

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHE "H", NEW DELHI**

Before Sh. Saktijit Dey, Vice President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 39/Del/2023 : Asstt. Year: 2018-19

ITA No. 40/Del/2023 : Asstt. Year: 2019-20

ITA No. 41/Del/2023 : Asstt. Year: 2020-21

Vinod Gupta, 867, Joshi Road, Karol Bagh, New Delhi - 110005.	Vs	Income Tax Officer, Ward-70(1), New Delhi.
(APPELLANT)		(RESPONDENT)
PAN No. AORPG9074K		

Assessee by : None

Revenue by : Sh. Amit Katoch, Sr. DR

Date of Hearing: 03.10.2023

Date of Pronouncement: 11.10.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by assessee against the orders of National Faceless Appeal Centre, Delhi, dated 11.11.2022, 11.11.2022 and 10.11.2022, respectively.

2. Following common grounds have been raised by the assessee for the assessment years 2018-19 and 2019-20 except that there is variation in figures. The grounds for Assessment Year 2018-19 in ITA No.39/Del/2023 read as under:

"1. That on the facts and circumstances of the case, The Ld. AO(CPC) and consequently the Ld. National Faceless Assessment Centre (NFAC) has added back Rs.52,35,353/- (Rs.65,25,759/- for AY 2019-20) u/s 36(1) (va) of the Act on the basis that employee's

contribution to the extent was deposited after the due date prescribed under the relevant law.

2. That on the facts and circumstances of the case, the learned assessing officer has grossly erred in raising a demand towards tax of Rs. 18,86,519/- (Rs.22,81,075/- for AY 2019-20) by disallowing the employees contribution to staff welfare schemes under section 36(1)(va) of the Income Tax Act 1961.

3. That the additional interest charged u/s 234B and 234C of the Act amounting to Rs. 5,37,883/- (Rs.3,46,978/- for AY 2019-20) is wholly illegal and untenable and is prayed not to be upheld."

3. The following grounds have been taken for the assessment year 2020-21 in ITA No.41/Del/2023:-

"1. That on the facts and circumstances of the case, The Ld. AO(CPC) and consequently the Ld. National Faceless Assessment Centre (NFAC) has added back Rs.5,57,191/- u/s 36(1) (va) of the Act on the basis that employee's contribution to the extent was deposited after the due date prescribed under the relevant law.

2. That on the facts and circumstances of the case, the learned assessing officer has grossly erred in raising a demand towards tax of Rs.1,73,843/- by disallowing the employees contribution to staff welfare schemes under section 36(1)(va) of the Income Tax Act 1961."

4. None appeared on behalf of the assessee.

5. The Id. DR submitted that in this case, the assessee deposited the amount of provident fund contributed by employees beyond the due date, but, within the due date of filing the return of income u/s 139 (1) of the Act.

6. The issue of ESI/PF payment has attained finality by the order of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-I, vide order dated 12th October, 2022 wherein it was observed that employers have to deposit the employee's contribution towards EPF/ESI on or before the due date for availing deduction. In the cases before the Hon'ble Apex Court, the employers had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant provisions of the Act. The Assessing Officer ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". It was held that those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective Acts. The Income Tax Appellate Tribunal and later the Hon'ble Gujarat High Court dismissed the challenge against this order of AO. In appeal, the court noted that the Hon'ble Kerala High Court has also ruled in favour of revenue on this issue whereas the Hon'ble High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi have favoured the interpretation beneficial to the assessee. The Hon'ble Apex Bench effectively reversed the judgment in Commissioner of Income Tax vs. Alom Extrusions Ltd. (1 SCC 489) relied upon by the assessee.

7. The Hon'ble Apex Court in the case of Checkmate Services P. Ltd. vs. Commissioner Of Income Tax-I in CA No. 2833/2016 vide order dated 12.10.2022 observed that there is a marked distinction between the nature and character of the two amounts viz., the employers' contribution and employees'

contribution required to be deposited by the employer. The first one is 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. The Hon'ble Apex Court held as under:

"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 43 B 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 assesseees 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 non-obstante clause under Section 43 B 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."

8. As the issue of payment of employees contribution towards the PF has been ruled against the assessee by the Hon'ble Supreme Court, the appeal of the assessee on this ground is liable to be dismissed.

9. In the result, the appeals of the assessee are dismissed.
Order Pronounced in the Open Court on 11/10/2023.

Sd/-

(Saktijit Dey)
Vice President

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 11/10/2023

Subodh Kumar, Sr. PS/DK

Copy forwarded to:

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

ASSISTANT REGISTRAR