

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER &  
SHRI RAJ KUMAR CHAUHAN, JUDICIAL MEMBER,**

**ITA No.4810/Mum/2023 (AY 2017-18)**

Motilal Oswal Home Finance Ltd. Motilal Oswal Tower Prabhadevi Mumbai 400024	vs.	Dy CIT, Circle – 4(1)(1) Room No. 649, 6 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai 400020
PAN/GIR No. : AAMCA0234H		
Appellant	..	Respondent

Appellant by :	Shri Malav P. Sheth
Respondent by :	Shri Sunil Shinde, Sr. A.R.

Date of Hearing	15.05.2024
Date of Pronouncement	16.05.2024

आदेश / O R D E R

**PER OM PRAKASH KANT, AM:**

This appeal by the assessee is directed against order dated 07.11.2023, passed by the Id. Commissioner of Income Tax (Appeals) – National Faceless Appeal Centre (NFAC), Delhi (in short ‘the Id. CIT(A)) for AY 2017-18 raising following grounds:

**1. *Disallowance of employees' contribution to Provident Fund of Rs 42,04,363***

*On the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowance made by the learned Assessing Officer in relation to delay in depositing employees' contribution to Provident Fund aggregating Rs*

*42,04,363/- under section 36(1)(va) read with section 438 of the Income-tax Act, 1961 (Act).*

*Without prejudice to the above, on the facts and circumstances of the case and in law, the learned CIT(A) erred in not granting relief with respect to the payment made of delayed employees' contribution to Provident Fund under section 37(1) of the Act as the same is wholly and exclusively incurred for the purpose of the business of the Appellant and ignoring the fact that the default is only for few days.*

**2. Disallowance of employees' contribution to ESIC of Rs.1,41,191**

*On the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowance made by the learned Assessing Officer in relation to delay in depositing employees' contribution to ESIC amounting to Rs 1,41.191 under section 36(1)(va) read with section 438 of the income-tax Act, 1961 ('Act').*

*Without prejudice to the above, on the facts and circumstances of the case and in law, the learned CIT(A) erred in not granting relief with respect to the payment made of delayed employees' contribution to ESIC under section 37(1) of the Act as the same is wholly and exclusively incurred for the purpose of the business of the Appellant and ignoring the fact that the default is only for one day.*

**3. The appellant craves leave to add to amend, alter, delete and/or modify the above grounds of appeal on or before the final date of hearing of this appeal petition."**

2. We have heard the rival submission of the parties and perused the relevant material on record. In the grounds raised the assessee has challenged the disallowance of employees' contribution to Provident Fund of Rs. 42,04,363/- and disallowance of employees' contribution to ESIC of Rs.1,41,191/-, which has been sustained by the ld. CIT(A). We find that the ld. CIT(A) has relied on the decision of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. v. CIT, Civil Appeal No.

28/33 of 2016 dated 12.10.2022. The relevant finding in relation to disallowance of Provident Fund contribution is reproduced as under:

*3.7 I have carefully considered the explanation of the Appellant. The Appellant has raised contentions of allowability of delayed deposit of employees contribution to PF u/s 37(1) of the Act. Honorable Supreme Court in the case of Checkmate Services Pvt. Ltd. (supra) has deliberated on the allowability of the delayed deposit of employees contribution of PF. Relevant extract of the same is provided below:*

*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 re 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 438.*

*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 438 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 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.*

*55. 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.*

*38 The judgement of Hon'ble Supreme Court discussed supra is squarely on employee's contribution where the employer has no role but to deposit the amount without any delay as same is the contribution of the employee and not that of the employer. Hence, I confirm the addition on this ground as this amount is not the income of the employer but that of the employee.”*

3. Similarly, the ld. CIT(A) while upholding the disallowance for employees' contribution to ESIC, has followed the finding of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd (supra). The relevant finding of the ld. CIT(A) is reproduced as under:

*“4.2 The Appellant has deposited the ESIC contribution of the employees beyond the due date of the month of January 2017. The AO has disallowed the delayed employees' contribution of Rs.1,14,191 u/s. 36(1)(va).*

4.3 *The facts and contentions of the Appellant in relation to the claim of belated contribution to ESIC are similar to ground of appeal no. 1 in relation to PF contribution. Following the discussion in the earlier paragraphs, the ground No. 2 raised by the appellant is dismissed.”*

4. In view of the binding precedent followed by the ld. CIT(A), we do not find any infirmity in the order of the ld. CIT(A) on the issue in dispute and accordingly ground Nos. 1 & 2 of the appeal of the assessee are dismissed.

5. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 16.05.2024.

Sd/-  
(RAJ KUMAR CHAUHAN)  
Judicial Member

Sd/-  
(OM PRAKASH KANT)  
Accountant Member

Place: Mumbai

Date: 16.05.2024

n.p

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण DR, ITAT,  
Mumbai
6. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//  
आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt. Registrar)  
आयकरअपीलीयअधिकरण/ ITAT, Bench, Mumbai.