**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E",MUMBAI**

**BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)**

I.T.A. No.764/Mum/2022 - 2009-10
I.T.A. No.765/Mum/2022 - 2010-11

M/s Ravi Developments 76, Laxmi Palace, Mathuradas Road Kandivali (West), Mumbai-400 067 **PAN : AAAFR2516G**	vs	The ACIT, Central Circle-2, Thane 6th Floor, Room No.13, A-Wing Ashar IT Park, Road No.216-Z, Wagle Industrial Estate, Thane- 400 604
APPELLANT		**RESPONDENT**

Present for the Assessee	Shri Purram Tejwani a/w Shri Anand Kanse
Present for the Department	Shri Biswanath Das –CIT DR

Date of hearing	12/09/2023
Date of pronouncement	19/10/2023

O R D E R

Per Bench:

These appeals filed by the Revenue are against the separate orders of the Commissioners of Income-tax,(Appeal), Pune-11 [in short, 'the CIT(A)'] both dated 26/05/2022 for assessment year 2009-10 & for assessment year 2010-11.

2. The assessee is engaged in the business of developing commercial and residential projects. There was a search and survey operation carried out on the assessee and its partner on 24/03/2011. The assessment was completed under section 143(3) read with section 153A in which various additions and disallowances were made by the Assessing Officer. The assessee filed an appeal before the CIT(A), who partly allowed the appeal of the assessee. The assessee preferred further appeal before the Tribunal contending the various additions / disallowances made by the assessee. The co-ordinate bench of the Tribunal vide order dated 04/08/2022 (ITA No.764 &765/Mum/2022) gave partial relief to the assessee. One of the issues contended by the assessee before the Tribunal was the disallowance made towards belated remittance of PF & ESI in which the Tribunal held the issue in favour of the assessee by relying on the decision of the co-ordinate bench in this regard.

3. In view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd in Civil Appeal No.2833 of 2016 passed on 12/10/2022, the revenue moved a miscellaneous application praying before the Tribunal to recall the order. The Tribunal vide order dated 31/07/2023 (M.A. No.211 & 212/Mum/2023, order dated 31/07/2023), recalled the order for the limited purpose of adjudicating the issue pertaining to delayed remittance of PF / ESI. Thus, these appeals are before us for hearing for adjudicating the grounds pertaining to the impugned issue.

4. Before us, the Ld.AR submitted that the delay with respect to the remittance of PF / ESI dues were marginal i.e. 5 to 8 days and that the amount involved is not significant. In view this the ld AR prayed that the disallowance under section 36(1)(va) of the Act may be deleted considering the facts of the case

5. We heard the parties and perused the materials on record. We find that now, the issue in question "as to whether the assessee is entitled for deduction claimed towards contribution of sum to provident fund on behalf of the employees deposited after due date prescribed under the Act but before the date of filing the return"; has been set at rest by the Hon'ble Supreme Court in case of Checkmate Services P Ltd vs CIT Civil Appeal No.2833 of 2016 dated 12/10/2022 that assessee is not entitled for claim of deduction qua the amount deposited towards employees contribution on account of provident fund after due date prescribed under the Act by returning following findings:-

> *"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 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, Atom Extrutions 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 43 B, 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(l)(va) and simultaneously inserting the second proviso of Section 43 B, 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(l)(va)) was maintained - and continues to be maintained. On the other hand, Section 43 B 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(l)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(l)(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(l)(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 43 B.

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."

6. Respectfully following the decision rendered by Hon'ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT (supra), we are of the considered view that Ld. CIT(A) has rightly decided the issue against the assessee as the employees contribution on account of ESI / PF lying deposited with the employers has to be deposited before the due date prescribed under the Act. Since the assessee has failed to comply with the condition precedent for depositing the employees contribution on account of PF & ESI before the due date prescribed under the Act,

the assessee is not entitled for any deduction. So finding no illegality or perversity in the impugned order passed by the Ld. CIT(A).

7. In result Ground No.1 for AY 2009-10 (ITA No.764/Mum/2022) and Ground No.3 for AY 2010-11 (ITA No.765/Mum/2022) are dismissed.

Order pronounced in the open court on 19/10/2023

Sd/- **sd/-**

(AMIT SHUKLA)	**(PADMAVATHY S.)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt :19th October, 2023
Pavanan

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai