

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

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)  
AND  
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)**

**I.T.A. Nos.1677 & 1678/Mum/2023  
(Assessment years 2017-18 & 2018-19)**

Krystal Integrated Services Pvt Ltd Krystal House, Duncan Causeway Road, Sion, Mumbai-400 022 <b>PAN : AABCK5816C</b>	vs	DCIT, CPC Bangalore National Faceless Assessment Centre, Delhi
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee represented by	Shri Krunal Gaglani, CA
Department represented by	Shri Prakash Kishinchandani (SR. AR.)

Date of hearing	09-08-2023
Date of pronouncement	18-08-2023

**ORDER**

**PER : MS PADMAVATHY S. (AM)**

These two appeals are filed by the assessee against the orders of Commissioner of Income-tax (Appeals) (National Faceless Appeal Centre (NFAC)[in short, the Ld.CIT(A)] dated 15/03/2023 for assessment years 2017-18 & 2018-19. Since the issue contended in both the appeals are similar, there were heard together and disposed of through this common order.

2. The only issue common to both the appeals contended by the assessee pertain to disallowance towards delayed remittance of employees' contribution by the assessee

under ESI Act. Assessee's returns for A.Y. 2017-18 & 2018-19 were processed under section 143(1) by the Central Processing Unit at Bengaluru where disallowance is made under section 143(1)(iv) towards delay in remittance of employees' contribution towards ESI amounting to Rs.8,39,53,960/- for A.Y. 2017-18 and Rs.5,18,55,125/- for A.Y. 2018-19. The Ld.CIT(A) confirmed the disallowance for both the assessment years by relying on the decision of the co-ordinate bench of the Tribunal in the case of Deutsche India Pvt Ltd. Aggrieved, the assessee is in appeal before the Tribunal.

3. During the course of hearing, the Ld.AR submitted a detailed written submission, the gist of which is as under :-

**“1.1. Delay in depositing employee contribution is due to genuine reasons:**

1.1.1. Appellant company is engaged in the business of Providing Facility Management Services, Security Agency Services, House Keeping Services and Supply, Installation, Testing and Commissioning Services.

1.1.2. Majority of the clients of the appellant are government entities. The approval and processing of invoices of the appellant by these entities is done as per their internal processes and policies.

1.1.3. There is considerable time lag in recovery of dues from the Government entities, which affects the cash flow position of the appellant. The same is the primary reason for delay in depositing the statutory dues with relevant government authority.

1.1.4. There is no intentional delay on part of the appellant and it is ensured that payments are made as and when the funds are available.

1.1.5. The rationale behind introducing clause (x) to section 2(24) and section 36(1)(va) of the Act was explained in Memorandum to Finance Bill, 1987, relevant extract of which is reproduced hereunder:

***"Measures of penalising employers mis-utilising contributions to the provident fund or any funds set up under the provisions of (lie Employees State Insurance Act, 1948, or any other fund for the welfare of employees -***

*12.1 The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section 4313). The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. "Due date" means the date*

*by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise"*

**[Emphasis Supplied]**

The aforesaid is also referred by Hon'ble Apex Court while passing the decision in case of Checkmate Services (P.) Ltd. vs. CTT (2022) 143 taxmann.com 178 (para no. 35 of the order)

The intention of introducing the aforesaid provisions was to penalize assessee's who retained the employee's contribution and mis-utilized the funds. In the instant case, the reason for delay as mentioned above is due to time lag involved in recover)' of dues from government entities. Permanent disallowance will lead to genuine hardship to the appellant in the instant case, as there was no malafide intention to mis-utilize the funds.

**1.2. Disallowance u/s 36(l)(va) of the Act made via adjustment u/s 143(l)(iv)(a) is not valid:**

1.2.1. CPC Bengaluru disallowed the claim by invoking section 143(l)(iv) of the Act, based on reporting made in tax audit report, which is not valid.

1.2.2. Reliance is placed on following judicial decisions:

- a) PR Packaging Service vs ACIT (ITA No. 2376 / MUM / 2022 (Mumbai Trib. SMC Bench)
- b) Kalpesh Synthetics Pvt. Ltd. vs DCIT 195 1TD 142 (Mum Trib.)

The delay is primarily due to genuine cash flow / liquidity issue with the appellant and there were no intentions of the appellant for retaining the dues and mis-utilize the same. Accordingly appellant prays before your Honor to allow the claim of the Appellant."

4. The Ld.DR, on the other hand, submitted that the issue of disallowance towards delayed remittance of ESI / PF dues are settled by the judgment of Hon'ble Supreme Court in the case of Checkmate Services P Ltd vs CIT Civil Appeal No.2833 of 2016 dated 12/10/2022.

5. We heard the parties & perused the material on record. We find that the issue in question "as to whether the assessee is entitled for deduction towards Employees contribution to provident fund / ESI deposited after due date prescribed under the Act but before the date of filing the return;" has been set at rest by the Hon'ble Supreme Court in case of Checkmate Services P Ltd vs CIT Civil Appeal No.2833 of 2016 dated

12/10/2022 where it is held that assessee is not entitled for claim of deduction qua the amount deposited towards employees contribution on account of provident fund / ESI after due date prescribed under the respective Act. The relevant findings of the Hon'ble Supreme Court are as under:-

*"51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd.; Commissioner of Income-Tax and another v. Sabari Enterprises; Commissioner of Income Tax v. Pamwi Tissues Ltd.; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Atom Extrusions. As noticed previously, Atom Extrusions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.*

*52. When Parliament introduced Section 43 B, what was on the statute book, was only employer's contribution (Section 34(1) (iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(l)(va) and simultaneously inserting the second proviso of Section 43 B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions - especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is*

*received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time - by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1) (iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43 B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessee's liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assesseees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.*

*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 latter 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 43 B.*

*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 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.”*

10. The ld AR submitted that the delay in remittance of statutory dues is due to genuine working capital constraints of the assessee. However we are unable appreciate the same since the fact remains that the assessee has deducted the PF/ESI from the salary paid to the employees and has utilized the amount deducted towards its business purpose i.e. payment of salary to laborers. Accordingly, respectfully following the ratio of the decision rendered by Hon’ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT (supra), we are of the considered view that CIT(A) has rightly decided the issue against the assessee as the employees contribution on account of PF / ESI lying deposited with the employers has to be deposited before the due date prescribed under the respective Act. Accordingly we find no infirmity in the impugned order passed by the CIT(A) and the appeals filed by the assessee is hereby dismissed.

7. In the result, appeals filed by the assessee for A.Ys 2017-18 & 2018-19 are dismissed.

**Order pronounced in the open court on 18/08/2023.**

Sd/-

sd/-

<b>(VIKAS AWASTHY)</b>	<b>(PADMAVATHY S)</b>
<b>JUDICIAL MEMBER</b>	<b>ACCOUNTANT MEMBER</b>

Mumbai, Dt : 18<sup>th</sup> August, 2023

Pavanan

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

**BY ORDER,**

//True Copy//

**Asstt. Registrar / Senior Private Secretary  
ITAT, Mumbai**