

**THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member
Ms. Astha Chandra, Judicial Member**

ITA No. 1500/Del/2022 : Asstt. Year: 2018-19

SMG International, C-8, Mayapuri Industrial Area, Phase-II, New Delhi-110064 (APPELLANT)	Vs.	Income Tax Officer, Ward-30(5), New Delhi (RESPONDENT)
PAN No. AAPFS0231E		

Assessee by : None

Revenue by : Sh. Amit Shukla, Sr. DR

Date of Hearing: 01.05.2023

Date of Pronouncement: 25.07.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of National Faceless Appeal Centre (NFAC), Delhi dated 15.03.2022.

2. The assessee has raised the following grounds of appeal:

"A. The Id. CIT(A) erred in law and on facts in confirming the addition of Rs.2,40,532/- on account of delayed payment of ESI/PF in the facts and circumstances of the case despite the contrary rulings of Hon'ble Apex Court and Hon'ble Delhi High Court in plethora of cases.

B. The Id. CIT(A) erred in law and on facts in confirming the addition of Rs.2,40,532/- on the pretext that the explanations added to section 43B and 36(1)(va) by the Finance Act, 2021 have a retrospective effect and would apply for all matters with effect from 01.04.1984.

C. The Id. AO erred in law and on facts in confirming the addition of Rs.2,40,532/- simply on the basis of whims, surmises and conjectures.

D. The Id. CIT(A) erred in law and on facts in confirming the addition of Rs.2,40,532/-, in the facts and circumstances of the case without giving any personal hearing thereby denying the proper opportunity of being heard and without following the principles of natural justice."

3. The assessee has also raised the following additional grounds of appeal:

"F. The AO (CPC Bangalore) erred in law and on facts in increasing the income and the Id. CIT(A) erred in law and on facts in confirming the increase in income of Rs.2,40,532/- made by AO under section 36(1)(va) in respect of delayed deposit of PF/ESI contribution by the appellant. The action of Id. AO and Id. CIT(A) is not valid in the eyes of law since the power, while processing the return, to make adjustment u/s 143(1)(A)(iv) having the impact of increase in income has been conferred on the AO w.e.f. 01.04.2021 as inserted by the Finance Act, 2021."

4. The additional grounds are heard and dismissed owing to clear provisions of Section 36(1)(va) and Section 143(1)(A)(iv).

5. The matter has attained finality by the order of the Hon'ble Supreme Court wherein it was observed that employers have to deposit the employee's contribution towards EPF/ESI on or before the due date for availing deduction. In the cases before the Hon'ble Apex Court, the employers had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant provisions of the Act. The Assessing Officer ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums

received by the appellants constituted "income". It was held that those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective acts. The Income Tax Appellate Tribunal and later the Gujarat High Court dismissed the challenge against this order of AO. In appeal, the court noted that the Hon'ble Kerala High Court has also ruled in favour of revenue on this issue whereas the Hon'ble High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi have favoured the interpretation beneficial to the assessee. The Hon'ble Apex Bench effectively reversed the judgment in Commissioner of Income Tax vs. Alom Extrusions Ltd. (1 SCC 489) relied upon by the assessee.

6. The Hon'ble Apex Court in the case of Checkmate Services P. Ltd. vs. Commissioner Of Income Tax-I in CA No. 2833/2016 vide order dated 12.10.2022 observed that there is a marked distinction between the nature and character of the two amounts viz., the employers' contribution and employees' contribution required to be deposited by the employer. The first one is 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. The Hon'ble Apex Court held as under:

"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 43 B 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 43 B 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."

7. As the issue of payment of employees contribution towards the PF has been ruled against the assessee by the Hon'ble Supreme Court, the appeal of the assessee on this ground is liable to be dismissed.

8. In the result, the appeal of the assessee is dismissed.
Order Pronounced in the Open Court on 25/07/2023.

Sd/-

(Astha Chandra)
Judicial Member

Dated: 25/07/2023

Subodh Kumar, Sr. PS

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member