

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No.302/DEL/2023  
[A.Y. 2018-19]

Promise Manpoer Services Limited  
A-47,Ground Floor Hari Vihar,  
Near Metro Pillar No.820, Dwarka Kakrola  
South West Delhi  
Delhi-110078  
PAN No.AAGCP4495B

Vs. ITO  
Ward- 20 (2)  
Delhi

(Applicant)

(Respondent)

Assessee By : None

Department By : Shri Vivek Vardhan, Sr. DR

Date of Hearing : 20.09.2023

Date of Pronouncement : 20.09.2023

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER**

This appeal by the assessee is preferred against the order dated 20.12.2022 by NFAC, Delhi pertaining to A.Y. 2018-19.

2. The grievance of the assessee read as under :-

1. *On the facts and circumstances of the case, the order passed by the learned commissioner of Income Tax (Appeals), National Faceless Appeal Centre, CIT(A), NFAC] is bad both in the eyes of law and on facts.*

2. *On the facts and circumstances of the case, the Learned CIT(A), NFAC has erred both on facts and in law in confirming the action of the DCIT, CPC adding income of Rs.44,29,16.00.*

3. *On the facts and circumstances of the case, Learned CIT(A), NFAC has erred both on facts and in law in confirming the addition of Rs.44,29,416.00 made by DCIT,CPC on account of delayed payment of employees' contributions to EPF & ESI by invoking the provision of Explanation 2 to Section 36 (1) (va) and Explanation 5 to Section 43B of the Income-tax Act, 1961 both inserted by the Finance Act, 2021 but considering it as applicable for previous years also.*

4. *On the facts and circumstances of the case, the Learned CIT(A), NFAC has erred both on facts and in law in*

*confirming addition by DCIT, CPC despite the fact that the additions itself are not tenable in law.*

3. None appeared on behalf of the assessee inspite of notices. On perusal of the grounds of appeal we decided to proceed ex parte since the grievance is squarely covered in favour of the revenue and against the assessee by the decision of the Hon'ble Supreme Court in the case of M/s. Check Mate Services Private Limited 448 ITR 518.

4. There is no dispute that there was a delay in depositing the employees contribution.

5. We have given a thoughtful consideration to the facts mentioned in the paper book and the case laws relied upon the assessee mentioned therein. On a thoughtful consideration we find that none of the case laws relied upon are relevant after the decision of Hon'ble Supreme Court (supra).

6. The relevant findings of the Hon'ble Supreme Court read as under :-

*"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 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 interpretation were to be adopted, the nonobstante 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."*

7. We find that even the NFAC while dismissing the appeal has followed the decision of the Hon'ble Supreme court (supra). Therefore, we do not find any reason to interfere with the findings of the NFAC. The appeal of the assessee is accordingly dismissed.

8. Decision announced in the open court on 20.09.2023.

**Sd/-**  
**[ASTHA CHANDRA]**  
**JUDICIAL MEMBER**

**Sd/-**  
**[N.K. BILLAIYA]**  
**ACCOUNTANT MEMBER**

Dated: SEPTEMBER, 2023.  
\*Neha\*

Copy forwarded to:

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

Asst. Registrar,  
ITAT, New Delhi