IN THE INCOME TAX APPELLATE TRIBUNAL, JABALPUR BENCH, JABALPUR (SMC)
(through Video Conferencing)

BEFORE SH. SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER

ITA No. 37 & 38/Jab/2021
Assessment Years : 2018-19 & 2019-20

Nikhil Mohine, Ward No. 11, 128,Gandhi Ward, Parasia, Chhindwara, Chhindwara (M.P.)-480441 [PAN: AUMPM9207F]	vs.	Deputy Commissioner of Income Tax, CPC, Income Tax Department, Bengaluru, Karnataka -560500
(Appellant)		(Respondent)

Appellant by	Smt. Jancy Biju , Advocate
Respondent by	Sh. S.K.Halder, Sr. DR
Date of hearing	26/10/2021
Date of pronouncement	18/11/2021

ORDER

Per Sanjay Arora, AM

This is a set of two Appeals by the Assessee, i.e., for two consecutive years, being assessment years 2018-19 & 2019-20, agitating the dismissal of his appeals before the National Faceless Appeal Centre, New Delhi ('NFAC' or 'first appellate authority' for short) dated 22/8/2019 and 10/4/2020 for the two successive years respectively.

The respective cases

2.1 The only issue arising in these appeals is the disallowance in respect of the employees' contribution to the employees' provident fund and the employees' state insurance fund, on account of the same having been deposited (by the assessee-employer) beyond the due dates for the deposit thereof under the

relevant statute. The assessee's case is that the same has been nevertheless deposited before the due date of filing the return of income u/s. 139(1) for the relevant year/s and, in fact, along with interest for the delayed deposit, i.e., under the relevant statute. The Hon'ble Karnatka High Court has in *Essae Teraoka P. Ltd. vs. Dy. CIT* [2014] 366 ITR 408 (Kar) clarified that the word 'contribution', as defined u/s. 2(c) of the Employee's Provident Fund Act, 1952, includes both the employees' and the employers' contribution. The amount, even as noted by the Hon'ble Court, is in fact deposited in the first instance by the employer and, further, vide the same challan. *How could the same be therefore, it was posited, treated differently*? The Revenue invokes *Explanation-5* to sec. 43B to make the adjustment to the returned income/s for the relevant years, which though came on the statute book only w.e.f. 1.4.2021. How could the same thus have an application for the years under reference, being AYs. 2018-19 and 2019-20.

2.2 The Revenue's case, relying on the impugned order/s, is that the disallowance/s has been effected u/s. 36(1)(va) – which defines the 'due date', by which date the sum specified thereunder is to be paid to qualify for deduction thereunder, as the date prescribed for payment under the relevant statute, – and not u/s. 43B, which is being employed by the assessee to advance his case of the payment having been made by the due date of filing the return of income u/s. 139(1). Section 36(1)(va) makes a clear reference to the employee's contribution, *being the sums received therefrom by the assessee as an employer for deposit, on employee's behalf*, with the relevant fund. Section 43B, in contradistinction, concerns the employer's contribution, i.e., that contributed by him to the relevant fund, which is in addition to the employee's contribution. It is only this contribution that is the subject matter of and governed by sec. 43B. The *Explanations* to ss. 36(1)(va) and 43B, though inserted by Finance Act, 2021, w.e.f. 01/4/2021, are, clearly, declaratory in character, even as expressed therein and, thus, retrospective.

3. I have heard the parties, and perused the material on record.

The scope of the controversy

4.1 My first observation in the matter is that the adjustment to the returned income stands made u/s. 143(1) (for AY 2019-20) and u/s. 154 (for AY 2018-19). The scope of an adjustment under these two sections is very limited, excluding any contentious or debatable issue, i.e., on which there could conceivably be two points of view (*ITO v. Volkart Brothers v. ITO* [1971] 82 ITR 50 (SC)). Clearly, therefore, the merits of the case of the opposing sides aside, the Revenue's case can survive only where the *Explanations* to section 36(1)(va) and 43B, inserted simultaneously by Finance Act, 2021, remove the allowance (or otherwise) of the impugned sums outside the realm of controversy, which has in fact attended it for long, with there being decisions by the Hon'ble High Courts on either side. In other words, what would clinch and be determinative of the matter is the scope of *Explanation-2* to sec. 36(1)(va) and *Explanation-5* to s. 43B, inserted on the statute book by Finance Act, 2021, w.e.f. 1.4.2021. It would though be relevant to state here that an amendment being inserted with effect from a particular date would not by itself be conclusive of it being not retrospective, so that it would not apply to periods anterior to that date (*CWT v. B.R. Theatres & Indl. Concerns P. Ltd*. [2005] 272 ITR 177 (Mad)). The test to be applied for deciding as to whether a later amendment should be given a retrospective effect, despite the legislative declaration specifying a prospective date as the date from which the amendment is to come into force, it was explained therein, is as to whether without the aid of the subsequent amendment the unamended provision is capable of being so construed as to take within its ambit the subsequent amendment. There is case law galore on the amendments, despite being apparently prospective, having been held as retrospective in nature, with some under the Act being as follows: *CIT v. Calcutta Export Co. Ltd*. [2012] 404 ITR 654 (SC); *CIT v. Vatika Township (P.) Ltd*. [2014] 367 ITR 466 (SC); *CIT v. Alom Extrusions Ltd*. [2009] 319 ITR 306 (SC); *Allied Motors (P.) Ltd. v.*

CIT [1997] 224 ITR 677 (SC); and *Bagri Impex (P.) Ltd. v. Asst. CIT* [2013] 214 Taxman 305 (Cal), with the latter two by the Apex Court being in the context of s. 43B itself.

The *Explanations*

4.2 The *Explanations* under reference read as under:

Explanation 2.— For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;

(to section 36(1)(va), renumbering the existing *Explanation* thereto as *Explanation* 1)

Explanation 5.— For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies. (to section 43B, after Explanation 4 thereto)

The same are unambiguously worded. They clarify, with a view to remove any doubt in the matter, that s. 36(1)(va) and s. 43B operate in different fields. While that to the former clarifies the 'due date' u/s. 36(1)(va) to be that under the relevant statute, i.e., under which the deposit of the contributions is to be made, that to the latter is *qua* the sum received by the assessee from any of his employees to which the provision of s.2(24)(x) apply, excluding thus the employers' contribution to these funds. *This, again, is not in doubt or dispute, but, as afore-noted, as to whether the same, as their clear language states, do indeed clarify the law as it always stood*? That is, are the said *Explanations* essentially and intrinsically explanatory or clarificatory in nature, so as to be given a retrospective effect. It would, therefore, be necessary to discern and appreciate the true meaning and scope thereof, toward which it would be appropriate to read the relevant provisions of the Act as well as traverse their legislative history.

The law

4.3 The relevant provisions read as under:

Definitions.

2. In this Act, unless the context otherwise requires,—

(24) "income" includes—

(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 (34 of 1948) or any other fund for the welfare of such employees;

Other deductions.

36. (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 section 28—

(i) …..(v)

(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;

Certain deductions to be only on actual payment.

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or

(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,

(c) to (f) ….

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him:

The following *provisos* were inserted w.e.f. 01/4/1988:

Provided that nothing contained in this section shall apply in relation to any sum referred to in cl. (a) or cl. (c) or cl. (d) or cl. (e) or cl. (f), 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 s. 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:

Provided further that no deduction shall, in respect of any sum referred to in cl. (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below cl. (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realized within fifteen days from the due date.

By Finance Act, 2003, w.e.f. 01/4/2004, the second *proviso* to sec. 43B of the Act was deleted and the first *proviso* amended to read as under:

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. (emphasis, supplied)

It is clear that the Act provides separately for the employee's and employer's contribution to the employee welfare funds; the former being required by law to be deducted by the assessee-employer from the salary of the employee (and before its payment thereto), and deposited, along with an equal contribution by him, to the relevant fund by the due date as defined there-under. The two components, i.e., the employees' and employers' contribution, referred to in s. 2(24)(x) and s. 43B respectively, are thus different even as they may be required to be deposited together and, accordingly, per the same challan, separately mentioning the amount under each, i.e., to the employee's account in the relevant fund. *It is permissible in law, even as apparent from the reading of the foregoing provisions, to provide for the two, bearing in fact different characters, separately*. The employee's contribution is a part of his salary, *qua* which deduction, on gross basis, i.e., without any deduction, is exigible in arriving at the business profit (of the employer) on becoming due for payment, and irrespective of its actual payment to the employee (which would only be at net of any deduction/s therefrom), i.e., where the accounts of such business are kept on mercantile basis. The employee welfare legislations, however, provide that a part of it be deducted by the employer and credited to the employee's account,

required to be statutorily maintained, with the relevant fund. It is this deduction, statutorily mandated, as a contribution by the employee, which thus represents money held under trust by the assessee-employer (for and on behalf of the employee) for being so deposited, which is regarded, i.e., by the legal fiction of s.2(24)(x), as the employer's income. *How could the same, being thus received, actually or constructively, by the employer from the employee and, therefore, regarded as his income u/s. 2(24)(x), be regarded as the employer's contribution to the employee welfare fund*? The same could, by definition, only be that contributed by him, as an employer, to the employee's account in the fund. The employee's contribution is regarded as the employer's income upon being received by way of deduction from the employee's salary, which the employer is contractually obliged to pay – so that the employer retains it in a fiduciary capacity, only due to the legal fiction of sec. 2(24)(x), which is therefore to be read strictly, albeit contextually, in light of the object sought to be achieved and, further, along with the other provisions of the statute (*Ishikawajima-Harima Heavy Industries Ltd. v. DIT* [2007] 288 ITR 408 (SC)). A deduction in computing business profit u/s. 28 in its respect is correspondingly provided for u/s. 36(1)(va) on payment by the due date for its deposit with the relevant fund. This was done, as explained in the relevant Finance Bill, to penalize the employers who retained the employee's monies, received thus. The employer's contribution to the relevant fund, on the other hand, is that which the assessee, as an employer, is required to contribute and deposit therewith, as explained hereinbefore, i.e., over and above the employees' salary, in equal sum (or even otherwise), and which is deductible u/s. 37(1). Section 43B, however, introduces a disability, so that the statutory payments specified therein, including the employer's contribution to the employee welfare funds (under clause (b) thereof), would, despite being otherwise allowable and irrespective of the assessee's method of accounting, be deductible in computing his income u/s. 28 only on actual payment. If the assessee-employer – as argued in *Essae Teraoka P. Ltd.*

(supra), is to pay the employee's contribution (to the employee welfare fund) in the first instance, so as to be regarded as a contribution by the employer, covered u/s. 43B, there is no question of its deduction, as the same is liable to be recouped by the assessee from the employee by way of deduction from his salary. *That is, the same cannot, by definition, be regarded as an expense and, further, would be liable to be regarded as so only where the same is not recoverable from the employee*. In law, it is only on it being received from the employee, i.e., as and when it is, that the same is liable to be regarded as the assessee-employer's income u/s. 2(24)(x), and upon satisfaction of the condition of sec. 36(1)(va), entitled to a deduction in its respect in the computation of the business income of the assessee-employer u/s. 28. Further, the deposit of the two contributions to the account of the employee in the relevant fund together is clearly a procedural aspect of the matter and, consequently, of little moment.

Discussion

5.1 A timing difference, with a view to enforce financial discipline in discharge of their statutory dues by businesses, stands thus introduced by s. 43B, coopted on the statute by Finance Act, 1983, w.e.f. 01/4/1984. Where the date of actual payment falls in a subsequent year, the deduction gets postponed to the said year. By Finance Act, 1987, a relaxation was introduced w.e.f. 01/4/1988, so that a payment by the due date of filing the return of income u/s.139(1) for the relevant year would not attract postponement and, thus, disallowance. The same was held retrospective by the Apex Court in *Allied Motors (P.) Ltd*. (supra). Vide the second *proviso* to sec.43B, the sums specified in clause (b) were treated differently from others specified in s.43B (vide other clauses thereof) inasmuch as these would be entitled to deduction only on the credit to the employee's account with the relevant fund by the due date defined under the relevant statute, as specified u/s. 36(1)(va); both the employee and employer contribution being required by law to be paid together in discharge of his obligations as an employer. This *proviso* continued unaltered, and it is only the sums specified in

the first *proviso* to s.43B that were governed by the principle of deduction on actual payment, the premise of sec. 43B, and to which, therefore, the relaxation by way of payment by the due date of the filing the return of income for the relevant year, by the Finance Act, 1987, applied. This, however, was not without its concomitant issues. A delayed payment by the employer (of his contribution) thus attracted an absolute bar for deduction. *Further still, how could a provision mandated to provide for a timing difference introduce such a bar, exceeding its purview*? The second *proviso* was accordingly deleted by Finance Act, 2003 w.e.f. 01/4/2004, and the first *proviso* amended, providing a uniform treatment for all the sums covered u/s. 43B. *All this was noted and explained by the Apex Court in Alom Extrusions Ltd.* (supra). However, due to the issues afore-stated, which were thereby sought to be addressed, the amendments to s. 43B were held by it as retrospective, i.e., since 01/4/1988, the inception of the *provisos*. This, despite the provision having been on the statute book since 1988, carving out a separate treatment, i.e., vis-à-vis the sums specified under other clauses of s. 43B, thereby conveying the legislative intent, manifest in its clear and unambiguous language. That is, to keep the employer's contribution to the employee welfare funds on the same footing as the employee's contribution thereto, governed by s. 36(1)(va), so that deduction in its respect would be available only on the payment by the due date for the deposit of the same under the relevant fund, as against restricting the deduction on actual payment – which is the clear mandate of s. 43B, for the other sums specified therein, subject of course to the payment by the due date of filing of return of income for the year in which the liability stands incurred. *Sec. 36(1)(va) continues on the statute book in the same form, i.e., without any amendment*. There was, thus, i.e., by Finance Act, 2003, a clear departure in the treatment of the two contributions legislatively, dated back judicially to the inception of the *proviso*. Another aspect to be noted here is that sec. 36(1)(va), which represents a primary condition for deduction, i.e., for sums covered thereby, itself provides for the condition of payment for deduction, and

one that is more stringent than that provided by s. 43B. Even arguing the employees' contribution to be covered by s. 43B would thus be to no consequence. What is lost sight of while opining thus, as have several decisions by the Hon'ble High Courts, i.e., post the amendment to s. 43B by Finance Act, 2003, is that s. 43B, in contradistinction to s. 36(1)(va), is not a deduction, but a disabling, provision, introducing a timing effect. It comes into play, in respect of the sums specified therein, only where the same are *otherwise allowable*, i.e., under some other provision of the Act. Section 43B introduces an additional condition of actual payment, extending it up to the due date of filing the return u/s. 139(1) for the relevant year, i.e., in which the liability for the same is incurred, for its allowability. The same shall operate to disable absolutely only where there is no payment, as where the same is disputed, and which would be in consonance with the law as explained by the Apex Court in *Chowringhee Sales Bureau P. Ltd.* [1973] 87 ITR 542 (SC) and, following it, in *Sinclair Murray & Co. P. Ltd. v. CIT* [1974] 97 ITR 615 (SC). Continuing further, the employees' contribution would thus require being allowable u/s. 36(1)(va) before the condition of s. 43B can be further applied thereto. Inasmuch as sec. 36(1)(va) itself provides for the condition of actual payment and, further, one which is more stringent than sec. 43B, the argument is of, as afore-stated, no consequence; rather, a non-starter. The foregoing is of course without detracting from the fact of the clear provisions of law, which provide separately for the employee and employer part of the contribution to be credited to the account of the employee with the relevant welfare fund under the relevant welfare legislation, so that there is nothing in the clear and unambiguous language thereof to suggest of the two being at par, i.e., insofar as their deductibility under the Act in the computation of the income u/s. 28 is concerned. Suggesting so therefore implies a complete disregard of the clear provisions of law. It is this difference, which continues to obtain to date in view of no amendment to s. 36(1)(va), that the newly inserted *Explanations* to ss. 36(1)(va) and 43B emphasize, seeking to, even as clarified

therein, explain the law as it stands; rather, as it always stood. In fact, that sec. 43B(b) governed only the employer's contribution, deduction *qua* which is entitled only on payment by the due date u/s. 36(1)(va), which was later extended to the due date of filing the return u/s.139(1), was the uniform view of the different High Courts. Delineating a separate date (for payment) for sums specified under cl. (b) of s. 43B, per a separate (second) *proviso* thereto, eliminated any scope for any doubt in the matter. *How could, one wonders, in view of such clear enunciation of law across different High Courts (see para 5.3), the employee contribution be regarded as subject to deduction u/s. 37(1) r/w s. 43B and, thus, deductible where paid by the due date of filing the return u/s. 139(1)*? No doubt, the Hon'ble Court in *Hitech (India)* (infra) regarded the employee's contribution to the employee fund, being a part of the employer's obligation for deposit, as also covered u/s. 43B(b), but, as explained hereinbefore, the same cannot be regarded as an expense – for it to be claimed as a deduction, unless the sum contributed by the employee is first received by the assessee and, accordingly, regarded as his deemed income u/s. 2(24)(x), necessitating it being deductible u/s. 36(1)(va) before the *non obstante* clause of s. 43B could be further applied thereto.

5.2 The function of the Courts is to interpret the law as legislated, giving a fair look and reading to the provision, i.e., the literal rule of interpretation, where the language is clear and unambiguous, referred to as the golden rule of interpretation (*CIT v. Calcutta Knitwears* [2014] 362 ITR 673 (SC)). The law is an edict of the legislature, with the duty of the courts being to discern the legislative intent, which is to be the foundational basis of all interpretative exercise (*Padmasundara Rao (Decd) v. State of Tamil Nadu* [2002] 255 ITR 147 (SC); *CIT v. Baby Marine Exports* [2007] 290 ITR 323 (SC); *Britannia Industries Ltd. v. CIT* [2005] 278 ITR 546 (SC)). If not in the language in which the law is couched, where is the legislative intent to be found, so that where the

law is clear, as it indeed is in the instant case, no other rule of interpretation is required (*Ajmera Housing Corporation v. CIT* [2010] 326 ITR 642 (SC); *CIT v. Tara Agencies* [2007] 292 ITR 444 (SC)). Not so doing would be to usurp the legislative function by the courts which is impermissible. The following extract from *Padmasundara Rao (Decd)* (supra), even as the case law in the matter is legion, as a reference to the afore-stated decisions by the Apex Court would reveal, would be instructive in the matter:

The rival pleas regarding rewriting of statute and *casus omissus* need careful consideration. It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them" [see *Lenigh Valley Coal Co. vs. Yensavage* 218 FR 547]. The view was reiterated in *Union of India vs. Filip Tiago de Gama of Vedem Vasco de Gama* AIR 1990 SC 981.

In *Dr. R. Venkatachalam & Ors. etc. vs. Dy. Transport Commissioner*, AIR 1977 SC 842, it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary [See *Rishabh Agro Industries Ltd. vs. P.N.B. Capital Services Ltd.* (2000) 5 SCC 515]. The legislative *casus omissus* cannot be supplied by judicial interpretative process. The language of s. 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in *Narasimhaiah's* case (supra). In *Nanjudaiah's* case (supra), the period was further stretched to have the time period run from the date of service of the High Court's order. Such a view cannot be reconciled with the language of s. 6(1). If the view is accepted it would mean that a case can be covered by not only cls. (i) and/or (ii) of the *proviso* to s. 6(1), but also by a non-prescribed period. The same can never be the legislative intent.

Two principles of construction—one relating to *casus omissus* and the other in regard to reading the statute as a whole—appear to be well settled. Under the first principle a *casus omissus* cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a *casus omissus* should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a

particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. "An intention to produce an unreasonable result", said Danckwerts L.J. in *Artemiou vs. Procopiou* [1966] 1 QB 878 "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction [per Lord Reid in *Luke vs. IRC* [1963] AC 557 where at p. 577, he also observed: "this is not a new problem, though our standard of drafting is such that it rarely emerges". (pgs. 154-155)

Coming back to the interpretation of the employee's contribution, being the sum contributed by him to his fund (through the agency of his employer by first receiving it), as governed by s. 43B(b), surely there is no case of a manifestly absurd or anomalous result, much less one which could not have been intended by the Legislature, so as to do any violence to the words. Rather, as pointed out, even so, sec. 36(1)(va) would prevail to eschew any deduction in its respect where not paid by the due date specified under the relevant statute. No case of a *causus omissus*, even otherwise not lightly inferred, is also made out. Hardship, it is well-settled, cannot by itself be a ground for reading down a clear provision, even as in the instant case it would contradict the avowed object of a timely fulfillment of the statutory obligations *qua* the labor welfare legislations by the assessee-employers. There is in fact no case of hardship; the money to be paid being of the employee, held under trust by the employer, who thus acts in respect of those monies in a fiduciary capacity. This also explains the differential treatment of the two contributions, or its continuation, even as explained time and again in the Board Circulars. It is this continuation that the amendments (by way of the *Explanations* under reference), as afore-stated, that is sought to be statutorily emphasized. The taxing statutes are to be strictly construed (see: *UOI vs. Bombay Elphinstone Spinning & Weaving Co. Ltd. & Ors*. 2001(1) SC 536; *Orissa State Warehousing Corpn. vs. CIT* [1999] 237 ITR 589 (SC); *Novapan India Ltd. v. CCE* 1994 (73) ELT 769 (SC); *IPCA Laboratory Ltd. v. Dy. CIT* [2004] 266 ITR 521 (SC)). As such, even *qua* the employer's contribution,

covered u/s. 43B(b), there was no reading down of the provision by the Hon'ble Courts, and the clear intent of its deductibility being subject to payment by the due date u/s. 36(1)(va) accepted uniformly from 01/4/1988 to 01/4/2003, i.e., the date of insertion and deletion respectively of the second *proviso*. Here it also be noted that the Apex Court in *Allied Motors* (supra) and *Alom Extrusions* (supra) did not read down section 43B *per se*, much less sec. 36(1)(va), but invoked the interpretative principles (of unintended results and hardship) with regard to restrospectivity in holding the amendments to the former, made prospectively, as curative and, thus, retrospective. Dating back an amendment taking cognizance of a hardship is very different from reading down a provision on account of the said hardship. The Hon'ble Court, as a reading of its decision in *Alom Extrusions* (supra) shows, was also moved by the fact that payment of labour welfare arrears by an employer during the previous year 2003-04, relevant to AY 2004-05, or later, would qualify for deduction u/s. 37(1) r/w s. 43B(b), while payment prior thereto, though beyond the due date u/s. 36(1)(va), would have lost the deduction forever, so that regarding the amendment as amendatory would result in an unintended and anomalous result (pgs. 315-316). The legislative intent being manifest in the clear and unambiguous language of the provisions, there was no occasion to read them down, which is to supply any gaps discovered therein. Where none exist or are shown, not honoring the language is not legally permissible and beyond the judicial competence, unless, of course, it is the *vires* of the provision that is under challenge, and is held as *ultra vires* the Constitution. In any case, the same concerned s. 43B, and had nothing to do with interpreting s. 2(24)(x) or s. 36(1)(va). In fact, the constitutionality of both, the *provisos* to sec. 43B and sec. 36(1)(va), stand upheld in *Hitech (India) (P.) Ltd. v. UoI* [1992] 227 ITR 446 (AP). In fact, one of the arguments assumed in the challenge thereto (by way of writ petition), which though did not find favour with the Hon'ble Court, was that sec. 43B is discriminatory insofar as it places the sums specified in cl. (b) thereof on a footing different from those in other clauses

thereof. *Where, then, one may ask, is the question of reading down the said provision so as to extend the time limit for the deposit of employee's contribution to the due date of filing the return of income u/s. 139(1) for the relevant year*? The legislative history of s. 43B also shows that the two components of the contribution were initially conceived to be treated on the same footing, which in fact is the premise of the several decisions which have held, particularly post the amendments to s. 43B, the employee part of the contribution to be covered thereby, and which has been explained hereinbefore to be unfeasible in view of the clear mandate of sec. 36(1)(va), which overlaps that of s. 43B so as to exclude the applicability of the latter. It may however be made clear that even an absence of this unfeasibility would make the argument of s. 36(1)(va) as yielding to s. 43B, or as employee contribution being covered by s. 43B, in view of the clear legislative intent, as indefensible, even as held in *CIT v. Madras Radiators & Pressings Ltd.* [2003] 264 ITR 620 (Mad). The only manner of holding so, as one can think of, is where the said intent is itself held as outside the legislative competence, which is not the case. In other words, the argument fails on the anvil of the clear language of the provisions of law, and the unfeasibility afore-said only adds to the same.

5.3 The amendments under reference by way of *Explanations* to ss. 36(1)(va) and 43B, the difference between these two sections, which have no interface since the deletion of second *proviso* to s. 43B (with simultaneous amendment in first *proviso*) by Finance Act, 2003, held retrospective since its inception in *Alom Extrusions* (supra), have been coopted on the statute-book with a view to remove any doubt in the matter. The proposition of the employee part of the contribution, delineated u/s. 2(24)(x), which is, as has always been, the only purview of s. 36(1)(va), being also subject to sec. 43B(b), has been explained as untenable as the occasion to invoke sec. 43B would arise only on the sum under reference being otherwise allowable, so that it shall have to first cross the hurdle of deductibility u/s. 36(1)(va), which incident only adds to the argument of the

amendments under reference being only clarificatory and declaratory of the law as it always stood, even as expressed per the clear, plain and unambiguous language of the two provisions, including, now, the *Explanations* thereto under reference. In fact, the very fact of insertion of the *Explanations* under reference, bearing a cross reference to other provision, which stands severed by the amendments by Finance Act, 2003, makes it amply clear that the same is only to eliminate any doubts arising in view of the certain decisions. The law as applicable on the first day of the assessment year would apply for any assessment year, unless provided otherwise, either expressly or by necessary implication (*Reliance Jute & Industries Ltd. vs. CIT* [1979] 120 ITR 921 (SC)). In the instant case, what would be more express; the *Explanation/s* itself providing, with a view to remove doubts, of the stated position to have been always the case, so that at no point of time, i.e., since the inception of sections 43B and 36(1)(va), has the sum referred to in section 2(24)(x) been regarded as subject to the former and, further, the 'due date' referred to in the latter (s. 36(1)(va)), defined per *Explanation* (since renumbered as *Explanation* 1) thereto, as having any bearing on section 43B, wherein the due date applicable is specified as that for furnishing the return of income u/s.139(1) for the relevant year. Of course this obtains post the amendment to s. 43B by Finance Act, 2003, w.e.f. 01/4/2004, held retrospective by the Apex Court since the inception of the second *proviso*, inserted w.e.f. 01/4/1988 simultaneous with ss. 2(24)(x) and 36(1)(va), further making apparent the legislative intent. This also explains as well as provides the legal basis for the use of words 'for the removal of doubts' and 'shall be deemed never to have been applied' in the newly inserted *Explanations*. This in fact has also been the unequivocal reading of the said provisions by several High Courts, as in *Jamshedpur Motor Accessories vs. UOI* [1991] 189 ITR 70 (Pat); *Hitech (India) (P.) Ltd.* (supra); *CIT vs. South India Corporation Ltd*. [2000] 242 ITR 114 (Ker); *Madras Radiators & Pressings Ltd.* (supra); *B.S. Patel v. Dy. CIT* [2010] 326 ITR 457 (MP); *CIT vs. Gujarat State Road Transport Corporation*

[2014] 366 ITR 170 (Guj), wherein the Hon'ble Gujarat High Court discountenanced the reliance by the assessee on several decisions taking a different view, which were argued for being followed, thus:

'Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of *Sarabhai Sons Ltd*. (supra), by the learned counsel appearing on behalf of the assessee and his submission that if two views are possible and different High Courts have taken a particular view, this Court may not take a different view, is concerned, we are of the opinion that in the present case, and as discussed hereinabove, only one view is possible as canvassed on behalf of the revenue and as observed by under section hereinabove and we are not in agreement with the view taken by the Himachal Pradesh High Court; Karnataka High Court; Rajasthan High Court and Punjab and Haryana High Court in the cases refereed to hereinabove, and therefore, the submission made on behalf of the assessee to follow the decisions of the different High Courts refereed to hereinabove and/or not to take a contrary view cannot be accepted.' (pgs. 185-186)

The Hon'ble Court, prior to expressing its opinion, also examined the decision by the Apex Court in *Alom Extrusions* (supra), relied upon by different High Courts in expressing their contrary view, to hold that the said decision by the Apex Court had nothing to do with s. 36(1)(va), but confined to the amendments to s.43B and, therefore, of no assistance, as indeed did the Hon'ble Court in *CIT v. Merchem* [2015] 378 ITR 443 (Ker), before whom again several decisions taking a different view were canvassed, though opined, also making reference to *Padmasundara Rao (Decd)* (supra), like-wise, so that the employee contribution was only governed by s. 36(1)(va) and not by s. 43B(b), as under: (pgs. 455-456)

'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 section 36(1)(va) along with section 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 section 36(1)(va) of the Act. *According to us, so far as section 43B (b) is concerned, it takes care of only the contribution payable by the employer/assessee to the respective fund*. Therefore, in that circumstances, section 36(1)(va) and section 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 section 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 section 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 persuades us to think that section 43B can be applied to the contribution payable by the assessee as an employer, which reads thus:

5.4 One may next consider the Notes on Clauses and the Memorandum explaining the provisions of the Finance Bill, 2021 inasmuch as the same operates as *contemporaneous exposito*. The latter, which subsumes the former, reads as under:

Payment by employer of employee contribution to a fund on or before due date

Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.
Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head 'Profits and gains of business or profession'.
Clause (va) of the said sub-section provides for deduction of 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* to the said clause provides that, for the purposes of this clause, "due date" to mean 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.
Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee's contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be dearly distinguished from the employee's contribution towards welfare funds. *Employee's contribution is employee's own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity*. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of subsection (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions.

Accordingly, in order to provide certainty, it is proposed to—

(i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the "due date" under this clause ; and

(ii) amend section 43B of the Act by inserting *Explanation* 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. (emphasis supplied)

[Clauses 8 and 9]

It clarifies, in no uncertain terms, that the legislative intent, clear from the beginning, was that sec. 43B(b) did not include the employee's contribution to the employee welfare funds. However, as some decisions by the Hon'ble Courts had opined otherwise, the *Explanations* under reference, though clarificatory of the law as it always was, are made operative prospectively, i.e., AY 2021-22 onwards, so as to henceforth provide certainty. Though the same militates against the use of the express language of the *Explanations*, i.e., 'For the removal of doubts' and 'shall be deemed never to have been' employed by the statute, the said exposition by the agency introducing the Finance Bill makes it abundantly clear that the same are only intended to have a prospective application. The 'Notes on Clauses' state the same, to the same effect. The amendments under reference are, thus, though clarificatory, shall have a prospective application, i.e., for AY 2021-22 and subsequent years. It is unfortunate that neither party brought

the same to my notice during hearing, which would have saved considerable effort in deciding the appeals under reference, even as two decisions by the Hyderabad Bench of the Tribunal were sought to be placed on record after the conclusion of the hearing by the assessee's counsel, and which again do not make any reference to either the Notes on Clauses or the Memorandum. There is, however, one aspect that yet remains to be seen, i.e., a decision by the Hon'ble jurisdictional High Court, if any, in the matter. This is as the same, where it pertains to an assessment year prior to AY 2021-22, shall prevail. This is as the same would be rendered *de hors* the *Explanations* under reference, which have been held as applicable only for AY 2021-22 and subsequent years. An inquiry in its respect was also made hearing, making it clear that, where so, the same, being binding, shall in any case prevail, i.e., irrespective of the retrospective or otherwise operation of the *Explanations*. Both the parties stated of no such decision, and neither is any such in my notice. Consequently, no action u/s. 143(1) or u/s. 154 could have been taken by the Revenue relying on the said *Explanations*, which are effective only from 01/4/2021, i.e., from AY 2021-22. It is made clear, if only as a matter of abundant caution, that a disallowance in 'assessment' would be on a different footing inasmuch as there is scope for adjudication and adopting a view on merits in such proceedings. Further, this adjudication, as indeed the conclusion aforesaid of the *Explanations* being prospective, is subject to any decision by the Hon'ble jurisdictional High Court, i.e., the High Court of Madhya Pradesh, if any, taking a view consistent with that sought to be conveyed per the said *Explanations* for any year prior to AY 2021-22 inasmuch as the same is binding on all authorities falling, as well as assessee's operating, under its' territorial jurisdiction. Where so, the Revenue can take any remedy permissible under law to enable it to pass an order consistent with the decision by the Hon'ble jurisdictional High Court. Needless to add, the burden shall be on the Revenue, which shall be bound to observe the principles of natural justice, confronting the assessee with any such decision, and deciding per a

speaking order. It is also at liberty to move this Tribunal for a restoration of the instant appeals and an order consistent with the decision by the Hon'ble jurisdictional High Court.

In sum

6. The adjustment to the returned income in the instant case having been made by the AO u/ss. 143(1) and 154, which do not admit any contentious issue, the question that arises for consideration is if the *Explanations* to sections 36(1)(va) and 43B by Finance Act, 2021 are declaratory of the law as it always stood, as signified by the words expressly employed therein, inserted to remove any doubt in the matter, again, as also stated therein, to be therefore read retrospectively, or was prospective, with therefore no application for the years under reference. The *Explanations* are stated to be effective 01/4/2021, which though cannot be said to be conclusive of the matter (*State of M.P. v. Rameshwar Rathod* [1990] AIR 1990 SC 1849). The law, which was found to have passed the test of constitutionality, attracted an almost uniform view across different High Courts, i.e., of the sums specified u/s. 43B(b) to be, in terms of the said section, deposited within the time stipulated u/s. 36(1)(va) to be eligible for deduction (in the computation of business income of the assessee-employer u/s. 28). That is, the employee's contribution was, and indeed continues to be, subject to section 36(1)(va), making for a uniform treatment under the Act for both the employee's and the employer's contribution to the employee welfare funds. This position, departed from by Finance Act, 2003, w.e.f. 01/4/2004, was held as retrospective by the Apex Court in *Alom Extrusions* (supra), i.e., w.e.f. 01/04/1988, i.e., the date of insertion of the second *proviso* to s. 43B. The same though has no bearing on the employee contribution (to the welfare fund), which continues to be subject to section 36(1)(va), to which no amendment has been made throughout its existence on the statute-book (with effect from 01/04/1988), save the *Explanation 2* under reference, inserted by FA, 2021. This position, i.e., of the employee contribution being subject to s. 36(1)(va) remained undisputed, i.e., till the

decision in *Alom Extrusions* (supra), only where-after decisions taking a view of it being covered by section 43B(b) and, thus, deductible on being deposited by the due date of filing the return u/s. 139(1), i.e., the date specified in s.43B for other sums specified therein, made uniform after the deletion of the second *proviso*. The argument is untenable as section 43B comes into play only where the sum under reference is 'otherwise allowable', i.e., u/s. 36(1)(va) in respect of the employee's contribution, which rather is regarded, on receipt, as the employer's income u/s. 2(24)(x). *The employer's contribution, an expense deductible u/s. 37(1), could, after all, only be out of his own monies, and not that received under trust from another*. True, section 43B is a *non obstante* provision, so that it would prevail. However, the same itself provides for its application only to sums specified therein which are 'otherwise allowable', so that even *assuming* the employee contribution to be covered there-under would be of no consequence. This in fact is the only reading and, besides, in agreement with the object of section 43B seeking to provide an additional condition for deduction *qua* statutory obligations where otherwise allowable under the Act. The un-tenability afore-said in fact stems from the fallacy in regarding the employee contribution as being covered by section 43B(b), which speaks only of sums payable by assessee-employer by way of (his) contribution, which cannot surely be stretched to sums received by him from the employee for being deposited. Implicit in the notion of 'contribution' is that which is provided or parted with by one from his own pocket; depositing what stands received from another could never be attributed or regarded as ones' own contribution. Not so considering is to ignore section 36(1)(va), inserted, along with section 2(24)(x), simultaneously with the two *provisos* to section 43B, by Finance Act, 1987 w.e.f. 01/04/1988, and to which in fact the sums specified in section 43B(b), as per the law as originally conceived and enacted, even as accepted by all the Courts, including the Apex Court in *Alom Extrusions* (supra), were subject, with in fact both the *provisos* to s. 43B and s. 36(1)(va) also passing the test of constitutionality. It is

only on *omitting section 36(1)(va)* from the statute-book, an impermissibility, that the employee contribution would become deductible u/s. 37(1) read with section 43B, validating the argument of the employee-contribution being deductible on being deposited (by the employer) to the credit of the employee's account with relevant fund by the due date of filing the return of income u/s. 139(1) in his case. It is this legislative intent, manifest in the clear, unambiguous language of the relevant provisions and, in fact, read as so, that the *Explanations* inserted by Finance Act, 2021 seek to make amply clear. There is, again, nothing in *Alom Extrusions* (supra), post which decision there has been a cleavage of judicial opinion, to suggest otherwise; the question addressed by the Hon'ble Court in that case being the retrospectivity or otherwise of the amendments to section 43B by Finance Act, 2003. Even otherwise, a decision is an authority for what it actually decides and not what may remotely or even logically follow from it (see: *Bhavnagar University v. Palitana Sugar Mills* [2003] (2) SCC 511; *CIT v. Sun Engineering Works (P.) Ltd*. [1992] 198 ITR 297 (SC); *Goodyear India Ltd. vs. State of Haryana & Anr.* [1991] 188 ITR 402 (SC); *Lachman Dass Bhatia Hingwala (P.) Ltd. vs. Asstt. CIT* [2011] 330 ITR 243 (Del)(FB)). The argument of hardship in *Alom Extrusions* (supra) is not applicable to the employee-contribution as the money stands already received by the employer and, two, the prescribed date is only that by which it is supposed to deposit both the contributions with the relevant fund. The argument of unintended result, also adopted in that case, is again applicable only to the employer part of the contribution; the employee contribution being subject to 36(1)(va), which has not witnessed any amendment relaxing the condition of payment specified therein. The *Explanations* and *provisos*, it is well-settled, have interpretative value. Viewed from any angle, sec. 43B(b) does not include the employee contribution, and even regarding so is to no avail, rendering the *Explanations* under reference, even as suggested by their express language, explanatory. An examination of the Notes on Clauses to, and the Memorandum explaining the Provisions of, Finance

Bill, 2021, however, resolves the matter beyond the pale of any doubt. While confirming the *Explanations* under reference to be explanatory of the law, even as signified by the clear, unambiguous language employed therein, are yet stated to be prospective inasmuch as they are applicable assessment year 2021-22 onwards. Lastly, no decision by the Hon'ble jurisdictional High Court in the matter has been either cited before me, or found, which, where so, would, irrespective of the view expressed therein, hold for the relevant years, being prior to the year of applicability of the *Explanations* under reference. No adjustment, in view of the conflicting judicial opinion, could, accordingly, be made to the returned income u/s. 143(1)/154, which sections admit only issues on which there could be conceivably no two views, rampant, irrespective of merits thereof, in the instant case, which aspect, as explained therein, has been given cognizance to in making the provision applicable not retrospectively. The assessee, accordingly, succeeds in his challenge to the impugned adjustments, which are held as bad in law and directed for deletion. This is of course subject to any different view taken by the Hon'ble jurisdictional High Court for any year prior to AY 2021-22. I decide accordingly.

7. In the result, the assessee's appeals are allowed.

Order pronounced in the Open Court on November 18, 2021

Sd/-
(Sanjay Arora)
Accountant Member

Dated: 18/11/2021
Aks/Singh

Copy of the Order forwarded to:

1. The Appellant: Nikhil Mohine, Ward No. 11,128,Gandhi Ward, Parasia, Chhindwara, Chhindwara (M.P.)-480441
2. The Respondent:
   a) Deputy Commissioner of Income Tax, CPC, Income Tax Department, Bengaluru, Karnataka -560500

b). Assistant Director of Income Tax, CPC, Income Tax Department, Bengaluru, Karnataka -560500

3. The Pr. CIT-1, Jabalpur
4. The CIT(Appeals)-1, Jabalpur
5. The Sr. DR, ITAT, Jabalpur
6. Guard File

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