

**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.239/DEL/2023
Assessment Year 2019-20

Cargo Motors Gujarat Pvt. Ltd. A-406, Somdutt Chamber-15 Bhikaji Cama Place New Delhi	Vs.	ACIT Circle-5(2) New Delhi
TAN/PAN: AAACC1203G		
(Appellant)		(Respondent)

Appellant by:	None		
Respondent by:	Shri Vivek Kumar Upadhyay, Sr.DR		
Date of hearing:	25	07	2023
Date of pronouncement:	25	07	2023

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre (NFAC), Delhi ('CIT(A)' in short) dated 07.12.2022 arising from the intimation order dated 07.07.2020 passed by the Assessing Officer (AO) under Section 143(1) of the Income Tax Act, 1961 (the Act) concerning AY 2019-20.

2. The captioned appeal relates to Assessment Years 2019-20 involving issue of disallowance of expenditure towards employees contribution to ESIC/PF under Section 36(1)(va) of the Act.

3. When the matter was called for hearing, none appeared for

the assessee. Under the circumstances, we proceed *ex-parte* in the absence of the assessee.

4. Ld. Sr.DR for the Revenue, on its part, contended that CPC has rightly made additions of Rs.94,13,251/- to the returned income of the assessee on account of late deposits of employees' contribution to PF/ESIC while processing the return of income under Section 143(3) of the Act. The rectification application under Section 154 by the assessee thereon has been rightly rejected and confirmed by the CIT(A) in the light of the judgment rendered in the case of *Checkmate Services Pvt. Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC)*. The ld. Sr.DR for the Revenue submitted that even for the Assessment Year 2019-20 in question, belated deposit of employees' contribution held in trust by the employer assessee are to be reckoned as taxable income under Section 2(24)(X) r.w. Section 43B and deduction under Section 36(1)(va) of the Act would not be permissible. The ld. Sr.DR on behalf of the Revenue further contended that the delayed deposits of employees' contribution indicated in the audit report is sufficient for adjustment under Section 143(1) of the Act as held in *Weather Comfort Engineers Pvt. Ltd. vs. ACIT-CPC Bangaluru ITA No.959/Del/2021 order dated 15.02.2023*.

5. The issue towards taxability of belated employees' contribution to PF/ESIC is no longer *res integra* in the light of the judgment of Hon'ble Supreme Court in the case of *Checkmate Services (supra)*. The Hon'ble Supreme Court in this case observed that Income Tax Act differentiates between the employees' contribution and employer contribution to the PF/ESIC Act while in respect employer's contribution, Section

43B is applicable but however with respect of employees' contribution the conditions specified in Section 36(1)(va) is applicable and Section 43B(b) does not cover employees' contribution deducted by employer from salary of the employees. The Co-ordinate Bench of Tribunal in *Weather Comfort (supra)* has held that such adjustment/disallowance is permissible in the proceedings carried out under Section 143(1) of the Act. In parity with the view taken by Co-ordinate Benches, on first principles, we do not see any merit in the case of the assessee for impermissibility of such adjustment under Section 143(1) of the Act.

6. The Co-ordinate Bench of Tribunal in the case of *Sentinel Consultants Pvt. Ltd. vs. ACIT ITA No.7 & 8/Del/2023* order dated 12.06.2023 observed in para no.9.3 of that order that month during which the disbursement of salary is actually made would be relevant for the purposes of determination of due date. The relevant operative para of the order of the Co-ordinate Bench of Tribunal is reproduced herein under for ready reference:

*“9.3 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 of the AO. The AO shall examine this aspect and fresh order in accordance with law after giving proper opportunity.”*

7. The observations made in Sentinel Consultants Pvt. Ltd. shall apply mutatis mutandis. Consequently, we consider it expedient to restore the issue back to the file of AO for factual verification and redetermination in the issue on the light of determination made by the Co-ordinate Bench in the case of Kanoi Paper and Industries Ltd. (supra). The AO shall thus recompute the amount of disallowance under Section 36(i)(va) of the Act, if any, on the above basis, in accordance with law. The assessee shall be entitled to appropriate relevant under Section 36(i)(va) of the Act where it is found that deposits have been made towards PF/ESIC within the due date from the close of month of actual disbursement of salary/wages in the light of interpretation rendered in the case of Kanoi Paper and Industries Ltd. (supra).

8. Hence, in terms of such observations, the intimation for Assessment Year 2019-20 is set aside and the issue towards claim of deduction under Section 36(1)(va) is restored back to the file of the AO for fresh determination in accordance with law.

9. In the result, the appeal of the assessee is allowed ex-parte for statistical purposes.

Order dictated and pronounced in the open Court on 25/07/2023

Sd/-

**[CHANDRA MOHAN GARG]
JUDICIAL MEMBER**

DATED: /07/2023

Prabhat

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**