IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 2ND DAY OF JULY 2018 / 11TH ASHADHA, 1940

I.T.A.No.172 of 2016

AGAINST THE ORDER IN I.T.A.NO.275/COCH/2014 DATED 19-07-2016 OF INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN. [ASSESSMENT YEAR 2008-09]

APPELLANT(S)/ RESPONDENT IN ITA:-

M/S.POPULAR VEHICLES & SERVICES PVT.LTD.,
MAMANGALAM, KOCHI - 682 019
REPRESENTED BY ITS CHIEF MANAGER ACCOUNTS, MR. ANTONY.V.V.

BY ADVS.SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURYAN THOMAS
SRI.RAJA KANNAN

RESPONDENT(S)/ APPELLANT IN ITA:-

THE COMMISSIONER OF INCOME TAX,
C.R. BUILDINGS, I.S. PRESS ROAD,
ERNAKULAM, KOCHI - 682018

BY SRI.P.K.R.MENON, SENIOR COUNSEL, GOVERNMENT OF INDIA (TAXES)
BY SRI.JOSE JOSEPH, STANDING COUNSEL FOR G.O.I. (TAXES)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 02-07-2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:-

APPENDIX

APPELLANT'S ANNEXURES:-

ANNEXURE-A THE TRUE COPY OF THE ASSESSMENT ORDER DATED 06.12.2010 ISSUED UNDER SECTION 143(3) OF THE ACT BTY THE DEPUTY COMMISSIONER OF INCOME TAX, RANGE-4, CIRCLE 4(1), KOCHI FOR THE A.Y.2008-09.

ANNEXURE-B THE TRUE COPY OF THE APPEAL MEMORANDUM (WITHOUT ANNEXURES) DATED 24.12.2010 FILED BEFORE THE COMMISSIONER OF INCOME TAX (APPEALS), CHALLENGING ANNEXURE-A ORDER.

ANNEXURE-C THE TRUE COPY OF THE ORDER DATED 14.01.2014 ISSUED BY THE COMMISSIONER OF INCOME TAX (APPEALS)-II, KOCHI FOR THE A.Y.2008-09.

ANNEXURE-D THE TRUE COPY OF THE APPEAL MEMORANDUM (WITHOUT ANNEXURES) DATED 15.05.2014 FILED BY THE APPELLANT BEFORE THE APPELLATE TRIBUNAL.

ANNEXURE-E THE TRUE COPY OF THE APPEAL MEMORANDUM (WITHOUT ANNEXURES) DATED 13.06.2014 FILED BY THE REVENUE BEFORE THE APPELLATE TRIBUNAL.

ANNEXURE-F THE TRUE COPY OF THE COMMON ORDER DATED 14.08.2014 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH.

ANNEXURE-G THE TRUE COPY OF THE ORDER DATED 11.12.2015 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, IN MISCELLANEOUS PETITION NO.5/COCH/2015 IN ITA NO.275/COCH/2015.

ANNEXURE-H THE TRUE COPY OF THE ORDER DATED 19.07.2016 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, IN I.T.A.NO.275/COCH/2014, RELATING TO THE A.Y.2008-09.

RESPONDENT'S ANNEXURES:-

NIL.

vku/-

[true copy]

K. Vinod Chandran & Ashok Menon, JJ.

I.T.A.No.172 of 2016

Dated, this the 02nd day of July, 2018

JUDGMENT

Vinod Chandran, J:

A Company, the appellant herein, who failed to pay the employees' contribution under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 [for brevity, the EPF & MP Act] and the Employees State Insurance Act, 1948 [for brevity "ESI Act"] before the due date provided under the said enactments, is before this Court claiming deduction in the year 2008-09 for the employees' contribution belatedly paid in the previous year to the assessment year.

2. The issue is covered by a decision of this Court in ***CIT v. Merchem Ltd.*** **[(2015) 378 ITR 443 (Ker.)**. The learned Counsel appearing for the appellant, however, urges that the said decision requires reconsideration.

3. The amounts to be remitted by the employer towards the employees' provident fund and employees' state insurance are the employer's contribution and the employees' contribution. The decision of the Division Bench of this Court noticed ***CIT v. Alom Extrusions Ltd.*** **[(2009) 318 ITR 306 (SC)];** but, however, misread

the principle applied by the Hon'ble Supreme Court, is the argument advanced to compel reconsideration. We find that the Division Bench which admitted the appeal also raised a question as to whether a reconsideration of ***Merchem Ltd.*** was required. The questions of law framed by a Division Bench, on admission, are as follows:

> "(i) Whether the term 'amounts payable' as used in the relevant provision of law does take in employee's contribution as well, or will it stand confined to employer's contribution alone?
>
> (ii) Whether the separate course of action envisaged under Section 36(1)(v)/(va) of the Income Tax Act in respect of the employees' and employers' contribution will get vanished/eclipsed, by virtue of non-obstante clause contained in Section 43B of the Act?
>
> (iii) Whether the effect of deletion of the second proviso to Section 43B in the year 2004 was considered by the Bench in Merchem Ltd.'s case (cited supra) in the context of the questions raised as above and whether the dictum in Merchem Ltd.'s case requires reconsideration?"

4. The learned Counsel for the appellant took us through the provisions to argue that sub-clause (v) of Section 36(1) was applicable only with respect to an approved fund as distinguished from a statutory fund created under the EPF&MP Act or the ESI Act.

What is applicable is sub-clause (va) of Section 36(1), wherein there was an Explanation, enabling the deduction as available in Section 36 only if there was a payment made of the contribution before the “due date”. However, in considering the sustainability of the deduction claimed, one has to look at Section 43B, which has a nominal heading “Certain deductions to be only on actual payment”. Sub-clause (b) of Section 43B specifically takes in the contribution payable by the employer, which includes both the employer's and employee's contribution. There was a proviso introduced by the Amendment Act of 1988, by which any sum referred to in clause (b) would be allowed as a deduction only if it has been actually paid during the previous year on or before the due date as provided in the Explanation below Section 36(1)(va). This was later amended to take in situations in which cash and cheque payments are made; which amendment is not relevant for our consideration. The proviso itself was deleted in 2004 and the question arose before the Hon'ble Supreme Court in ***Alom Extrusions Ltd.*** as to whether the deletion was a curative amendment and hence, would apply to the earlier years also. The Hon'ble Supreme Court has held that the amendment is curative and in such circumstances the deduction

has to be permitted, even for the earlier years, *dehors* the proviso which existed then; subsequently deleted as a curative measure.

5. The Division Bench of this Court in ***Merchem Ltd.*** though noticed the aforesaid decision, held the belated payment of employees' contributions, which was the subject matter of that case, as is the subject here too; will not qualify for deduction. It is, hence, there is a plea raised for reconsideration of the said decision. The learned Counsel would also specifically point to para 16 of ***Alom Extrusions Ltd.***, which speaks of an employer sitting on the collected contributions and depriving the workmen of the rightful benefits under the social welfare legislation, which, according to the Supreme Court, had resulted in the introduction of the proviso; later deleted. This reference can only be to the employee's contribution, is the argument. On such deletion and the Supreme Court holding that the deletion is curative, necessarily the deduction had to be allowed in the year without reference to the “due date”. It is specifically pointed out that Section 43B is a *non-obstante* clause and would have overriding effect and application over the other provisions. Section 30 of EPF&MP Act is also pointed out to argue that whether it be the contribution of the employer or the employee,

it is the liability of the employer and, hence, the employer's and employee's contribution cannot be treated differently insofar as the deductions permissible under Section 36.

6. The learned Senior Counsel for Government of India (Taxes), however, would seek to sustain the orders of the Tribunal in the present case, which has relied on ***Merchem Ltd.***. ***Merchem Ltd.***, according to the learned Senior Counsel, has decided the issue of employee's contribution in the correct perspective while ***Alom Extrusions Ltd.*** considered the deduction permissible of the employer's contribution. The appeal has to be rejected, argues the learned Senior Counsel.

7. We will first notice the provisions.

"S.2(24) "income" includes -

xxx xxx xxx

(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 A(34 of 1948), or any other fund for the welfare of such employees".

"S.36. Other deductions

(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt

with therein, in computing the income referred to in the section 28 -

xxx xxx xxx

(v) any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust;

(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

Explanation.- for the purposes of this clause, “due date” means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise”.

“S.43B. Certain deductions to be only on actual payment

Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of -

xxx xxx xxx

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or

superannuation fund or gratuity fund or any other fund for the welfare of employees".

8. Looking at the provisions we are definite that the Act treats employer's and employee's contribution distinctly. Sub-clause (v) of Section 36(1) speaks of a gratuity fund, wherein the employee does not contribute at all. Section 36(1)(va) speaks of the employee's contribution to a welfare fund for the benefit of employees alone, by virtue of the specific reference to Section 2 (24). Section 2 (24) includes as income, any contribution received by the employer from the employee for the purpose of remittance to a fund created for the welfare of the employees; including *inter alia* a provident fund and that under the ESI Act. When the same is remitted on the due date as prescribed in the statute or order creating such fund, then it is eligible for deduction under Section 36. Section 43B(b) refers to "a sum payable by the assessee as an employer", to an employees welfare fund which is the employer's contribution.

9. We have carefully gone through the decisions of the Hon'ble Supreme Court as also of the Division Bench. The primary question to be considered is whether there should be a

reconsideration of ***Merchem Ltd.***. ***Alom Extrusions Ltd.*** and ***Merchem Ltd.*** applied in two different fields; the former with reference to Section 43B(b), being employer's contribution and the latter dealing with employee's contribution as covered by Section 36(1)(va). We would first deal with ***Alom Extrusions Ltd.,*** which has dilated upon the history of the legislation and the reason for the various amendments brought in. We first notice that the question which arose for consideration in ***Alom Extrusions Ltd.*** was as to *"whether omission (deletion) of the second proviso to section 43B of the Income-tax Act, 1961, by the Finance Act, 2003, operated with effect from April 1, 2004, or whether it operated retrospectively with effect from April 1, 1988" (sic para 4)*. The Hon'ble Supreme Court noticed that prior to Finance Act, 2003, the second proviso to Section 43B restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date.

10. Here we have to notice that sub-clause (b) of Section 43B speaks of sum payable by the employer which is the 'employer's contribution', payable by the employer without deduction

from the salary of the employee. Employees contribution though remitted to the fund by the employer, it is deducted from the employees salary, which deduction is statutorily enabled. Deduction from the salary of the employee, of course, is the liability of the employer and so is the remittance to the fund but it does not change the essential nature of the contribution; which is of the employee. A contribution deducted from the employee's salary and paid by the employer cannot, for a moment, be termed as the employer's contribution. There is a clear distinction insofar as the contributions payable under the EPF&MP Act as also the ESI Act. The employer's contribution has to be paid by the employer himself and there is possible no deduction from the salary of the employee, whereas with respect to the employee's contribution, it has to be deducted from the salary of the employee and paid to the relevant fund.

11. The Supreme Court in ***Alom Extrusions Ltd.***, as was noticed, was specifically considering the issue with respect to the employer's contribution. The Hon'ble Supreme Court noticed that prior to 1983 even a book entry made with respect to an assessee following the mercantile system of accounting, making a

provision for the payment of contributions towards EPF and ESI could be claimed as a deduction. By introduction of Section 43B in the Finance Act, 1983, the object was to *"disallow deductions claimed merely by making a book entry based on the mercantile system of accounting" (sic - para 16).* Section 43B made it mandatory for the department to grant deduction in computing the income under Section 28 in the year in which the tax, duty, cess, etc. were paid. However, the due dates under the various enactments, ie; the welfare and tax legislation would not have the due date before the date of filing of return as provided in the Income Tax Act. On account of this the first proviso was introduced to grant a relief by way of deduction insofar as the tax, duties, cess or fee paid before the filing of the return under the IT Act though after the previous year; the liabilities having accrued in that previous year. This relaxation, however, was restricted to tax, duties, cess and fee and not applied to contributions to labour welfare funds. The reason also stated by the Hon'ble Supreme Court "*to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare*

funds" (*sic* - para 16). It is this declaration by the Hon'ble Supreme Court which is relied on by the learned Counsel for the appellant to contend that the Hon'ble Supreme Court was considering the question of employee's contribution also. Otherwise, there would not have been a reference to an *'employer sitting on the collected contribution'*, is the compelling argument.

12. We have to understand this statement with reference to the question framed by the Hon'ble Supreme Court at the first instance in the opening paragraph of the judgment. We also have to notice that even otherwise the Explanation to sub-clause (va) of Section 36(1) took care of the employee's contributions; which was introduced by the Finance Act, 1987 with effect from 01.04.1988, from which date the statute recognised the distinction between employee's and employer's contribution. In this context we have to necessarily dwell upon the various amendments over the years and look at the sequence in which they were brought in. Only on introduction of Section 43B with effect from 01.04.1984, there was an insistence that there should be actual payment of amounts claimed as deductions, enumerated under the provision. Section 43B (b) spoke of sum payable by the employer by way of

contribution to a welfare fund. At that point it could be understood that the sub-clause took in both employee's and employer's contribution. The legislature then took note of the circumstance that many claim the deduction on the ground of maintaining accounts on mercantile or accrual basis and fail to discharge the liability. Hence by Finance Act 1987, clause (x) under Section 2 (24) , sub-clause (va) of Section 36 (1) and the 2nd proviso to Section 43B were brought in. From that date the statute treats the employee's and employer's contribution differently.

13. Otherwise there was no requirement for bringing in a sub-clause under the definition clause of 'income' including the employee's contribution received by the employer and providing a deduction by sub-clause (va) and permitting the deduction only if that contribution is paid in accordance with the statute, which created the fund. The 2nd proviso to Section 43B then underwent a cosmetic change and later was deleted. There was also a new proviso added under Section 43B for permitting deduction on contributions paid before the returns are filed. This took in only the employer's contribution especially since Section 2(24) and sub-clause (va) were retained. The employee's contributions, as

Merchem Ltd. noticed, stands on a different footing, since it is collected from the employee as a deduction in their salary itself. This would in effect be income of the assessee, as has been specifically indicated in the definition of “income” under Section 2(24)(x), which provision was introduced w.e.f 01.04.1988 as per Finance Act, 1987.

14. We are of the opinion that the question with respect to employee's contribution is regulated by clause (x) of Section 2(24) and sub-clause (va) of Section 36(1) and would not be affected by Section 43B. Section 43B though a *non-obstante* clause, makes deductions to be allowable only on actual payment; when such deductions are otherwise allowable. Primarily it is to be noticed that it is a restrictive clause, the amendments to which or the deletion of a proviso in which cannot lead to it being converted as an enabling provision permitting deduction even when there was no deduction permissible by the other provisions of the Act. The *non-obstante* clause has no effect insofar as the employee's contribution which is specifically covered by sub-clause (va) of Section 36(1). By virtue of the Explanation below sub-clause (va), no deduction could be claimed if the contribution has not been paid,

after collection from the employees by way of deduction from their salaries, within the due date under the EPF&MP Act. The deletion of a proviso under Section 43B cannot render otiose the Explanation under Section 36(1)(va).

15. ***Merchem Ltd.***, we notice, dealt with the specific question of disallowance of employee's contribution when the same was not paid within the time provided under the statute under which the welfare fund was created and held so in paragraph 19:

> "19. Therefore, income of the assessee includes any sum received by the assessee from his employee as contribution to any Provident Fund or superannuation fund or funds set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948) or any other fund for the welfare of such employees. According to us, on a reading of Sec. 36(1)(va) along with Sec. 2(24)(x), it is categoric and clear that the contribution received by the assessee from the employee alone was treated as income for the purpose of Sec. 36(1)(va) of the Act and therefore we are of the considered opinion that the assessee was entitled to get deduction for the sum received by the assessee from his employees towards contribution to the fund or funds so mentioned only if, the said amount was credited by the assessee on or before the due date to the employees

account in the relevant fund as provided under Explanation 1 to Sec.36(1)(va) of the Act. According to us, so far as Sec. 43B(b) is concerned, it takes care of only the contribution payable by the employer/assessee to the respective fund. Therefore, in that circumstances, Sec. 36(1)(va) and Sec. 43B(b) operate in different fields i.e. the former takes care of employee's contribution and the latter employer's contribution. The assessee was entitled to get the benefit of deduction under Sec. 43B(b) as provided under the proviso thereto only with regard to the portion of the amount paid by the employer to the contributory fund. Such an understanding of Sec. 43B is further exemplified by the phraseology used in the proviso, which reads thus:

> "Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under Sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."

Further, in Explanation 1 to Sec. 43B also, the phraseology used persuade us to think that Sec. 43B can be applied to the contribution payable by the assessee as an employer, which reads thus:

> “For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed

> in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983 or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him."

Therefore, according to us, since the Respondent has admittedly not paid the deduction so made within the due date as provided under Sec. 36(1)(va), the Respondent was not entitled to get deduction of the amounts deducted thereunder for and on behalf of the employees".

16. The learned Judges had elaborately considered the decision in ***Alom Extrusions Ltd.*** and has found the provisions having application in different fields. Section 43B(b) dealt with the employer's contribution and sub-clause (va) of Section 36(1) was concerned with the employees contribution as rightly held. We do not find ourselves persuaded to take a different view with respect to employee's contribution and we respectfully follow the decision of the Division Bench of this Court in ***Merchem Ltd.***. We, hence, answer the substantial question of law raised with respect to reconsideration of ***Merchem Ltd.*** in the negative, against the assessee and in favour of the Revenue.

17. The other question of law framed refer to the 'amounts payable', the reference obviously is to *"any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other funds for the welfare of employees"* as found in sub-clause (b) of Section 43B, which refers only to the employer's contribution and not the employee's contribution. Employee's contribution, as has been already held by us, is covered by clause (va) of Section 36(1) and the deduction is restricted by the Explanation below it. With respect to employer's contribution, the deduction is allowable only on actual payment, as per Section 43B restricted only by the proviso as is now available in the Act, which requires payment before the filing of return. Any sum paid as employer's contribution, which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income, under sub-section (1) of Section 139, then the same would be enabled deduction. Hence, in the present case if the employer's contribution under the EPF or ESI for the financial year 2007-08 is paid after the said year but before the date of filing of the return for that year, then

necessarily it would be allowable as a deduction in the assessment year, *de hors* the fact that it was paid in the subsequent year.

18. Sub-clause (va) of Section 36(1) takes care of the employee's contribution, which stands unaffected by Section 43B as the restriction available in Section 43B is already available under the Explanation to the said clause, with a qualification of the payment being before the due date, as stipulated by the statute or order creating the fund. We would also observe that, as the Hon'ble Supreme Court noticed, the legislature took a different approach with respect to the contributions deducted from the salary of the employees which had to be paid to the welfare fund within the due date; as provided under the statute which created the welfare fund. The contributions which are deducted at the time of payment of salary is received by the employer-Company and is treated as income under Section 2(24). On remittance of this contribution, within the due date, it is allowed as a deduction under Section 36. If it is not paid to the welfare fund within the due date provided under the relevant statute, it remains as an income in the books of accounts of the assessee/employer Company. The said contribution having not been paid to the applicable welfare fund within the due

date provided, the assessee for all time is deprived of claiming such a remittance, made subsequently, as deduction from the income. This, as the Hon'ble Supreme Court noticed, is looking at the spirit behind the labour welfare legislation and the need for the employer to satisfy the remittance within the time provided under the statute creating the welfare fund. At least with respect to the employee's contributions, which the employer deducts from the salary of the employees, if it is not remitted into the fund within the due date, the employer not only has defaulted the stipulation in the labour legislation but has received an income; *albeit* an illegal enrichment. Sub-section (v) is with respect to and confined to a gratuity fund and does not have any relevance here. We, hence, answer the other questions of law framed, also against the assessee and in favour of the Revenue.

We dismiss the appeal, leaving the parties to suffer their respective costs.

Sd/-
K.Vinod Chandran
Judge

Sd/-
Ashok Menon
Judge

vku/-

[true copy]