

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" NEW DELHI**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
SHRI M BALAGANESH, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A Nos. 116 & 117/Del/2023

निर्धारणवर्ष/Assessment Years:2018-19 & 2019-20

Dignus Services, CB-358, 3 rd Floor, Ring Road, Naraina, New Delhi. PAN No AANFD4934F.	बनाम Vs.	ITO, Ward 29(6), New Delhi.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	Dr. Rakesh Gupta, Adv. & Shri Somil Agrawal, Adv.
राजस्वकीओरसे /Revenue by	Shri Vivek Kumar Upadhyay, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	21.08.2023
उद्घोषणाकीतारीख/Pronouncement on	26.09.2023

आदेश /O R D E R

PER C.N. PRASAD, J.M.

These two appeals are filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals) in sustaining the disallowance made u/s 43B of the I.T. Act in respect of PF & ESI contributions.

2. The Ld. Counsel for the assessee submits that the CPC while processing the return disallowed Rs.1,77,54,030/- representing both

employee and employers contribution towards PF & ESI based on the tax audit report. The Ld. Counsel for the assessee submits that there is a mistake in tax audit report in mentioning the PF & ESI contributions in respect of employee and also the employer which was corrected by filing revised tax audit report which was not considered by the authorities below. The Ld. Counsel for the assessee submits that the actual position in respect of the contributions towards PF & ESI is as under: -

S.No.	Particulars	Employee Share	Employer Share	Total
1.	ESIC Contribution deposited before Due Date under ESIC Act.	2,06,175	5,58,104	7,64,279
2.	ESIC Contribution deposited after Due Date under ESIC Act but before due date of filing return u/s 139(1).	9,87,571	26,75,030	36,62,601
3.	ESIC Contribution deposited after Due date under ESIC Act and after due date of filing return u/s 139(1).	1,256	3,404	4,660
	Total ESIC Contribution	11,95,002	32,36,538	44,31,540
4.	PF Contribution deposited before Due date under PF Act.	7,50,205	4,46,679	11,96,884
5.	PF Contribution deposited after Due date under PF Act but before due date of filing return u/s 139(1).	73,46,711	64,03,621	1,37,50,332
	Total PF Contribution	80,96,916	68,50,300	1,49,47,216

3. The Ld. Counsel further submits that in so far as the employers contributions to PF & ESI is concerned they were remitted before due date of filing return of income and, therefore, they have to be allowed as deduction.

4. Coming to the employee's contribution to PF & ESI the Ld. Counsel for the assessee submits that the due date for deposit of PF & ESI shall be reckoned from the month in which disbursement of salary was made. In other words, the Ld. Counsel submits that for computing the period of delay "month" to be taken should be the month in which salary/wages are disbursed by the assessee as held by the Kolkata Bench of the Tribunal in the case of Kanoi Paper Industries Ltd. Vs. ACIT (75 TTJ 448) and the Delhi Bench in the case of Vigilant Security Placement and Detective Services Pvt. Ltd. Vs. DCIT in ITA No.2740/2022 dated 13.06.2023. Reliance was also placed on the decision of the Mumbai Bench of the Tribunal in the case of Fluid Air (India) Ltd. Vs. DCIT (63 ITD 182).

5. Heard rival submissions, perused the orders of the authorities below. In so far as the PF & ESI contributions in respect of employer are concerned the same are allowable as deduction if they are remitted before due date for filing of return of income. The assessee contends that these contributions were remitted before due date of filing of return of income which fact needs to be verified by the Assessing Officer. Therefore, we direct the AO to verify the contentions of the assessee and if these contributions are remitted

before due date for filing of return of income the same be allowed as deduction.

6. Coming to employees contributions towards PF & ESI we noticed that similar issue came up for adjudication in the case of Bercos Melody House Vs. DCIT in ITA Nos. 277 & 278/Del/2023 and the Tribunal by order dated 25.09.2023 held as under: -

“4. Heard rival submissions. Identical issue came up before the coordinate bench in the case of Rekha Vs. ITO, ITA No.584/Del/2020 dated 09.08.2023 and also in the case of Sentinel Consultants Pvt. Ltd. Vs. ACIT, ITA No. 7 & 8/Del/2023 dated 12.06.2023. The coordinate bench in the case of Sentinel Consultants Pvt. Ltd. Vs. ACIT (supra) restored the issue to the file of the AO with the following observations: -

“9. 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- Bangluru 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.”

5. *Following the decision of the coordinate bench, we restore this issue to the file of the AO to decide the issue in the light of the observations made by the coordinate bench in the case of Sentinel Consultants Pvt. Ltd. and also the decision of the Kolkata Bench in the case of Kanoi Paper & Industries Ltd. Vs. ACIT (supra). Needless to say that the Assessing Officer shall provide adequate opportunity of being heard to the assessee, the assessee is at liberty to provide all the necessary information in support of its contention.”*

7. Following the said order, we restore this issue to the file of the AO to decide the issue in the light of the observations made by the Tribunal in the case of Kanoi Paper & Industries Ltd. Vs. ACIT (supra). Needless to say that the Assessing Officer shall provide adequate opportunity of being heard to the assessee, the assessee is at liberty to provide all the necessary information in support of its contention. Ground no.1 of grounds of appeal is allowed for statistical purpose.

8. Ground no.5 of grounds of appeal is in respect of levy of interest u/s 234B which is consequential in nature and, therefore, this is restored to AO.

9. Ground no.6 of grounds of appeal is in respect of levy of interest u/s 234A. The assessee contends that interest u/s 234A is not leviable as the assessee filed return on 16.10.2018 before the last date of filing of return as per CBDT Circular u/s 119 of the Act which extended the date to 31.10.2018. The contentions of the assessee shall be verified by the Assessing Officer. Thus, we restored this ground to the AO for verification and adjudication in accordance with law.

10. Coming to the appeal for the AY 2019-20 facts being identical the decision taken by us for the AY 2018-19 applies *mutatis mutandis* to the AY 2019-20. We order accordingly.

11. In the result, appeals of the assessee are partly allowed as indicated above.

Order pronounced in the open court on 26.09.2023

Sd/-
(M BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 26.09.2023

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi