

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'A', NEW DELHI

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER

AND

SH. KUL BHARAT, JUDICIAL MEMBER

ITA No.2893/Del/2022

Assessment Year: 2017-18

Bihari Lal Menghani, Wz-13, 2nd Floor, Bindra Market, Tilak Nagar, New Delhi PAN No.AAFFB5151N	Vs	DCIT Circle – 34 (1) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant	Sh.Tarun Chanana, Advocate
Respondent	Sh. Kanv Bali, Sr. DR

Date of Hearing	25.10.2023
Date of Pronouncement	25.10.2023

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order dated 13.09.2021 by NFAC, Delhi pertaining to A.Y. 2017-18.

2. The grievance of the assessee read as under :-

1. On the facts and circumstances of the case and in law, the order passed by the Ld. CIT(A) (NFAC) is erroneous and bad in law.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) (NFAC) has erred in confirming the addition of Rs. 8,30,434/- made by the Ld. DCIT (CPC) vide order u/s 143(1) dated 26/03/2019 on account of late deposit of employees' contribution towards ESI & PF u/s 36(1)(va) of Income Tax Act, 1961 though deposited before filing the return of income for AY 2017-18.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) (NFAC) has erred in confirming the disallowances of Rs. 8,30,434/- being employees' contribution towards ESI & PF though paid late but before furnishing the return of Income, on the ground that the explanations introduced through Finance Act, 2021 u/s 36(1)(va) and section 43B with effect from 01/04/2021 being applicable retrospectively, the deduction cannot be allowed.

4. *The appellant craves a pray to add, alter, modify, amend, or withdraw any ground(s) of Appeal either at the time of hearing or prior thereto.*

3. We have carefully perused the orders of the authorities below. The undisputed fact is that there was a delay in depositing the employees Contribution towards ESI and PF. The assessee has claimed to have deposited before filing the return of income.

4. This issue has now been settled by the Hon'ble Supreme Court in favour of the revenue and against the assessee in the case of **Check Mate Services Private Limited 448 ITR 518** wherein the Hon'ble Supreme Court has held as under :-

“53. The distinction between an employer’s contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers’ income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – 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. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. 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 43B 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 assessees 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 nonobstante

clause under Section 43B 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. Respectfully following the decision of the Hon'ble Supreme Court (supra) we decline to interfere with the findings of the CIT(A).
The appeal is accordingly dismissed.

6. Decision announced in the open court on 25.10.2023.

Sd/-
[KUL BHARAT]
JUDICIAL MEMBER

Dated: October, 2023.

Neha, Sr PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Asst. Registrar,
ITAT, New Delhi