

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"C" BENCH, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.2805/Mum./2023**  
(Assessment Year : 2020-21)

**ITA no.2806/Mum./2023**  
(Assessment Year : 2021-22)

Creative Integrated Facility Management  
711, Goyal Trade Centre, Shantivan  
Boriwali (East), Mumbai 400 066  
PAN – AAIFC5522F

..... Appellant

v/s

Commissioner of Income Tax (Appeals)  
National Faceless Appeal Centre, Delhi

..... Respondent

Assessee by : None  
Revenue by : Shri H.M. Bhatt

Date of Hearing – 05/12/2023

Date of Order – 05/12/2023

**ORDER**

**PER BENCH**

The present appeals have been filed by the assessee challenging the impugned orders of even date 12/06/2023, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment years 2020-21 and 2021-22.

2. When these appeals were called for hearing neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed. Therefore, in view of the above, we proceed to dispose off the present appeals

ex-parte, qua the assessee after hearing the learned Departmental Representative ("*learned DR*") and on the basis of material available on record.

3. In its appeal for the assessment year 2020-21, the assessee has raised the following grounds:-

"1) Disallowance of employees contribution to PF & ESIC Expenses

*For that on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals), has erred in disallowing amount of Rs. 33,88,722/-in respect of employees contribution to PF & ESIC Expenses to the extent not credited to the employees account on or before the due date 36(1)(va) claimed in return in schedule OI and audit report as, allegedly, reported in Tax Audit Report (Form 3 CD).*

2) Disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return -143(1)(a)(iv)

*For that on the facts and in the circumstances of the case, the learned CIT Appeals erred in confirming the disallowance of Employees; Contribution to provident fund and ESIC, on or before the due date or extended due date.*

3) General

*For that the appellant craves leave to add, amend, delete or substitute any ground/s, if so advised, at or before the time of hearing.*

4. While in its appeal for the assessment year 2021-22, the assessee has raised the following grounds:-

"1) Disallowance of employees contribution to PF & ESIC Expenses

*For that on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre, erred by disallowing of Rs. 20,55,431/- in respect of employees contribution to PF & ESIC Expenses to the extent not credited to the employees account on or before the due date 36(1)(va) claimed in return in schedule OI and audit report as, allegedly, reported in Tax Audit Report (Form 3 CD).*

2) Disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return

*For that on the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals)- National Faceless Appeal Centre erred in confirming the disallowance of Rs.20,55,431/-(Rs. 18,73,139 towards*

*employees Provident Fund and Rs. 1,82,292 towards ESIC). As alleged, there is inconsistency in Any sum received from employees as company contribution to any provident fund or superannuation fund or any fund set up under ESI Act or any other fund for the welfare of employees to the extent not credited to the employees account on or before the due date or extended due date. 36(1)(va) claimed in return in schedule OI and audit report as allegedly reported in Tax Audit Report - Form 3CD. The learned AO must have noted that there is no mention of such amount in Tax Audit Report.*

*3) General*

*That the appellant craves leave to add, amend, modify, rescind, supplement or alter any of the grounds. stated here-in-above either before or at the time of hearing of the appeal."*

5. The only grievance of the assessee, in both appeals, is against the disallowance on account of delayed payment of employees' contribution to Provident Fund (P.F) and Employees State Insurance Corporation (E.S.I.C) under section 36(1)(va) of the Act.

6. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee filed its return of income for the assessment year 2020-21 on 25/01/2021, declaring a total income of Rs. 23,67,880 and for the assessment year 2021-22 on 26/02/2022, declaring a total income of Rs. 53,66,570. The returns filed by the assessee were processed vide intimation, issued under section 143(1) of the Act, determining the total income of Rs. 57,56,600 for the assessment year 2020-21 and Rs. 74,21,140 for the assessment year 2021-22, inter-alia, after making disallowance of Rs. 33,88,722 and Rs. 20,55,431, on account of delayed payment of employees' contribution to P.F. and E.S.I.C. under section 36(1)(va) of the Act, for the assessment years 2020-21 and 2021-22, respectively. Vide impugned order, the learned CIT(A) dismissed the ground raised by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

7. The learned DR submitted that the issue arising in the present appeal is squarely covered in favour of the Revenue by the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. v/s CIT, [2022] 448 ITR 518 (SC).

8. We have considered the submissions of the learned DR and perused the material available on record. We find that the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra) held that the payment towards employees' contribution to P.F. and E.S.I.C., after the due date prescribed under the relevant statute is not allowable as a deduction under section 36(1)(va) of the Act. The relevant findings of the Hon'ble Supreme Court, in the aforesaid decision, are 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 latter 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 assessee is 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."*

9. In both appeals, from the record, it is evident that the employees' contributions to P.F. and E.S.I.C. were deposited after the due date prescribed under the relevant statute. Thus, respectfully following the aforesaid decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra), the grounds raised by the assessee are dismissed.

10. In the result, both appeals by the assessee are dismissed.

Order pronounced in the open Court on 05/12/2023

**Sd/-**  
**OM PRAKASH KANT**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 05/12/2023**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai