आयकर अपीलीय अधिकरण, **'सी' न्यायपीठ, चेन्नई।**
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: CHENNAI

श्री वी. दुर्गा राव**, माननीय न्यायिक सदस्य** एवं
श्री **जी. मंजूनाथा, माननीय** लेखा सदस्य **के समक्ष**
BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.82/Chny/2022**
निर्धारण वर्ष **/Assessment Year: 2017-18**

Mr.Anand Jesudass, 3/381C, Vrikshaa Sriramdev Garden, Pattanampudur, Coimbatore-641 016. [**PAN:** AISPA 8126 B]	**v.**	The Income Tax Officer, Non-Corporate Ward-2(5), Coimbatore.
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Ms.N.V.Lakshmi, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Mr.M.Rajan, CIT
सुनवाई की तारीख/Date of Hearing	:	28.03.2022
घोषणा की तारीख /Date of Pronouncement	:	31.03.2022

आदेश **/ O R D E R**

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the Principal Commissioner of Income Tax, Coimbatore-1, dated 23.12.2021 and pertains to assessment year 2017-18.

2. The assessee has raised the following grounds of appeal:

A. The order of Learned Principal Commissioner of Income Tax-1, Coimbatore ('PCIT-1) is erroneous, bad in law, prejudicial to the appellant and contrary to the facts and circumstances of the case.

B. The Learned PCIT-1 erred in initiating the proceedings under section 263 of the Act for setting aside the assessment order dated 21.12.2019 passed under section 143(3) of the Act. The PCIT failed to appreciate that the assessment order is neither 'erroneous' nor 'prejudicial to the interest of the revenue' and therefore he has no jurisdiction for revision under section 263 of the Act.

C. The Order of the Learned PCIT is without jurisdiction. The Learned PCIT failed to appreciate that the jurisdiction under section 263 of the Act can be invoked only if the "twin conditions" laid down under the Act are satisfied.

D. The Learned PCIT is not justified in holding that the assessing officer completed the assessment without proper enquiry. The Learned PCIT-1 ought to have appreciated that assessment order dated 21.12.2019 was passed after making necessary and requisite inquiries and thorough examination of all details that were called for and submitted by the Appellant.

E. The PCIT-1 erred in invoking the provisions of section 263 of the Act without forming an opinion that order dated 21.12.2019 is erroneous in so far as it is prejudicial to the interests of the revenue.

F. The Learned PCIT erred in imposing his view on the views of the assessing officer. The Learned PCIT failed to appreciate that the issue on

allowance of employee's contribution to PF is a debatable issue and there were two views possible.

G. The Appellant craves leave to add, supplement, amend, delete or otherwise modify any of the grounds stated hereinabove at the time of hearing.

3. The brief facts of the case are that assessee is an individual engaged in consultancy service and IT enabled BPO services, filed his return of income for the AY 2017-18 on 13.08.2017 admitting total income of Rs.2,14,57,450/-. The case was taken up for scrutiny under CASS to verify the cash deposits found in various bank accounts and the assessment has been completed u/s.143(3) of the Act on 21.12.2019 and determined total income of Rs.2,17,29,450/- by making additions towards unexplained cash deposits of Rs.2,72,000/- in Karur Vysya Bank. The case has been, subsequently taken up for revision proceedings u/s.263 of the Act, by the Principal Commissioner of Income Tax, Coimbatore-1, and accordingly, show cause notice dated 29.09.2021 was issued and served on the assessee for objections, if any, to the proposed revision. The Ld.PCIT had taken up the revision proceedings u/s.263 of the Act on the ground that the AO has completed the assessment without verifying the issue of belated

remittances of employees' contribution to PF in light of provisions of Sec.36(1)(va) of the Act, which rendered the Assessment Order erroneous in so far as it is prejudicial to the interest of the Revenue. In response to the notice, the assessee has filed Written Submissions on 29.10.2021 and explained that the assessment order passed by the AO is neither erroneous, nor prejudicial to the interest of the Revenue. The Ld.PCIT after taking into account Written Submissions filed by the assessee and has also by following certain judicial precedents, including the decision of the Hon'ble Supreme Court in the case of Malabar Industrial Co. v. CIT reported in [2000] 243 ITR 83 (SC) held that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue on the issue of belated remittances of employees' contribution to PF and thus, set aside the assessment order passed by the AO u/s.143(3) of the Act dated 21.12.2019 and direct the AO to re-do the assessment after verification of the facts. Aggrieved by the order of the Ld.PCIT, the assessee is in appeal before us.

4. The Ld.AR for the assessee submitted that the Ld.PCIT erred in revising assessment order u/s.263 of the Act without appreciating the fact that the assessment order passed by the AO is neither erroneous nor prejudicial to the interest of the Revenue and therefore, he has no jurisdiction to set aside the assessment order. The Ld.AR further referring to Paper Book filed by the assessee submitted that the AO has examined the issue of employees' contribution to PF in light of various evidences filed

by the assessee and after satisfying with the explanation furnished by the assessee, has completed the assessment. Therefore, on the very same issue, the Ld.PCIT revised the assessment order, which is incorrect.

5. The Ld.DR, on the other hand, supporting the order of the Ld.PCIT, submitted that the assessment order passed by the AO is erroneous and also prejudicial to the interest of the Revenue, because the AO has failed to consider the belated remittances of employees' contribution to PF in light of provisions of Sec.36(1)(va) r.w.s.43B of the Act, even though, the law is very clear on the issue. The Ld.PCIT has rightly set aside the assessment order passed by the AO u/s.263 of the Act and his order should be upheld. The Ld.DR further has filed Written Submission on the issue which is reproduced as under:

> *The written submission on the issue of belated remittance by the assessee of 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 the Employees State Insurances Act, 1948 or any other fund for the welfare of such employee is as under:*
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> *1.2 It is apprehended that the Honourable Bench might rely on the decision arrived in "Adyar Ananda Bhavan Sweets India P Ltd in ITA no.402 & 403/CHNY/2021 dated 08-12-2022, wherein relying on the interpretation of statute by the Honourable Supreme Court of India vide CIT v/s Vatika Township Pvt Ltd as reported in 367 ITR 466 while deciding on applicability of a proviso introduced to section 113 of the Act. The honourable Supreme Court held therein that there cannot be imposition of any tax without the authority of law and such law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. Based on this logic, honourable IT AT Chennai Bench held as under:*
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> *"In the present case also, before insertion of Explanation 2 to Section 36(1) (va) of the Act, there is ambiguity regarding due date of payment of employees' contribution on account of provident fund and ESI, whether the due date is as per the respective acts or up to the due date of filing of return of income of the assessee. As noted by honourable Supreme Court an amendment made to a taxing statute can be said to be intended to remove hardship only of the assessee and not of the Department. Imposing of a retrospective levy on the assessee would be caused undue hardship and for that reason Parliament specifically chose to make the proviso affective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 01.04.2021 i.e. for and from assessment year 2021-22 of Explanation-2 to s. 36(1) (va) of the Act and not retrospectively "*

1.3 From the above, it is seen that the decision has been arrived basically on two-fold logic:

a. a taxing statute can be said to be intended to remove hardship only of the assessee and not of the Department

b. Imposing of a retrospective levy on the assessee would be caused undue hardship

2. Departments View

2.1 In this regard, the Department would like to place on record the following facts.

a. While arriving at such conclusion, the focus of the Honourable ITAT was only on the welfare of the Assessee and not that of crores of low paid employees who have been impacted by the action of late remittance of the Employees contribution made from the employees hard earned Salaries and entrusted with their employer for its remittance within the due dates prescribed under the respective laws of funds governing the remittance.

b. The Honourable ITAT overlooked on the fact that late remittance by the employer of the Employees contribution, made from their Salaries receivable and entrusted with the employer in their fiduciary capacity for remittance within the stipulated dates of the fund, has deprived the employees of the rightful earning of interest and timely benefits on their contribution for the period the employer held such moneys of the employee and used it for the purpose of the employers business and thus unjustly enriching the Assessee employer.

c. Though the above fact of morality has been clearly brought out in the explanatory note to the Finance Act-2021, this fundamental reason for bringing out such clarificatory explanation was overlooked in the above decision. To quote....

"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 40 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 clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee 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 sub-section (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 "

Such a detailed reasoning was given by the legislation while introducing the Finance Act-2021. Accordingly, the following explanation was inserted.....

"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 "

The wordings like 'for the removal of doubts'; "provisions of section 43B shall not apply "; "shall be deemed never to have been applied for the purposes of determining the due date' under this clause" unambiguously clarified that the 'due date' as mentioned under section 43(B) was never to have been ever intended to have been applied for determining the due date under the provisions of section 36(l)(va).

d. However, the Honourable ITAT while rendering the decision in "Adyar Ananda Bhavan Sweets India P Ltd in IT A no.402&403/CHNY/2021 dated 08-12-2022 has completely ignored this legislative intention and the use of language in the explanation introduced and simply concluded that the clarificatory explanation introduced into the section would cause undue hardship to the assessee if held to be effective retrospectively.

e. The conclusion that "explanation introduced into the section would cause undue hardship to the assessee if held to be effective retrospectively " has been arrived by the Honourable ITAT based on the assumption that there was an ambiguity in the interpretation of law or the language usage in the law and hence, the assessee would have presumed and acted based on such presumption of the 'due date' and such actions already carried out cannot be reversed based on legislation made retrospectively.

f. Further, the Honourable ITAT while deciding in the case of M/s Benco Thermal Technologies Pvt. Ltd in ITA No.281/Chny/2021 dated 23-02-2022 had wrongly held that in case of belated payment or non-payment, the employer not only pays interest on delayed payment but can incur penalties also for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the consequences are already provided under those acts which would take care of the employees' interest was of the view that on account of their existing provision under the PF Act-1952 for levy of interest on delayed remittance and consequential penalty, the interest of the Employee are protected. While reaching at this conclusion, the Honourable ITAT did not bother to verify on the fact that there is no provision under the PF Act to pass on such collected interest on the delayed remittance to the actual effected employees who have been deprived of interest for the period on their money illegally held by the employer and thus no law to protect employees interest.

2.2 Department has been always and continues to be of the view that provisions of section 36(l)(va) and section 43B(b) are independent of each other.

Section 36(l)(va) addresses 'Employees contribution' and Section 43B(b) addresses 'Employers contribution'. They are two independent financial transaction treated independently and differently under the Income Tax Act.

'Employees contribution' is from the employees' Salaries received 'Employers contribution' is from the assessee's business funds

2.3 Section 36(1) specifies some of the expenditures that are allowable and the conditions under which they are to be allowed. Clause (va) under this states as under -

"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 "

2.4 Section 2(24)(x) of the Income Tax Act mandates that as and when contributions are made by the employee, from their Salaries towards ESI/ESF/ESI fund, such contributions received will have to treated as income of the employer in their books. When such income so received is credited into the employees account in the EPF/ESF/ESI funds, before the due date as governed by the corresponding Act, rule or order or notifications issued of the fund, then such amount credited by the employer

will be allowed as an allowable deduction under the provisions of section 36(l)(va) from the business receipts of the employer.

2.5 Whereas, section 43B(b) deals with only employers contribution (which they are law bound to independently contribute apart from the collection already made from the salaries of the employee) towards EPF/ESF/ESI. The first proviso of section 43B permits such independent contribution of the employer to be allowed as a deductible expenditure, if and only if the same is remitted before filing the return of income u/s 139(1).

2.6 On insertion of proviso to section 43B, many of the courts started interpreting that the 'due date' as mentioned under section 36(1)(va) would mean due date as per the provisions of section 139(1) without appreciating that the nature and type of transaction. The provisions of section 36(l)(va) is totally independent and has nothing to do with nature of transaction as mentioned under section 43B(b) of the Act. The courts interpreted, the word 'contribution' is used not only to mean contribution of the employer but also contribution to be made on behalf of the member employed by the employer directly by misinterpretation of Paragraph 30 of the PF Scheme-1952. The Paragraph 30 should have been read along with the provisions of Paragraph 32 of the Scheme. Paragraph 32 of the Scheme permits the employer in recovering from the employee the contribution made by the employer on behalf of the employee of the employees share of contribution. In other words, the PF Scheme permits the Employer to contribute initially both the Employees contribution and employer's contribution and later recover the employees the employee's contribution portion.

2.7.CBDT Circular

On account of the above, CBDT vide Circular No. 22/2015 dt.17.12.2015 (enclosed as Annexure-1) issued clarification as below:

" ....Accordingly, w.e.f 1.4.1988, the settled position is that if the assessee deposits any sum payable by it by way of tax, duty, cess or fee by whatever name called under any law for the time-being in force, or 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, on or before the 'due date' applicable in his case for furnishing the return of income under section 139(1) of the Act, no disallowance can be made under section 43B of the Act.

It is clarified that this Circular does not apply to claim of deduction relating to employee's contribution to welfare funds which are governed by section 36(1)(va) of the IT Act".

2.8. At least with the said CBDT clarification of the provisions of law, the assessee is law bound to have followed and not guided by interpretations of law, as pronounced by various judicial authorities wherein again when there is no uniformity of stand on the issue of 'due date'. The assessee is primarily bound by the provisions of law and the CBDT circulars clarifying the provisions of law. Hence, at least from the date of issuance of the CBDT circular, i.e. from 17-12-2015, the assessee's ought to have had no such confusion and followed remittance of employees contribution collected from the employees' salaries and remitted within the due dates governing such funds. Hence, the conclusion arrived by the Honorable ITAT that imposing of a retrospective levy on the assessee would be caused undue hardship to the assesses is totally unfounded and have no merit.

3. The Legislative intent explained by the Honourable Supreme court in the case of Alom Extrusions Limited while deciding on effective date.

3.1 The Honourable ITAT attention is invited to the very decision of the Honourable Supreme court in civil appeal No.7771 of 2009 in the case of Commissioner of Income Tax Versus M/s. Alom Extrusions Limited (319 ITR 306) wherein on a similar issue on interpretation of effective date, Honourable Supreme court held as under:

"It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate -with effect from 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003. Before concluding, we extract herein below the relevant observations of this Court in the case of Commissioner of Income Tax, Bangalore vs. J.H. Gotla, reported in [1985] 1561.T.R. 323, which reads as under:

"We should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be sub served by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

For the afore-stated reasons, we hold that Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate with effect from 1st April, 1988 [when the first proviso came to be inserted].

3.2 In the instant legislation also, the Honourable ITAT failed to address as to how the language used by the legislature could be implemented prospectively. It failed to appreciate that the stringent provision of section 36(l)(va) was introduced by the legislation to protect the interest of crores of low paid Salaried employees being exploited by the few employers and was more penal in nature.

3.3 As per section 2(24)(x), any sum received by the assessee from his employees as contributions to any provident fund (PF) or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act (ESI) or any other fund for the welfare of the employees, is the income of the assessee. If this sum is credited by the assessee to his employee's account in the relevant funds on or before the due date, mentioned under such Act, rule or order then, such sum is allowable as a deduction. If not, this sum is not allowable (emphasis supplied).

3.4 Thus, the employees' contribution to PF, ESI etc., is to be paid before the due date, as per those respective Acts and not before the due date for filing of return under Income-tax Act as held by the Honourable IT AT in the case of "Adyar Ananda Bhavan Sweets India P Ltd Vs ACIT in ITA no.402&403/CHNY/2021 dated 08-12-2022" and in M/s Benco Thermal Technologies Pvt. Ltd in ITA No.281/Chny/2021 dated 23-02-2022.

4. The Request

a. For all the above reasons given above, the Honourable ITAT Bench is requested to differentiate its own decision passed in "Adyar Ananda Bhavan Sweets India P Ltd Vs ACIT in ITA no.402&403/CHNY/2021 dated 08-12-2022" and M/s Benco Thermal Technologies Pvt. Ltd in ITA No.281/Chny/2021 dated 23-02-2022.

b. The Honourable ITAT Bench may please decide independently of the appeal filed based on the facts and merits of the case involved without reliance on decisions which has been passed without consideration of all the facts.

c. The Honourable ITAT Bench may please verify the fact that the benefit of the 'Due Date' as provided under section 43B of the Income Tax Act be extended to only to such

contribution made by the employer, of both the employees and employers contribution, without recovery of the employees portion from the employee as per paragraph 32 of the PF Scheme-1952.

d. The Honourable ITAT Bench may please hold that wherever the employer had recovered the Employees contribution in line with paragraph 32 of the PF Scheme, the 'due date' for remittances of such recoveries by interpreted as the Due date as per the PF and ESI Act as there is no provision under the PF Act or the PF Scheme to compensate the employee of loss of interest for the period in which his contribution to the PF or ESI fund has been miss-utilized by his employer through delayed remittance and using it as a source of fund to run the employers business.

e. The Department is of the conscious view that it is the bounded duty of the Government and its various bodies to protect the interest of the common persons, who have no access to power or resources, from being exploited of their ignorance of law and their rights.

6. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The Ld.PCIT has revised the assessment order passed by the AO u/s.143(3) of the Act dated 21.12.2019, for the reason that the assessment order passed by the AO is erroneous, and also prejudicial to the interest of the Revenue on the issue of employees' contribution to PF u/s.36(1)(va) of the Act. According to the Ld.PCIT, although the assessee has remitted employees' contribution to PF beyond the due date specified under the respective Act, but the AO has simply accepted the explanation furnished by the assessee and allowed deduction, which render the assessment order passed by the AO is erroneous and also prejudicial to the interest of the Revenue. We have given our thoughtful consideration to the reasons given by the PCIT in light of arguments advanced by the Ld.AR and we ourselves do not subscribe to the reasons given by the PCIT for simple reason that the AO has examined the issue of employees' contribution to PF during the course of assessment proceedings, which is evident from the fact that the AO had issued notice

u/s.142(1) of the Act dated 20.09.2019 with a specific question on the issue of contribution made to PF and proof of payment, for which, the assessee has furnished complete details of contribution made to PF along with Tax Audit Report with specific date of remittance of employees' contribution to PF. The AO after considering details furnished by the assessee, has accepted the explanation with regard to belated remittances of PF under the respective Act, but within the due date specified u/s.139(1) of the Act. From the above, what is clear is that the AO has considered the issue and has taken a view and allowed deduction towards employees' contribution to PF wherever such contribution is remitted on or before due date for furnishing return of income. Therefore, we are of the considered view that the Ld.PCIT is erred in revising the assessment order passed by the AO on the ground that the AO has not verified the issue of belated remittances of PF.

7. Further, the issue of belated remittances of employees' contribution to PF beyond the due date specified under the respective Act, but within the due date for filing return of income u/s.139(1) of the Act, is now settled by the decisions of various Courts, including the decision of the Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Ltd., reported in [2009] 319 ITR 306 (SC), and also the decision of the coordinate Bench of the ITAT in the case of M/s.Adyar Ananda Bhavan Sweets India Ltd., in ITA Nos.402 & 403/Chny/2021 dated 08.12.2022. The Tribunal has considered an identical issue in light of latest amendment to the provisions of

Sec.36(1)(va) of the Act, by the Finance Act, 2021 w.e.f.01.04.2021 and after considering the relevant facts held that amendment inserted to the provisions of Sec.36(1)(va) of the Act, is prospective in nature, which is applicable from the AY 2021-22 onwards. Therefore, from the above it is clear that up to AY 2020-21, even if employees' contribution to PF were remitted beyond the due date specified under the respective Act, but within the due date specified u/s.139(1) of the Act, then the same needs to be allowed as deduction. The AO after considering the relevant facts including the details filed by the assessee and also relevant provisions of Sec.36(1)(va) of the Act, has taken a view and has allowed deduction to the assessee towards belated remittances of employees' contribution to PF. Therefore, once the AO has considered the issue and has taken a view, then the ld.PCIT cannot revise the assessment order on the very same issue by holding that the AO has not verified the issue or the AO should have conducted further enquires on the issue. It is a well settled principle of law by the decision of the various courts that in so far as invoking the jurisdiction u/s.263 of the Act, twin conditions must be satisfied, as per which, the order passed by the AO must be erroneous and also prejudicial to the interest of the Revenue. In this case, the assessment order passed by the AO is neither erroneous nor prejudicial to the interest of the Revenue. Therefore, we are of the considered view that the ld.PCIT is completely erred in revising the assessment order passed by the AO u/s.143(3) of the Act dated 21.12.2019 by exercising his powers u/s.263

of the Act. Hence, we quashed the order passed by the Ld.PCIT u/s.263 of the Act.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced on the 31st day of March, 2022, in Chennai.

Sd/-	***Sd/-***
(वी. दुर्गा राव**)**	**(जी. मंजूनाथा)**
(V. DURGA RAO)	**(G. MANJUNATHA)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 31st March, 2022.
TLN
आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF