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

## माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
## माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
## BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
## HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA No.459/Chny/2020**
**(निर्धारण वर्ष / Assessment Year: 2017-18)**

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| **DCIT**<br>Corporate Circle-3(1),<br>Chennai. | **बनाम**/<br>Vs. | **M/s. Talentrpro India HR Pvt. Ltd.**<br>New No.64, Old No.30, Ethiraj Salai,<br>Egmore, Chennai-600 008. |
| स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AABCP-9823-A** | | |
| (अपीलार्थी**/Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

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| अपीलार्थी की ओरसे/ **Assessee by** | : | None |
| प्रत्यर्थी की ओरसे/**Revenue by** | : | Shri P. Sajit Kumar (JCIT) –Ld. DR |
| सुनवाई की तारीख**/Date of Hearing** | : | 14-06-2022 |
| घोषणा की तारीख **/Date of Pronouncement** | : | 06-07-2022 |

## आदेश / O R D E R

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeal by revenue for Assessment Year (AY) 2017-2018 arises out of the order of learned Commissioner of Income Tax (Appeals)-11, Chennai [CIT(A)], ITA No.7/19-20 dated 11-12-2019 in the matter of intimation issued by Centralized Processing Center (CPC), Bengaluru u/s 143(1) on 23-03-2019. The sole grievance of the revenue is that deduction of delayed payment of Employees Contribution to PF as disallowed by CPC u/s 36(1)(va) r.w.s 2(24)(x), has been allowed by Ld. CIT(A). At the time of hearing, none appeared

for assessee. However, upon perusal of impugned order, we find that the issue is covered in assessee's favor by our own order and therefore, we proceed to dispose-off the appeal on the basis of material on record.

2. The assessee's return of income was processed by CPC wherein prima-facie adjustment of late payment of Employees Contribution to PF for Rs.330.12 Lacs was made in terms of Sec. 36(1)(va) r.w.s 2(24)(x). Upon further appeal, the adjustment was confirmed by Ld. CIT(A) vide order dated 18.09.2019. In the meantime, the case was picked up for scrutiny and an assessment was framed u/s 143(3) on 18.12.2019 wherein Ld. AO made this adjustment since the assessee's appeal against intimation stood dismissed by Ld. CIT(A) in its order dated 18.09.2019. However, the assessee preferred rectification of order dated 18.09.2019 and another order was passed by Ld. CIT(A) on 11.12.2019 which is order under challenge before us. This order was passed since the issue of adjustment u/s Sec. 36(1)(va) r.w.s 2(24)(x) was not addressed in order dated 18.09.2019. The Ld. CIT(A) allowed the claim of the assessee by relying on the decision of Hon'ble High Court of Madras in **CIT v. Industrial Security & Intelligence India (P.) Ltd. [TCA No. 585 of 2015, dated 24-7-2015].** Aggrieved, the revenue is in further appeal before us.

3. We find that this issue is now covered in assessee's favor by our decision in lead order titled as **M/s Benco Thermal Technologies Private Ltd. V/s Asstt. Director of Income Tax (ITA No.281/Chny/2021 on 23.02.2022),** the operative portion of which read as under: -

**Our findings and Adjudication**

4. We find that as per the provisions of clause (b) of Sec.43B of the Act, any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund and gratuity fund or any other fund for the welfare of employees would be allowed as deductions only on actual payment. However, the proviso to Sec. 43B provides that if the said sum is paid on or before due date for furnishing of return of income u/s. 139(1) of the Act, the deduction would still be available to the assessee.

The term 'Income' as defined in Sec.2(24)(x) 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 the Employees' State Insurance Act, 1948 (ESI) or any other fund for the welfare of such employees. In other words, the contribution received by the assessee from its employees towards specified welfare funds is always treated as income of the assessee.

However, the provisions of Sec. 36(1)(va) of the Act provides that any sum received by the assessee in terms of Sec. 2(24)(x) of the Act shall be allowed as deduction, if such sum is credited by the assessee to the employees' account in the relevant fund or funds on or before the due date. The term 'due date' as per Explanation would mean the date by which the assessee is required as an employer to credit employees' contribution to the employees' account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract or service or otherwise. Thus, the contribution received by the assessee from its employees' towards welfare funds, though treated as income u/s 2(24)(x), would be allowed as deduction u/s 36(1)(va) provided the same is remitted to the concerned funds before due date as specified in statute governing those funds. Any payment made beyond that date would result into denial of deduction to the assessee.

5. We find that even though the provisions of Sec.43B only covers the Employer's contribution and not employees' contribution, still the higher courts have held that the provisions of Sec.43B would be applicable to employees' contribution as well. In other words, if the employees' contribution has been paid by the assessee before due date of filing of return of income as per Sec.139(1), the deduction would still be available to the assessee notwithstanding the fact that the payment was made beyond the due date as per the applicable Acts & Rules governing the welfare funds.

6. One of such case is the decision of Hon'ble Karnataka High Court in the case of **EssaeTeraoka (P.) Ltd. (43 Taxmann.com 33: 04.02.2014).** In this decision, the Hon'ble Court distinguished the case law of Hon'ble Gujarat High Court in the case of **CIT V/s Gujarat State Road Transport Corpn. (41 Taxmann.com 100; 26.12.2013)** and held that employees' contribution so paid by the assessee before due date of filing of return of income u/s 139(1) would be an allowable deduction. The same was on the reasoning that the provisions of Sec.43B provide an extension to the employer to make payment of welfare funds by 'due date' applicable for furnishing the return of income u/s 139(1). It was held that the provisions of Sec.43B start with non-obstante clause and provide that 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 welfare fund, shall be allowed if it is paid on or before the due date as contemplated under Section

139(1). 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 as specified therein. It was examined that the expression 'contribution' as defined in Section 2(c) under the PF Act would mean a contribution payable in respect of a member under the scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies. If this definition is read with sub-para (1) of paragraph 29 in Chapter-V of the PF Scheme, it would mean that the contributions payable by the employer under the scheme shall be at a particular rate and the contribution payable by the employee shall be equal to the contribution payable by the employer. The Paragraph 30 of the PF scheme provides for payment of contributions. Sub-para (1) of paragraph 30 states that the employer shall, in the first instance, pay both the contribution payable by himself (in this scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this scheme referred to as the member's contribution). From bare perusal of sub-para (1) of paragraph 30, it is clear that 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. The Paragraph 38 of the PF scheme provides for Mode of payment of contributions. As provided in sub-para (1), the employer shall, before paying the member, his wages, deduct his contribution from his wages and deposit the same together with his own contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word 'contribution' used in clause (b) of section 43B means the contribution of the employer as well as the contribution of the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income u/s 139(1), the employer is entitled for deduction.

7. Similar is the ratio of decision of Hon'ble Rajasthan High Court in the case of **Pr. CIT V/s Rajasthan State Beverages Corpn. Ltd. (84 Taxmann.com 173; 04.08.2016)** which followed the earlier decision in **CIT V/s State Bank of Bikaner & Jaipur (43 Taxmann.com 411; 06.01.2014)**. The Hon'ble Court, in the case of **CIT V/s State Bank of Bikaner & Jaipur (supra)** held that the provisions of Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1)(va) and if read in isolation, Sec. 43B would become obsolete. The Hon'ble Court further held that these provisions were brought in as the due amounts on one pretext or the other were not being deposited by the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said amounts were not deposited. The court observed that the respective Act such as PF etc. also provides that the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income under sub-section (1) of Section 139 of the IT Act. Following the same, similar decision was rendered in **Pr. CIT V/s Rajasthan State Beverages Corpn. Ltd. (supra).**

8. We find that the revenue preferred Special leave Petition (SLP) against this decision which was dismissed by Hon'ble Supreme Court (reported as 84 Taxmann.com 185; 04/07/2017) with following observations: -

1. Delay condoned.

> 2. We do not find any merit in this petition. The special leave petition is, accordingly, dismissed.

In other words, the issue could be said to have attained finality since no merit was found in the revenue's petition by Hon'ble Apex Court.

9. A similar view favorable to assessee has been taken by Hon'ble Karnataka High Court in **Spectrum Consultants India Pvt. Ltd. V/s CIT (49 Taxmann.com 29; 09.12.2013)**; Hon'ble High Court of Bombay in **CIT V/s Ghatge Patil Transports Ltd. (53 Taxmann.com 141; 14.10.2014);** Hon'ble Delhi High Court in **CIT V/s Aimil Ltd. (188 Taxman 265 23.12.2009);** Hon'ble Patna High Court in the case of **Bihar State Warehousing Corp. Ltd. (88 Taxmann.com 455; 16.03.2016);** Hon'ble High Court of Uttarakhand in **CIT V/s Kicha Sugar Co. Ltd. (35 Taxmann.com 54; 20.05.2013)**; Hon'ble High Court of Calcutta in **CIT V/s Vijay Shree Ltd. (43 Taxmann.com 396; 06.09.2011).** Thus, pre-dominant view of majority of Hon'ble High Court is in assessee's favor wherein it was held that the Employees' Contribution paid by the assessee before due date of furnishing of return of income u/s 139(1) would be an allowable deduction considering the provisions of Sec.43B.

However, view against the assessee has been taken by Hon'ble Kerala High Court in **Popular Vehicles & Services P. Ltd. V/s CIT (96 Taxmann.com 13; 02.07.2018)** as well as Hon'ble Gujarat High Court in **CIT V/s Gujarat State Road Transport Corpn. (supra).** In these cases, the view of Hon'ble Courts is that the provisions of Sec.36(1)(va) and Sec.43B operate differently and therefore, any late remittance of Employees' Contribution beyond due date as specified in relevant statutes governing those funds, would result into denial of deduction to the assessee in terms of Sec.36(1)(va) r.w.s. 2(24)(x).

10. So far as the decision of jurisdictional High Court of Madras is concerned, the coordinate bench of Hon'ble Court has rendered similar decision favoring assessee in **CIT v. Industrial Security & Intelligence India (P.) Ltd. [TCA No. 585 of 2015, dated 24-7-2015]** and held as under: -

> 5. We find that the Tribunal has rightly relied on the decision of the Supreme Court in the case of **CIT V. Alom Extrusions Ltd.** reported in 319 ITR 306, whereby, the Supreme Court held that omission of second proviso to Section 43B and amendment to first proviso by Finance Act, 2003 are curative in nature and are effective retrospectively, i.e., with effect from 1.4.1988 i.e., the date of insertion of first proviso. The Delhi High Court in the case of **CIT V. Amil Ltd. reported in 321 ITR 508** held that if the assessee had deposited employee's contribution towards Provident Fund and ESI after due date as prescribed under the relevant Act, but before the due date of filing of return under the Income Tax Act, no disallowance could be made in view of the provisions of Section 43B as amended by Finance Act, 2003.
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> 6. In the present case, the assessee had remitted the employees contribution beyond the due date for payment, but within the due date for filing the return of income. Hence, following the above-said decisions, we find no reason to differ with the findings of the Tribunal. Accordingly, we find no question of law much less any substantial question of law arises for consideration in these appeals. Accordingly, both the Tax Case (Appeals) stand dismissed. No costs. Consequently, M.P.No.1 of 2015 is also dismissed.

However, in later decision titled as **Unifac Management Services (India) P. Ltd. V/s DCIT (100 Taxmann.com 244; 23.10.2018),** the single judge bench of Hon'ble Court has held that the scope of Section 43B and Section 36(1)(va) are different and thus, there is no question of reading both provisions together to consider as to whether assessee-employer is entitled to deduction in respect of sum belatedly paid towards employee contribution and therefore, for considering such question, application of section 36(1)(va) read with section 2(24)(x) alone is proper course. It was further held that though an amendment has been introduced to Section 43B, whereby actual date of payment is enough for considering deduction, if such date falls before date for filing return but in absence of any amendment made to section 36(1)(va), both contributions, viz., 'employees' and 'employers' cannot be brought under same scope and ambit of section 43B to claim deduction.

Keeping in view the fact that the decision in **CIT v. Industrial Security & Intelligence India (P.) Ltd. (supra)** has been rendered by co-ordinate bench, this decision shall have precedent over the decision of **Unifac Management Services (India) P. Ltd. V/s DCIT (supra)** which has been rendered by single judge bench.

11. In the light of aforesaid judicial precedents especially the decision of Hon'ble High Court of Madras in **CIT v. Industrial Security & Intelligence India (P.) Ltd. (supra)** and keeping in view the fact the Special Leave Petition (SLP) filed by the revenue against the decision of Hon'ble Rajasthan High Court favoring assessee has already been dismissed by Hon'ble Supreme Court (para-8), we are inclined to take a view favoring the assessee. Accordingly, we would hold that the provisions of Sec.43B would override the provisions of Sec.36(1)(va) and accordingly, the employees' contribution as paid by the assessee before due date of filing of return u/s 139(1) would still be an allowable deduction notwithstanding the fact that the payment was made beyond due date as specified in the relevant statute governing those welfare funds.

12. So far as the effect of amendment brought in by Finance Act, 2021 is concerned, we find that Finance Act, 2021 has proposed amendment to Sec.36(1)(va) and Sec.43B to clarify the position that Sec.43B would never apply to such contributions. For the same, an explanation-2 has been inserted in Sec. 36(1)(va) which state that Section 43B would not apply and is presumed never to have been applied to establish the due date under this sub-section. Similarly, Explanation-5 has been inserted to Section 43B to explain that the rules of that section do not apply and are never regarded to have applied to any funds received by the assessee from employees. The controversy as to the date of applicability of amendment arises in view of the fact that both the Memorandum as well as the Finance Bill state that relevant amendment will take effect on 01/04/2021 and apply to Assessment Year 2021-22 and subsequent assessment years. The submissions of the revenue would be that the amendment is merely clarificatory in nature and would have retrospective operation. However, the assessee would maintain that the provisions would have prospective operations only and the pre-amended period would be largely guided by the ratio of judicial pronouncements favoring the assessee.

13. We find that this issue has already been settled by co-ordinate bench of this Tribunal in **Adyar Anand Bhawan Sweets India Pvt. Ltd. V/s ACIT (134 Taxmann.com 56; 08.12.2021).** In the said decision, it has already been held by the coordinate bench that the amendment to Sec.36(1)(va) by way of insertion of explanation-2 would operate prospectively only. This view has been taken by the

bench considering the ratio of decision of Hon'ble Supreme Court in the case of **CIT v. Vatika Township (P.) Ltd. [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC)** and it was finally held that the amendment brought in by Finance Act, 2021 to the provisions of Section 36(1)(va) as well as to the provisions of Sec.43B would have prospective application only. The pertinent observations of the bench were as under: -

> 6.7 We noted from the judgment of Hon'ble Supreme Court in Vatika Township (P.) Ltd. (supra), 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. In present case before us, as noted by CIT(A) that their exists divergent judgments of various High Courts. The CIT(A) has noted the case laws in favour of Revenue:
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> 1. Popular Vehicles & Services (P.) Ltd. v. CIT [2018] 96 taxmann.com 13/257 Taxman 120/406 ITR 150 (Ker.)
> 2. CIT v. Gujarat Road Transport Corpn. [2014] 41 taxmann.com 100/223 Taxman 398/366 ITR 170 (Guj.)
> 3. CIT v. Merchem Ltd. [2015] 61 taxmann.com 119/235 Taxman 291/378 ITR 443 (Ker.)
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> The CIT(A) himself noted the ambiguity in para 7.4 of his order, which reads as under:
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> 7.4 While rendering above decisions the Hon'ble High Courts had the occasion to examine and distinguish a catena of judgements which are usually relied upon by appellants to advance the proposition that the provisions of section 43B encompass within its scope the employees' Contribution as well and therefore any such contribution though not remitted by the employer within due date specified by the PF/ESI Acts, will still be permissible deduction if the same is actually paid in pursuance of sec. 43B.
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> The CIT(A) further noted the decisions in favour of assessee in para 7.7, and the same are as under:
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> 1. CIT v. Alom Extrusions Ltd. [2009] 185 Taxman 416/319 ITR 306 (SC)
> 2. Aimil Ltd. (supra)
> 3. CIT v. NispoPolyfabriks [2013] 350 ITR 327/213 Taxman 376/30 taxmann.com 90 (HP);
> 4. CIT v. Alembic Glass Industries Ltd. [2015] 279 ITR 331/149 Taxman 15 (Guj.);
> 5. CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar);
> 6. CIT v. Pamwi Tissues Ltd. [2009] 313 ITR 137 (Bom.);
> 7. Spectrum Consultants India (P.) Ltd. v. CIT [2013] 34 taxmann.com 20/215 Taxman 597 (Kar.);
> 8. CIT v. Udaipur DugdhUtpadak Sahakari Sangh Ltd. [2013] 35 taxmann.com 616/217 Taxman 64 (Mag.)/[2014] 366 ITR 163 (Raj.) and
> 9. CIT v. Hemla Embroidery Mills (P.) Ltd. [2013] 37 taxmann.com 160/217 Taxman 207 (Mag.)/[2014] 366 ITR 167 (Punj. & Har.).
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> 6.8 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 Hon'ble 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 effective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 1-4-2021 i.e. for and from assessment year 2021-22 of Explanation 2 to s. 36(1)(va) of the Act and not retrospectively.

6.9 Thus, from the above, it is clear that the amendment brought in the statute i.e., by Finance Act, 2021, the provisions of section 36(1)(va) r.w.s. 43B of the Act amended by inserting Explanation 2 is prospective and not retrospective. Hence, the amended provisions of section 43B r.w.s. 36(1)(va) of the Act are not applicable for the assessment year 2018-19 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue of assessee's appeal is allowed.

14. So far as the argument of the Ld. DR that the employees' interest would be adversely impacted, is concerned, we find that the respective Acts governing welfare funds would take care of those eventualities. 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. However, we are concerned with a case wherein the contributions have already been deposited by the assessee before due date of furnishing of return of income u/s 139(1) and the assessee is claiming deduction of the expenditure under the scheme of the Act. Therefore, this argument of Ld. DR though may carry weightage from morality point of view but it would not be of much relevance to decide the issue as to whether the assessee is eligible to claim the expenditure keeping in view the scheme of the act.

15. Finally, the assessee's appeal succeeds on merits. The revenue is directed to grant the deduction so claimed by the assessee and re-compute assessee's income.

16. The appeal stands allowed in terms of our above order.

4. Facts being pari-materia the same, we see no reason to interfere in the impugned order.

5. The appeal stand dismissed.

Order pronounced on 06th July, 2022.

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| **Sd/-** | **Sd/-** |
| **(MAHAVIR SINGH)** | **(MANOJ KUMAR AGGARWAL)** |
| **उपाध्यक्ष /VICE PRESIDENT** | **लेखासदस्य / ACCOUNTANT MEMBER** |

चेन्नई / Chennai; दिनांक / Dated : 06-07-2022

*EDN/-*

**आदेश की प्रतिलिपि  ग्रेषित/Copy of the Order forwarded 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