

IN THE INCOME TAX APPELLATE TRIBUNAL
SMC BENCH, PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT

आयकर अपील सं. /ITA No.960/PUN/2023

निर्धारण वर्ष / Assessment Year : 2019-20

M/s. General Power System, Plot No.26, Vaibhav Niwas, Shivaji Nagar, Dindori Road, Mhasrul, Panchavati, Nashik 422 004 Maharashtra PAN : AAJFG5474D	Vs.	ITO, Ward-1(1), Nashik
Appellant		Respondent

Assessee by
Revenue by

Shri Sanket Joshi
Shri Kumar Arvind Bhardwaj

Date of hearing

05-10-2023

Date of pronouncement

06-10-2023

आदेश / ORDER

PER R.S. SYAL, VP:

This appeal by the assessee arises out of the order dated 06-03-2023 passed by the National Faceless Appeal Centre (NFAC), Delhi u/s.250 of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2019-20.

2. The only issue raised in this appeal is against the confirmation of disallowance u/s.36(1)(va) amounting to Rs.7,07,429/- made by the ADIT, CPC, Bengaluru in the intimation u/s.143(1) towards late deposit of employee's contribution to ESI and EPF etc.

3. Briefly stated, the facts of the case are that the CPC, Bengaluru made the disallowance of Rs.7,07,429/- on account of late deposit of the employee's share of contribution to ESI/EPF beyond the due date under the respective Acts but paid before the due date u/s.139(1) of the Act. The Id. CIT(A) affirmed the intimation by relying on the Hon'ble Supreme Court judgment in the case of *Checkmate Services Pvt. Ltd. (2022) 448 ITR 518 (SC)*. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

4 Having heard the rival submissions and gone through the relevant material on record, it is seen that the issue of disallowance of employee's contribution to ESI and EPF etc. u/s.36(1)(va) has been set to rest by the Hon'ble Supreme Court in the aforementioned case of *Checkmate Services (supra)* by holding that the delay in the deposit of the employee's share beyond the due date prescribed under the respective Acts has to be confirmed notwithstanding the fact that the amount was actually deposited before the due date u/s.139(1) of the Act. It is further noted that the Finance Act, 2021 has inserted Explanation 1 to section 36(1)(va) providing that the due date for the purpose of this clause means "the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule or order

or notification issued thereunder or under any standing order, award, contract of service or otherwise”. Explanation 2 has also been inserted by the same Finance Act clarifying for the removal of doubts “that the provisions of section 43B *shall not apply and shall be deemed never to have been applied* for the purpose of determining the ‘due date’ under this clause”. The effect of insertion of these two Explanations to section 36(1)(va) is that the due date for the purposes of deposit of employees’ share will have to be considered as the one which is stipulated under the respective Acts; and that the provisions of section 43B, granting the benefit of deduction even if the amount is actually paid after the close of the year but before the due date u/s 139(1) of the Act, shall not apply. Simultaneous amendment has been carried out to section 43B by means of insertion of Explanation 5 by the same Finance Act, 2021, again for the removal of doubts “that the provisions of this section *shall not apply and shall be deemed never to have been applied* to a sum received by the assessee from any of his employees to which the provisions of sub-section (x) of clause (24) of section 2 applies”. The net effect of the amendments made to sections 36(1)(va) and 43B, which are patently clarificatory in nature, is that deduction in respect of employees’ share of ESI/EPF etc. will be allowed to the employer only if it is actually paid by the stipulated

date under the respective Acts. In case, such an amount is paid beyond the due date under the respective Acts but before the due date u/s.139(1) of the Act, the deduction is lost forever. Notwithstanding the above, the share of employer's contribution to recognized provident fund etc. continues to get deducted in the same previous year even if it is paid beyond the due date under the respective Acts but before the due date for filing of return u/s.139(1). In view of the above position, I hold that the authorities below were justified in not allowing deduction u/s.36(1)(va) in respect of employee's contribution to ESI/EPF.

5. The Id. AR submitted that while making the disallowance, the CPC, Bengaluru considered not only the contribution by the employee's to these funds but also the contribution made by the employer as well. It was submitted that the contribution made by the employer needs to be allowed as deduction in terms of section 43B of the Act. I agree with the contention of the Id AR that deduction towards the employer's share of ESI/EPF etc. needs to be allowed in the year under consideration if the payment is made before the time granted u/s.139(1) of the Act for filing of the return. I, therefore, set-aside the impugned order to this extent and remit the matter to the file of the AO for examining the details and restricting the disallowance in

above terms. Needless to say, the assessee will be allowed reasonable opportunity of hearing.

6. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the Open Court on 06th October, 2023.

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 06th October, 2023
Satish

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The Pr.CIT concerned
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,
SMC, Pune / DR, ITAT, Pune
5. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	05-10-2023	Sr.PS
2.	Draft placed before author	06-10-2023	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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