IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, VP AND SHRI GIRISH AGRAWAL, AM

ITA Nos.6135 & 6136/Mum/2024
(Assessment Years: 2010-11 & 2014-15)

Diebold Nixdorf India Private Limited 17th Floor, Building No.2, Romell Tech Park, Nirlon Compound, Goregaon (E), Mumbai-400 063	Vs.	Commissioner of Income Tax – 56 Aaykar Bhavan, Churchgate, Mumbai-400 020
PAN/GIR No. AAACD 3206 C		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Shri Nikhil Tiwari
Respondent by	:	Shri R. R. Makwana

Date of Hearing	:	16.01.2025
Date of Pronouncement	:	28.01.2025

O R D E R

Per Saktijit Dey, VP:

The captioned appeals by the assessee, arise out of two separate orders of learned Commissioner of Income Tax (Appeals)-56, Mumbai, pertaining to the assessment years (A.Ys.) 2010-11 and 2014-15.

ITA No. 6135/Mum/2024 (A.Y. 2010-11)

2. In ground no.1, the assessee has challenged the disallowance of payment made towards employees' contribution to Provident Fund (PF for short) and Employee's State Insurance Corporation ('ESIC' for short), amounting to Rs.1,66,084/- u/s. 36(1)(ea) of the Income Tax Act, 1961 ('the Act' for short).

3. Briefly, the facts are, the assessee, a resident corporate entity, is stated to be engaged in business of trading Automated Teller Machine, Networked cash dispensers,

etc. For the assessment year under dispute, the assessee filed its return of income on 20.09.2011, declaring income of Rs.60,25,38,254/-. In course of assessment proceeding, while verifying the audit report, the Assessing Officer (AO) noticed that the assessee had claimed deduction on account of payment made towards employee's contribution to PF and ESIC. On further verification, he noticed that payment towards employees contribution to PF & ESIC was not made within the due date as provided u/s. 36(1)(va), of the Act. Thus, he treated such contribution made towards PF & ESIC as 'income of the assessee' in terms with section 2(24)(x) of the Act and added an amount of Rs.1,66,084/- to the income of the assessee. Though, the assessee contested the aforesaid addition before learned first appellate authority, however, the addition was sustained.

4. Before us, learned counsel appearing for the assessee, though at the outset, conceded that the issue is no more *res integra* in view of the decision of Hon'ble Supreme Court in case of *Checkmate Services Pvt Ltd Vs. CIT* [2022] 143 taxmann.com 278 (SC), however, he submitted that the payment made by the assessee should be allowed as 'business expense' u/s. 37(1) of the Act. He submitted that allowability of claim u/s.37(1) of the Act has not been examined by the Hon'ble Supreme Court in case of *Checkmate Services Pvt Ltd Vs. CIT* (supra). He submitted, even if a particular expenditure is disallowed u/s. 36(1) of the Act, for violation of specific condition, however, such expenditure can be allowed u/s. 37(1) of the Act. In support, he relied upon the following decisions:

Sr. No.	*Particulars*
1	*M/s. BBG Metal Syndicate Private Ltd. vs. DCIT (ITA No.112/CTK/2022) (Cuttack – Trib.)*
2	*Nirakar Security and Consultancy Services Private Ltd. vs. ITO (ITA No. 98/CTK/2022) (Cuttack – Trib.)*
3	*Bombay Steam Navigation Co. vs. CIT [1965] 56 ITR 52 (SC)*
4	*CIT vs. Aspinwal & Co. (Travancore) Ltd. [1992] 62 Taxman 254 (Kerala HC)*
5	*CIT vs. High Land Produce Co. Ltd. [1976] 102 ITR 803 (Kerala HC)*
6	*CIT vs. High Land Produce Co. Ltd. [1986] 158 ITR 419 (SC)*

5. The learned Departmental Representative ('ld. DR' for short) submitted, once the issue has been settled by the Hon'ble Supreme Court, the assessee cannot subvert the process of law.

6. We have considered rival submissions and perused the materials on record. We have also applied our mind on the decision relied upon. Factually, there is no dispute that employees contribution towards PF & ESIC were not deposited in the respective accounts within the stipulated period provided u/s. 36(1)(va) of the Act read with the provisions contained in PF & ESIC Acts. Section 36(1)(va) of the Act very clearly provides that if employees contribution to PF & ESIC are not paid within the stipulated time period, such amount has to be treated as 'income' of the assessee u/s. 2(24)(x) of the Act. In fact, the issue is no more *res integra* in view of the ratio laid down by the Hon'ble Supreme Court in the case of *Checkmate Services Pvt Ltd Vs. CIT* (supra). Even, the assessee accepts the aforesaid position. However, the assessee has made an alternative claim that the payment can still be allowed as 'business expense' u/s. 37(1) of the Act. In our view, this claim of the assessee has to be rejected at the threshold in view of the position of law declared by the Hon'ble Supreme Court in the case of *Checkmate Services Pvt Ltd Vs. CIT* (supra). Once the Hon'ble Supreme Court has decided that delayed payment of employee's contribution to PF & ESIC cannot be allowed as deduction, the assessee cannot expect the very same relief under another provision. More so, when section 36(1)(va) of the Act

mandates that such contribution has to be treated as 'income of the assessee'. Insofar as, the judicial precedents relied upon by the learned counsel of the assessee, on a careful perusal, we are of the view that in none of the decisions the alternate claim of deduction u/s. 37(1) of the Act has been accepted. Therefore, in our view, the decisions relied upon will be of no help to the assessee. Therefore, we decline to interfere with the decision taken by the departmental authorities.

7. In ground no. 2, the assessee has raised the issue of taxability of unrealized foreign exchange fluctuation gain amounting to Rs.9,67,06,326/-.

8. Briefly, the facts are, during the year under consideration, the assessee earned an amount of Rs.9,67,06,326/-, on account of revaluation of outstanding dues payable to its overseas sister concern due to fluctuation in the valuation of the foreign exchange. In the return of income filed for the assessment year under dispute, the assessee recognized such gain to be in the revenue side and offered it as 'income'. Accepting such income offered by the assessee, the A.O. completed the assessment. As could be seen, in A.Ys. 2009-10, 2014-15 and 2016-17, the assessee incurred loss on account of fluctuation in rate of foreign exchange *qua* similar payments to be made to the overseas sister concern. However, the loss claimed by the assessee in the revenue side was not accepted by the A.O.

9. Against these assessment orders, the assessee has preferred appeals, challenging the disallowance of losses.

10. However, in the appeal filed before learned first appellate authority for the assessment year under dispute, the assessee raised an additional ground claiming that in case the department takes a stand that loss on account of fluctuation in foreign exchange

rate is in the capital side, the gain on similar transaction cannot be treated as 'revenue in nature'. Therefore, the foreign exchange fluctuation gain offered as 'income' in the impugned assessment year should be withdrawn. While considering assessee's aforesaid claim, learned first appellate authority observe that since the assessee has not raised the issue through a revised return of income, it cannot be entertained.

11. Before us, learned counsel appearing for the assessee reiterated the stand taken before learned first appellate authority. Whereas, learned Departmental Representative ('ld. DR' for short) relied upon the observations of learned first appellate authority.

12. Having considered rival submissions, we find, the assessee has consistently followed a Revenue recognition method, under which the gain/loss arising on account of foreign exchange fluctuation has been treated as 'revenue in nature'. Therefore, wherever gain arose, the assessee offered it as 'income' and wherever there was loss, the assessee has claimed the loss. Following such revenue recognition principle, the assessee has offered the gain as 'income' in the impugned assessment year. Therefore, in our view, since the offer of gain as income is consistent with the accounting principle regularly followed by the assessee, claim of withdrawal of such income cannot be accepted. If assessee's claim of foreign exchange fluctuation loss has not been accepted by the Revenue in some other assessment years, the issue has to be thrashed out in those assessment years and not here. However, we must observe, rule of consistency applies not only to the assessee, but also to the Revenue. In case, the gain derived is treated to be in the character of revenue, the loss arising in similar account also has to be treated to be on revenue account. The department has to take a consistent stand on this issue. With the afore-said observations, this ground is dismissed.

12.1 In the result, appeal is dismissed.

ITA No. 6136/Mum/2024 A.Y. 2014-15

13. In ground no. 1, the assessee has challenged the disallowance of deduction claimed towards payment of employee's contribution to PF & ESIC, amounting to Rs.2,78,27,748/-. This issue is identical to the issue raised in ground no. 1 of ITA No. 6135/Mum/2024, decided by us in the earlier part of the order. The decision taken therein would apply *mutatis mutandis* to this ground as well. Accordingly, ground is dismissed.

14. In ground nos. 2 to 8,the assessee has challenged the disallowance of additional claim of deduction, amounting to Rs.41,26,12,905/-.

15. Briefly, the facts are, for the assessment year under dispute, the assessee filed its return of income on 28.11.2015, declaring income of Rs.31,65,40,940/-. In course of assessment proceeding, the assessee, through submissions made on different dates, made additional claims of deduction, the details of which are as under:

Sr. no.	***Nature of claims***	***Amount***	***Claimed vide submission dated***
1	*Reversal of excess provision for doubtful debts*	*24,88,40,105*	*17.12.2017*
2	*Inadvertent double disallowance of provision for liquidated damages*	*1,15,45,958*	*14.12.2017*
3	*Inadvertent disallowance of capital expenditure under section 40(a)(i) of the Act*	*3,09,15,140*	*11.12.2017*
4	*Deduction in respect of payments to Diebold Financial Equipment, China ('Diebold China') which was disallowed in the proceeding AY for management shared support services under section 40(a)(i) of the Act*	*8,86,24,632*	*11.12.2017*
5	*Inadvertent Disallowance of payments to Diebold China for management shared support services under section 40(a)(i) of the Act.*	*3,26,87,070*	*11.12.2017*
	Total amount of Additional claims	*41,26,12,905*	

14. The A.O., however, did not entertain assessee's claim, stating that such claim has not been made through a revised return of income. In this context, he relied upon the

decision of the Hon'ble Supreme Court in case of *Goetze (India) Ltd. vs. CIT* [2006-TIOL-198-SC-IT). In the first appellate proceedings also, learned first appellate authority endorsed the view of the A.O.

15. We have considered rival submissions and perused the materials on record. It is the say of the assessee that in the return of income, the assessee has inadvertently not claimed certain deduction which were required to be claimed. It is submitted, unless assessee's claim is allowed it will amount to double disallowance. It is observed, the additional claim made by the assessee has been rejected only on the ground that such claim was not made through a revised return of income. In our considered opinion, the restriction imposed on the A.O. in entertaining an additional claim not made through revised return of income, does not apply to the appellate authorities. Therefore, learned first appellate authority should have examine the additional claim made by the assessee. Since, we have held that the assessee can make additional claim, which was not made in the return of income, assessee's claim has to be verified factually by looking into the relevant facts and evidences. Such examination having not taken place before the Departmental Authorities, we are inclined to restore the issue to the A.O. for fresh adjudication after providing reasonable opportunity of being heard to assessee. These grounds are allowed for statistical purpose.

16. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 28.01.2025

Sd/-	Sd/-
(Girish Agrawal) Accountant Member	(Saktijit Dey) Vice President

Mumbai; Dated : 28.01.2025
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai