so, the issue is highly debatable.

4. That without prejudice, on merits, addition of Rs. 2,63,96,393/-for PF and ESIC contribution of employees deposited beyond the due date as per PF and ESIC Act but within the time allowed to file the IT is fully allowable and cannot be added back.

4. The Id. Assessee Representative (AR) pressing into service cross objection of assessee and simultaneously controverting the grounds of revenue submitted that the additions/disallowance made by the Assessing Officer by passing the order under Section 143(1) are illegal, bad in law & without jurisdiction as the AO-CPC erred in law as well as on merits in making addition / adjustment of Rs. 2,63,96,393/-for the PF and ESIC contribution of the employees deposited beyond the due date as per PF and ESIC Act but within the time allowed to file the IT Us. 139 (1) and deposited before filing I.T. return. He further contended that under the facts and circumstances, the addition of Rs. 2,63,96,393/- for PF and ESIC contribution of employees deposited beyond the due date as per PF and ESIC Act but within the time allowed to file the IT is outside the scope of addition / adjustment while processing the IT Us. 143 (1) of the Act, also because, more so, the issue is highly debatable. He also submitted that without

prejudice to legal contentions of assessee, on merits also, addition of Rs. 2,63,96,393/- for PF and ESIC contribution of employees deposited beyond the due date as per PF and ESIC Act but within the time allowed to file the IT is fully allowable and cannot be added back.

5. Replying to the above, the learned CIT(DR) supported the orders of the authorities below and submitted that Assessing Officer CPC is validly entitled to make disallowance on the issue therefore cross objection of the assessee may kindly be dismissed. Placing reliance on the recent judgment of Hon'ble Supreme Court in the case of Checkmate Pvt. Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC) the learned CIT(DR) submitted that the issue is squarely covered against the assessee therefore grounds of revenue may kindly be allowed reversing the first appellate order and restoring that of the Assessing Officer.

6. Placing rejoinder to the above, the Id. AR supported the cross objection of assessee and submitted that in view of recent order of ITAT Delhi Bench in the case of Sentinel Consultants P. Ltd. in ITA Nos. 7 & 8/Del/2023 order dated 12.06.2023, the matter may kindly be restored to the file of Assessing Officer for afresh determination in accordance with law allowing the assessee to place factual matrix of the issue before the Assessing Officer and all relevant arguments in support of its claim.

7. From the cross objections and submissions of Id. AR we note that the Id. AR for the assessee submits at the outset that such adjustments/ disallowances for alleged delay in deposit of employees contribution to PF/ESIC is not permissible while drawing intimation under S. 143(1) of the Act having regard to several tribunal decisions. The Id. AR also submitted that alternatively the claim of assessee is allowable u/s. 37(1) of the Act and he has relied on certain orders of coordinate benches of Tribunal to support this plea.

8 The Id. AR further submits that the assessee, in the instant case, has shown business income from the business of building construction and allied services and interest income under the head income from other sources. Therefore, in the backdrop of nature of work, the Id. AR contends that the salary in such business is often disbursed to the employees as and when the funds are arranged from the clients. Owing to belated receipt of service charges from clients, the disbursement of salary are also, at times, paid late in tandem. The 'due date' for deposit of employees' contribution under the respective Acts should therefore be reckoned with reference to the month of actual salary payment and not when the liability to pay arises to an employer. It was further contended that when the due date under PF/ESIC Act is computed with reference to the month in which the salary has been actually paid, the alleged delay in

payment of ESIC/PF would be substantially ironed out. The Id. counsel states that the Revenue has computed the delay with reference to the month in which the liability to pay salary has arisen to the employer rather than the month in which such salary has been actually paid resulting in alleged delay giving rise to impugned disallowance.

9. On the other hand, the Id. CIT(DR) supporting appeal of revenue has placed reliance on the order u/s. 143(1) of the Act and recent judgment of Hon'ble Supreme Court in the case of Checkmate (supra).

10. We notice at the outset that an opportunity was given via electronic platform of the deptt. for the proposed adjustments and in the absence of e-response, the adjustments were carried out the CPC Bengluru and intimation was issued enhancing the assessed income in the captioned assessment years. The CIT(A) in the first appeal has sustained the adjustments towards belated deposits of employees' contribution to PF/ESIC in the light of the judgment rendered by the Hon'ble Supreme Court in Checkmate Pvt. Ltd. vs. CIT, (2022) 143 taxmann.com 178 (SC). The contention of the Assessee that such additions cannot be made under the umbrella of S. 143(1) is covered against the assessee the decision of the co-ordinate bench in the case of Weather Comfort Engineers Private Limited vs. ACIT-CPC ITA No. 959/Del/2021 order dated 15/02/2023. The action of CPC and CIT(A) thus cannot be faulted where some opportunity was admittedly given for e-response.

11. First of all, we proceed to adjudicate the 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.

12. Now we left with the main contention of Id. AR 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 of the AO. The AO shall examine this aspect and fresh order in accordance with law after giving proper opportunity. Consequently, grounds of revenue as well as cross objection of assessee requires re-examination and afresh adjudication by the Assessing Officer enabling him to consider the issue afresh.

13. Therefore in view of foregoing discussion and observations the intimations u/s. 143(1) of the Act for AY 2019-20 is set aside and the issue of allowability of employees contribution to ESIC & PF is restored to the file of Assessing Officer for a fresh adjudication after allowing due opportunity of hearing to the assessee by considering the explanation and factual matrix of the issue and factual contentions of assessee, without being influence with the earlier intimation and first appellate order.

14. In the result, the appeal of the revenue and cross objection of assessee are allowed for statistical purposes.

Order pronounced in the open court on 18.07.2023.

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Sd/-
(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Dated: 18th July, 2023.

NV/-

Copy forwarded to :

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

// By Order //

Asstt. Registrar, ITAT, New Delhi