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

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.33 & 34/MUM/2023
(A.Ys: 2018-19 & 2019-2020)

Pravin Malshi Shah 13/174, Dadi Sheth Agiyari Lane Mumbai - 40002 **PAN: AAQPS3856E**	*v.*	Circle – 23(1) Matru Mandir, Tardev Road Mumbai – 400 007
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Ashok Mehta**
Department Represented by	**:**	**Shri Pratap Narayan Sharma**
Date of Hearing	**:**	**06.03.2023**
Date of Pronouncement	**:**	**13.03.2023**

O R D E R

PER BENCH

1. These appeals are filed by the assessee against different orders of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 21.12.2022 and 10.11.2022 for the A.Ys. 2018-19 and 2019-20 respectively.

2. Since the issues raised in both these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA.No. 33/MUM/2023 for Assessment Year 2018-19 as a lead appeal.

3. The Assessee has challenged the disallowance of ₹.13,73,999/ being payment of Provident Fund and ESI respectively, u/s.36(1)(va) of Income-tax Act, 1961 (in short "Act").

4. The Assessee in the return of income filed on 13.10.2018 had declared total income of ₹.58,05,700/-. The said return was processed online by CPC Bangalore and accordingly, adjustment of ₹.13,73,999/- was made in the intimation u/s.143(1) on account of late payment of employee contribution towards PF & ESI. The contention of the Assessee has been that payments have not been made within the due date of 15 day of next months as per the respective Act but made much before the due date of filling of return income.

5. Before the Ld. CIT(A) various submissions and judgments were cited by the Assessee in favor of the proposition that if the payment of PF &

ESI has been made before the due date of filling of the return of income u/s 139(1) the same should not be disallowed.

6. The Ld.CIT (A), after discussing the various issues relating to employees contribution and finally justified the disallowance made as per provisions of section 143(1)(a)(iv) of the Act. After detail discussion and relying on various judicial pronouncements, Ld.CIT(A) dismissed the appeal filed by the assessee.

7. On perusal of the material placed on record, we find that, it is undisputed fact that at payment of PF & ESI for sums amounting to ₹.13,73,999/- was not made within the due date prescribed under the PF & ESI Act, but has been filed much before the due date of filing the return of income.

8. Before us, the Ld. Counsel reiterated the submissions made before the Ld.CIT(A) and further he submitted that the payment of employees' contribution towards EPF and ESIC includes both employer and employee contributions. In this regard he brought to our notice From 3CB at Page No. 4 and 15 of the Paper Book. was paid before due date of filing return of income. However, now Hon'ble Supreme Court in the case of

"**Checkmate Services Private Limited vs. CIT in Civil Appeal No. 2833 of 2016 dated 12.10.2022**" has decided this issue against the Assessee. At the same time, he relied on the Coordinate Bench decision in the case of M/s. P.R. Packaging Services *v.* ACIT in ITA.No. 2376/Mum/2022 dated 07.12.2022.

9. The relevant observation and finding given by the Hon'ble Supreme Court in Para No. 31-37 and Para No. 52-54 of the judgement are summarized as under: -

- *Section 43B falls in Part-V of the IT Act. What is apparent is that the scheme of the Act is such that sections 28 to 38 deal with different kinds of deductions, whereas sections 40 to 43B spell out special provisions, laying out the mechanism for assessments and expressly prescribing conditions for disallowances. In terms of this scheme, section 40 (which too start with a non obstante clause overriding sections 30-38), deals with what cannot be deducted in computing income under the head "Profits and Gains of Business and Profession". Likewise, section 40A(2) opens with a non obstante clause and spells out what expenses and payments are not deductible in certain circumstances. Section 41 elaborates conditions which apply with respect to certain deductions which are otherwise allowed in respect of loss, expenditure or trading liability etc. If this scheme is considered, sections 40-43B, are concerned with and enact different conditions, that the tax adjudicator has to enforce, and the assessee has to comply with, to secure a valid deduction. [Para 31].*

- *The scheme of the provisions relating to deductions, such as sections 32-37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfillment of particular conditions, would qualify as allowable deductions: failure by the*

assessee to comply with those conditions would render the claim vulnerable to rejection. In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of section 36(iv). It is noteworthy, that this provision was part of the original IT Act, it has largely remained unaltered. On the other hand, section 36(1)(va) was specifically inserted by the Finance Act, 1987, with effect from 1-4-1988. Through the same amendment, by section 3(b), section 2(24) which defines various kinds of "income" inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt. i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(vo) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (ie., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (Le., section 36(1)(iv)). [Para 32].

- *The significance of this is that Parliament treated contributions under section 36(1)(vo) differently from those under section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund" However, the phraseology of section 36(1)(va) differs from section 36(1)(iv), it enacts that "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." The essential character of an employees' contribution, Le.. that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date. [Para 33]*

- *It is therefore, manifest that the definition of contribution in section 2(c) is used in entirely different senses. In the relevant deduction clauses. The differentiation is also evident from the fact*

that each of this contribution is separately dealt with in different clauses of section 36(1). All these establish that Parliament. While introducing section 36(1)(va) along with section 2(24)(4), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two [Para 34]

- *It is evident that the intent of the lawmakers was clear that sums referred to in clause (b) of section 438, Le.. "sum payable as an employer, by way of contribution" refers to the contribution by the employer The reference to "due date" in the second proviso to section 4311 was to have the same meaning as provided in the explanation to section 36(1)(va). Parliament therefore, through this amendment, sought to provide for identity in treatment of the two kinds of payments: those made as contributions, by the employers, and those amounts credited by the employers, into the provident fund account of employees, received from the latter, as their contribution. Both these contributions had to necessarily be made on or before the due date. [Para 37]*

- *When Parliament introduced section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting section 36(1)(vo) and simultaneously inserting the second proviso of section 43B, its intention was not to treat the disparate nature of the amounts, similarly. The memorandum introducing the Finance Bill clearly stated that the provisions - especially second proviso to section 43B- was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time - by way of contribution of the employees' share to*

their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained and continues to be maintained. On the other hand, section 43B covers all deductions that are permissible as expenditures, or out- goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitles an assessee to the benefit of deduction from the total income. The essential objective of section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure. [para 52]

- *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. [Para 53]*

- *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 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 employee's contributions which are deducted from their income. They are not part of the assessee employer's income nor are they head 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. [Para 54]"*

10. Thus, once the Hon'ble Supreme Court has held that if the payment has been made with respect employees contribution after the due date, the same has to be disallowed and cannot be allowed as deduction and therefore, adjustment has rightly been made. Section 143(1)(a) provides for following adjustment: -

"i) any arithmetical error in the return;

ii). An incorrect claim, if such incorrect claim is apparent from any information in the return;

iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;

(iv). Disallowance of expenditure "for increase in income indicated in the audit report but not taken into account in computing the total income in the return;

(v). Disallowance of deduction claimed under "[section 10AA or under any of the provisions of Chapter VI-A under the heading "C-Deductions in respect of certain incomes", if] the return is furnished beyond the due date specified under sub-section (1) of section 139."

11. Thus, if there is any incorrect claim apparent from any information in the return, then adjustment is permissible. Here in this case, once the claim of deduction as per the law in not allowable, same can be disallowed in the intimation u/s 143(1). The judgment of Hon'ble Supreme Court is a law, which has to be interpreted that this was the position of law from the date of enactment of provision. Further, clause (iv) states that, if any disallowance of expenditure has been indicated in the audit report, but not taken into account in computing the total income in the return, same also can be adjusted. The auditor in the audit report specifies the due date as prescribed u/s. 36(1)(va) of the Act and the date on which deposit has been made, then in the computation of income, the same cannot be claimed as deduction, because the law envisages that such payment is disallowable, because it has not been paid within the due date.

12. Accordingly, we hold that such an adjustment is permissible under the scope of section 143(1) of the Act. However, the adjustment has to

be to the extent of employees' contribution. Therefore, Assessing Officer is directed to restrict the disallowance to the extent of employee contribution i.e., ₹.6,74,509/-

13. In the result, **appeal of the Assesses is partly allowed.**

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14. Coming to the appeal relating to A.Y. 2019-20, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y. 2018-19 is applicable to this assessment year also. However, Assessing Officer is directed to disallow only to the extent of employees' contribution i.e., ₹.7,88,835/-. Accordingly, this appeal is partly allowed.

15. To sum-up, both the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 13th March, 2023

Sd/-	Sd/-
(AMIT SHUKLA)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 13/03/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum