

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

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.2842/Mum./2022
(Assessment Year : 2020-21)

Deutsche India Pvt. Ltd.
(Earlier Known as DBOI Global
Service Private Limited)
Block B-4, Level-6, Nirlon Knowledge Park
Western Express Highway, Goregaon (E)
Mumbai 400 063 PAN – AACCD2953L

..... Appellant

v/s

Asstt. Director of Income Tax
Central Processing Centre
Bangaluru 560 500

.....Respondent

Assessee by : Shri Niraj Sheth
Revenue by : Smt. Mahita Nair

Date of Hearing – 04/01/2023

Date of Order – 22/02/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 08/09/2022, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2020-21.

2. In this appeal, the assessee has raised the following grounds:-

"1. The Commissioner of Income-tax (Appeals)- Income Tax Department, National Faceless Appeal Centre (NFAC), Delhi (CIT(A)) erred in upholding the action of The Asst. Director of Income-tax, CPC Bengaluru (hereinafter referred to as 'the AO') in making disallowance for an amount of Rs 6,30,42,740 on account of employees' contribution to Provident Fund, under section 36(1)(va) of the Act without appreciating the facts in the case of the Appellants.

The Appellants pray that the AO be directed to delete the disallowance under section 36(1)(va) of the Act.

2. The CIT(A) erred in holding that the interest chargeable under section 234D of the Act was consequential to the outcome of the appeal, thereby not appreciating the facts in the case of the appellants.

The Appellants pray that the AO be directed to delete the excess interest charged under section 234C of the Act.

The Appellants crave leave to add to, alter, amend, vary, omit or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised."

3. The only grievance of the assessee is against disallowance on account of delayed payment of employee's contribution to provident fund under section 36(1)(va) of the Act.

4. The brief facts of the case as emanating from the record are: The assessee filed its return of income on 10/02/2021, declaring a total income of Rs.459,03,58,100. The said return was processed under section 143(1) of the Act vide intimation dated 26/12/2021, computing the total income of the assessee at Rs.465,34,00,840, after making an addition of Rs.6,30,42,740, on account of delayed payment towards employee's contribution to provident fund under section 36(1)(va) of the Act.

5. The learned CIT(A) vide impugned order dated 08/09/2022 dismissed the appeal filed by the assessee on this issue and held that if the employer fails to deposit the entire amount towards employees' contribution on account of provident fund with concerned department on or before the due date under

the relevant statute, the assessee shall not be entitled for deduction to that extent. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative placed reliance upon the decision of the coordinate bench of the Tribunal in P.R. Packaging Service vs ACIT, in ITA No. 2376/Mum./2022, and submitted that even after the decision of Hon'ble Supreme Court in Checkmate Services (P.) Ltd. vs CIT, [2022] 448 ITR 518 (SC) no disallowance under section 36(1)(va) can be made vide intimation under section 143(1)(a) of the Act.

7. On the contrary, the learned Departmental Representative vehemently relied upon the decision of the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. (supra) and submitted that this issue is no longer *res integra* and has been decided in favour of the Revenue.

8. We have considered the rival submissions and perused the material available on record. In the present case, it is undisputed that the employee's contribution to provident fund was deposited by the assessee after the due date prescribed under the relevant statute but within the due date of filing the income tax return in accordance with section 139(1) of the Act. We find that the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. (supra) held that payment towards employee's contribution to provident fund after the due date prescribed under the relevant statute is not allowable as deduction under section 36(1)(va) of the Act. The relevant findings of the Hon'ble Supreme Court, in the aforesaid decision, are 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 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."

9. We find that, recently, in Nissan Enterprise Ltd. vs DCIT-CPC, in ITA No.3270/Mum/2022, the Tribunal vide order dated 17/02/2023, after considering the aforesaid decision in P.R. Packaging Service (supra) held that pursuant to the decision of the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. (supra), the claim of deduction towards employee's contribution to PF

& ESI made by the taxpayer becomes an incorrect claim warranting prima facie adjustment under section 143(1) of the Act. The relevant findings in the aforesaid decision are as under:-

"3.1. The Id. AR vehemently relied on the decision of the Co-ordinate Bench of this Tribunal in the case of P.R. Packaging Services in ITA No.2376/Mum/2022 dated 07/12/22 (authored by the undersigned) wherein this issue has been decided in favour of the assessee. We find that the said decision was rendered by applying the provisions of Section 143(1)(iv) of the Act. Pursuant to the aforesaid decision of the Hon'ble Supreme Court, the claim of deduction towards employee's contribution to PF & ESI made by the assessee becomes an incorrect claim warranting prima facie adjustment u/s.143(1) of the Act. Hence, the decision relied by the Id. AR would not advance the case of the assessee.

3.2. In view of the aforesaid observations and respectfully following the decision of the Hon'ble Supreme Court referred to supra, the grounds raised by the assessee are hereby dismissed"

10. Therefore, respectfully following the decision of the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. (supra), we find no infirmity in the impugned order passed by the learned CIT(A). As a result, ground No. 1 raised in assessee's appeal is dismissed.

11. The issue arising in ground no.2, pertains to levy of interest under section 234C of the Act, which is consequential in nature. Therefore, ground No. 2 is decided accordingly.

12. In the result, the appeal by the assessee is dismissed.

Order pronounced in the open Court on 22/02/2023

Sd/-
OM PRAKASH KANT
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 22/02/2023

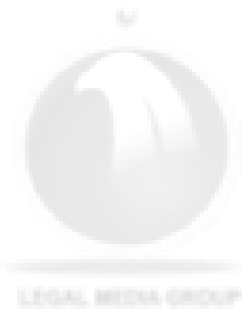
Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE