

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "E" NEW DELHI**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER  
AND  
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No.110/Del/2023  
निर्धारणवर्ष/Assessment Year:2018-19

<b>Mahesh Chand Sharma</b> H.No.1700, YMCA, Opp. Indira Nagar, Faridabad, Haryana. PAN No.BEEM9175H	<u>बनाम</u> Vs.	<b>ITO</b> Ward 1(3), Faridabad, Haryana.
अपीलार्थी <b>Appellant</b>		प्रत्यर्थी/ <b>Respondent</b>

<b>Assessee by</b>	<b>None</b>
<b>Revenue by</b>	<b>Shri Mahesh Kumar, Sr. DR</b>

सुनवाईकीतारीख/ Date of hearing:	11.03.2024
उद्घोषणाकीतारीख/ Pronouncement on	17.05.2024

**आदेश /O R D E R**

**PER C.N. PRASAD, J.M.**

This appeal is filed by the assessee against the order of the Ld.CIT(Appeals)-NFAC, Delhi dated 28.11.2022 for the AY 2018-19.

Assessee raised the following grounds: -

1. *“That on the Facts and Circumstances of the case and in law, the order passed by the Ld. Assessing Officer (hereinafter referred to as Ld. AO) is bad in law and the appellant denies its liability to be assessed at income of Rs.1,11,63,360/- as against the returned income of Rs.28,46,200/-*

*2. That on the facts and circumstances of the case and in law, the Assessing Officer erred in making addition amounting to Rs.83,17,160/- of Employee Contribution of PF and ESI Under section 43B, which is uncalled for, based on surmises and conjectures and bad in law*

*That above grounds are independent and without prejudice to each other. The appellant craves for leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing in the interest of the natural justice.”*

2. In spite of issue of notice, none appeared on behalf of assessee nor any adjournment was sought, therefore, we dispose of this appeal on hearing the Ld. DR.

3. Ld. DR submits that the only issue in appeal of the assessee is disallowance made u/s 43B of the Act in respect of Employees Contribution to PF & ESI. Ld. DR submits that in view of decision of the Hon'ble Supreme Court in the case of Checkmate Services Private Limited Vs. CIT (448 ITR 518) the Assessing Officer rightly made the disallowance of the contributions made towards PF & ESI which were paid beyond the due dates specified under the respective acts.

4. We find that the issue in appeal has since been decided by the Hon'ble Supreme Court in the case of Checkmate Services Private

Limited Vs. CIT (supra), wherein the Hon'ble Supreme Court held as under: -

*“Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, Employees' State Insurance Scheme, etc., for long periods of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other, undisputed liabilities also are not paid.*

*35.3 To curb this practice, the Finance Act has inserted a new section 43B to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force or any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare- of employees shall irrespective of the previous year in which the liability to pay such sum was incurred, be allowed only in computing the income of that previous year in which such sum is actually paid by the assessee.”*

...

*54. 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. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed. ”*

7. The assessee in his “Statement of Facts” has stated that “... These additions had been made in disregard to the settled law according to which no such

*prima facie adjustments can be made for issues which are debatable and controversial. Even the decisions of the Honble Apex Court and the jurisdictional High Court on this issue were kept at bay while making the said additions". However, their lordships, when deciding the case cited supra, had occasion to consider all the existing decisions in this regard. After due consideration and deliberation their lordship have distinguished the issue in the dispute herein and ruled differently: wherein it is held that Employee's contributions has to be paid on or before the due dates. Hence, the earlier rulings on this aspect are no longer good law and the settled law has been enunciated in this Judgement."*

5. On careful perusal of the order of the Ld.CIT(A), we see no infirmity in sustaining the disallowance made u/s 43B as the Ld.CIT(A) decided the issue following the decision of the Hon'ble Supreme Court in the case of Checkmate Services Vs. CIT (supra).
6. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 17.05.2024

Sd/-  
(PRADIP KUMAR KEDIA)  
ACCOUNTANT MEMBER

Sd/-  
(C.N. PRASAD)  
JUDICIAL MEMBER

Dated: 17.05.2024

\*Kavita Arora, Sr. P.S.

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT  
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi