IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. Nos. 25 & 26/Asr/2023
Assessment Years: 2018-19 & 2019-20

M/s Karnail Singh & Co., 410 Model Town, Jalandhar 144001 [PAN: AAEFK 2218G] **(Appellant)**	**V.**	Deputy Commissioner of Income Tax, Circle-3, Jalandhar **(Respondent)**

Appellant by	None
Respondent by	Smt. Rajinder Kaur, CIT- DR

Date of Hearing : 12.04.2023
Date of Pronouncement : 25.04.2023

ORDER

Per Dr. M. L. Meena, AM:

Both the appeals have been filed by the assessee against the order of the Ld. CIT(A) National Faceless Appeal Centre (NFAC), Delhi even dated 14.12.2022 in respect of Assessment Years: 2018-19 & 2019-20.

2. The assessee has challenged common issue in both the appeals regarding disallowance made by the CPC u/s 36(1)(va) by rejecting the assessee's claim u/s 43B on account of payment of PF & ESI after the due date.

3. The assessee has filed an adjournment application, stating therein that its counsel shall not be able to attend the proceedings due to some unavoidable circumstances. We find no merit in the adjournment application of the assessee in absence of specific reason/cause beyond the control of either the assesse or its counsel to attend the hearing fixed for today and since, the issue being covered by the latest judgment of Hon'ble Apex Court in the case of Checkmate Services (P.) Ltd. v. Commissioner of Income Tax-1 [2022] 143 taxmann.com 178 (SC), hence, the adjournment application of the assessee is rejected for insufficient reason, and it is decided to hear the appeal on merits.

4. The brief facts of the case are that the assessee had e-filed his Return of Income on 30-09-2019 declaring a total income of Rs.2,99,46,511/-. The return was processed by CPC, Bengaluru determining the total income at Rs.3,05,83,400/-. The assessee had paid employee share of ESI and PF on dates after the due dates prescribed

under the ESI and PF Act though the same were paid before filing of Income Tax Return. Hence, the addition was made for employee share of ESI and PF by CPC. The assessee filed a rectification application u/s 154 of the I.T. Act on 30/06/2020. The same was dismissed vide order dated 17/08/2020.

5. The assessee being aggrieved with the Order by CPC, went in appeal before the Ld. CIT(A) who has confirmed the addition by observing as under:

> **5.1** I have considered the submissions and facts of the case carefully. From perusal of the grounds, I notice that the appellant is aggrieved over on the issue of disallowance of amount u/s. 36(1) (va) of the IT Act. It is presumed that the said disallowance is made for not remitting the same to the prescribed account before the due date prescribed under the PF Act.
>
> **5.2** Before proceeding further, it will be profitable to reproduce the relevant provisions of the 1961 IT Act with amendments, made from time to time, as extracted below:
>
> > **i. "Section 2. Definitions.**
> > In this Act, unless the context otherwise requires, -
> > 2(24) "income" includes
>
> (x) 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;..."
>
> "Section 36. Other deductions. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28

(iv) any sum paid by the assessee as an employer by way of contribution towards a recognized provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognizing the provident fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head “Salaries” or to the contributions or to the number of members of the fund;”

(va) 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 1. -For the purposes of this clause, "due date" means 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.”

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.”5

ii. With effect from 01.04.1984, Section 43B was inserted. It reads inter alia, as follows: “Section 43B. Certain deductions to be only on actual payment. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) **only in computing** the **income referred to in section 28 of that previous** year **in which such sum is actually paid by him:**

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

Explanation : For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him."

By Section 9 of the Finance Act, 1989, the following second proviso was added: "Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date."

