

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member
Ms. Astha Chandra, Judicial Member**

ITA No. 688/Del/2023 : Asstt. Year : 2019-20

Col. Krishan Kumar Nanda (Retd.), Prop. M/s Tiger Force Security Services, K-316, M.B. Road, Lado Saria, New Delhi-110030	Vs	ACIT, Circle-61(1), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. ACSPN7598Q		

**Assessee by : Sh. Vikram Kakkar, Adv.
Revenue by : Sh. Vivek Vardhan, Sr. DR**

Date of Hearing: 30.08.2023	Date of Pronouncement: 29.09.2023
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ORDER

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

The present appeal has been filed by the assessee against the order of National Faceless Appeal Centre (NFAC), Delhi dated 13.01.2023.

2. Following grounds have been raised by the assessee in this appeal:

"1. Because the Ld. Assessing Officer, Centralized Processing Centre, Bangalore("AO") and Ld. Commissioner of Income Tax - Appeals (National Faceless Appeal Centre, Delhi) ("CIT-A"), has erred in law and on facts in making addition of Income of Rs.65,77,784/-, resulting in Assessment of Total Income of Rs.1,53,51,440/- on account of disallowance of payment of employee's contribution towards ESI and PF deposited after due date as per the provisions of those acts but before filing of return of income tax.

2. Because the CIT-A, has further failed to appreciate the provisions of Section 36(1)(va) and Section 43(b) of the Income Tax Act, 1961 ("Act"), thereby disallowing the claim of Rs 65,77,784/- towards payment of employee's contribution towards ESI and PF deposited after due date provide under the enactment.

3. Because the CIT-A, erred in law to retrospectively apply amendment/explanation to the provisions of section 36(1)(va) and section 43B of the Act as per Finance Bill, 2021 in this instant case. Therefore, the claim being correct, no addition can be made.

4. Because the CIT-A, failed to provide any opportunity of personal hearing to the appellant to represent the case on merits and the same is in gross violation of the principles of natural justice.

5. Because the order of the CIT-A is erroneous as it has passed on order contrary to the law established with respect to the issue at hand.

6. Because the order of the CIT-A is erroneous as it has been passed in violation of the principle of judicial discipline.

7. Because the Intimation Order U/s 143(1) of the Act is bad in law and against the facts of the case, which the CIT(A) has failed to consider to allow the claim of Rs 65,77,784/- towards payment of employee's contribution towards ESI and PF."

3. 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 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.

4. 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."

5. 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.

6. In the result, the appeal of the assessee is dismissed.

Order Pronounced in the Open Court on 29/09/2023.

Sd/-

(Astha Chandra)
Judicial Member

Sd/-

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

Dated: 29/09/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR