

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
BEFORE Shri C.M. Garg, Judicial Member
and
Shri Pradip Kumar Kedia, Accountant Member**

ITA No. 152/Del/2023
(Assessment Year: 2020-21)

Encotec Energy (India) Pvt. Ltd, 90-A, Pocket 1, Mayur Vihar, Phase-1, New Delhi (Appellant) PAN: AACCE1338E	Vs.	DCIT, Circle-7(1), New Delhi (Respondent)
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Assessee by :	Shri Baldev Raj, CA
Revenue by :	Shri N. K. Bansal, Sr. DR
Date of Hearing	22/06/2023
Date of pronouncement	17/08/2023

ORDER

PER C. M. GARG, J. M.:

1. This appeal has been filed by the assessee against the order of the Id CIT(A)/ National Faceless Appeal Centre (NFAC), Delhi dated 06.12.2022 for AY 2020-21 involving issue of disallowance of expenditure towards employees contribution to ESIC/PF under Section 36(1)(va) of the Act.
2. Briefly stated the facts of the case are AO, CPC has made addition of Rs. 2,00,67,017/- to the returned income of the assessee u/s 143(1)(a)(iv) of the Act on account of late deposit of employee contribution to PF and ESI while processing the return of income vide order dated 14.03.2022.
3. The assessee preferred appeal before the CIT(A) against the proposed adjustment. The CIT(A) also denied the relief in the light of judgment of Hon'ble Supreme Court in the case of Check Mate Pvt. Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC).

4. Aggrieved by the first appellate order, the assessee is in appeal before the Tribunal.

5. The Id. counsel for the assessee at the outset submitted that the deposit of employees' contribution should be reckoned from the month in which the salary has been actually disbursed rather than the month for which the salary relates. For instance, the salary for the month of April, 2018 has been paid in the month of May 2018 and therefore, due date for deposit of employees contribution to PF/ESIC should be reckoned from May 2018 and consequently the due date should be recorded as 15.06.2018. Once, this methodology is adopted then there is no delay in deposit of the employees' contribution towards ESIC as well as PF.

6. The Id. counsel thus submitted that in the light of the decision of the Co-ordinate Bench in the case of Sentinel Consultants P. Ltd. in ITAs No. 7 & 8/Del/2023 Assessment Year 2018-19 and 2019-20 order dated 12.06.2023, the matter should be remitted to the file of the Assessing Officer for satisfying itself about deposit of employees contribution well within time and for rectification of the intimation drawn under Section 143(1) of the Act.

7. Identical issue cropped up in the case of the Sentinel Consultants P. Ltd. (supra). The relevant observation of the Co-ordinate Bench in the matter is reproduced hereunder:

8. We have carefully considered the rival submissions and perused the material available on record. The disallowance of employees' contribution to PF/ESIC for breach of condition under Section 36(1)(va) is in controversy.

"9.1 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.

9.2 We now turn to 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.

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.

As regards the justifications advanced on behalf of the assessee towards improper disallowances under S. 43B and 40(a)(ia) in respect of service tax liability and non-deduction of TDS on interest etc. we are not in a position to express any view in the absence of requisite documentary evidences. These issues are also restored to the file of AO. The assessee shall be at liberty to adduce all legal and factual arguments before the Assessing Officer for logical conclusion in the matter. The AO shall

determine the issues involved in accordance with law after giving proper opportunity.

Hence, in terms of such observations, the intimations for both Assessment Years 2018-19 and 2019-20 are set aside and the issues in appeal are restored back to the file of the Assessing Officer for its fresh determination in accordance with law.

In the result, both the captioned appeals of the assessee are allowed for statistical purposes."

9. The observations made in the decision of the Co-ordinate Bench shall apply mutatis mutandis. In parity with the aforesaid decision, the matter is remitted to the file of the Assessing Officer for fresh adjudication of the issue in accordance with law having regard to the observations made in the case of Sentinel Consultants P. Ltd. (supra). Needless to say, proper opportunity shall be given to the assessee to adduce evidence towards timely deposit of employees contribution to the PF/ ESIC.

11. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 17/08/2023.

-Sd/-
(Pradip Kumar Kedia)
ACCOUNTANT MEMBER

-Sd/-
(C. M. GARG)
JUDICIAL MEMBER

Dated: 17/08/2023

A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi