

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, Accountant Member and  
Shri Aby T.Varkey, Judicial Member

**ITA No. 879/Coch/2022**  
(Assessment Year: 2017-18)

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| Sreelekshmi Cashew Company<br>Lekshmi Prabha, Kadappakkada<br>Kollam 691008<br>[PAN:AAZFS1211Q]<br><b>(Appellant)</b> | vs. | The Income Tax Officer<br>Ward - 1 & TPS, Kollam<br><br><b>(Respondent)</b> |
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Appellant by: Shri T.V. Hariharan, CA  
Respondent by: Dr. Prasanth V.K., CIT-DR

Date of Hearing: 16.05.2023  
Date of Pronouncement: 12.06.2023

**ORDER**

Per: Sanjay Arora, AM

This is an Appeal by the Assessee directed against the order under section 263 of the Income Tax Act, 1961 ('the Act') dated 04.02.2022 by the Principal Commissioner of Income Tax (Pr. CIT) in respect of its assessment under section 143(3) of the Act dated 11.12.2019 for Assessment Year (AY) 2017-18.

2. The background facts of the case, to the extent relevant, are that on a perusal of the assessment record of the assessee-firm for the relevant year, it was observed by the learned Pr. CIT, the competent authority u/s. 263 of the Act, that the Audit Report under section 44AB of the Act for the relevant year reported (at Item No. 20B of Form 3CD) a delayed deposit of the Employees' contribution to the Employees' Welfare Fund, i.e., with reference to time limit specified under section 36(1)(va), at Rs.15,98,004. Only a sum of Rs.3,99,963, however, had been

brought to tax under section 2(24)(x) r.w.s. 36(1)(va) of the Act in assessment. The balance Rs.11,98,042 had been not similarly disallowed on the ground of it having been deposited by the due date of filing the return of income u/s. 139(1) of the Act, i.e., the time limit applicable for deposit of employer's contribution to Employees' Welfare Fund, deductible under section 37(1) r.w.s. 43B(b) r.w. *proviso* thereto. The same was clearly contrary to the decision by the Hon'ble jurisdictional High Court in *CIT vs. Merchem Ltd.* (ITA No. 244/2014, dated 08/9/2015) and *CIT vs. Popular Vehicles Service Pvt. Ltd.* (ITA No.172/2016, dated 02/7/2018), reproducing therefrom. He, accordingly, vide the impugned order, partially set aside the assessment, directing the Assessing Officer (AO) to verify the relevant facts and pass an order in accordance with law after giving the assessee an opportunity of being heard in the matter. Aggrieved, the assessee is in appeal.

3. We have heard the rival contentions, and perused the material on record. We are completely at loss to understand the cause of the assessee's grievance. Beginning the decision in *CIT vs. South India Corporation Ltd.* [2000] 242 ITR 114 (Ker), the Hon'ble jurisdictional High Court has, per a series of decisions, including *Merchem Limited* (supra), reported at [2015] 378 ITR 443 (Ker) and *Popular Vehicles & Services P. Ltd.* (supra), reported at [2018] 406 ITR 150 (Ker), clarified that while deduction of the employer's contribution to the Employees' Welfare Funds is governed by section 37(1), the employees' contribution thereto is, on the other hand, by section 36(1)(va) of the Act. Section 37(1) excludes from its ambit, beside others, any expenditure of the nature specified in sections 30 to 36 of the Act. The same represents trite law, explained time and again by the Hon'ble Courts, as recently once again in *Southern Technologies Ltd. v. CIT* [2010] 320 ITR 577 (SC). True, section 43B is a *non-obstante* clause, which would therefore apply to a deduction u/s. 36 as well. It is, however, not an enabling, but a disabling provision, which comes into play only where the expenditure under reference is allowable under any other provision of

the Act. The condition precedent for allowance u/s. 36(1)(va), i.e., of payment by the due date as specified under the relevant employee welfare legislation, having not been met, so that the employee's contribution is not deductible there-under, the question of further travelling to section 43B of the Act does not arise. We are, in fact, in view of the decisions of the Hon'ble jurisdictional High Court, each of which is a detailed order, not required to exercise ourselves in the matter, which is thus squarely covered under *Explanation 2(d)* to section 263 of the Act, even as observed by the Bench during the hearing. We do so only to bring forth the complete incongruence with the law, stated explicitly per the statute, as well as abundantly clarified by the higher courts of law, that attends the assessment order, besides displaying a complete disregard of the law in passing an order contrary to the law laid down by the Hon'ble jurisdictional High Court. Equally incomprehensible is the assessee's challenge thereto. The Hon'ble Apex Court has in *Asst. CIT v. Saurashtra Kutch Stock Exchange Ltd.* [2008] 305 ITR 277 (SC) explained that the decision by the jurisdictional High Court even subsequent to the passing of the order shall invite its rectification inasmuch as the said decision relates back in time to the date of the said order. The specific issue has in fact since attained finality, i.e., on pan-India basis, by the decision by the Hon'ble Apex Court in *Checkmate Services Pvt. Ltd. v. CIT* (in Civil Appeal 2833/2016, dated 12/10/2022). Needless to add, the decision by it in *CIT vs. Alom Extrusions Ltd.* [2009] 319 ITR 306(SC), being *qua* the employer's contribution, deductible u/s. 37(1) of the Act, is not on the point. Reliance thereon is misplaced, more so as the same stands also considered by the Hon'ble jurisdictional High Court, both in *Merchem Ltd.*(supra)and *Popular Vehicles & Services P. Ltd.*(supra).The same was in fact concerned with the retrospectivity or otherwise of the amendment to second *proviso* thereto by Finance Act, 2003, w.e.f. 01.04.2004. Under the circumstances, we find no reason to interfere with the impugned order. We decide accordingly.

4. In the result, the appeal by the assessee is dismissed.

*Order pronounced on June 12, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963*

Sd/-  
(Aby T. Varkey)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin, Dated: June 12, 2023

Copy to:

1. The Appellant
2. The Respondent
3. The CIT concerned
4. The DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar  
ITAT, Cochin

n.p.