IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'SMC' NEW DELHI

BEFORE SHRI SAKTIJIT MEMBER, JUDICIAL MEMBER

ITA No.1217/Del/2022
Assessment Year: 2018-19

Sona Fashions Inc. H 9, Mohan Coop. Industrial Estate, B1, Mathura Road, South Delhi, New Delhi	**Vs.**	ITO, Ward-29(5), New Delhi
PAN :AACFS7353L		
(Appellant)		**(Respondent)**

Appellant by	Sh. Ashok Kumar Bhatia, CA
Respondent by	Sh. Om Parkash, Sr. DR

Date of hearing	30.08.2022
Date of pronouncement	30.08.2022

ORDER

This is an appeal by the assessee against order dated 30.03.2022 of National Faceless Appeal Centre (NFAC), Delhi, pertaining to the assessment year 2018-19.

2. The dispute in the present appeals is confined to disallowance of deduction claimed of Rs.10,31,122/- for assessment year 2018-19 under section 36(1)(va) of the Income-tax Act, 1961 (for short 'the Act') representing delayed payments of employees' contribution to Provident Fund (PF) and Employees State Insurance (ESI).

3. I have considered rival submissions and perused the materials on record. There is no dispute that the assessee has paid/remitted the employees' contribution to PF and ESI before the due date of filing of return of income under section 139(1) of the Act. The only reason for which the amount has been disallowed is, they were not deposited within the time specified under the relevant statute in terms of Explanation to section 36(1)(va) of the Act. I find, the aforesaid dispute is squarely covered by the decision of the Coordinate Bench in ITA No.1392/Del/2021 and Ors. (Raj Kumar and Ors., dated 28.02.2022). The relevant observations of the Coordinate Bench in case of Raj Kumar (supra) are as under:

> "5. We have heard the arguments of the parties concerned and also the arguments of the representatives of the Department.
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> ***6. We have gone through amendments in the Income Tax Act inserted by Finance Act 2021, Memorandum, plethora of orders passed by the various benches of Tribunal and the judgments of Hon'ble High Courts of various Judicatures.***
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> *7. Co-ordinate Benches of the Tribunal have been taken view that the employee's contribution to PF and ESI, if paid before the due date of filing of the Income Tax Return u/s 139(1), is an allowable deduction and no disallowance can be made. To mention a few*
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> - *Order of the ITAT, Hyderabad in the case of Crescent Roadways Pvt. Ltd., vs., DCIT vide ITA.No.1952/ Hyd/2018 dated 01.07.2021.*
> - *Order of the ITAT, Delhi in the case of DCIT vs. Dee Development Engineers Ltd., vide ITA.No.4959/Del./2016 dated 08.04.2021.*

- *Order of the ITAT, Delhi in the case of DCIT vs. Planman HR (P) Ltd., vide ITA.No.5152/ Del./2017 dated 15.07.2021.*
- *Order of the ITAT, Chennai in the case of DCIT vs. Talenpro India HR Pvt. Ltd., vide ITA.No.265/ Chennai/2019 dated 09.04.2021.*
- *Order of the ITAT, Agra in the case of Mahadev Cold Storage vs. Jurisdiction Assessing Officer vide I.T.A. Nos. 20 & 21/Agra/2021 dated 14.06.2021.*
- *Order of the ITAT, Chennai in the case of DCIT vs. Repco Home Finance Pvt. Ltd., reported in [2020] 183 ITD 782 ITAT-Chennai.*
- *Order of ITAT in the case of Eagle Trans Shipping & Logistics (India) (P.) Ltd. Vs ACIT in ITA No. 324/Del/2017 order dated 25.07.2019 wherein the issue has been ruled against the assessee based on the judgments of Hon'ble High Court of Delhi in the case of CIT Vs. Bharat Hotels Ltd. 410 ITR 417.*
- *Order of ITAT, Delhi in the case of Vedvan Consultants Pvt. Ltd. Vs. DCIT in ITA No. 1312/Del/2020 dated 26.08.2021 wherein the issue has been ruled against the assessee based on the judgments of Hon'ble Madras High Court, Hon'ble Bombay High Court and Hon'ble Kerala High Court. The said orders are examined which are as under:*

MADRAS HIGH COURT : October 23, 2018
M/S. UNIFAC MANAGEMENT SERVICES (INDIA) PRIVATE LTD. VERSUS THE DEPUTY COMMISSIONER OF INCOME TAX, CORPORATION CIRCLE 3 (2) , CHENNAI

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 the assessee is entitled to deduction in respect of the sum belatedly paid towards such contribution, especially when such sum is, admittedly, a sum received by the assessee/employer from his employee. Therefore, for considering such question, application of Section 36(1)(va) r.w.s. 2(24)(x) alone is the proper course and any other interpretation would only defeat the object and scope of both the provisions viz., 43B and 36(1)(va).

Accordingly, the writ petition fails and the same is dismissed.

KERALA HIGH COURT : [2015] 378 ITR 443 : September 8, 2015

THE COMMISSIONER OF INCOME TAX, COCHIN VERSUS M/S MERCHEM LIMITED

The distinction drawn to credit the amount of the employer and the employee was with a clear objective and there is no illegality or other legal infirmity in classifying the contributions of employees and employer in the matter of crediting the same to the appropriate statutory authorities. Considering section 36(1)(va) of the Income Tax Act as it stands, with respect to any sum received by the assessee from any of his employees to which the provisions of clause (x) of sub-section (24) of section 2 applies, assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28 if such sum is not credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as per explanation to section 36(1)(va) of the Act.

BOMBAY HIGH COURT: [2014] 368 ITR 749 (Bom): October 14, 2014

THE COMMISSIONER OF INCOME TAX VERSUS GHATGE PATIL TRANSPORTS LTD.

The employer assessee would be entitled to deduction only if the contribution to the employee's welfare fund stood credited on or before the due date and not otherwise – following the decision in Commissioner of Income Tax V/s. Alom Extrusions Ltd. [SUPREME COURT] – both employees' and employer's contributions are covered under the amendment to Section 43B of I.T. Act – the Tribunal was right in holding that payments are subject to benefits of Section 43B.

8. We have examined the decision of the Hon'ble Gujarat High Court in the case of State Road Transport Corporation (366 ITR 170) wherein the court has held the the payment were not allowable u/s 36(1)(va).It was held as under:

"Section 43B, read with section 36(1)(va) of the Income Tax Act, 1961 Business disallowance - Certain deductions to be allowed on actual payment (employee's contribution) - whether where an employer has not credited sum received by it as employee's contribution to employee's account in relevant fund on or before due date as prescribed in Explanation to section 36(1)(va), assessee shall not be entitled to deduction of such amount though he deposits same before due date prescribed under section 43B i.e.

prior to filing of return under section 139(1). Held, yes - assessee State Transport Corporation collected a sum being Provident Fund contribution from its employees. However, it had deposited lesser sum in Provident Fund account. Assessing Officer disallowed same under section 43B. However, Commissioner (Appeals) deleted disallowance on ground that employee's contribution was deposited before filing return. Whether since assessee had not deposited said contribution in respective fund account on date as prescribed in explanation to section 36(1)(va), disallowance made by Assessing Officer as just and proper."

9. Similarly, the judgments of Hon'ble High Court of Delhi in the case of CIT Vs. Bharat Hotels Ltd. 410 ITR 417 held that the amounts were not allowable u/s 36(1)(va). The relevant portion is as under:

"7. The issue here concerns the interplay of Section 2(24)(x) of the Act read with Section 36(1)(va) of the Act alongside provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (especially Regulation 38 of the Employees' Provident Funds Scheme, 1952) and the provisions of the Employees' State Insurance Act, 1948. The AO had brought to tax amounts which were deducted by the employer/assessee from the salaries and wages payable to its employees, as part of their contributions. It is not in dispute that the employer's right to claim deductions under the main part of Section 43-B of the Act is not an issue. The question the AO had to then decide was whether the amounts deducted from the salaries of the employees which had to be deposited within the stipulated time (in terms of notification/circular dated 19.03.1964 which was modified on 24.10.1973), as far as the EPF contribution went and the period of three weeks as far as the ESI contributions went. The AO made a tabular analysis with respect to the contributions deducted and actually deposited. The cumulative effect of notifications under the Employees' Provident Funds Act, 1952 and the Employees State Insurance Act, 1948 was that in respect of the EPF Scheme contributions the deductions were to be deposited within 15 days of the succeeding wage period with a grace period of 5 days; for ESI contributions the deposit with the concerned statutory authority had to be made within three weeks of the succeeding wage month/period. The CIT in this case confirmed the additions - made by the AO based on the entire amounts that were disallowed. The ITAT however granted complete relief.

8. Having regard to the specific provisions of the Employees' Provident Funds Act and ESI Act as well as the concerned notifications which granted a grace period of 5 days (which appears to have been late withdrawn recently on 08.01.2016), we are of the opinion that the ITAT's decision in this case was not correct. The assessee undoubtedly was entitled to claim the benefit and properly treat such amounts as having been duly deposited, which were in fact deposited within the period prescribed (i.e. 15 + 5 days in the case of EPF and 21 days + any other grace, period in terms of the extent notification). As far as the amounts constituting deductions from employees' salaries towards their contributions, which were made beyond such stipulated period, obviously the assessee was not entitled to claim the deduction from its returns.

9. In view of this discussion, the Revenue's appeal is partly allowed. The AO is directed to examine the contributions made with reference to the dates when they were actually made and grant relief to such of them which qualified for such relief in terms of the prevailing provisions and notifications. We also clarify that the assessee would be entitled to deduction in terms of Section 36(1)(va) of the Act."

10. We have also examined the decision of the Hon'ble Allahabad High Court in the case of Sagun Foundry Pvt. Ltd. Vs CIT 145 DTR 265 wherein it was held that as the payments have been made before the due date specified u/s 139(1) and as such are fully allowable. The Hon'ble High Court of Allahabad has considered the case of Gujarat State Road Transport Corporation and held as under:

"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 v. 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. 200506 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 v. 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, constitute 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 employee 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 employers contribution the second proviso to Section 43B which provided that even with respect to the employers 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 employers 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 v. 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 Gujarat High Court dissented with the judgments of Rajasthan High Court in Commissioner of Income-Tax v. Udaipur Dugdh Utpadak Sahakari Sangh Ltd., (2014) 366 ITR 163, Punjab and Haryana High Court in Commissioner of Income-Tax v. Hemla Embroidery Mills P. Ltd., (2014) 366 ITR 167 , Himachal Pradesh High Court in Commissioner of Income-Tax v. Nipso Ployfabriks Ltd., (2013) 350 ITR 327 and Karnataka High Court in Commissioner of Income-Tax v. 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 Gujarat High Court in Commissioner of Income-Tax v. Gujarat State Road Transport Corporation (supra) and this occasion came in Essae Teraoka P. Ltd. v. Deputy Commissioner of Income-Tax, (2014) 366 ITR 408. Dispute relates to A.Y. 200809. 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 Officers 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 Assessees 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 Assessees counsel relied on earlier judgment of Karnataka High Court in Commissioner of Income-Tax v. 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 Honble 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 and Haryana High Court in Commissioner of Income-Tax v. Hemla Embroidery Mills (P.) Ltd., (supra) not only followed Commissioner of Income-Tax v. Alom Extrusions Ltd. (supra) but also its own earlier judgment in Commissioner of Income-Tax v. 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 v. Merchem Ltd., (2015) 378 ITR 443, has followed the decision of Gujrat High Court in Commissioner of Income-Tax v. Gujrat State Road Transport Corporation (supra) and dissented with the otherwise judgments of Rajasthan High Court in Commissioner of Income-Tax v. State Bank of Bikaner and Jaipur, (2014) 363 ITR 70, Karnataka High Court in Commissioner of Income-Tax v. Spectrum Consultants India P. Ltd. (supra) and Bombay High Court in Commissioner of Income-Tax v. 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 v. 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 v. 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 practise 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 than 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 and 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."

11. Thus, we find that the Judgment of Hon'ble Allahabad High Court has duly reflected on the judgments of various Hon'ble Courts and taken a considered decision on this issue.

12. With regard to the precedentiary value in deciding the issue before us, we have gone through the following judgments:

The Hon'ble Allahabad High Court in K. N. Agarwal v. CIT 189 ITR 769 held that,

"Indeed, the orders of the Tribunal and the High Court are binding upon the Assessing officer and since he acts in a quasi judicial capacity, the discipline of such functioning demands that he should follow the decision of the Tribunal or the High Court, as the case may be. He cannot ignore merely on the ground that the Tribunal's order is the subject

matter of revision in the High Court or the High Court's decision is under appeal before the Supreme Court. Permitting him to take such a view would introduce judicial indiscipline, which is not called for even in such cases. It would lead to a chaotic situation".

13. The Hon'ble Apex Court in Baradakanta Mishra vs. Bhimsen Dixit AIR 1972 SC 2466 held that it would be anomalous to suggest that a Tribunal over which a High Court has superintendence can ignore the law declared by it and if a Tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision as in respect of Supreme Court, making the law declared by the High Court binding on subordinate Courts.

14. At this juncture, we would like to mention that there is no fixed rule or direction as to what should be apposite course to resort in case of conflicting decisions of Hon'ble Jurisdictional High Court and non-jurisdictional High Court.

15. Article 141 of the Constitution lays down that the "law declared" by the Supreme Court is binding upon all the courts with the territory of India. The "law declared" has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. Hence, it flows from the above that the "law declared" is the principle culled out on the reading of a judgment as a whole in the light of the questions raised, upon which the case is decided. Ambica Quarry Works vs. State of Gujarat (1987) 1 SCC 213; and CIT vs. Sun Engg. Works (P) Ltd. (1992) 4 SCC 363.

16. The Hon'ble Supreme Court in CIT vs. Ralson Industries Ltd. (288 ITR 322) observed that when an order is passed by a higher authority, the lower authority is bound thereby keeping in view the principles of judicial discipline.

17. The High Courts are Court of record under Article 215 of the Constitution. By virtue of the provisions of Article 227, the High Courts have power of superintendence over all Courts and tribunals in their respective jurisdiction. Thus, it is implied that all Courts and Tribunals in the respective State will be bound by the decisions of the High Court.

18. In order to have fixity, finality and conclusiveness of the judicial proceedings, the 'precedents' have a remarkable role in the formation of judicial opinions, judicial orders and dispensation of justice. The concept of "Stare decisis et non quieta movere", which translates as 'to stand by things decided and not disturb settled points'. The doctrine of stare decisis, or binding precedent, is the principle by which judges are bound by decisions of superior courts. The principal abet in predictability, uniformity and judicial fairness.

19. We have also given considerable thought to the words of the Hon'ble Judges of the Supreme Court in the case of Distributors (Baroda) Pvt. Ltd vs. Union of India 1985 AIR 1585 wherein it was held that,

"To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter A.M.Y. at page 18: "a Judge ought to be wise enough to know that he is fallible therefore everyday to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors".

20. Thus, we see a fine balance between the fixity and the flexibility.
21. In this background, the various decisions of the Hon'ble Jurisdictional High Courts have been perused.

22. In the case of CIT Vs. Bharat Hotels Ltd. 410 ITR 417, the question of law at serial no. 2 framed by the Hon'ble High Court reads as under: (order dated 06.09.2018)

"2. Whether the payment of provident fund and employees state insurance dues deposited by the assessee within the grace period would qualify for deduction under Section 43B of the Income Tax Act, 1961?"

23. The said question was dealt at para 7 & 8 of the order, it has been held that the assessee undoubtedly was entitled to claim the benefit and properly treat such amounts as having been duly deposited, which were infact deposited within the period prescribed (i.e. 15+5 days in the case of EPF and 21 days + any other grace period in terms of extent notification).

24. Thus, the Hon'ble Court has held that the employers contribution is an allowable deduction, if paid before the due date answering the question of law framed. The Hon'ble Court went further and held that as far as the amounts constituting deductions from employee's salaries towards their contributions, which were made beyond such stipulated period, obviously the assessee was not entitled to claim the deduction from its returns.

25. We have perused the order of the Hon'ble Jurisdictional High Court in the case of CIT Vs. AIMIL Ltd. 321 ITR 508 vide order dated 23.12.2009 held that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, 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 Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Hon'ble Supreme Court in the case of Vinay Cement Ltd.

26. The brief facts of such case are as under:

"2. The case relates to the assessment year 2002-03. The respondent assessee had filed its return on 30-10-2002 declaring income at Rs. 7,95,430. During the assessment proceedings, the Assessing Officer (AO) found that the assessee had deposited employers' contribution as well as employees' contribution towards provident fund and ESI after the due date, as prescribed under the relevant Act/Rules. Accordingly, he made addition of Rs. 42,58,574 being employees' contribution under section 36(1)(va) of the Act and Rs. 30,68,583 being employers' contribution under section 43B of the Act. Felt aggrieved by this assessment order, the assessee preferred appeal before the CIT(A) who decided the same vide orders dated 15-7-2005. Though the CIT(A) accepted the contention of the assessee that if the payment is made before the due date of filing of return, no disallowance could be made in view of the provisions of section 43B, as amended vide Finance Act, 2003, he still confirmed the addition made by the Assessing Officer on the ground that no documentary proof was given to support that payment was in fact made by the assessee. The assessee filed an application under section 154 of the Act before the CIT(A) for rectification of the mistake. After

having satisfied that payment had, in fact, been made, the CIT(A) rectified the mistake and deleted the addition by holding that the assessee had made the payment before the due date of filing of the return, which was a fact apparent from the record."

The decision of ITAT:

27. The Co-ordinate Bench of ITAT relied on the judgment of Hon'ble Supreme Court in the case of CIT Vs. Vinay Cements Ltd. 213 CTR 268 to support its decision to the effect that if the employers' as well as employees' contribution towards provident fund and ESI is paid before the due date of filing of return, no disallowance can be made by the Assessing Officer.

28. The relevant part of the order of the ITAT relying on the CIT Vs. Vinay Cements Ltd. (supra) is as under:

"11. We have carefully considered the rival submissions in the light of material placed before us. In the assessment order ld. Assessing Officer has categorically stated that what the amount due was for which month in respect of EPF, Family Pension, PF inspection charges and ESI deposits and what were the due dates for these deposits and on which date these deposits were made. The dates of deposits are mentioned between 23rd May, 2001 to 23rd April, 2002. The latest payment is made on 23rd April, 2002 and assessee being limited company had filed its return on 20th October, 2002 which is a date not beyond the due date of filing of the return. Thus, it is clear beyond doubt that all the payments which have been disallowed were made much earlier to the due date of filing of the return. The disallowance is not made by the Assessing Officer on the ground that there is no proof of making such payment but disallowance is made only on the ground that these payments have been made beyond the due dates of making these payments under the respective statute. Thus, it was not an issue that the payments were not made by the assessee on the dates which have been stated to be the dates of deposits in the assessment order. If such is a factual aspect then according to latest position of law clarified by Hon'ble Supreme Court in the case of CIT v. Vinay Cement Ltd. that no disallowance could be made if the payments are made before the due date of filing the return of income. This issue came before Hon'ble Supreme Court in the case of CIT v. Vinay Cement Ltd. which was a special leave petition filed by the

department against the High Court Order of 26th June, 2006 in ITA No. 2/05 and ITA No. 56/03 and ITA No. 80/03 of the High Court of Guwahati, Assam and it is order dated 7th March, 2007. A copy of the said order is placed on record. The observations of their Lordships on the issue are as under :—

'In the present case we are concerned with the law as it stood prior to the amendment of section 43B. In the circumstances the assessee was entitled to claim the benefit in section 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return.

The special leave petition is dismissed."

29. Thus, we find that the Co-ordinate bench of ITAT and the Hon'ble Jurisdictional high Court of Delhi have relied on the judgment of Vinay Cements Ltd. (supra).

30. Further, the Hon'ble Jurisdictional High Court of Delhi in the case of PCIT Vs. Pro Interactive Services (India) Pvt. Ltd. in ITA 983/2018 dated 10.09.2018 while dismissing the appeal of the Revenue held that "the legislative intent was/is to ensure that the amount paid is allowed as an expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of Employee's Provident Fund (EPD) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under Section 2(24)(x) of the Act."

31. Further, this issue has been examined in the Finance Act, 2021 which are as under:

"Section 2 (24) (x) of the Income Tax Act, 1961 reads: "any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees."

FINANCE ACT, 2021

[13 OF 2021]

An Act to give effect to the financial proposals of the Central Government for the financial year 2021-2022.BE it enacted by Parliament in the Seventy-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title and commencement.

1. *(1) This Act may be called the Finance Act, 2021.*

(2) Save as otherwise provided in this Act,—

(a)	*sections 2 to 88 shall come into force on the 1st day of April, 2021;*
(b)	*sections 108 to 123 shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.*

Amendment of section 36.

9. *In section 36 of the Income-tax Act, in sub-section (1), in clause (va), the Explanation shall be numbered as Explanation 1 thereof and after Explanation 1 as so numbered, the following Explanation shall be inserted, namely:—*

'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;'.

Amendment of section 43B.

11. *In section 43B of the Income-tax Act, after Explanation4, the following Explanation shall be inserted, namely:—*

"Explanation5.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies.".

32. We have also perused the Memorandum Explaining the Provisions in the Finance Bill, 2021. Under the head "Provision relating to Direct Taxes" with to rationalization of various provisions, the issue of clause (24) of Section 2 sub-clause (x), Section 36(1) clause (va), Section 43B with regard to provisions of sub-Section (1) of Section 139 have been dealt at length. The gist is as under:

"Rationalization of various Provisions
<u>Payment by employer of employee contribution to a fund on or before due date</u>

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 employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be 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 –

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

(ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.
These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years."

[Clauses 8 and 9]

33. Thus, the matter has been finally decided and the controversy has been put to rest.

34. Having gone through the Orders of the Co-ordinate Bench of Tribunal allowing the delayed payment pertaining to employees contribution, Orders of the Co-ordinate Bench of Tribunal disallowing the delayed payment pertaining to employees contribution, Judgments of various Hon'ble Courts disallowing the delayed payment, Judgments of various Hon'ble Courts disallowing the delayed payment, provisions of Section 2(24)(x), Section 36(1)(va), Section

> *43B, Section 139(1) of the Income Tax Act, 1961, provisions of Finance Act 2021, Memorandum explaining the provisions in Finance Bill, 2021 and the specific amendments which will take effect from 01.04.2021, we hereby hold that no disallowance is called for belated payment of the employee's contribution to the respective ESI and EPF fund in the case of assessee who have deposited the same before the due date of filing of Income Tax Return.*
>
> *35. In the result, the appeals of the assessee are allowed and the appeals of the Revenue are dismissed."*

3.2 Respectfully following the decision of the Coordinate Bench, as referred to above, I delete disallowance of Rs.10,31,122/-. Accordingly, ground is allowed.

4. In the result, the appeal is allowed.

Order pronounced in the open court on 30th August, 2022

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 30th August, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi