

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

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No. 16/Jab/2023  
(ASSESSMENT YEAR- 2017- 2018)**

M/s. A.R.Transport, Delha Mod, sarla Nagar, Maihar Distt., Satna-485772	vs	ITO, Ward-1, Satna
<b>(Appellant)</b>		<b>(Respondent)</b>
<b>PAN No. AAYFA6634L</b>		

<b>Assessee By</b>	None
<b>Revenue By</b>	Shri Rajesh Kumar Gupta, Sr.DR
<b>Date of hearing</b>	21/09/2023
<b>Date of Pronouncement</b>	22/09/2023

**ORDER**

**PER OM PRAKASH KANT, A.M.:**

The appeal by the assessee is directed against order dated 01.12.2022 passed by Ld. Commissioner of Income Tax(Appeals), National Faceless Appeal Centre, Delhi [in short "Ld.CIT(A)"] for assessment year 2017-18, raising following ground:

- 1. "That the order u/s 250 of the I.T. Act, 1961 passed by the Ld. Commissioner of Income Tax (Appeals)- NFAC dated 01.12.2022 is illegal, invalid and bad in law.*
- 2. That as per the facts and in position of law, the Ld. Commissioner of Income Tax (Appeals) has erred in disallowing the claim made by the appellant on account of employee's*

*contribution of PF at Rs 2,37,773/- as the same was paid on or before the due date of filing of the Income Tax Return and is to be allowed as per the proviso of section 36(1)(va) and 43B of I.T. Act, 1961, respectively.*

*3. That the Ld. Commissioner of Income Tax (Appeals) failed to appreciate that the provision of section 43B and sec. 2(24)(x) read with sec. 36(1)(va) ought to have been interpreted liberally keeping in view of principle of equity and legislative intent behind enacting such prohibitory provisions so that injustice and absurdity could be avoided.*

*4. That the Ld. Commissioner of Income Tax (Appeals) failed to appreciate the fact that there could be no disallowance of Employees share of ESI/PF paid belatedly as per the due dates laid down in the law relating to contribution of ESI/PF, if the same has nevertheless been paid on or before the due date for filing return of income u/s. 139(1) of the Act.*

*5. That the Ld. Commissioner of Income Tax (Appeals) has erred in considering the fact that the explanatory memorandum to the Finance Act, 2021 proposing amendment in Section 36(1)(va) as well as Section 43B is applicable only from 01.04.2021. These provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect unless the legislature specifically says so.*

*6. That the addition of Rs. 2,37,773/- deserves to be knocked out.*

*7. That the appellant reserves the right to amend/alter/raise any additional grounds at the time of hearing.”*

2. At the time of hearing, despite notifying neither anyone attended the proceedings nor filed any adjournment application on behalf of the assessee. Therefore, the appeal is heard *ex-parte* qua the assessee after hearing the Ld Departmental Representative and material available on record.

3. The only controversy in the case of the assessee is disallowance of employee's contribution to the PF/ESI deposited after due date under the relevant Acts.

4. We have heard Ld. DR on issue in dispute and perused the relevant material available on record. We find that Ld.CIT(A) has upheld the disallowance following the decision of Hon'ble Supreme Court in the case of ***Checkmate Services P. Ltd. vs Commissioner of Income Tax-1 in Civil Appeal no. 2833 OF 2016***. Relevant part of the order of Ld.CIT(A) is reproduced as under:-

## **5. Decision**

*Ground No.1 to 4*

*1. Addition of Rs.2,37,773/- u/s 36(1)(va) of the I.T.Act, 1961*

*In the present case, as per the Form 3CD for the AY 2017-18, the appellant deposited the total contribution to the provident fund as per the following table:-*

20b	<i>Details of contribution received from employees for various funds as referred to in section 36(1)(va):</i>				
	<i>Nature of Fund</i>	<i>Sum received from employees</i>	<i>Due date for payment</i>	<i>The Actual amount paid</i>	<i>The actual date of payment to the concerned authorities.</i>
	<i>Provident Fund</i>	<i>40115</i>	<i>16.05.2016</i>	<i>40115</i>	<i>2016.05.81</i>
	<i>Provident Fund</i>	<i>43334</i>	<i>15.06.2016</i>	<i>43334</i>	<i>2016.06.17</i>
	<i>Provident Fund</i>	<i>39917</i>	<i>15.07.2016</i>	<i>39917</i>	<i>2016.07.13</i>
	<i>Provident Fund</i>	<i>30704</i>	<i>16.08.2016</i>	<i>30704</i>	<i>2016.08.19</i>
	<i>Provident Fund</i>	<i>39021</i>	<i>15.09.2016</i>	<i>39021</i>	<i>2016.09.16</i>
	<i>Provident Fund</i>	<i>41693</i>	<i>15.10.2016</i>	<i>41693</i>	<i>2016-10-14</i>
	<i>Provident Fund</i>	<i>40575</i>	<i>15.11.2016</i>	<i>40575</i>	<i>2016-11-15</i>
	<i>Provident Fund</i>	<i>13788</i>	<i>15.12.2016</i>	<i>13788</i>	<i>2016-12-30</i>
	<i>Provident Fund</i>	<i>17707</i>	<i>16.01.2017</i>	<i>17707</i>	<i>2016-01-31</i>
	<i>Provident Fund</i>	<i>17872</i>	<i>15.02.2017</i>	<i>17872</i>	<i>2016-02-18</i>
	<i>Provident Fund</i>	<i>17373</i>	<i>15.03.2017</i>	<i>17373</i>	<i>2016-03-22</i>
	<i>Provident Fund</i>	<i>17859</i>	<i>15.04.2017</i>	<i>17859</i>	<i>2016-04-27</i>

*From the above table, it is observed that the total employee contribution deposited to provident fund is of Rs. 3,59,958/-.*

*Out of the total employees contribution of Rs. 3,59,958/-, only Rs. 1,22,185/-for the month of July 2016, Oct 2016 and Nov 2016 was deposited on or before the contribution amounting to Rs. 2,37,773/- was deposited only after due date due date. For rest of the months under the year consideration, the employees contribution amounting to Rs.2,37,773/- was deposited only after due date prescribed under the respective Act.*

*In this regard, it is pertinent to quote the most recent decision of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. Vs. CIT-1 [Civil Appeal No. 2833 of 2016] wherein it has been held as follows:*

*51. The analysis of the various judgments cited on behalf of the assessee i.e.. Commissioner of Income-Tax v. Aimil Ltd.; Commissioner of Income-Tax and another v. Sabari Enterprises; Commissioner of Income Tax v. Pamwi*

*Tissues Ltd.; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. and Nipso Poly fabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 438 (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 Extrusions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.*

*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 438, 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 assessee's 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 assessee is 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 438 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 assesseees 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.*

*In light of the above discussion and respectfully following the decision of the Hon'ble Supreme Court as discussed above, the addition of Rs. 2,37,773/- towards late depositing the employees contribution to the provident fund is confirmed. Hence, the appellant fails on this ground.”*

5. In view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. vs Commissioner of Income Tax-1 (supra), we do not find any error in the order of Ld.CIT(A) on the issue in dispute and accordingly, we uphold the same. Thus, grounds raised by the assessee are dismissed.

6. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court on 22/09/2023.

**Sd/-**

**Sd/-**

**(PAVAN KUMAR GADALE)**  
**JUDICIAL MEMBER**

**(OM PRAKASH KANT)**  
**ACCOUNTANT MEMBER**

*\*Amit Kumar\**

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Asstt. Registrar  
Jabalpur Bench