

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

**BEFORE DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SH. SUDHIR KUMAR, JUDICIAL MEMBER**

ITA No.3714/Del/2023
Assessment Year: 2020-21

TDI Infracorp (India) Ltd. Upper Ground Floor 11, Tolstoy Marg, Connaught Vandana Building Place, Connaught Place, Delhi-110001 PAN No.AACCT41228	Vs.	ADIT CPC Bengaluru
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Tarandeep Singh CA
Respondent by	Sh. Amit Katoch Sr DR

Date of hearing:	25/07/2024
Date of Pronouncement:	06/08/2024

ORDER

PER SUDHIR KUMAR, JM:

This appeal by the assessee is directed against the order of the Commissioner of the Income Tax (Appeals) New Delhi [hereinafter referred to as "CIT(A)"] vide order dated 25.10.2023 pertaining to A.Y. 2021-22 and arises out of the assessment order dated 11.11.2022 under section 143(1) of Income Tax Act [hereinafter referred to as "the Act"]

2. The assessee has raised the following grounds of appeal :-

11. That the learned Commissioner of Income Tax (Appeals) has grossly erred both in law and on facts in sustaining the assessment order passed by Assessing Officer u/s 143(1).

2. That the learned Commissioner of Income Tax (Appeals) has erred in both law and on facts in sustaining the addition of Rs. 18,07,532 u/s 36 in respect of ESI & PF which was not paid before the due date. The action of learned AO is illegal & bad in law as this expenditure is allowable if it is paid before the due date of filing of income tax return as held in Hon'ble Delhi High Court in ITA No. 1063/2008 in case of CIT vs. AIMIL Ltd 321 ITR 508. This amount was paid before the due date of filing of income tax return.

3. That the appellant craves leave to add, amend, modify or alter the grounds of appeal.

3. The brief fact of the case is that the assessee has filed its return of income for the concerned year under consideration of Rs.5,00,81,200/-. The CPC has made the disallowance at Rs.18,07,532/-u/s.36(1)(va) being employee's contribution deposited beyond due date under respective statute. The assessee has filed the appeal against the order of AO before the Ld CIT(A). The appeal of the assessee was dismissed by the Ld.CIT(A) vide order dated 25.10.2023, against which the assessee is in appeal before us.

4. We have heard the parties and perused the material available on the record.

5. The Ld AR has submitted that the CPC has wrongly disallowed the payments in spite of paying them within the prescribed time limit. He has further submitted that assessee has paid the dues before the due date of filing the return of income. The reliance has placed on the judgment of the Hon'ble Delhi High Court in the case of **CIT vs AIMIL Ltd 321 ITR 508**. In support of his contention, he has filed a Paper book containing pages 1 to 70 in which he has attached the copy of chart depicting dates on which salary is paid, copy of tax Audit report, and copies of orders of various appeals, passed by Hon'ble ITAT. Reliance has placed on the following order of the of the Hon'ble ITAT;

(i) ITA no 2376/mum/2022 of M/s PR Packing Service

(ii) ITA no 210/Del/2022 Benson Movers Pvt Ltd

(iii) ITA no 164/DEL/2023 Technologies Pvt Ltd

(iv) MTR Maiya's vs ITO {2023} 152 taxmann.com 189 Bangalore-Tri in this case Hon'ble ITAT in para 16 held as under :-

16. As far as the employees contribution to EPF & ESI the details of which are extracted in para 6 of this order to the extent of Rs. 40,388/-is concerned, the of the assessee is that these remittances were within the due date for filing return u/s 139(1) they were belated payments under submission the respective Acts and hence no disallowance is called for. This issue is settled by the Hon'ble

Supreme Court judgment in Checkmate Services (P) Ltd. (supra) wherein it is held that that section 43B(6) does not cover employees' contributions to PF, ESI etc., deducted by employer from salaries of employees and that employees contribution has to be deposited within the due date u/s 36(1) (va) i.e. due dates under the relevant employee welfare legislation like PF Act, ESI Act etc. failing which the same would be treated as income in the hands of the employer u/s.2(24)(x). Respectfully following this judgment, we sustain the disallowance to the extent of Rs. 40,588/-towards belated remittances towards employees contribution to EPF & ESI under the respective Acts.

(v) Sai Computers Ltd vs ADIT {2023} 155 taxmann.com 607(Delhi-Trib)

(vi) Sentinel Consultants Pvt Ltd vs ACIT 202 ITD 154(Del)

6. The Ld. DR has supported the order of the Ld CIT(A) and submitted that the assessee has deposited the employee contribution fund and ESI after the due date. The Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd Vs. Commissioner of Income Tax-I in CA No.2833/2016** vide order dated 12-10-2022 has observed that there is a marked distinction between the nature and character of the two amounts viz, the employers' contribution and employee' 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 Supreme Court 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 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.

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.”

7. Ld AR has submitted that the assessee has deposited the ESI/PF amount before filing the return of income which is much before time. This argument is not tenable because 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** wherein it was observed that employers have to deposit the employee's contribution towards EPF/PF on or before the due date for availing deduction. The provisions of section 43B are not applicable under these circumstances and do not absolve the assessee from disallowance if deposited late, even if they are deposited before the due date for filing of return. The AO has rightly disallowed the payments of ESI/PF which was deposited after the due date. The appeal has no force and liable to be dismissed.

8. As a result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 06.08.2024.

Sd/-
(DR. B R R KUMAR)
ACCOUNTANT MEMBER

NEHA, Sr. PS
Date:- 06.08.2024

Sd/-
(SUDHIR KUMAR)
JUDICIAL MEMBER