IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH : COCHIN

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
Ms. PADMAVATHY S., ACCOUNTANT MEMBER

ITA No.217/Coch/2021
Assessment Year : 2018-19

Welcare Hospital, S A Road, Vyttila – 682 019. **PAN : AAAFW 4033 H**	Vs.	The Assistant Director of Income Tax, Non Corporate Circle (1), Kochi, Kerala.
APPELLANT		RESPONDENT

Assessee by	:	Shri Surendranath Rao, CA
Revenue by	:	Smt. J M Jamuna Devi, Sr. AR

Date of hearing	:	06.12.2022
Date of Pronouncement	:	19.12.2022

O R D E R

Per Padmavathy S, Accountant Member:

This is an appeal by the assessee against the order dated 30.10.2021 of the CIT(Appeals), National Faceless Assessment Centre, Delhi [NFAC] in relation to Assessment Year 2018-19.

2. The only issue in this appeal is regarding disallowance of belated payment of Provident Fund of Rs.9,04,853 u/s. 43B r.w.s. 36(1)(va) of the Act by the revenue authorities.

3. The assessee is a super specialty hospital, filed its return of income electronically on 24.10.2018 declaring an income of

Rs.89,82,050. The return was processed by CPC and intimation u/s. 143(1) dated 10.12.2019 was issued on 19.12.2019 raising a demand of Rs.12,29,350. Subsequently, revised intimation u/s. 154 dated 14.2.2020 was issued to the assessee on 18.2.2020 reducing the demand to Rs.3,68,550. The CPC disallowed the contribution of PF paid after the due date. The CIT(A), NFAC confirmed the same. Aggrieved, the assessee is in appeal before the Tribunal.

4. The ld. AR submitted that the payment of employee contribution to PF though belated, but **was** before the due date of fling the return of income u/s. 139(1) of the Act and otherwise allowable u/s. 43B of the Income-tax Act, 1961 [the Act]. Reliance was placed on the ITAT Hyderabad decision in the case of Salzgitter Hydraulics Pvt. Ltd. v. ITO, 189 ITD 676 and Supreme Court decision in the case of M.M. Aqua Technologies Ltd. v. CIT, 436 ITR 582 (SC).

5. The ld. DR relied on the orders of lower authorities.

6. We have considered the rival submissions and perused the material on record. We find that this issue is covered against the assessee by the decision of Supreme Court in the case of *Checkmate Services [2022] 143 taxmann.com 178 (SC)*. The relevant extract of the decision is as given below –

> "52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not

amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned

law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed."

7. In view of the above decision of the Hon'ble Supreme Court, we hold that the employees contribution to PF should be remitted before the due date as per explanation to section 36(1)(va) i.e., on or before the due date under the relevant employee welfare legislation like PF Act., for the same to be otherwise allowable u/s.43B.

8. In the result, the appeal of the assessee is dismissed.

Pronounced in the open court on this 19th day of December, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(PADMAVATHY S)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 19th December, 2022.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore/Cochin.