

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

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND**  
**SHRI K.M. ROY, ACCOUNTANT, MEMBER**

**ITA no.168/Nag./2024**  
(Assessment Year : 2017-18)

Barbate Automotive (India) Pvt. Ltd.  
K.H. no.63/6, 63/3, Arya Cars  
Bhandara Road, Kapsi, Nagpur 441 202  
PAN – AADCB1189M

..... Appellant

v/s

Dy. Commissioner of Income Tax  
Circle-3, Nagpur

..... Respondent

Assessee by : Shri Sanjay Thakar  
Revenue by : Shri Abhay Y. Marathe

Date of Hearing – 16/05/2024

Date of Order – 16/05/2024

**ORDER**

**PER K.M. ROY, A.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 12/12/2023, passed by the learned Commissioner of Income Tax (Appeals), Kolkata, [*learned CIT(A)*], for the assessment year 2017-18.

2. In its appeal, the assessee has raised following grounds:-

*"1) Ld. CIT(A) erred in confirming the disallowance made by Assessing Office amounting to Rs.7,88,452/- towards Employees Contribution Welfare Fund, by misinterpreting actual Legal position.*

*2) The learned CIT(A) erred in not properly consider Assessee's submission and various supporting documents filed before him, by the Assessee.*

3) *The learned CIT(A) erred in not properly consider the amended provision by Finance Act, 2002 in section 43-B and he did not properly appreciate the various case laws cited by Assessee especially judgment of Hon'ble Bombay High Court (jurisdictional H.C.) in the case of CIT, Pune Vs. Ghatge Patil Transport Ltd. (ITL No. 1002 & 1032 of 2012 decided on 14.10.2014, 007) and instead considered various judgments that are not at all applicable to the Assessee.*

4) *Assessee craves leave to urge additional grounds and to alter or amend any grounds at the time of hearing, if necessary.*

PRAYER

*It is prayed that disallowance of ₹ 7,88,452, may kindly be deleted."*

3. The only grievance of the assessee is against disallowance on account of delayed payment of employee's contribution to provident fund under section 36(1)(va) of the Act.

4. The brief facts of the case, as emanating from the records are: The assessee is a Company filed its return of income on 22/10/2018, declaring a total income of ₹ 1,98,31,510. The case was selected for scrutiny and notice under section 143(2) of the Act was issued on 21/09/2018, which was duly served. The Assessing Officer concluded assessment under section 143(3) of the Act on 20/12/209, making an addition of ₹ 7,88,452.

5. The learned CIT(A) confirmed the order of the Assessing Officer by dismissing the appeal of the assessee by observing as under:-

"V. DECISION:-

*I have gone through the assessment order passed by Assessing Officer (AO) and details o submission given by appellant.*

*The fact of the case is the Assessing Officer has disallowed the Employee Contribution to Welfare Fund of Rs. 7,88,452 Under Section 43B of the Income Tax Act, 1961 as late deposit of employees contribution towards ESIC/EPF. The AO ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". Those amounts could not have been allowed as deductions under Section 36(1)(va)*

of the IT Act when the payment was made beyond the relevant due date under the respective Acts.

*This issue is put to rest by recent Hon'ble Supreme Court decision in 2022 in the case of Checkmate Services Pvt Ltd Vs CIT-I (Supreme Court) Civil Appeal No. 2833 of 2016 (SC). The court held that employees (not employer) contribution towards ESIC/EPF, if paid belatedly, will be in the nature of deemed income as employer holds the same in a capacity of trusteeship. Thus court distinguishes between employees contribution and employer contribution.*

*The Hon'ble court observed, "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. Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 3124) 100. 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, ie, 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 56(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 Fabilites, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.*

*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 438.

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 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.

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."

Therefore, as per above decision by Hon'ble supreme court, all the case laws cited by appellant get nullified on this issue. The AO's decision that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums

*received by the appellants constituted "income". Those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective Acts found to be correct.*

*With these remarks, all the grounds in this appeal are dismissed."*

6. Aggrieved, the assessee is in further appeal before the Tribunal.

7. The learned Counsel for the assessee reiterating the submissions made before the authorities below submitted that The learned CIT(A) was not justified in not consider the amended provision by Finance Act, 2002 in section 43-B and he could not appreciate the various case laws cited by the Assessee especially judgment of Hon'ble Bombay High Court (Jurisdictional H.C.) in the case of CIT, Pune v/s Ghatge Patil Transport Ltd. (ITL No. 1002 & 1032 of 2012 decided on 14.10.2014, 007) and instead considered various judgments that are not at all applicable to the Assessee.

8. Per contra, the learned Departmental Representative vehemently relied upon the decision of the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. (supra) and submitted that this issue is no longer res integra and has been decided in favour of the Revenue.

9. We have considered the rival submissions and perused the material available on record. In the present case, it is undisputed that the employee's contribution to provident fund was deposited by the assessee after the due date prescribed under the relevant statute but within the due date of filing the income tax return in accordance with section 139(1) of the Act. We find that the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. (supra) held that payment towards employee's contribution to provident fund after the due

date prescribed under the relevant statute is not allowable as deduction under section 36(1)(va) of the Act. The relevant findings of the Hon'ble Supreme Court, in the aforesaid decision, are as under:

*"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 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 nonobstante 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."*

10. Therefore, respectfully following the decision of the Hon'ble Supreme Court in Checkmate Services (P.) Ltd. (supra), we see no legal infirmity in the

impugned order passed by the learned CIT(A) warranting interference at the instance of the assessee company. Accordingly, upholding the order passed by the learned CIT(A), all the grounds of appeal raised by the assessee are dismissed.

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

Order pronounced in the open Court on 16/05/2024

**Sd/-**  
**V. DURGA RAO**  
**JUDICIAL MEMBER**

**Sd/-**  
**K.M. ROY**  
**ACCOUNTANT MEMBER**

**NAGPUR, DATED: 16/05/2024**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Nagpur; and
- (5) Guard file.

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

Sr. Private Secretary  
ITAT, Nagpur