**IN THE INCOME TAX APPELLATE TRIBUNAL**
**LUCKNOW BENCH "A", LUCKNOW**

**BEFORE SHRI. A. D. JAIN, VICE PRESIDENT**
**AND SHRI T. S. KAPOOR, ACCOUNTANT MEMBER**

ITA No.98/LKW/2021
Assessment Year: 2019-20

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| Jagmani Micro Knit Pvt. Ltd.<br>2, Sarvodaya Nagar<br>Kanpur | v. | The DCIT<br>Circle 2(1)(1)<br>Kanpur |
| TAN/PAN:AAACH3405B | | |
| (Appellant) | | (Respondent) |

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| Appellant by: | Shri Pradeep Kapoor, C.A. | | |
| Respondent by: | Shri Harish Gidwani, D.R. | | |
| Date of hearing: | 03 | 03 | 2022 |
| Date of pronouncement: | 05 | 04 | 2022 |

**O R D E R**

**PER A.D. JAIN, V.P.:**

This is assessee's appeal against the order of the ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi dated 26.8.2021, for the Assessment Year 2019-20, raising the following Grounds of Appeal:

*(1) The Id. CIT(A) has erred in law and on facts, in upholding an addition of Rs.19,05,852/- which represented employees' contribution to Provident Fund etc., that had been made in the intimation dated 14.09.2020, (earlier intimation dated 09.11.2020) under section 143(1)(a), which was referable to as "Assessment".*

*(2) The appellate order dated 26.8.2021 is based on mis-application of the, decision of Hon'ble Supreme Court in the case of CIT vs. Alom Extrusions Ltd. reported in (2009) 319 ITR 306 (and various other legal pronouncements, as have*

*been referred to in the appellate order under, reference itself).*

*(3) In any case, Explanation 1 below clause (Va), of section 36(1), which contained meaning of 'due date', had been brought on the statute, by the Finance Act 2021, w.e.f. 1.4.2021 and the same could not be said or held to be having any retrospective application, so as to govern the assessment year 2019-20, under reference here.*

*(4) In any case, and for the reason that contribution received from the employees had duly been deposited in the accounts of employees with Government Departments concerned, and the failure being not absolute, the 'delay in deposit' could not have been adversely viewed, so far as issue of admissibility of such deposit, as 'deduction' was concerned.*

*(5) In view of the fact that the appellant had deposited the sums in question in the Government account of the employees' concerned, but well before filing the "return" under section 139(1) for the assessment year 2019-20, such payments were covered by section 43B and various limbs mentioned thereunder and accordingly, no such disallowance was called for, either on facts or in law;*

*(6) In a later decision in the case of Shagun Foundry, the Hon'ble Allahabad High Court had explained various nuances of the Hon'ble Supreme Court judgment in the case of Alom Extrusions Ltd., supra and had finally held that such contributions (by employees towards various welfare schemes) were fully covered by section 43B and explanation thereto and accordingly disallowance of the sum of Rs.19,05,852/-, is contrary to the judicial interpretation, which has got binding effect.*

2. The brief facts of the case are that the assessee filed its return of income for the Assessment Year 2019-20, showing an income of Rs.4,31,91,140/-. The Assessing Officer, by making a disallowance of Rs.19,05,852/- on account of sum received from

employees as contribution to Provident Fund/ESI to the extent not credited to the employees' accounts on or before the due dates as prescribed under section 36(1)(va) of the I.T. Act, assessed the income of the assessee at Rs.4,50,97,000/- vide order/intimation dated 14.09.2020 u/s 143(1) received from the Assistant Director of Income Tax, CPC, Bengaluru.

3. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal before the ld. CIT(A). The ld. CIT(A), NFAC, vide his/her impugned order, confirmed the order of the Assessing Officer. The assessee is in further appeal before this Tribunal.

4. The ld. Counsel for the assessee, at the outset, submitted that the issue involved relates to the disallowance sustained by the ld. CIT(A), of Rs.19,05,852/-, representing employees' shares towards contribution to PF, which the assessee had deposited beyond the due date mentioned in the provisions of the relevant section of the Income Tax Act. However, the deposits were made before the filing of return of income for the relevant assessment year. The ld. Counsel for the assessee further submitted that the issue involved in this appeal is squarely covered in favour of the assessee by the judgment of the Hon'ble Jurisdictional High Court, in the case of 'Sagun Foundry (P.) Ltd. vs. CIT', [2017] 78 taxmann.com 47 (Allahabad), wherein, the Hon'ble High Court has relied upon and referred to the decision of the Hon'ble Supreme Court in the case of 'CIT vs. Alom Extrusions Ltd.', [2009] 319 ITR 306. It was submitted that therefore, the addition sustained by learned CIT(A) be deleted.

5. The ld. D. R., on the other hand, placing reliance on the order of the ld. CIT(A), has submitted that the ld. CIT(A) has relied on a number of case laws for sustaining the addition. In

this regard, our attention was invited to the findings of learned CIT(A). Placing reliance on the order of the ld. CIT(A), the ld. D.R. submitted that an amendment was brought in by the Finance Act, 2021, which is clarificatory or of curative nature, and has retrospective effect, and therefore, the addition sustained by the ld. CIT(A) be upheld.

4. We have heard the rival parties and have gone through the material placed on record. We find that with regard to the grievance of the assessee against the action of the ld. CIT(A) in confirming the addition made by the CPC relating to employees' contribution towards PF, there is no dispute between the parties regarding the date of deposit of PF, which clearly is beyond the prescribed date of deposit as applicable under the relevant section of the I.T. Act. Further, there is no dispute between the parties that the deposit was made before the filing of return of income for the relevant assessment year.

5. The Hon'ble Allahabad High Court, in the case of 'Sagun Foundry (P.) Ltd. vs. CIT' (supra) has dealt with a similar issue and after taking into account the judgment of the Hon'ble Supreme Court in the case of 'CIT vs. Alom Extrusion Ltd.' (supra), has decided the issue in favour of the assessee, by holding as under:

> *"16. Learned counsel for Assessee argued that the issue in question is covered by Supreme Court judgment in* ***Commissioner of Income Tax Vs Alom Extrusions Ltd., (2009) 319 ITR 306****, but both learned counsels appearing for rival parties admitted that even after the aforesaid judgment, various High Courts have taken divergent views on the question, whether Section 43B can be read alongwith Section 36(1)(va) or both have independent, distinct and separate field of operation. In this back drop, we find*

*it appropriate, first, to examine judgments of various High Courts which have been rendered after considering Supreme Court judgment in* ***Commissioner of Income Tax Vs Alom Extrusions Ltd. (supra)*** *and thereafter would examine the entire aspect in totality.*

*17. We find that with respect to employees contribution to Provident Fund, as to whether disallowable or not with reference to Section 36(1)(va) read with Section 43B, a similar question came up for consideration before Gujarat High Court in* ***Commissioner of Income Tax Vs Gujarat State Road Transport Corporation, (2014) 366 ITR 170****. Therein Assessee collected Rs.51,06,02,712/ from its employees towards provident fund contribution but deposited Rs.21,16,61,582/ with provident fund trust. Thus there was a short fall of Rs.24,89,41,130/. This amount of short fall was treated by Assessing Officer as income of Assessee vide Section 2(24)(x) read with Section 36(1)(va) of Act 1961. Assessing Officer also added Rs.1,93,55,580/ being the amount of short fall towards employers contributory provident fund and disallowed the same under Section 43B of Act 1961. He also disallowed the said amount of Rs.1,93,55,580/ from expenses claimed by Assessee for the A.Y. in question i.e. 2005-06 as per provisions under Section 43B. Dissatisfied with assessment order, Assessee preferred appeal before CIT(A) who vide order dated 25.06.2009 partly allowed the same and deleted disallowance of Rs.24,89,41,130/ (short fall in employees' contribution to provident fund) and Rs.1,93,55,580/ (short fall in employers' contribution to provident fund) observing that employees' contribution/employers' contribution was deposited before filing Return under Section 139(1) of Act 1961 for the relevant period. Revenue, in its turn, preferred appeal before Tribunal. Relying on judgment in* ***Commissioner of Income Tax Vs Alom Extrusions Ltd. (supra)****, Tribunal dismissed appeal and confirmed order passed by CIT(A). That is how matter came before High Court in appeal. Court considered following question, posed in para 7.01, reads as under:*

> *"Short question which is posed for consideration of this court is with respect to the disallowance of the amount being the employees' contribution to the PF account/ESI contribution which admittedly which the concerned assessee did not deposit with the PF Department/ESI Department within due date under the PF Act and/or the ESI Act."*

*18. Gujarat High Court referred to Section 2(24)(x) and found that any sum received by Assessee (employer) from his employees as contributions to any provident fund or superannuation fund or any fund set up under Act, 1948, or any other fund for welfare of such employees, constitutes income. However, Section 36 of Act 1961 provides for deduction in computing income referred to in Section 28. The relevant provision of Section 36 applicable to the case before Gujarat High Court was Section 36(1)(va) with which we are also concerned. It entitles an Assessee for deduction in computing income referred to in Section 28 with respect to any sum received by Assessee (employer) from his employees to which Section 2(24)(x) apply, if such sum is credited by Assessee to employees accounts in the relevant fund before due date i.e. date prescribed in the relevant statute applicable to the concerned fund. Court also noticed that Section 43B is in respect to certain deductions and applies only on actual payment. It held that amendment was made by deletion of Second Proviso of Section 43B only, but no corresponding amendment was made under Section 36(1)(va). It said:*

> *"It is required to be noted that as such there is no amendment in Section 36(1)(va) and even the Explanation to Section 36(1) (va) is not deleted and is still on the statute and is required to be complied with. Merely because with respect to the employer's contribution the second proviso to Section 43B which provided that even with respect to the employer's contribution (Section 43B(b)), the Assessee was required to credit the amount in the relevant fund under the PF Act or any other fund for the welfare of the employees*

> *on or before the due date under the relevant Act, is deleted, it cannot be said that Section 36(1)(va) has been deleted and/or amended."*

*19. That is how Gujarat High Court held that Section 43B would not be attracted in a case where dispute relates to employees contribution only. Section 43B would be confined only to employer's contribution. It further said:*

> *"Therefore, with respect to the employees contribution received by the assessee if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in the Explanation to Section 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in Section 28 of the Act."*

*20. Gujarat High Court distinguished judgment of* ***Commissioner of Income Tax Vs Alom Extrusions Ltd. (supra)*** *on the ground that therein actual dispute relates to employers' contribution and whether amendment in Section 43B by Finance Act, 2003 would operate retrospective or not, Supreme Court had no occasion to consider deduction with reference to Section 36(1)(va). For the same reason Gujrat High Court dissented with the judgments of Rajasthan High Court in* ***Commissioner of Income-Tax Vs Udaipur Dugdh Utpadak Sahakari Sangh Ltd., (2014) 366 ITR 163,*** *Punjab & Haryana High Court in* ***Commissioner of Income-Tax Vs Hemla Embroidery Mills P. Ltd., (2014) 366 ITR 167,*** *Himachal Pradesh High Court in* ***Commissioner of Income Tax Vs Nipso Ployfabriks Ltd., (2013) 350 ITR 327*** *and Karnataka High Court in* ***Commissioner of Income-Tax Vs Sabri Enterprises, (2008) 298 ITR 141****.*

*21. Karnataka High Court had an occasion to consider, whether it should dissent with the view taken in the earlier judgments and follow the view taken by Gujrat High Court in* ***Commissioner of Income Tax Vs Gujrat State Road Transport***

***Corporation (supra)*** *and this occasion came in* ***Essae Teraoka P. Ltd. Vs Deputy Commissioner of Income Tax, (2014) 366 ITR 408****. Dispute relates to A.Y. 2008-09. Assessee filed Return on 26.09.2008. Return was processed under Section 143(1) and thereafter on scrutiny, notice under Section 143(2) was issued. Assessing Officer completed assessment by order dated 24.12.2010 under Section 143(3) disallowing Rs.12,51,737/- under Section 36(1)(va) and also disallowing Rs.1,04,621/- under Section 14A read with Rule 8D. In appeal, CIT (A) reversed findings of Assessing Officer but on appeal preferred by Revenue, Tribunal restored Assessing Officer's order and that is how matter came to Karnataka High Court. The question up for consideration was, "whether Tribunal was justified in affirming finding of Assessing Officer and denying Assessee's claim of deduction of employees contribution to PF/ESI alleging that the payment was not made by appellant in accordance with the provisions of Section 36(1)(va) of Act 1961." The Assessee's counsel relied on earlier judgment of Karnataka High Court in* ***Commissioner of Income Tax Vs Spectrum Consultants P. Ltd., (2014) 2 ITROL 622*** *while counsel for Revenue attempted to pursue to take a different view following decision of Gujarat High Court. The Division Bench judgment delivered by Hon'ble Dilip B. Bhosale, (as his lordship then was) held, if the contribution of employees fund is deposited within due date the Assessee is straightaway entitled for deduction under Section 36(1)(va). However Section 43B provides for certain deductions allowable only on actual payment. It gives an extension to the employer to make payment of contribution to provident fund or any other fund, till due date applicable for furnishing of Return under Section 139(1) of Act 1961, in respect of previous year in which liability to pay such sum was incurred, and evidence of such payment is furnished by Assessee along with such Return. Court then said:*

> *"In short,* ***this provision states, notwithstanding anything contained in any other provision contained in this Act****, a deduction otherwise allowable in this Act in*

> *respect of any sum payable by the assessee as an employer by way of contribution to any fund such as provident fund shall be allowed if it is paid on or before the due date as contemplated under Section 139(1) of the Income Tax Act.* ***This provision has nothing to do with the consequences****, provided for under the PF Act/PF Scheme/ESI Act, for not depositing the "contribution" on or before the due dates therein."*
>
> *(emphasis added)*

*22. It also said that the word "contribution" used in clause (b) of Section 43B of Act 1961 means the contribution of employer and employee, both, and that being so, if contribution is deposited on or before due date for furnishing Return of income under subsection (1) of Section 139 of Act 1961, employer is entitled for deduction.*

*23. Though in a short judgment, but Punjab & Haryana High Court in* ***Commissioner of Income Tax Vs Hemla Embroidery Mills (P.) Ltd., (supra)*** *not only followed* ***Commissioner of Income Tax Vs Alom Extrusions Ltd. (supra)*** *but also its own earlier judgment in* ***Commissioner of Income Tax Vs Rai Agro Industries Ltd., (2011) 334 ITR 122****, to hold that Section 43B shall apply to both 'contributions' i.e. employers' and employees'.*

*24. Kerala High Court in recent judgment in* ***Commissioner of Income Tax Vs Merchem Ltd., (2015) 378 ITR 443****, has followed the decision of Gujarat High Court in* ***Commissioner of Income Tax Vs Gujarat State Road Transport Corporation (supra)*** *and dissented with the otherwise judgments of Rajasthan High Court in* ***Commissioner of Income Tax Vs State Bank of Bikaner and Jaipur, (2014) 363 ITR 70****, Karnataka High Court in* ***Commissioner of Income Tax Vs Spectrum Consultants India P. Ltd. (supra)*** *and Bombay High Court in* ***Commissioner of Income Tax Vs Ghatge Patil Transports Ltd., (2014) 368 ITR 749****.*

*25. Before following a particular view when there is divergence in views of different High Courts, we find it appropriate to examine Supreme Court judgment in* ***Commissioner of Income Tax Vs Alom Extrusions Ltd. (supra)*** *to find out whether it can be confined only in respect to employers' contribution or is applicable to both 'contributions', whether by employer or employee.*

*26. The question, whether benefit under Section 43B, as a result of amendment of Finance Act, 2003, is retrospective or not, came to be considered in* ***Commissioner of Income Tax Vs Alom Extrusions Ltd. (supra)****. Court considered the intent, purpose and object in the historical back drop of insertion of Section 43B and its progress by way of various amendments. Referring Section 2(24)(x) it said, income is defined under Section 2(24) which includes profits and gains. Further in clause (x) of Section 2(24) any sum received by Assessee from employees as 'contributions' to any provident fund/superannuation fund or any fund set up under Act 1948, or any other fund for welfare of such employees constitute 'income'. This is the reason why every Assessee/ Employer was entitled to deduction even prior to April, 1, 1984, keeping books on mercantile system of accounting, as a business expenditure, by making provision in his books of account in that regard. Assessee was capable of keeping money with him and just by mentioning in accounts, was able to claim deduction as business expenses. Section 43B was inserted to check this practice and it resulted in discontinuing mercantile system of accounting with regard to tax, contributions etc. With induction of Section 43B an Assessee could claim deduction on actual payment basis. By Finance Act, 1988 Parliament inserted first proviso w.e.f. 01.04.1988 which inter alia provides that any sum payable by Assessee by way of tax, duty, cess or fee, if payment is made after closing of accounting year but before date of filing of Return under Section 139(1), Assessee would be entitled to deduction on actual payment basis. This proviso did not include within its ambit, contributions under labour welfare statutes. By Finance Act, 1988, Second Proviso thus Second*

*proviso was further amended by Finance Act, 1989 w.e.f. 01.04.1989.*

*27. Court held that Assessee/employer thus would be entitled to deduction only if contribution stands credited on or before due date given in the Act 1952 or Act 1948. Second proviso created difficulties, inasmuch as under Act, 1981, due date was after the date of filing of returns and thus industries made representations to the Ministry of Finance. Court, looking to the history of amendments held, it is evident that Section 43B, when enacted in 1984, commences with a non obstante clause. The underlying object being to disallow deductions claimed merely by making a book entry based on the mercantile system of accounting. At the same time, Section 43B made it mandatory for the Department to grant deduction in computing income under Section 28 in the year in which tax, duty, cess etc. is actually paid. Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under Provident Fund Act, Municipal Corporation Act (Octroi) and other Tax laws. Therefore, by way of First Proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax duty cess or fee is paid before the date of filing of the return under Act 1961, Assessee would then be entitled to deduction.This relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer should not sit on the collected contributions and deprive workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. But when implementation problems were pointed out for different due dates, uniformity was brought about in first proviso by Finance Act, 2003. Hence, amendment made by Finance Act 2003 in Section 43B is retrospective, being curative in nature and apply from 01.04.1988. In the result when contribution had been paid, prior to filing of return under Section 139(1), Assessee/employer would be entitled for deduction and since deletion of Second Proviso and amendment*

*of First Proviso is curative and apply retrospectively w.e.f. 01.04.1988.*

*28. From the aforesaid judgment, we find that irrespective of the fact that deduction in respect of sum payable by employer contribution was involved, but Court did not restrict observations, findings and declaration of law to that context but looking to the objective and purpose of insertion of Section 43B applied it to both the contributions. It also observed clearly that Section 43B is with a non-obstante clause and therefore over ride even if, anything otherwise is contained in Section 36 or any provision of Act 1961.*

*29. Therefore, we are clearly of the view that law laid down by High Courts of Karnataka, Rajasthan, Punjab & Haryana, Delhi, Bombay and Himachal Pradesh have rightly applied Section 43B in respect to both contributions i.e. employer and employee. Otherwise view taken by Gujarat High Court and followed by Kerala High Court, with great respect, we find expedient to dissent therewith.*

*30. In view of above all the questions formulated above are answered against Revenue and in favour of Assessee."*

6. We find that in the aforesaid judgment passed by Hon'ble Jurisdictional High Court, the Hon'ble Court has dealt with various case laws of different High Courts and the Hon'ble Apex Court, and has decided the issue in favour of the assessee.

7. The Lucknow Bench of the Tribunal, in the following cases, has decided a similar issue in favour of the assessee, following the judgment in the case of 'Sagun Foundry' (supra):

1. 'Tirubala International Pvt. Ltd. vs. DCIT' in I.T.A. No.726/Lkw/2016, order dated 17.05.2018.
2. 'Axis Motors Pvt. Ltd. vs. DCIT' in I.T.A. No.289/Lkw/2019, order dated 31.7.2019.

8. As regards the argument of ld. D.R. that after the passing of the judgment in the case of 'Sagun Foundry' (supra), there has been amendment in section 36(1)(va) of the Act, we find that the said amendment is applicable w.e.f. 1.4.2021 and is prospective in nature and not retrospective.

9. The Allahabad Bench of the Tribunal, in the case of 'JCIT, Circle-2, Allahabad vs. Bharat Pumps and Compressors Ltd.' in I.T.A. No.147 & 148/Alld/2016, after taking into account the aforesaid amendment brought in by the Finance Act, 2021, has decided the issue in favour of the assessee by holding the amendment to be applicable from April 2021 only. The relevant portion of the findings of the Tribunal is reproduced below:

> *"There is a recent amendment to Section 36(1)(va) by Finance Act, 2021, wherein Explanation 2 was inserted, which reads as under:*
>
> > *"36(1)(va) ……..*
> > *……*
> >
> > *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;"*
>
> *Correspondingly, there was an amendment to Section 43B of the 1961 Act by Finance Act, 2021, wherein Explanation 5 was inserted , which reads as under:*
>
> > *"43B……..*
> > *……*
> >
> > *Explanations- 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 applied."*

*Although, on perusal of the above amendment by Finance Act, 2021 , it transpires that the said explanation was inserted by way of removal of doubt to clarify the law as existed on the statute so far as employee contribution received by employer from employee which is to be deposited to the credit of employee with PF fund on or before the due date as provided in statute governing PF, to enable the employer to claim deduction u/s 36(1)(va) of the 1961 Act read with Section 2(24)(x) of the Act, and no deduction shall be allowed by virtue of Section 43B in case of delayed deposit beyond the time stipulated for deposit under relevant statute governing PF by virtue of being hit by Section u/s 36(1)(va) of the Act as it is stated in the explanation that 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 , although the said amounts were deposited before the due date as prescribed for filing of return of income u/s 139(1) of the 1961 Act. The above amendment from the plain reading of the Section indicates that it ought to have retrospective effect , but on perusal of Memorandum to Finance Bill 2021, it transpires that the lawmakers have consciously made it applicable from ay: 2021-22 and subsequent assessment years. It is also recognised in the said Memorandum that some courts have applied the provision of section 43B on employee contribution as well and have decided this issue in favour of taxpayer. The said explanation was inserted to rationalise the provisions of Section 36(1)(va) and 43B of the 1961 Act and it is stated in Memorandum to Finance Bill, 2021 that the said explanation is inserted to provide certainty. It is specifically stated in Memorandum to Finance Bill, 2021 that these amendments to Section 36(1)(va) and 43B shall take effect from 01st April, 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years. It is also to be noted that several of the tax-payers (except in the State of Gujarat and Kerala , and such other States where Hon'ble jurisdictional High Court has decided this issue in favour of Revenue) situated in the States where Hon'ble Jurisdictional High Court has decided this issue in favour of tax-payers, have already been allowed the deduction towards employee contribution received by employer which was deposited late*

*by employer beyond the time stipulated u/s 36(1)(va) , but before the due date as prescribed for filing of return of income u/s 139(1) of the 1961 Act, and there cannot be a class different now at this stage where the deduction is to be denied on the ground of strict interpretation of the provisions of Section 36(1)(va) , unless the amendment made by Finance Act, 2021 is made specifically applicable retrospectively from the date of insertion of the provision or any other specified earlier date in the Finance Act, rather on the other hand , the Memorandum to Finance Bill, 2021 has specifically made this amendment applicable from 01.04.2021 and specified that the same shall be made applicable from assessment year 2021-22 and subsequent assessment years. We are presently concerned with ay: 2005-06. The relevant clause to Memorandum to Finance Bill, 2021 is reproduced hereunder:*

> *"Rationalisation of various Provisions*
>
> *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 there-under 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 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 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.*

*Accordingly, in order to provide certainty, it is proposed to -*

*(1) 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 assesses from arty 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. [Clauses 8 and 9]"*

10. In view the above facts and circumstances, the issue is decided in favour of the assessee.

11. Nothing further hence survives for adjudication and as such, the other grounds raised by the assessee are not required to be gone into, nor was anything else argued.

12. In the result, the appeal of the assessee stands allowed.

Order pronounced in the open Court on 05/04/2022.

| | |
|---|---|
| Sd/- | Sd/- |
| [T. S. KAPOOR] | [A. D. JAIN] |
| ACCOUNTANT MEMBER | VICE PRESIDENT |

DATED:05/04/2022

JJ:

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Assistant Registrar