By Section 21 of the Finance Act, 2003, the above second proviso was omitted. Thereafter, by Finance Act, 2021 the following Explanation 5 was added, w.e.f. 01.04.2021:

"Explanation 5.-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."

iii. The limit for deposit of employee's contribution under the relevant acts/regulations are follows:

A. EPF Scheme

Chapter VI: Declaration, Contribution Cards, and Returns

38. Mode of payment of contributions

"(1) The employer shall, before paying the member his wages in respect of any period or part of period for which contribution are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee and in respect of which provident fund contributions are payable, as the Central Government may fix, he shall within fifteen days of the close of every month pay the same to the Fund electronic through internet banking of the State Bank of India or any other Nationalised Bank or through PayGov platform or through scheduled banks in India including private sector banks authorized for collection on account of contributions and administrative charge:

Iv In addition to the above, a five-day grace period was allowed to employers in terms of the Manual of Accounting Procedure (Part-1 General). However, the grace period was discontinued by circular bearing No. WSU/9(1)(2013)/Settlement/35631 dated 08.01.2016, made applicable to contributions for January 2016 onwards.

B. ESI Regulations:

"31. Time for payment of contribution - An employer who is liable to pay contributions in respect of any employee shall pay those contributions within 21 days of the last day of the calendar month in which the contributions fall due"

v. A circular had explained the rationale for introduction of Section 43B:

"Disallowance of unpaid statutory liability - Section 43B

35.2 Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, Employees' State Insurance Scheme, etc., for long periods of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other, undisputed liabilities also are not paid.

35.3 To curb this practice, the Finance Act has inserted a new section 438 to provide that deduction for any sum payable by the assessee by way of tax or

duty under any law for the time being in force or any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare- of employees shall irrespective of the previous year in which the liability to pay such sum was incurred, be allowed only in computing the income of that previous year in which such sum is actually paid by the assessee."

vi. The scope and effect of the newly inserted Section 36(1)(va) and the newly inserted provisos to Section 43B of the IT Act were elaborated in a Central Board of Direct Taxes

(hereinafter, "CBDT") circular bearing No. 495.8 Relevant extracts of the circular are as follows:

"Measures of penalizing employers who misutilise contributions to the provident fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948, or any other fund for welfare of employees

12.1 The existing provisions provide for a deduction in respect of any payment by way of contribution to a provident fund or superannuation fund or any other fund for welfare of employees in the year in which the liability is actually discharged [section 438], The effect of the amendment brought about by the Finance Act, is that no deduction will be allowed in the assessment of the employer(s) unless such contribution is paid to the fund on or before the "due date". Due date means the date by which an employer is required to credit the "contribution" to the employee's account in the relevant fund under the provisions of any law or term of contract of service or otherwise [Explanation to section 36(1)(va) of the Finance Act])."

5.3. The appellant has relied upon the Judgment of Jurisdictional High-Court in CIT Faridabad Vs Lakhani Rubber Udyog P Ltd and Apex Court Judgement in CIT Vs Alom Extrusion Ltd.

5.4. I reiterate that noticing the division of opinion on this issue among various High courts, now this issue has been put to rest by the Hon'ble Supreme Court in revenue's favor in its recent decision in bunch of appeals titled as Checkmate services P. Ltd Vs CIT (Civil Appeal no.2833 of 2016 dated 12.10.2022). The highlights of the honorable apex court are discussed as under: -

1. Referring to legislative history of the provisions of Section 2(24)(x), 36(1)(va) and 43B, Supreme Court observed that Parliament's endeavour in introducing Section 43B [which opens with its non-obstante clause] was to primarily ensure that deductions otherwise permissible and hitherto claimed on mercantile basis, were expressly conditioned, in certain cases upon payment. Supreme Court considered the scheme of provisions in Section 28 to 38 and Section 40 to 43B and highlighted that Section 40 to 43B are concerned with and enact different conditions, that the tax adjudicator has to enforce, and the Assessee has to comply with, to secure a valid deduction. (Para 30-31)

2. Supreme Court referred to amendments made in Section 2(24)(x) and explicated that since these amounts (deductions from employees) were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Supreme Court pointed out that Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date, i.e. the dates specified in the concerned enactments such as EPF/ESI Acts. (Para 32)

3. Supreme Court referred to the memorandum to Finance Bill, 1987 which introduced Section 2(24)(x) and Section 36(1)(va) as also the second proviso in Section 43B and opined that both the employer's contribution and contribution made by employer on behalf of employee had to necessarily be made on or before the due date. (Para 37)

4. Supreme Court observed that vide the second proviso to Section 43B, deduction was allowable only if the impugned payments were made before the specified due date and this position continued for 14 years. Subsequently, based on Kelkar Committee recommendations, the deduction was made available even if the specified payments were made before due date of filing the income tax return which led to the deletion of the second proviso. (Para 39 to 43)

5. Supreme Court relied on coordinate bench ruling in M.M. Aqua Technologies Ltd [TS-645-SC-2021] wherein the rationale for introduction of Section 43B was explained. Likewise, relied on recent ruling in Exide Industries [TS-212-SC-2020] upholding the constitutional validity of

Section 43B wherein it was held that the section merely operates as an additional condition for the availment of deduction qua the specified head. Similarly, Supreme Court also referred to coordinate bench ruling in Ace Multi Axes Systems Ltd [TS-571-SC-2017] reaffirming that deductions are to be granted only when the conditions which govern them are strictly complied with, which was also endorsed by Supreme Court in Dilip Kumar [TS-421 -SC-2018], (Para 42-50)

6. Supreme Court opined that coordinate bench while deciding the case of Atom Extrusions [TS-31 -SC-2009-0] failed to consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. Likewise, it failed to consider Sections 2(24)(x) and 36(1)(va) as well as the separate provisions in Section 36(1) for employers' contribution and employees' contribution. (Para 44-45)

7. Supreme Court stated that when the Section 43B was introduced, what was on the statute book, was only employer's contribution and there was no question of employee's contribution being considered as part of the employer's earning. Highlighted that the memorandum to Finance Bill, introducing Section 36(1)(va) clearly stated that it 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. (Para 52)

8. Supreme Court explained that that the Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) only deems the amounts received/deducted from employees as income - it is the character of the amount that is important, i.e., not income earned. Supreme Court highlighted the significance of this provision as 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. (Para 52)

9. Supreme Court opined that "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. " (Para 53)

10. SC held that the Gujarat High Court's finding 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. Supreme Court explained that 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 and the what constitutes the due date is defined by the statute. (Para 54)

11. Noting that although the section provides 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, Supreme Court opined that "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...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." (Para 54).

12. SC also held that recently in the case of Union of India &Ors. vs. Exide Industries Limited &Ors, "this court examined, and repelled a challenge to the constitutionality of Section 43B, especially the provision requiring actual payment, in respect of leave encashment benefit of employees. The court observations in this regard are relevant:

"20. Section 43B, however, is enacted to provide for deductions to be availed by the Assessee in lieu of liabilities accruing in previous year without making actual payment to discharge the same. It is not a provision to place any embargo upon the autonomy of the Assessee in adopting a particular method of accounting, nor deprives the Assessee of any lawful deduction. Instead, it merely operates as an additional condition for the availment of deduction qua the specified head.

21. Section 43B bears heading "certain deductions to be only on actual payment". It opens with a non-obstante clause. As per settled principles of interpretation, a non obstante Clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless specifically provided for. Out of the allowable deductions, the legislature consciously earmarked certain deductions from time to time and included them in the ambit of Section 43B so as to subject such deductions to conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of mercantile system of accounting on accrual of liability basis qua the specific head of deduction covered therein and not to other heads. But that is a matter for the legislature and its wisdom in doing so.

22. The existence of Section 43B traces back to 1983 when the legislature conceptualised the idea of such a provision in the 1961 Act. Initially, the provision included deductions in respect of sum payable by Assessee by way of tax or duty or any sum payable by the employer by way of contribution to any provident fund or superannuation fund. It is noteworthy that the legislature explained the inclusion of these deductions by citing certain practices of evasion of statutory liabilities and other liabilities for the welfare of employees..."

5.5. In view of the above, it is very clear that the employee's contribution is held under trust and should be paid within time of the relevant act otherwise there will be disallowance under section 43B. The employees contribution to PF and ESI unless remitted to the Government account within the due date as provided under the relevant statutes, in terms with section 36(1) (va) of the Act, it has to be treated as income of the assessee as per section 2(24)(x) of the Act.

> **5.6.** Thus, the law laid down by the Hon'ble Supreme Court is the law of the land and applies in all matters. Further, in the case of Khoday Distilleries Ltd. vs. Mahadeshwara Sahakara Sakkare Karkhane Ltd. [2019] 104 taxmann.com 25(SC), the Hon'ble Supreme Court has held the statement of law contained in the order of the Hon'ble Supreme Court is a declaration of law. The judgments relied upon by the appellant pertain to the period prior to the decision of the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. (supra). Respectfully following the aforesaid decision of the Hon'ble Apex Court (Civil Appeal No.2833 of 2016 dated 12.10.2022), I uphold the disallowance. This ground of the assessee is dismissed."

6. We have heard the Ld. DR at length, perused the material on record, impugned order, and grounds of the appellant before us. Admittedly, the assessee had paid employee share of ESI and PF on dates after the due dates prescribed under the ESI and PF Act though the same were paid before filing of Income Tax Return. The issue of Payment of PF and ESI contribution to the employees' is settled by the Hon'ble Apex Court in its latest judgement given in the Case of "Checkmate services P. Ltd Vs CIT', (Civil Appeal no.2833 of 2016 dated 12.10.2022) vide para 52 to 54 as under:

> *"**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.*

7. The Ld. CIT (A) has discussed the provisions of 2(24) on definition of income, section 36, section 28, section 43B, Explanation 2 on due dates and EPF Scheme referring CBDT Circular Bearing No. 4958. The Ld. CIT (A) has followed the apex court judgement while confirming the addition by observing vide clause 8 to para 5.4 that Supreme Court explained that the Parliament intended to retain the separate character of these two amounts,

is evident from the use of different language. Section 2(24)(x) only deems the amounts received/deducted from employees as income - it is the character of the amount that is important, i.e., not income earned. Supreme Court highlighted the significance of this provision as the one hand it brought into the fold of "income" amounts that were receipts or deductions from employee's 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. (Para 52)

8. He has further mentioned in clause 9 to para 5.4 above that Supreme Court opined that "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. " (Para 53)

9. Further the CIT(A) has referred to the held part in clause 10 to para 5.4 stating therein that SC held that the Gujarat High Court's finding 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. Supreme Court explained that 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 and the what constitutes the due date is defined by the statute. (Para 54)

10. From the above, it is very clear that the employee's contribution is held under trust and should be paid within the prescribed time/due date given in the relevant act otherwise there will be disallowance under section 43B. Thus, the employees contribution to PF and ESI unless remitted to the Government account within the due date as provided under the relevant statutes, in terms with section 36(1) (va) of the Act, it has to be treated as income of the assessee as per section 2(24)(x) of the Act.

11. Thus, the LD. CIT (A) has followed the law laid down by the Hon'ble Supreme Court, which is the law of the land and applies in all matters. Further, in the case of Khoday Distilleries Ltd. vs. Mahadeshwara Sahakara Sakkare Karkhane Ltd. [2019] 104 taxmann.com 25(SC), the Hon'ble Supreme Court has clearly held the statement of law contained in the order

of the Hon'ble Supreme Court is a declaration of law. The judgments relied upon by the appellant before the CIT(A) and reiterated before us in grounds pertain to the period prior to the decision of the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. (supra).

12. Respectfully following the Judgement of the Hon'ble Apex Court (Civil Appeal No.2833 of 2016 dated 12.10.2022), we find no infirmity or perversity in the order of the CIT(A) to the facts on record. Accordingly, the impugned order confirming the addition on account of disallowance of PF and ESI is upheld. Thus, the issue raised in the grounds of the assessee is rejected.

13. In the result, both the appeals filed by the assessee are dismissed.

Order pronounced in the open court on 25.04.2023

Sd/-	**Sd/-**
(Anikesh Banerjee)	**(Dr. M. L. Meena)**
Judicial Member	**Accountant Member**

GP/Sr./P.S.

Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

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