

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H',
World Trade Centre, Nauroji Nagar,
NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member,
Sh. Sudhir Kumar, Judicial Member**

ITA No. 2780/Del/2023 : Asstt. Year: 2020-21

Ultimate International Pvt. Ltd., B-15/3, Okhla Industrial Area, Phase-II, South East Delhi, New Delhi-110020 (APPELLANT)	Vs	ACIT, CPC, Bangaluru (RESPONDENT)
PAN No. AAACU1202F		

**Assessee by : None
Revenue by : Sh. Amit Katoch, Sr. DR**

Date of Hearing: 25.07.2024	Date of Pronouncement: 29.07.2024
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of National Faceless Appeal Centre (NFAC), Delhi dated 04.08.2023.

2. Following grounds have been raised by the assessee:

"1. The order passed by the Honorable National Faceless Appeal Center ("NFAC") and the learned Assessing Officer ("AO") is not in accordance with the law and is contrary to the facts and circumstances of the present case and in any case in violation of the principle of equity and natural justice.

2. That on the facts and circumstances of the case and in the law, Hon'ble NFAC has passed the order without giving proper opportunity of being heard to the Appellant.

3. That on the facts and circumstances of the case and in the law, Hon'ble NFAC erred in upholding the disallowance of Rs. 1,97,890, on account of late payment of Employees Contribution to Provident Fund, which was paid before the due date of filing of Income Tax Return.

4. That on the facts and circumstances of the case and in the law, Hon'ble NFAC has misinterpreted the contention of the appellant and wrongly justified the addition/disallowance by taking shelter to amendments introduced/brought vide/by Finance Bill 2016.

5. That on the facts and circumstances of the case and in the law, Hon'ble NFAC/Ld. AO has wrongly proposed and made the addition/disallowance under section 143(1) of the Income Tax Act, 1961, whereas the bare provisions itself says that the addition shall be made for an incorrect claim which is apparent from record or disallowance indicated in the audit report in audit report but not taken into account in computing the total income in return, Here none of the conditions as indicated under the provisions of section 143(1) of the Act have been fulfilled as there is no mistake apparent from record nor the Tax Audit indicated any disallowance under section 36(1)(va) of the Act.

6. That on the facts and circumstances of the case and in the law, Hon'ble NFAC/Ld. AO has erred in making disallowance of Rs.1,97,890/- while passing the Intimation Order under section 143(1) of the Act, on account of Employees' Contribution to Provident Fund or Any Other Fund, which is highly debatable and controversial.

7. That on the facts and circumstances of the case and in the law, Hon'ble NFAC erred in upholding the disallowance of Rs. 1,97,890/- on account of Employees' Contribution to Provident Fund or Any Other Fund by Ld. AO referring to the amendment brought in by the Finance Act, 2021, w.e.f. 01.04.2021, which is not applicable to the assessment year under consideration.

8. That on the facts and circumstances of the case and in the law, Hon'ble NFAC erred in confirming the addition of Rs. 1,97,890/- on account of Employees' Contribution to Provident Fund or Any Other Fund by Ld. AO under section 143(1) of the Act replying on the decision of Hon'ble Supreme Court in the case of Checkmate Services P Ltd vs Commissioner of Income Tax-I, in Civil Appeal No. 2833 OF 2016 and others, as the decision is not applicable to the facts of the case of the Appellant.

9. That on the facts and circumstances of the case and in the law, Ld. AO erred in charging interest under sections 234B and 234C of the Act."

3. Aggrieved with the disallowance made u/s 143(1) with regard to delay in payment of employees contribution to PF account, the assessee filed appeal before the Id. CIT(A) who affirmed the order of the CPC disallowing the amount u/s 2(24)(x) r.w.s. 36(1)(va) invoking the judgment of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-I.

4. None attended during the hearing.

5. We find that the issue before us has been squarely covered by the judgment of the Hon'ble Apex Court, hence proceeded to adjudicate the grounds.

6. The issue of ESI/PF payment has attained finality by the order of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-I, vide order dated 12th October, 2022 wherein it was observed that employers have to deposit the employee's contribution towards EPF/ESI on or before the due date for availing deduction. In the cases before the Hon'ble Apex Court, the employers had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant provisions of the Act. The Assessing Officer ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". It was held that those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective acts. The Income Tax Appellate Tribunal and later the Gujarat High Court dismissed the challenge against this order of AO. In appeal, the court

noted that the Hon'ble Kerala High Court has also ruled in favour of revenue on this issue whereas the Hon'ble High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi have favoured the interpretation beneficial to the assessee. The Hon'ble Apex Bench effectively reversed the judgment in Commissioner of Income Tax vs. Alom Extrusions Ltd. (1 SCC 489) relied upon by the assessee.

7. The Hon'ble Apex Court in the case of Checkmate Services P. Ltd. vs. Commissioner Of Income Tax-I in CA No. 2833/2016 vide order dated 12.10.2022 observed that there is a marked distinction between the nature and character of the two amounts viz., the employers' contribution and employees' contribution required to be deposited by the employer. The first one is 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. The Hon'ble Apex Court held as under:

"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 43 B 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 43 B 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."

8. As the issue of payment of employees contribution towards the PF has been ruled against the assessee by the Hon'ble Supreme Court, the appeal of the assessee on this ground is liable to be dismissed.

9. In the result, the appeal of the assessee is dismissed.
Order Pronounced in the Open Court on 29/07/2024.

Sd/-

**(Sudhir Kumar)
Judicial Member**

Sd/-

**(Dr. B. R. R. Kumar)
Accountant Member**

Dated: 29/07/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR