

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'SMC' BENCH  
DELHI**

**BEFORE: SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER**

**ITA No.1972/Del/2023  
(Assessment Year: 2018-19)**

APPT Fashion, C-736, 2 <sup>nd</sup> Floor, New Friends Colony, New Delhi 110065	Vs.	The ACIT Circle 28(1), Delhi 110002
<b>PAN/GIR No. AARFA 0101 H</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	None
Revenue by	Shri Vivek Kumar Upadhyay, Sr.DR
<b>Date of Hearing</b>	<b>23/10/2023</b>
<b>Date of Pronouncement</b>	<b>27/10/2023</b>

**ORDER**

**PER SHAMIM YAHYA (A.M):**

This appeal filed by the assessee is directed against the order of Learned NFAC/CIT, New Delhi dated 09.05.2023 pertaining to Assessment Year 2018-19.

2. The grounds of appeal raised by the assessee, which read as under:-

*1) The Ld CIT (NFAC)-Delhi has erred in law and on facts of the case in not allowing the genuine claim of Rs. 17,98,164/- treating it as late deposit, as erred and failed to calculate the due date from the payment month of salary / wages, due to which the order of Ld CIT (NFAC)-Delhi is bad in law, bad-ab-initio and is liable to be set aside.*

*2) The Ld CIT (NFAC)-Delhi has erred in law and on facts of the case in not accepting the fact that the assessment proceeding u/s 143(1)(a) are Summary Assessment and any disallowances of any deduction u/s 36(1)(va) against the income u/s 2(24)(x) can be made only after assessment u/s 143(2)/(3) of the Act. Moreover, no additions can be made for any arguable / debatable / controversial matter.*

*3) The Ld CIT (NFAC)-Delhi has erred in law and on facts of the case with predetermined disposition of mind that the amendment [by Finance Act 2021] to Sec 36(1)(va) & 43B by inserting Explanation 5 is not applicable wef 01-04-2021 ie these are applicable retrospectively instead prospectively, in-spote of the fact it is clearly*

*indicated that the amendment will take effect wef 01-04-2021. Moreover these expenses on Employees Contribution on ESIC/PF can be claimed / allowed u/s 37(1)(b), being these Revenue Expenses; and are incurred wholly and exclusively for the purpose of business*

*4) The Ld CIT (NFAC)-Delhi has erred in law and on facts of the case in not allowing the claim of the assessee being allowed since the inception of the Company, but contrary to the concept of continuity / consistency.*

2. Brief facts of the case is that in this case AO, CPC disallowed Rs. 17,98,164/- for not depositing the employees contribution of PF&ESI covered u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act but paid to the respective funds after the due date as specified by the rules of relevant fund. Upon assessee appeal the Ld. CIT(A) found the issue covered in favour of the revenue by the Hon'ble Supreme Court order in the case of Checkmate Services (P.) Ltd. vs CIT. The order of Ld. CIT(A) in this regard may be gainfully read as under:-

*7.2 It is also relevant to mention here that the Hon'ble Supreme Court judgment in the case of Checkmate Services Pvt. Ltd. vs Commissioner of Income Tax-I (C.A. No. 2383 of 2016 - SC), while superseded the judgment in the case of CIT vs. Alom Extrusion Ltd. [2009] 185 Taxman 416 (SC), the prolonged ambiguity about whether employees' contribution can be deposited before the due date of filing of return or it has to be deposited on or before the due date mentioned in such acts, has been settled. The relevant extract of the judgment of the Apex Court is as under:*

*"In the opinion of this Court, the reasoning in the impugned judgment that the nonobstante 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 nonobstante 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 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 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".*

*7.3 In view of retrospective amendments made by the Finance Act, 2021 to section 36(1)(va) and section 43B, and the judgment of Hon'ble supreme court in the case of Checkmate Services Pvt. Ltd. VS Commissioner of Income Tax-I (C.A. No. 2383 of 2016 - SC), the contentions made in the submissions are not found acceptable and the disallowance of Rs. 17,98,164/- made by AO, CPC, for not depositing of employee's contribution to the PF and ESIC covered under section 36(1)(va) r.w.s. 2(24)(x) of "the Act" but paid to the respective funds after the due dates as specified by rules of relevant funds are correctly held as deemed income and, therefore, the disallowance is hereby confirmed as the said late payments are not covered under 43B of the Act. Accordingly, this appeal against the disallowance for deduction claimed amounting to Rs. 17,98, 164/- which was delayed as per the respective Act is dismissed.*

3. Against this order assessee has filed appeal. Despite notice nobody has appeared before me. Having heard the Ld. DR, I find that the issue now is fully covered in favour of the revenue by the judgment of Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. vs CIT, which is relied upon by the Ld. CIT(A). In this view of the matter, I do not find any infirmity in the order of Ld. CIT(A). Hence I uphold the same.

3. In the result, the appeal of the assessee stands dismissed.

Order pronounced in the open court on 27/10/2023.

**Sd/-**  
**(SHAMIM YAHYA)**  
**ACCOUNTANT MEMBER**

Delhi; Dated 27/10/2023

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**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Delhi.
4. CIT
5. DR, ITAT, Delhi
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Delhi