

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

BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER

ITA No.3536/DEL/2023
(Assessment Year : 2020-21)

Zenith Weldaids Pvt. Ltd. C-164, BS Road, Industrial Area, Ghaziabad-201 003	Vs.	CIT(NFAC) Delhi
PAN No. AAACZ 0626 J (APPELLANT)		(RESPONDENT)

Assessee by	Shri Rakesh Kumar Garg, C.A. and Shri Ankit Garg, C.A.
Revenue by	Shri Om Prakash, Sr. D.R.

Date of hearing:	29.01.2024
Date of Pronouncement:	02.02.2024

PER SHAMIM YAHYA, AM :

This appeal filed by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals) – National Faceless Appeal Centre (NFAC), Delhi dated 14.09.2023 pertaining to Assessment Year 2020-21.

2. The ground of appeal filed by assessee, reads as under:

1. *“The CIT Appeal has erred in law and on merits of case was not justified in making addition u/s 2(24)x read with sec 36(1)va of the Income tax Act 1961 In fact, the learned AO should examine whether the payment of contribution of PF/ESI was made within 15 days from the close of respective months during which the disbursement of such salary was made and has to re-compute the amount disallowable on this basis. In fact, all these employees' contribution to PF/ESI were made well within 15 days from the close of respective month during which the disbursement of such salary was made hence in this scenario nothing can be added as deemed income.*

2. *The CIT appeals has erred in law and on merits of case was not justified as any delayed payment of employee contribution to PF/ESI as prescribed u/s 36(1)(va) of the income tax act is beyond the ambit of adjustments to be carried out u/s 143(1) of the income tax act. Further PF/ESI are the deeming income as the same is collected from the employee salary and therefore, the same, is not under permissible adjustments.*
3. *The appellant reserves the right to add, amend or delete any ground of appeal on or before the date of hearing.”*

3. Brief facts of the case are that in this case, there was delay in depositing employee contribution of ESI and Provident Fund amounting to Rs.7,452/- and Rs.1,03,338/- respectively. The Assessing Officer disallowed the same. Upon assessee's appeal, learned CIT(A) following the decision of Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. upheld the disallowances. Against this order, assessee is in appeal before the ITAT.

4. I have heard both the parties and perused the record. Leaned Counsel for the assessee submitted that the Co-ordinate Bench of this Tribunal has heard similar issue and remanded the same to Assessing Officer with certain directions and he submitted that the same may kindly be followed.

5. Per contra, learned DR relied upon the orders of the CIT(A).

6. Upon careful consideration, we find that this Tribunal in ITA No. 2710/Del/2022 vide order dated 17.11.2023 has remanded the similar matter to the Assessing Officer by holding as under:

“5. In so far as employees contributions towards PF & ESI it is noticed that the issue as to whether the due date under PF/ESI Acts should be as

per the calendar month for which the salary is payable or from the month in which the salary is paid to the employee by the employer came up for adjudication in the case of Sentinel Consultants Pvt. Ltd. Vs. ACIT (supra) and the Tribunal restored the issue to the file of the AO with the following observations:-

“9. We have carefully considered the rival submissions and perused the material available on record. The disallowance of employees’ contribution to PF/ESIC for breach of condition under Section 36(1)(va) is in controversy.

9.1 We notice at the outset that an opportunity was given via electronic platform of the depts. for the proposed adjustments and in the absence of e-response, the adjustments were carried out the CPC-Bangluru and intimation was issued enhancing the assessed income in the captioned assessment years. The CIT(A) in the first appeal has sustained the adjustments towards belated deposits of employees’ contribution to PF/ESIC in the light of the judgment rendered by the Hon’ble Supreme Court in Checkmate Pvt. Ltd. vs. CIT (2022) 143 taxmann.com 178 (SC). The contention of the Assessee that such additions cannot be made under the umbrella of S. 143(1) is covered against the assessee the decision of the coordinate bench in the case of Weather Comfort Engineers Private Limited vs. ACIT-CPC ITA No. 959/Del/2021 order dated 15/02/2023. The action of CPC and CIT(A) thus cannot be faulted where some opportunity was admittedly given for e- response.

9.2 We now turn to alternate plea on behalf of the assessee for grant of deduction under general provisions for deduction of expenditure under S. 37 of the Act. We do not see any merit in such plea that the belated deposit of employees contributions to PF/ESIC governed under Section 36(1)(va) is also simultaneously amenable to deduction under Section 37(1) of the Act. In terms of the provision, Section 37(1) permits deduction of expenditure which is not in the nature of expenditure prescribed in Sections 30 to 36 of the Act and also not being in the nature of capital expenditure or personal expenses of the assessee. Thus, in view of such mandate of law, the deduction of expenditure under the general clause of Section 37(1) would not extend to expenditure specially covered within the ambit of Section 36(1)(va) of the Act. The Hon’ble Supreme Court in the case of Checkmate Pvt. Ltd. (supra) itself explains this position in Para 32 of the Judgment. Such view also draws support from the observations made in recent judgment of the Hon’ble Supreme Court in the case of Pr.CIT vs. Khyati Realtors (P) Ltd. (2022) 141 taxmann.com 461 (SC). The alternate plea is thus without any merit.

9.3 We also take note of yet another plea made out on behalf the assessee towards methodology of calculation of default under the

relevant PF/ESIC Act. The Ld. Counsel contends that the month during which the disbursement of salary is actually made would be relevant for the purposes of determination of due date of deposit under the respective statute. The accrual of liability towards payment of salary without actual disbursement would not fasten obligation for deposits of employees contribution in the labour Acts per se. as observed by the co-ordinate bench in Kanoi Paper and Industries Ltd. vs. ACIT (2002) 75 TTJ 448 (Cal). This aspect has not been found to be examined by the Assessing Officer or CIT (A). Hence without expressing any opinion on merits on this aspect, we deem it expedient to restore the matter to the file of designated AO. It shall be open to the assessee to place factual matrix before the AO and take such plea for evaluation of the AO. The AO shall examine this aspect and fresh order in accordance with law after giving proper opportunity.”

6. We find similar view has been taken by the co-ordinate benches in the cases of B. L. Kashyap & Sons Ltd. (supra) and VVDN Technologies Pvt. Ltd. (supra). The ld. Counsel submits that in view of these decisions the matter may be restored to the Assessing Officer to ascertain the due date for remittance of the PF/ESI contributions of employees. Considering the decisions of the coordinate benches referred to above we restore this issue to the file of the Assessing Officer to decide in the light of the observations made by the Tribunal in the case of Kanoi Paper & Industries Ltd. Vs. ACIT (supra). Needless to say that the Assessing Officer shall provide adequate opportunity of being heard to the assessee and the assessee is at liberty to provide all the necessary information in support of its contention.”

7. Upon careful consideration, I find that above said decision is rendered by Co-ordinate Bench of this Tribunal in identical case. In the said case, the Bench has noted the submissions of the assessee that the matter may be restored to the Assessing Officer to ascertain the issue of PF/ESIC Contribution of employee's funds. Following the same, I restore the issue to the file of the Assessing Officer to decide in the light of the above decision in the case of Kanoy Paper and Industries Limited vs. ACIT (supra). Needless to add that the assessee should be granted adequate opportunity of being heard.

8. In the result, appeal filed by the assessee stands allowed for statistical purposes.

Order pronounced in the open court on 02.02.2024

Sd/-

**(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

Date:- 02.02.2024

*Priti Yadav, Sr. PS**

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI