

**आयकर अपीलीय अधिकरण, “एस.एम.सी” न्यायपीठ,कटक**

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH CUTTACK

श्री जार्ज माथन, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं/ITA No.157/CTK/2023

(निर्धारण वर्ष / Assessment Year :2017-2018)

Sri Nirmal Chandra Padhiary, Bampada, Chhanpur, Birla Tyre Road, Balasore-756056	Vs	ACIT, Balasore Circle, Balasore
PAN No. :ACUPP 0872 B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri Mr. Somanath Sahoo, Advocate
राजस्व की ओर से /Revenue by	:	Shri Charan Dass, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	16/10/2023
घोषणा की तारीख/Date of Pronouncement	:	16/10/2023

**आदेश / O R D E R**

This is an appeal filed by the assessee against the order of the Id CIT(A), National Faceless Appeal Centre (NFAC), Delhi dated 25.01.2023 in Appeal No.ITBA/NFAC/S/250/2022-23/1049108098(1) for the assessment year 2017-2018.

2. This appeal of the assessee is time barred by 35 days. In this regard, Id. AR of the assessee has filed an application along with affidavit of the assessee for condonation of the delay, to which the Id. Sr. DR has not raised any serious objection to condone the delay. On perusal of the application and the affidavit of the assessee, we found that the delay occurred due to bonafide reasons. Accordingly, we condone the delay of 35 days in filing the appeal and appeal is disposed off finally.

3. It was submitted by the Id. AR that two additions are challenged in this appeal, one is against the disallowance of PF & ESI paid belatedly

and second is against the addition representing the peak credit of the undisclosed bank accounts.

4. With regard to the issue of addition made on account of delayed payment of PF and ESI in respect of employees contribution, it was submitted by the Id. AR that the payment was remitted well before the due date of filing of return of income u/s.139(1) of the Act. It was the prayer that the issue may be restored to the file of the Assessing Officer for verification and re-adjudication.

5. With regard to the issue of addition representing peak credit of the undisclosed bank accounts, though the Id. AR did not raise any serious objection, however, he submitted that the AO has not considered the fact that the deposits in the bank accounts were out of the business transaction of the assessee. It was submitted that no addition was called for.

6. In reply, Ld Sr. DR vehemently supported the order of the Id. AO and Id. CIT(A). With regard to the issue of addition made by the AO in respect of delayed payment of PF and ESI in respect of employees contribution, it was submitted by the Id. Sr. DR that the issue is now squarely covered by the decision of the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd Vs. CIT rendered in Civil Appeal No.2833 of 2016 dated 12.10.2022, reported in [2022] 143 taxmann.com 178 (SC), wherein, the Hon'ble Supreme Court has categorically held that if the employees contribution to PF and ESI has been paid beyond the time prescribed under the relevant PF Act, then same is not allowable

under section 43B of the Act even after the payment has been made before the due date of filing of return under the Income tax Act. It was the submission that the amount of employees contribution to PF and ESI, which has not been paid within the due date as prescribed under the relevant Act, has been held by Hon'ble Supreme Court to be not allowable u/s.36(1)(va) of the Act. It was the submission that the Hon'ble Supreme Court in paras 52 & 53 has also categorically held that the provisions of section 43B would not apply to the employees' contribution to PF and ESI.

7. In respect of the second issue, Id. Sr. DR submitted that the assessee has not produced any evidence before both the authorities below.

8. I have considered the rival submissions. Admittedly, the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd(supra) has categorically held that the employees contribution to PF and ESI to the extent it is not paid within due date prescribed under the PF Act, is not allowable u/s.36(1)(va) of the Act. The Hon'ble Supreme Court has also admittedly held that the provisions of section 43B of the Act would not apply to the provisions of section 36(1)(va) of the Act in respect of employees contribution. Respectfully following the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd (supra), we are of the view that the delayed payment in respect of employees contribution to PF and ESI is not allowable.

9. In the case of Nirakar Security & Consultancy Services Pvt Ltd vs ITO in ITA No.98/CTK/2022 for Assessment Year 2016-17,

order dated 17.10.2022, the Division Bench of this Tribunal after considering the arguments of Id AR, has restored the issue to the file of the Assessing officer with the following directions:

*“6. Liberty is granted to the Id AR to make all submissions in respect of allowability of disallowed contribution of the employees to PF and ESI under other relevant provisions in the interest of justice. This direction is being given because Id AR has submitted that as the amount is not allowable under section 36(1)(va) of the Act and same is also not covered under section 43B of the Act, the amount of delayed contribution to PF and ESI in respect of employees contribution would be treated as income in the hands of the assessee u/s.2(24)(x) and on subsequent payment of the same, it would be a business expenditure, which can be claimed u/s.37(1) of the Act. We are not expressing any opinion in regard to his arguments as it has not been examined by the lower authorities. Liberty is also granted to the assessee to raise all arguments as are found necessary by him before the lower authorities.”*

10. As the issue in the present appeal is also identical to the issue in the case of Nirakar Security & Consultancy Services Pvt Ltd.,(supra), on identical findings the issue in this appeal is restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity of being heard. This issue is partly allowed for statistical purposes.

11. In regard to the addition representing the peak credit of the undisclosed bank accounts, the submission made by the Id. AR is not found to be with any substantial evidence. Consequently, the addition made by the Id. AO and confirmed by the Id. CIT(A) stands confirmed.

12. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 16/10/2023.

Sd/-

(जार्ज माथन)

**(GEORGE MATHAN)**

**न्यायिक सदस्य / JUDICIAL MEMBER**

**कटक** Cuttack; दिनांक Dated 16/10/2023

*Prakash Kumar Mishra, Sr.P.S.*

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

1. अपीलार्थी / The Appellant-  
Sri Nirmal Chandra Padhiary,  
Bampada, Chhanpur,  
Birla Tyre Road, Balasore-756056
2. प्रत्यर्थी / The Respondent-  
ACIT, Balasore Circle, Balasore
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR,  
ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack