IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER

ITA No. 2634/Mum/2022
(A.Y.2017-18)

M/s Veto Switchgears And Cables Limited 4th Floor, Mumbai Maharashtra 400 058	Vs.	ACIT, 13(3)(2) Room No. 229, 2nd Floor, Aayakar Bhavan, Maharishi Karve Road, Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AACCV4990K		
Respondent	..	Appellant

Appellant by :	None
Respondent by :	Vranda U Matkarni

Date of Hearing	15.12.2022
Date of Pronouncement	16.12.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the order passed the NFAC, Delhi, dated 25.09.2021 for A.Y. 2017-18. The assessee has raised the following grounds before us:

"1. The Id. Commissioner of Income Tax (Appeals)-21, Mumbai ("the Id. CIT(A)") erred in facts and law in passing the order u/s 250 of the Act without providing adequate opportunity of being heard.

2(a) The Id. CIT(A) erred in facts and law in confirming the action of the Id. Assessing Officer in disallowing Employees' Provident Fund & ESIC contribution u/s 36(1)(va) r.w.s. 2(24)(x) amounting to Rs.4,77,415/- disregarding the fact that the same is paid before the due date of filing of

the return of income u/s. 139(1) of the I.T. Act, 1961 and hence allowable u/s. 438 of the Act.

(b) The Id. CIT(A) erred in facts and law in not appreciating the fact that the amendments made by the Finance Act, 2021 to section 36(1)(va) and 43B of the Act are prospective in nature and not applicable for the year under consideration.

3. The Id. CIT(A) erred in facts and law in confirming the action of the Id. Assessing Officer by not granting the credit of advance taxes paid of Rs.34,60,800/-, inadvertently paid under the code 106 pertaining dividend distribution tax.

All the above grounds are independent and without prejudice to the other grounds of appeal.

Your appellant craves leave to add, alter, amend, delete or modify any or all the grounds of appeal."

2. The return of income declaring total income of Rs.12,04,81,330/- was filed on 29.11.2017. The Assessing Officer completed the assessment u/s 143(3) assessing total income at Rs.12,09,58,750/- after making disallowance of Rs.4,77,415/- on account of employees' PF & ESIC contribution u/s 36(1)(va) r.w.s 2(24)(x) of the Act beyond the due date as prescribed in the specified act.

2. Aggrieved, the assessee filed before the ld. CIT(A). The ld. CIT(A) dismissed the appeal of the assessee.

3. During the course of appellate proceedings before us the ld. Counsel filed paper book comprising copies of document showing that amount received from employees towards EPF and ESI were deposited before the due date of filing of the return of income. The ld. Counsel has also placed reliance on the following judicial pronouncements:

1. *Alom Extrusions Limited 319 ITR 306 (SC)*
2. *Vinay Cement limited 313 ITR1 (ST)(SC)*
3. *Hind Filter Ltd. 90 taxmann.com 51 (Bombay)*
4. *Mahadev Cold Storage 127 taxmann.com 722 (Agra)*
5. *M/s Crescent Roadways Private Limited (ITA No.1952/Hyd/2018)*
6. *Ajay Piplani (ITA No. 114/Chd/2021)*
7. *Gopal Krishna Aswini Kumar ITA No. 359/Bang/2021*

8. *Krishna Kanha Shelters Pvt. Ltd Vs. ACIT ITAT agra*
9. *Kalpesh Synthetics Private Limited ITAT Mumbai ITA No. 1785/Mum/2021 A.Y. 2018-19.*

On the other hand, the ld. D.R. supported the order of ld. CIT(A).

4. Heard both the sides and perused the material on record. It is undisputed fact that assessee had deposited amount of Employees Contribution towards EPF and ESI to the Government's account beyond the due date as prescribed in the EPF act and the ESI act but before the due date of filing income tax return. As per provisions of Sec. 36(1)(va) with respect to any sum received by the assessee from any of its employees to which provision of Sec.2(24)(x) applied, if credited by the assessee to the employee's account in the relevant fund or funds on or before the due date, the assessee is entitled to the deduction. In the statement of facts, the assessee referred the decision of Hon'ble jurisdictional Bombay High Court in the case of Ghadge Patil Transport Ltd. 368 ITR 749 (Bombay) wherein held that both employer and employees contribution are covered under the amendment to section 43B of the Act. We have also perused the other various pronouncements referred by the assessee wherein held that employees contribution to EPF and ESI are allowable if paid by the due date of filing return of income u/s 139(1) of the Act. However, the cases relied upon by the assesse are of no help in view of the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT-1 & others, dated 12.10.2022. The Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT-1 Civil Appeal No. 2833 of 2016 and others dated 12.10.2022 held that provision of Sec. 43B cannot be applied in the case of employees contribution which are held in trust by the employees. It is an essential condition for the deduction that such amounts are deposited within the due date specified in the particular law. As per provisions of Sec.

36(1)(va) with respect to any sum received by the assessee from any of its employees to which provisions of Sec. 2(24)(x) applied if credited by the assessee to the employees account in the relevant fund or funds on or before the due date the assessee was entitled to the deduction. If the employers did not deposit the amount towards employees contribution on or before the due date as prescribed under the EPF/ESI, the assessee was not entitled to the deduction. The relevant operating part of the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT-1 Civil Appeal No. 2833 of 2016 and others dated 12.10.2022 is reproduced as under:

> *"51. The analysis of the various judgments cited on behalf of the assessee i.e., 11.27 and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrutions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.*
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> *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."

Since, the issue on hand being squarely covered by the decision of Hon'ble Supreme Court in the case mentioned as supra, therefore, we dismiss all the grounds of appeal of the assessee.

5. In the result, the assessee filed by the assessee stand dismissed.

Order pronounced in the open court on 16.12.2022

Sd/-	Sd/-
(Kavitha Rajagopal)	(Amarjit Singh)
Judicial Member	Accountant Member

Place: Mumbai
Date 16.12.2022
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.