

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

**BEFORE SH. SAKTIJIT DEY, VICE PRESIDENT
AND
SH. N. K. BILLAIYA, ACCOUNTANT MEMBER**

ITA No.1446/Del/2023
Assessment Year: 2017-18

Nishant Security and Allied Services Private Limited WZ-98, A/1, Ring Road, Naraina, New Delhi-110028 PAN No.AACCN3644A	Vs.	ITO Ward- 18 (3) Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Written application
Respondent by	Sh. Vipul Kashyap, Sr. DR

Date of hearing:	01/02/2024
Date of Pronouncement:	01/02/2024

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the assessee is preferred against dated 09.03.2023 by NFAC, Delhi pertaining to A.Y. 2017-18.

2. The sum and substance of the grievance of the assessee is that the CIT(A) erred in confirming the disallowance on account of delay in deposit of Employees Contribution to EPF and ESI.

3. None appeared on behalf of the assessee inspite of notices. Since the impugned issue is now well settled by the Hon'ble Supreme Court in favour of the revenue and against the assessee we decided to proceed exparte.

4. The quarrel relating to the delay in deposit of EPF / ESI has been settled by the Hon'ble Supreme Court 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 same the appeal is dismissed.
6. Decision announced in the open court on 01.02.2024.

**Sd/-
(SAKTIJIT DEY)
VICE PRESIDENT**

**Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

NEHA

Date:- .02.2024

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI