

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'F': NEW DELHI**

**BEFORE,  
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.379/Del/2023  
(ASSESSMENT YEAR 2020-21)**

Rakesh Janghu C/o The Tax Chambers Advocates & Legal Advisors C-177, Defence Colony LGF, Delhi-110 024 PAN-AHYPK 5280B	Vs.	Dy. Commissioner of Income Tax Circle-28(1), New Delhi
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA No.2675/Del/2022  
(ASSESSMENT YEAR 2018-19)**

**ITA No.2644/Del/2022  
(ASSESSMENT YEAR 2019-20)**

Dy. Commissioner of Income Tax Circle-28(1), New Delhi	Vs.	Rakesh Janghu E-2374, New Palam Vihar Gurgaon-122 017 PAN-AHYPK 5280B
<b>(Appellant)</b>		<b>(Respondent)</b>

**Cross Objection Nos.191 & 192/Del/2022  
(Arising out of ITA Nos.2675 & 2644/Del/2022)  
(ASSESSMENT YEARS 2018-19 & 2019-20)**

Rakesh Janghu E-2374, New Palam Vihar Gurgaon-122 017 PAN-AHYPK 5280B <b>(Appellant)</b>	Vs.	Dy. Commissioner of Income Tax Circle-28(1), New Delhi <b>(Respondent)</b>
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Assessee by	Ms. Swati Talwar, Advocate
Department by	Sh. Vivek Vardhan, Sr. DR

Date of Hearing	05/10/2023
Date of Pronouncement	09/10/2023

**ORDER**

**PER YOGESH KUMAR U.S., JM:**

The Appeal in ITA No. 379/Del/2023 (A.Y 2020-21 filed against the order of Learned Commissioner of Income Tax (Appeals)- National Faceless Appeal Centre (NFAC), Delhi [“Ld. CIT(A) for short”], dated 30/12/2022, the ITA No. 2675/Del/2022 (A.Y 2018-19) filed by the Revenue, and C.O No. 191/Del/2022 (A.Y 2018-19) by the assessee challenging the order of CIT(A) dated 13/09/2022 and ITA No. 2644/Del/2022 (A.Y 2019-20) by the Revenue, C. O

No. 192/Del/2022 (A.Y 2019-20) by the assessee challenging the order of CIT(A) dated 13/09/2022.

2. The Grounds taken in the above appeals as well as Cross Objections are as under:

**ITA No.ITA No.379/Del/2023 by the assessee (A.Y 2020-21)**

*"1. That on the facts and circumstances of the case, the order passed by the L.d. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre CIT(A), NFAC ("Ld.CIT(A)") dated 30.12.2022 (hereinafter referred to as 'impugned appellate order') is erroneous, arbitrary, without jurisdiction, illegal and bad in law.*

*2. That on the facts and circumstances of the case and in law, intimation order passed by ADIT, CPC, Bengaluru (hereinafter referred to as "Ld AO") u/s 143(1) of the Income Tax Act making an adjustment of Rs.8,06,89,964/- in this case is bad in law, without jurisdiction, illegal and therefore the said intimation order is liable to be quashed.*

*3. On the facts and circumstances of the case and in law, the L.d. AO passed the intimation order u/s 143(1) making disallowance of Rs.8,06,89,964/- u/s 36(1)(va) on account of late deposit of employees contribution towards PF/ESI under the head income from business in violation of the principles of natural justice.*

*4. That the Ld. CIT(A) grossly erred in placing reliance on amended provisions of Section 36(1)(va) and Section 43B as per Finance Act, 2021 by concluding that these amended provisions and decision of Hon'ble SC in case of Checkmate Services Pvt. Ltd. apply retrospectively for sustaining disallowance under section 36(1)(va) of Rs.8,06,89,964/- in the impugned AY.*

5. *That the Ld. AO erred both in law and on facts in assuming incorrect jurisdiction and making disallowance on account of late deposit of PF and/or ESI u/s 36(1)(va) to the tune of Rs.8.06,89,964/- at the time of processing of return u/s 143(1) even though this does not fall within the ambit of prima facie adjustment as per provisions of Section 143(1)(a) of the Income Tax Act. Therefore, such disallowance is beyond the scope of Section 143(1) and the Ld. AO should not have resorted to provisions of section 143(1).*

6. *The Ld. AO erred both in law and on facts by not appreciating the fact that disallowance pertaining to late deposit of employee's contribution towards PF/ESI before the due date of filing the ITR u/s 139(1) constitutes debatable issue and the adjustments u/s 143(1)(a) of Income Tax Act by way of intimation us 143(1) of Income Tax Act on debatable and controversial issues, is beyond the scope of Section 143(1) of Income Tax Act.*

7. *That the Ld CIT(A) erred in confirming the disallowance under section 36(xva) of Rs.8.06.89,964 made in the intimation under section 143(1) issued by Ld. DCIT, CPC. Bangalore ("Ld. AO) on account of delay in deposit of employee's contribution to PE/ESI simply relying upon the disclosure made in Tax Audit report.*

8. *Without prejudice to above grounds, disallowance made by the Ld. AO us 36(1)(va) r.w.s 438 for late deposit of employees contribution to ESUPF for Rs. Rs.8,06,89,964/- that has been deposited by the appellant before the due date for filing of return of income u/s 139(1) is allowable as business expense us 37 of the Income Tax Act.*

9. *That the Appellant denies liability towards interest charged u/s 234A, u/s 234B and u/s 234C and prays for appropriate relief.*

*The above grounds of appeal are independent and without prejudice to each other. The appellant craves leave to add amend withdraw*

*any grounds of appeal at the time of hearing or at any time before hearing with due permission of the Hon'ble Tribunal.”*

### **Consolidated Grounds of Appeal raised in the Revenue’s Appeal.**

*“1) Whether o facts and circumstances of the case, Ld.CIT(A) has erred in deleting additions mad by the AO-CPC on account of disallowance of deduction claimed u/s 36(1)(va) of the Income Tax Act, 1961 of Rs.6,85,16,048/- made on account of delayed deposit of employee contribution to PF/ESI as per relevant statues, by observing that it was deposited before the due date of filing of return of income, an observation contrary to relevant provisions of S. 36(1)(va) r.w.s. 43B of the Income Tax Act, 1961.*

*2) Whether an assessee is eligible for deduction u/s 36(1)(va) for sum received by assessee from his employees (PF/ESI contribution) to which provisions of sub-clause (x) of clause (24) of Section 2 apply, even if such sum was not credited by the assessee to the employee's account in the relevant fund or funds on or before the due date, when the relevant provisions of S. 43B for the deduction only on actual payments made on or before the due date.*

*3) The appellant craves leave to add, alter or amend any of the ground(s) of appeal before or during the course of hearing of the appeal.”*

### **Consolidated/Common Grounds raised assessee’s C.Os.**

*“1. On the facts and circumstances of the case and in law, intimation order passed by Asst. Director of Income Tax, CPC, Bangalore (hereinafter referred to as "Ld. 40") u/s 143(1) of the Income Tax Act making an adjustment of INR 6,85,16,048 in this case is bad in law, without jurisdiction, illegal and therefore the said intimation order is liable to be quashed.*

2. On the facts and circumstances of the case and in law, the Ld. AO passed the intimation order u/s 143(1) making disallowance of INR 6,85,16,048 u/s 36(1)(va) on account of late deposit of employees contribution towards PF/ESI under the head income from business in violation of the principles of natural justice.

3. The Ld. AO erred both in law and on facts in assuming incorrect jurisdiction and making disallowance on account of late deposit of PF and ESI u/s 36(1)(va) to the tune of INR 6,85,16,048 at the time of processing of return u/s 143(1) even though this does not fall within the ambit of prima facie adjustment as per provisions of Section 143(1)(a) of the Income Tax Act. Therefore, such disallowance is beyond the scope of Section 143(1) and the Ld. AO should not have resorted to provisions of section 143(1).

4. The Ld. AO erred both in law and on facts by not appreciating the fact that disallowance pertaining to late deposit of employee's contribution towards PF/ESI and before the due date of filing the ITR u/s 139(1) constitutes debatable issue and the adjustments u/s 143(1)(a) of Income Tax Act by way of intimation u/s 143(1) of Income Tax Act, on debatable and controversial issues, is beyond the scope of Section 143(1) of Income Tax Act.

5. That the Ld. AO grossly erred in not following the correct legal position laid down regarding disallowance made during the impugned AY of INR 6,85,16,048 and interpretation thereof.

*The above grounds of cross objection are independent and without prejudice to each other. The respondent craves leave to add/amend/withdraw any grounds of cross objections at the time of hearing or at any time before hearing with due permission of the Hon'ble Tribunal.”*

3. The issue involved in the above appeals and C.Os. are regarding disallowance of Employees Contribution to ESI/PF. The Ld. Counsel for the

assessee fairly submitted that the issue involved in the above appeals and the C.O. are covered against the assessee by the Judgment of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-1 in Civil Appeal No. 2833 of 2016, vide order dated 12/10/2022, wherein it is held that if the Employee's contribution to PF/ESI has been paid beyond the time prescribed under the relevant PF Act, then same is not allowable u/s 43B of the Income Tax Act.

4. Further, the Ld. Counsel for the assessee contended that the Employer would be at liberty to make payment of contribution within 15 days from the end of the month during which the disbursement of salary is actually made and the contribution to the PF/ESI are thus generated and contended that the Assessee paid salary/remuneration to the staffs for the month in the subsequent month, therefore employer is required to deposit PF/ESI Contribution within 15 days from the close of every month. The Ld. Counsel for the Assessee relied on the following judicial pronouncements in support of her contentions:

- i). ACIT v. M/s VVDN Technologies Pvt. Ltd. in ITA no.164/Del/2023 dated 04.07.2023 (ITAT Delhi)*
- ii). Aroma Aromatics & Flavours v. ACIT ITA no. 1634/Del/2020 dated 17.03.2023(ITAT Delhi )*
- iii). Prime Comfort Products Pvt. Ltd. v. ACIT ITA no.530/Del/2023 dated 26.04.2023 (ITAT Delhi)*
- iv).The Master Polishers v. ADIT in ITA no. 252/Mum/2023 dated 26.04.2023 (ITAT Delhi)*

*v).Mintri Tea Co. Pvt. Ltd. v. CIT reported in 2009 319 ITR 264 (ITAT Delhi)*

*vi).Peerless General Finance & Investment Co. Ltd. Vs. CIT reported in 228 CTR 72 (ITAT Delhi)*

5. The Ld. Counsel for the assessee further requested to restore the issue to the file of A.O. with a direction to find out 'every month' specified in Provident Fund Scheme as to whether the same is for the month for which salary/wages are 'due' or month for the 'payment' is referred to.

6. Per contra, the Ld. Departmental Representative submitted that the Hon'ble Supreme Court in the case of Checkmate Services (supra) held that the Employees Contribution deposited after respective due date cannot be allowed as deduction, therefore, the issue involved in the present Appeal/C.O. requires to be decided in favour of the Revenue.

7. We have heard both the parties and perused the material available on record and gave our thoughtful consideration. The provision of the Income Tax Act provides for payment of the Employees Contribution of ESI/PF on or before the due date prescribed under the relevant PF Act. The Hon'ble Supreme Court in the case of Checkmate Services (supra) categorically held that the Employees Contribution deposited after respective due date mentioned in the PF Act cannot be allowed as deduction u/s 36(1)(va) of the Act.

8. Now the issue in dispute in the present Appeals is in respect of the actual 'due date prescribed'. It is the case of the Assessee that the salary/remuneration payment to staff for the month was paid in subsequent months preferably in the first week of the next month. For example, the salary for the month of September, 2023 will be paid in the first week of October, 2023, thus, the Employer is required to deposit the PF/ESI Contribution within 15 days of the close of every month. As per the assessee, the due date has to be calculated within 15 days from the close of the month in which 'payment is made to the employee'. But according to the Revenue, the Contribution has to be deposited within 15 days from the close of the month for which salary/wages of the employee is due.

9. In the case of Master Polishers Vs. ADIT (supra), the Mumbai Tribunal held as under:-

*"2. In the ground No. 1 and 2 of the appeal, the assessee is aggrieved with the disallowance upheld by the Ld. CIT (A) in respect of employee's contribution to ESI/PF, which was made by the CPC as an adjustment and further sustained in rectification order u/s 154 of the Act. The Ld. CIT(A) has upheld the disallowance in view of binding precedent of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. v. CIT in Civil Appeal No. 2833 of 2016, observing as under:*

*"4. Having pursued the rectification order, the grounds of appeal and the written submissions the issue of admissibility of payment of employees' contribution of SIC/PF beyond the*

*due date as per the relevant Statute, raised through ground number 1 is not tenable in view of decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. VS CIT in Civil Appeal No2833 of 2016 with CA No2830/2016, CA No. 159/2019, CA No.2832/2016 and CA No: 2831/2016 vide judgment dated 12.10.2022, wherein it was held that deduction under 36(1)(va) of the IT Act is admissible only if the amount so received from employees for PF/ESIC is credited in specified account within the due date as per the relevant Statute. In the instant appeal, it is an admitted position of the appellant that there was delay in crediting the contribution so collected in the specified account within the due date as per the relevant Statute."*

10. The Hon'ble Calcutta Tribunal in the case of Konai Paper and Industries Ltd. Vs. ACIT reported in (2002) 75 TTJ Cal 448 held as under:-

*"6. Clause 38 of the Employees Provident Fund Scheme, 1952, fixes the time limit for making payment in respect of contribution to the provident fund to be 15 days from the close of the month concerned. However, the issue here is whether the "month" should be considered to be the month to which the wages relates or the month in which the actual disbursement of the wages is made, we are of the considered opinion that the expression "month" should mean here the month during which the wages/salary is actually disbursed irrespective of month to which the same relates. Thus the scheme of the government in this regard is that once a deduction is made in respect of the employees contribution to the provident fund from the salary/wages of the employee or the employer also makes*

his contribution, factually at the time of disbursement of the salary the payment in respect of such contribution should be made forthwith. If for some reason or other the payment of salary for a particular month be held up for considerable period of time it cannot be said that the employer would be liable to make payments in respect of the "employer's" as well as "employees" contribution in respect of wages for such period within a period of 15 days from the close of the month to which the wages relates. On the other hand, in our view, most appropriate interpretation would be that the employer would be at liberty to make payment of the contribution concerned within 15 days (subject however to the further grace period) from the end of the month during which the disbursement of the salary is actually made and the contribution of the, provident fund are, thus, generated, inasmuch as, the provision relating to the disallowance of such contribution on account of delay is rather an artificial provision. In our view, a liberal approach has got to be made to this issue. Ultimately, therefore we reverse the order of the lower authorities and direct the assessing officer to examine whether the payments of contribution in the present case were made within 15 days (allowed with further grace period of 5 days) from the close of the respective months during which the disbursement of the salary/wages were actually made. The assessing officer should recompute the amount disallowable, if any, on the above basis and take appropriate action accordingly" 5.1 In our opinion, it will be appropriate if the term 'every month' specified in Provident Fund scheme, whether it is the month for which salary/wages are due or month of the payment is referred to Relevant Authorities for finding out with reference to any judicial precedent in respect of provisions of the relevant Act. Accordingly, we restored this issue back to the file of the Ld.

*Assessing Officer with the direction to find out from the relevant PF authorities about the term every month' as mentioned in clause 38 of the employees provident fund scheme. Similarly, he may find out from the ESI Authorities. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The grounds of appeal of the assessee are accordingly allowed for statistical purposes.”*

11. The assessee placing the reliance on the above decisions, sought for direction to the A.O. to verify the 'due date' specified in the respective Acts and decide the issue afresh. Considering the above facts and circumstances and also the decision of the Mumbai Tribunal in the case of Master Polishers (supra), we restore the issue to the file of the A.O. to decide the same afresh keeping in view the directions of the Mumbai Bench of the Tribunal in the case of Master Polishers Vs. ACIT (supra) along with the Tax Audit Report filed by the Assessee and the return of income filed u/s 44AB of the Act. Needless to say, the Assessee shall be provided with reasonable opportunity of being heard. Accordingly, we partly allow/dispose off the above Appeals/C.Os. for statistical purpose.

Order pronounced in open Court on 09<sup>th</sup> October, 2023

Sd/-

**(SHAMIM YAHYA)**  
**ACCOUNTANT MEMBER**

Dated: 09/10/2023

Sd/-

**(YOGESH KUMAR U.S.)**  
**JUDICIAL MEMBER**

*Pk/R.N, Sr ps*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, NEW DELHI