

**IN THE INCOME TAX APPELLATE TRIBUNAL  
RAJKOT BENCH, RAJKOT  
(Conducted through E-Court at Ahmedabad)**

**BEFORE HRI WASEEM AHMED, ACCOUNTANT MEMBER &  
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

I.T.A. No.65/Rjt/2023  
(Assessment Year: 2017-18)

M/s. Chokshi Vachhraj Makanji & Company, Shishumangal Road, Gandhigram, Junagadh-362001	Vs.	Assistant Commissioner of Income Tax (Appeal), Circle-1(1), Rajkot
[PAN No.AAABFC3586E]		
(Appellant)	..	(Respondent)

<b>Appellant by :</b>	Shri Samir Jani, A.R.
<b>Respondent by:</b>	Shri Ashish Kumar Pandey, Sr. DR

<b>Date of Hearing</b>	14.12.2023
<b>Date of Pronouncement</b>	20.12.2023

**ORDER**

**PER SIDDHARTHA NAUTIYAL, JM:**

This appeal has been filed by the assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals), (in short “Ld. CIT(A)”), National Faceless Appeal Centre, (in short “NFAC”), Delhi in DIN & Order No. ITBA/NFAC/S/250/2022-23/1049596857(1) vide order dated 09.02.2023 passed for Assessment Year 2017-18.

2. The assessee has taken the following grounds of appeals:-

“1) The order passed by the Ld. CIT (A) on 09.02.2023 making addition on debatable issue is bad in law and against the weight of equity and natural justice to the extent that has not adjudicated the grounds in entirety. The same is prayed for deletion.

2) The Ld. CIT (A) has erred in making disallowance towards delayed payment of Provident Fund contribution of Rs.91369/- relying upon Gujarat High Court decision and ignoring all other High Court decisions. The issue of such allowance

*being debatable in nature no disallowance could have been made by way of an order u/s. 154 as held by the Apex Court in the case of T.S.Balaram , ITO v. Volkart Brothers 82 ITR 50, CIT v. Hero Cycles (P) Ltd. 228 ITR 463 and Bajaj Auto Finance Ltd. v. CIT 93 taxmann.com (Bombay). The disallowance is prayed for deletion.*

3) *The Ld. CIT (A) erred in not appreciating that the provisions of Section 43B overrides Section 36 (1) (va) and that disallowance under Section 36 (1) (va) was applicable only if the said contribution are not remitted within the due date as specified in Section 139 (1) as against the due date specified in the law under which remittance was required to be made and that all amount having been remitted within the due date prescribed by Income Tax Act, 1961 should be eligible for claim of deduction consequent to removal of proviso to section 43B of the Act. The same is prayed for allowance.*

4) *The Ld. CIT(A) erred in not considering the factual backdrop that the legislature has not only incorporated necessary amendments in section 36(1)(va) as well as 43B made vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of explanation that the same applies with effect from 01.04.2021 and thus not applicable to A.Y. 2017-18. The same is prayed for allowance.*

5) *The Appellant reserves his right to add, amend or withdraw any of the ground of appeal.”*

3. The brief issue for consideration before us is whether Ld. CIT(A) erred in confirming the disallowance of late payment of employee's contribution to Provident Fund and ESIC of Rs. 91,369/- under Section 36(1)(va) r.w.s. 24(x) of the Income Tax Act.

4. The Counsel for the assessee placed reliance on the case of **Arihant Automobiles v. ITO 137 Taxman.com (Jaipur ITAT)** and also on the case of **Jasbir Singh v ADIT in ITA number 1787/Mumbai/2021** which have taken the view that disallowance for late deposit of EPF/ESIC cannot be made by way of intimation under Section 143(1)(a) of the Act.

5. However, we observe that the position on this issue has now been unambiguously clarified by the Hon'ble Supreme Court with respect to all Assessment Years prior to AY 2021-22 in the case of **Checkmate Services**

**(P.) Ltd. [2022] 143 taxmann.com 178 (SC)** wherein the Supreme Court held that for assessment years prior to AY 2021-22, non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. The Supreme Court observed that there is a marked difference between nature and character of assessee-employer's contribution and amounts retained by assessee from out of employee's income by way of deduction wherein one is liability to be paid by employer and second is deemed income as per section 2(24)(x) which is held in trust by assessee-employer, thus, said marked difference was to be borne while interpreting obligation of assessee-employer under section 43B of the Act. The Hon'ble Supreme held that the non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was not part of assessee-employer's income, thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. Again the Supreme Court in the case of **Harrisons Malayalam Ltd. [2022] 145 taxmann.com 608 (SC)**, dismissed the SLP of the Department against order of High Court that where assessee-company failed to pay employees' contribution towards EPF and ESI within due date prescribed in respective Acts, deduction under section 36(1)(va) was not allowable.

6. We observe that ITAT Ahmedabad in the case of **Adani Infrastructure and Developers (P.) Ltd. 152 taxmann.com 564 (Ahmedabad - Trib.)** has on identical facts, decided the issue against the assessee with the following observations:

*“4. We observe that the position on this issue has now been unambiguously clarified by the Hon'ble Supreme Court with respect to all assessment years prior to AY 2021-22 in the case of Checkmate Services (P.) Ltd. (supra) wherein the Supreme Court held that for assessment years prior to AY 2021-22, non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. The Supreme Court observed that there is a marked difference between nature and character of assessee-employer's contribution and amounts retained by assessee from out of employee's income by way of deduction wherein one is liability to be paid by employer and second is deemed income as per section 2(24)(x) which is held in trust by assessee-employer, thus, said marked difference was to be borne while interpreting obligation of assessee-employer under section 43B of the Act. The Hon'ble Supreme held that the non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was not part of assessee-employer's income, thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. Again the Supreme Court in the case of **Harrisons Malayalam Ltd. v. CIT [2022] 145 taxmann.com 608/[2023] 291 Taxman 196/[2022] 449 ITR 391, dismissed the SLP of the Department against order of High Court that where assessee-company failed to pay employees' contribution towards EPF and ESI within due date prescribed in respective Acts, deduction under section 36(1)(va) was not allowable. Recently in the case of Ms. Nalina Dyave Gowda v. Asstt. DIT [2023] 146 taxmann.com 420/199 ITD 28 (Bang. - Trib.) the assessee during, financial year 2018-19 (assessment year 2019-20) made payment of employees' contribution to ESI and PF beyond due date specified under relevant Act and claimed deduction of same under section 36(1)(va). The Assessing Officer made disallowance of employees' contribution to ESI and PF while electronically processing return of income under section 143(1)(a) of the Act. The ITAT held that disallowance under section 143(1)(a) was valid in view of Supreme Court's decision in case of Checkmate Services (P.) Ltd. (supra) and the assessee will not be entitled to deduction of belated payment of ESI and PF of employees' share of contribution as per provisions of section 36(1)(va) of the Act. Again, recently Pune ITAT in the case of Cemetile Industries v. ITO [2022] 145 taxmann.com 209/[2023] 198 ITD 322 (Pune - Trib.) held that where assessee-employer deposited amount of employees contribution towards employees' provident fund and employees' state insurance corporation beyond due date***

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*stipulated in respective Acts, disallowance made under section 36(1)(va) was justified. The ITAT further held that adjustment under section 143(1)(a) by means of disallowance made for late deposit of employees' share to relevant funds beyond date prescribed under respective Acts was proper.*

*4.1 In view of the above observations respectfully following the decision of the Honourable Supreme Court in the case of Checkmate Services (P.) Ltd. (supra) and Harrisons Malayalam Ltd. (supra) and in the light of our observations, we hereby dismiss the assessee's appeal.*

*5. In the result, the appeal of the assessee is dismissed.”*

7. Recently in the case of **Ms. Nalina Dyave Gowda [2023] 146 taxmann.com 420 (Bangalore - Trib.)** the assessee during, financial year 2018-19 (Assessment Year 2019-20) made payment of employees' contribution to ESI and PF beyond due date specified under relevant Act and claimed deduction of same under Section 36(1)(va). The Assessing Officer made disallowance of employees' contribution to ESI and PF **while electronically processing return of income under Section 143(1)(a) of the Act.** The ITAT held that disallowance under Section 143(1)(a) was valid in view of Supreme Court's decision in case of **Checkmate Services (P.) Ltd. v. CIT [2022] 143 taxmann.com 178** and the assessee will not be entitled to deduction of belated payment of ESI and PF of employees' share of contribution as per provisions of Section 36(1)(va) of the Act.

8. Again, recently Pune ITAT in the case of **Cemetile Industries v. ITO [2022] 145 taxmann.com 209 (Pune - Trib.)** held that where assessee-employer deposited amount of employees contribution towards employees' provident fund and employees' state insurance corporation beyond due date stipulated under the respective Acts, disallowance made under Section 36(1)(va) was justified. The ITAT further held that adjustment under Section 143(1)(a) by means of disallowance made for late

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deposit of employees' share to relevant funds beyond date prescribed under respective Acts was proper.

9. In the case of **Guntubolu Uma Sai Prasad 154 taxmann.com 655 (Visakhapatnam - Trib.)**, the ITAT held that disallowance can be made under Section 143(1)(a) towards employees' contribution to EPF and ESI where assessee made payment towards employees' contribution to EPF and ESI beyond due date prescribed under respective Acts.

10. In view of the above observations and respectfully following the decision of the Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd. (supra)** and **Harrisons Malayalam Ltd. (supra)** and in the light of our observations, we hereby dismiss the assessee's appeal.

11. In the result, the appeal of the assessee is dismissed.

**This Order pronounced in Open Court on**

**20/12/2023**

**Sd/-**

**(WASEEM AHMED)**  
**ACCOUNTANT MEMBER**

Ahmedabad; Dated 20/12/2023

*TANMAY, Sr. PS*

**TRUE COPY**

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :**

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

**Sd/-**

**(SIDDHARTHA NAUTIYAL)**  
**JUDICIAL MEMBER**

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, राजकोट / ITAT, Rajkot