IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

I.T.A. No.275/Ahd/2023
(Assessment Year: 2012-13)

Schaeffler India Ltd., (A successor of Luk India Pvt. Ltd.), Opp. ABB, P.O. Maneja Vadodara-390013	Vs.	Assistant Commissioner of Income Tax, Circle-1(1)(1), Vadodara (Earlier ACIT, Circle-1, Hosur)
[PAN No.AAACL6817D]		
(Appellant)	..	**(Respondent)**

I.T.A. No.299/Ahd/2023
(Assessment Years: 2012-13)

Assistant Commissioner of Income Tax, Circle-1(1)(1), Vadodara	Vs.	M/s. Schaeffler India Ltd. (Erstwhile Luk India Pvt. Ltd.), P.B. No. 20, Royakottah Road, Hosur, Tamil Nadu-635109
[PAN No.AAACL6817D]		
(Appellant)	..	**(Respondent)**

I.T.A. No.692/Ahd/2024
(Assessment Years: 2019-20)

Schaeffler India Ltd., Opp. ABB, P.O. Maneja Vadodara-390013	Vs.	Assistant Director of Income Tax, CPC, Bangalore (JAO-Deputy Commissioner of Income Tax, Circle-1(1)(1), Vadodara
[PAN No.AAACF3357Q]		
(Appellant)	..	**(Respondent)**

Appellant by :	Shri Bhavin Marfatia, A.R.
Respondent by:	Shri Prathvi Raj Meena, CIT D.R. & Smt. Trupti Patel, Sr. D.R.

Date of Hearing	19.11.2024
Date of Pronouncement	27.11.2024

O R D E R

PER SIDDHARTHA NAUTIYAL - JUDICIAL MEMBER:

These appeals have been filed by the Assessee and the Revenue against the orders passed by the Ld. Commissioner of Income Tax (Appeals)-13, (in short "Ld. CIT(A)"), Ahmedabad, Commissioner of Income Tax (Appeals), (in short "Ld. CIT(A)"), ADDL/JCIT(A), Prayagraj, vide orders dated 03.03.2023 & 14.02.2024 passed for A.Ys. 2012-13 & 2019-20. Since common facts and issues for consideration are involved in all the years under consideration before us, the appeals filed by the assessee and Revenue for the aforesaid Assessment Years are being taken up together.

We shall first deal with the assessee's appeal (ITA No. 275/Ahd/2023) for A.Y. 2012-13

2. The assessee has raised the following grounds of appeal:

"Time barred Proceedings:

1) The learned Commissioner of Income Tax (Appeals) – 13, Ahmedabad ["CIT(A)"] erred in fact and in law in confirming the action of learned Assistant Commissioner of Income Tax, Circle – 1, Hosur ("the AO") in passing the order u/s 143(3) r.w.s. 144C of the Income-tax Act, 1961 ("the Act") beyond the time limit prescribed u/s 144C (3) of the Act.

Addition Rs. 31,37,991:

2) The learned CIT(A) erred in fact and in law in confirming the action of learned AO and TPO in disallowaing Rs. 31,37,991 u/s 37 of the Act.

3) The learned CIT(A) erred in fact and in law in invoking section 37 of the Act without satisfying the conditions stipulated under the Act.

4) The learned CIT(A) erred in fact and in law in disallowing Rs. 31,37,991 without disputing the fact that the expense was incurred for the purpose of the business of the Appellant.

5) The learned CIT(A) erred in fact and in law in disallowing the expense merely on the basis of assumption and presumptions.

Other Grounds:

6) The learned CIT(A) erred in fact and in law in confirming the action of the AO in charging interest u/s 234 D of the Act.

7) The learned CIT(A) erred in fact and in law in confirming the action of learned AO in initiating penalty proceedings u/s 271(1)(c) of the Act.

8) Your Appellant craves the right to add to or alter, amend, substitute, delete or modify all or any of the above grounds of appeal."

3. Before us, at the outset, the Counsel for the assessee submitted that he shall not be pressing for Ground No. 1 of the assessee's appeal (Time barred proceedings) and accordingly, Ground No. 1 of the assessee's appeal is dismissed as not pressed.

Ground Nos. 2 to 5 relate to addition of Rs. 31,37,991/- regarding disallowance of this amount by invoking Section 37 of the Act.

4. Before us, at the outset, the Counsel for the assessee submitted that this ground is directly covered by order of ITAT, Ahmedabad Bench in assessee's own case for A.Y. 2010-11 in ITA No. 133 to 137/Ahd/2023 vide order dated 12.01.2024. It would be useful to reproduce the relevant extracts of the ruling for ready reference:

"8. The brief facts in relation to these Grounds of Appeal are that the assessee had reimbursed a sum of Rs. 31,63,877/- to Schaeffler Technology GMBH and CO KG, Germany on account of professional services rendered by E.Y. Germany in lieu of Agreement entered with Schaeffler Germany. Accordingly, the proportionate share attributable to the assessee was recovered by Schaeffler Germany at cost from the assessee. A copy of Agreement between the assessee and Schaeffler Germany was submitted to the Assessing Officer and CIT(A) during the course of hearing (refer Pages 40-41 and 68-69 of CIT(A) order). However, the Counsel for the assessee submitted before us that the CIT(A) without granting opportunity of hearing, dismissed

the appeal and upheld the disallowance of the expenses under Section 37 of the Act, despite the fact that there was no specific finding either by AO or TPO or CIT(A) that the aforesaid expenses were not incurred wholly and exclusively for the purpose of business of the assessee. The Counsel for the assessee submitted that the aforesaid grounds of appeal have been dismissed by the Ld. CIT(A), without giving a fair opportunity of hearing to the assessee to present it's case on merits and produce all relevant documents in support of it's contention to claim deduction under Section 37 of the Act. Accordingly, the Counsel for the assessee submitted that in the interest of justice, this issue may be referred back to the file of Assesing Officer, so as to allow the assessee to produce all relevant documents in support of it's contention.

9. In response Ld. D.R. placed reliance on the observations made by Ld. CIT(A) in the appellate order.

10. We have heard the rival contentions and perused the material on record.

11. We are of the considered view that in the interests of justice the matter may be restored to the file of the Ld. A.O. so as to allow the assessee to produce relevant documents / evidences in support of claim of deduction of the aforesaid expenses under Section 37 of the Act.

12. In the result, Ground Nos. 1 to 5 of the assessee's appeal are allowed for statistical purposes."

5. In light of the observations made by the ITAT for A.Y. 2010-11, the matter is restored to the file of Ld. AO so as to allow the assessee to produce relevant documents / evidences in support of claim of deduction of the aforesaid expenses under Section 37 of the Act.

6. In the result, Ground Nos. 2 to 5 of the assessee's appeal are allowed for statistical purposes.

7. The other grounds of appeal are raised by the assessee are general in nature and do not require any specific adjudication.

Now we shall deal with Department's appeal for A.Y. 2012-13 (ITA No. 299/Ahd/2023)

8. The Department has raised the following grounds of appeal:

> *"1. Whether on the facts and in circumstances of the case, the Ld.CIT(A) has erred in law and facts in not upholding the downward adjustment made of Rs.4,48,93,558/- on account of Management Service Charges without appreciating the fact no supporting evidences/documents have been submitted by the assesses so as to prove that there is a valid agreement between the assessee and Schaeffler China for provision of Management Support Services for the relevant period?*
>
> *2. Whether on the facts and in circumstances of the case, the Ld.CIT(A) has erred in law and on facts in not appreciating the findings of the TPO that the service fee has to be benchmarked separately by analyzing each of the actual services received by the assessee and also the assessee company has separate team for seeing the HR issues, Administration, Finance, Marketing, Sales, Legal and Product development, technical planning.*
>
> *3. Whether on the facts and in circumstances of the case, the Ld.CIT(A) has erred in law and on facts in not considering the facts of the case that the assessee-company has not brought on record any cogent, relevant and reliable evidence to prove how and when these services were requisitioned from the AE were submitted by the assessee, whether the AEs have the capacity to provide such services to Indian AE or the details of the cost incurred by the AE for the provision of each type of service purported to have been received by the assessee,*
>
> *4. Whether on the facts and in circumstances of the case, the Ld. CIT(A) has erred in law and fact in not considering the facts of the case that TNMM method selected by the assessee should be rejected and CUP method should be Most Appropriate Method to determine the arm's length price separately.*
>
> *5. The appellant craves leaves to add, modify, amend or alter any grounds of appeal at the time of, or before, the hearing of appeal.*
>
> *It is prayed that the order of the CIT(A) on the above issue be set-side and that of the Assessing Officer be restored."*

9. We observe that there is only one issue relating to adjustment of Rs. 4,48,93,558/- on account of Management Service Charges in Department's appeal. At the outset, both the parties before us agreed that this issue is covered

directly by the order of ITAT, Ahmedabad Bench in assessee's own case in ITA No. 133 to 137/Ahd/2023 for A.Y. 2010-11 to 2014-15, wherein the ITAT Ahmedabad has dismissed the appeal of the Department on this issue.

10. The brief facts / background relating to this issue is that the assessee company had paid management fees to Schaeffler Holding China Company ("Associated Enterprise") and bench-marked the transaction by using TNMM. The Transfer Pricing Officer determined ALP of the transaction at Rs. NIL by treating the services performed by the Associated Enterprise at stewardship / shareholder activity. In appeal, the assessee provided details regarding the nature of services, service level agreement, break-up of amount paid for services, relevant invoices and email communications in support of services rendered by the AE to the assessee company. The Ld. CIT(A) deleted the adjustment made by the TPO by relying on the decision of ITAT, Pune Bench in case of group company "INA Bearings India Pvt. Ltd." (now merged with the assessee). However, before us, both the parties have agreed that the issue is now covered in favour of the assessee by decision of ITAT, Ahmedabad Bench in assessee's own case in ITA No. 133 to 137/Ahd/2023 vide order dated 12.01.2024

11. It would be useful to reproduce the relevant extracts ruling for ready reference:

> *"20. The brief facts in relation to these grounds of appeal are that assessee paid a sum of Rs. 6,72,02,428/- to Schaeffler Holding (China) Company Ltd. and a sum of Rs. 31,63,877/- to Schaeffler GmbH as management fees. The Assessing Officer held that the nature of support provided by Schaeffler China is in the nature of "Stewardship Activity" and hence does not entail any management fees to be paid. Without prejudice, the TPO held that assessee has not produced any details in respect of determination of payment made by the assessee to it's AEs at the time of entering into the Agreement alongwith the basis thereof, cost benefit analysis carried out by the assessee, the comparability analysis in respect of the payment etc., at the time of making the aforesaid payments. Accordingly, the TPO concluded that the Arm's*

Length Price of the services provided to the assessee by both the Associated Enterprises towards management fee, is to be taken at "NIL" and accordingly, recommended adjustment of the entire amount of Rs. 7,03,66,305/-.

21. In appeal before Ld. CIT(A), the assessee submitted that the issue is covered in favour of the assessee by the case of another group company in favour of the assessee, INA Bearings India Pvt. Ltd. vide order dated 24.06.2019 of ITAT Pune in ITA No. 150/PN/2017 for A.Y. 2011-12. The assessee submitted that the ITAT Pune had analyzed the same issue of payment of management fees to Schaeffler China and the decision in the aforesaid case rendered by Pune ITAT in respect of a group entity, has a direct correlation and bearing on the issue under consideration before Ld. CIT(A).

22. Accordingly, Ld. CIT(A) carried out a point-wise comparison between the facts of the assessee's case and the decision of INA Bearings for A.Y. 2011-12 and decided the issue in favour of the assessee.

23. The Department is in appeal before us against the aforesaid order passed by Ld. CIT(A) deciding the issue in favour of the assessee. Before us, D.R. submitted that Ld. CIT(A) has ignored the fact that no specific documents were provided by the assessee for justifying the payment of Management Fees. This vital fact has been ignored by the Ld. CIT(A) while deciding the issue in favour of the assessee. Further, the D.R. submitted that this issue has been decided in favour of the assessee by placing reliance by Ld. CIT(A) on decision rendered by Pune ITAT in the case of another group company and it is not clear whether the ratio of the aforesaid decision could be applied to the assessee's set of facts, especially in the light of the fact that the relevant documents in support of payment of Management Fees have not been submitted by the assessee.

24. In response, the Counsel for the assessee submitted that the issue is directly covered in favour of ITAT Pune decision in a group company case of INA Bearings to which reference was made by Ld. CIT(A) while deciding the issue in favour of the assessee. Further, the Counsel for the assessee drew our attention to Page 88 of the CIT(A) order and submitted that Ld. CIT(A) has given a specific finding that the services received from Schaeffler China are not stewardship activity. Further, Ld. CIT(A) at Para 4.5 Page 88 has also observed that for A.Ys. 2013-14 & 2014-15 similar Management Fees was paid by the assessee amounting to Rs. 14,80,65,367/- and Rs. 9,94,05,195/- to Schaeffler China, however, the TPO had accepted the payment and has not made any adjustment and accepted the same to be at Arm's Length. Accordingly, Ld. CIT(A), on basis of the above facts and the decision of ITAT Pune in group company case of INA Bearings has decided this issue in favour of the assessee and hence there is no infirmity in order passed by Ld. CIT(A).

25. We have heard the rival contentions and perused the material on record.

26. We observe that Ld. CIT(A) has made a specific finding that the assessee has provided relevant details regarding the nature of Service Level Agreement, description

of services, detailed invoices and copy of email communication for evidencing that services were rendered by the AEs. Further, Ld. CIT(A) at Para 4.5 Page 88 of his order has also given a specific finding that for A.Ys. 2013-14 and 2014-15, similar management fees was paid by the assessee to Schaeffler China, however, the TPO has not made any adjustments and accepted the same to be at Arm's Length. It would be useful to reproduce the relevant extracts of the order passed by Ld. CIT(A) for ready reference:-

> *"4.4 A reading of the above order shows that the ITAT Pune has deleted the adjustment suggested by the TPO in the case of INA Bearings on multiple reasons which are outlined and discussed vis-a-vis the facts in this case as below:*
>
> ***a) The first question which arises for our consideration is as to whether the TPO was right in determining the ALP of the international transaction of payment of Fees for Management services in a segregated manner?***
>
> *This issue was specific to the case of INA Bearing wherein Management fees was aggregated under the head manufacturing and trading payments and the TPO segregated the same and culled out Fees for Management services and then went on to determine the ALP for this international transaction. The ITAT held the action of TPO as correct. However, in the present case of my appellant it is seen that Fees for Management Services is already shown separately and this part of the ITAT order has no relevance in my case.*
>
> ***b) The ITA T then went on to find whether there was any agreement for rendition of Management support services?***
>
> *In the case before the Tribunal such Service Level Agreement existed between INA Bearing and Schaeffler China. Similarly in the case of present appellant also, similar SLA was part of paperbook furnished by the appellant. The wordings of the agreement are identical in c-both with respect to the scope of services that shall be provided and with respect to the service fee to be charged. The rates reflect the actual fully-loaded costs incurred in providing such services, plus a profit mark-up 5% (Cost plus method).*
>
> *However, it is seen that the Reimbursement agreement between the appellant and Schaeffler GmBH, copy of which was furnished is for reimbursement of expenses incurred in relation to EY report and were not related to the payment of any management fees and it pertained to CY 2007 & 2008.*
>
> *From the above discussion, it follows that there is valid Agreement between the assessee and Schaeffler China only for provision of Management support services to the assessee for the relevant period.*

c) The next question answered by the IT A T is whether any services were actually rendered?

In the case of INA Bearings, the ITAT Pune observed that the sum and substance of the TPO's observations, which he also emphatically stated in other parts of his order, is that services rendered by Schaeffler China to the assessee were in the nature of stewardship activities or shareholders services, for which no payment was required to be made. In present case before me also the major thrust of the argument of the TPO/AO is that the services performed by AE (directly or through other AEs) fall into the category of stewardship activity. Although the TPO refers to that 'no mails or contemporaneous documents were submitted in support of the receipt of such services' and 'to say nothing about the charge for such services being not in consonance with the type of services provided', there is no clear finding that the services claimed by the appellant to have been provided by Schaeffler China were actually not provided. It is seen that, as in the case of INA Bearings, in this case also, the appellant had monthly invoices raised by Schaeffler China in the name of the appellant showing variety of services provided. The invoice raised is in respect of each and every minute spent for assessee's work provided by by Schaeffler China. So, the appellant has adduced necessary evidence, as the INA Bearings had done before it's TPO, before the TPO to justify the Services rendered and expenditure claimed.

d) if yes, whether the services were in the nature of stewardship activities?; if not, whether these were at ALP?

In the case of INA Bearings, the ITAT Pune found that Schaeffler China provided services under head "Business Development", "Finance & Controlling Services", "Human Resources services, "Purchasing/Procurement services", "Supply chain Management services", "Process and Information services" and "Distribution sales services" etc. It held that patently such services are in the nature of normal business services performed with a view to enable the assessee to carry out its business operations producing effect on the assessee company and hence do not qualify as 'stewardship activities', thereby overturned the TPO action pro-tanto. In the case of my appellant also the same ratio applies in toto, mutatis mutandi as the services provided were identical in nature.

e) whether (he international transaction of payment of Fees for Management support services to the tune ofRs.5,65,53,971/- was of ALP?

The ITAT Pune measured the issue, on the basis of two aspects of TPO's order, viz..

1. The TPO held that the services received from Schaeffler China as stewardship activities leading to Nil ALP

The ITAT decided this issue by discussing the duties of AO and TPO to whom issue is referred only for purpose of determining the ALP of the international transaction and the duty or jurisdiction of the TPO is confined statutorily to do so only. The TPO determines the ALP of the transactions by carrying out FAR (functions performed, assets employed and risks undertaken) analysis and deploying one of the prescribed methods. It held that in this case the TPO has not questioned whether the services were rendered or not. It has accepted the proposition largely that the services were rendered but then went onto hold that these services were not required. The ITAT states that this is not the domain of the TPO but that of the AO and the TPO cannot usurp the power of AO and determine the services rendered to by valued at NIL. It has to work within the parameters of his power and determine the ALP for international transaction, he cannot say no services were required to be rendered so the fees charges should be NIL and such determination by the AO in the case of IN A Bearing vitiated the process. In the present case also, identical situation exists. SO the conclusion drawn by the ITAT Pune in the case cited applies in this case also.

2. The TPO did not apply any specific method for determining the ALP of the international transaction of payment of Fees for Management services.

On this issue the ITAT Pune said that the TPO did not apply any of the method for determination of ALP as per section 92CA. Examining the provision it said that ALP has to be determined as per the prescribed method which is MAM in the specific facts and circumstances of the case. IN case of INA bearing the TPO did not apply any of the prescribed and hence TP adjustments need to be deleted on this count as well. This ratio is squarely applicable in the present appeal as well.

f) The ITAT also gave credence to the fact that Schaeffler China charged service fee at the rate of actual cost incurred plus a markup of 5% which is of the nature Cost plus Method prescribed under the Rules. It also argued that even if, it is assumed that the mark up of 5% is not at ALP and the same should be as low as 1% or even less than that, still the difference arising on account of such mark-up going even up to 0% in a comparable uncontrolled situation, would be within +/-5% range, not requiring any transfer pricing adjustment. The ratio applies in this case also, as here also the SLA was similar and service fee was charged at a mark up of 5% to actual cost as in the case of IMA Bearings.

4.5 A very crucial aspect is that for AY 2013-14 & 2014-15 similar Management fees was paid by the appellant of Rs 14,80,65,367/- & Rs 9,94,05,195/- to Schaeffler China. However, the TPO has accepted the payment and not made any adjustments and accepted the same to be at Arm's length.

4.6 Despite the fact that during the year under consideration INA Bearing was a group concern and related party. But by a scheme of merger the same got merged with Schaeffler India and now part of the appellant concern. The issue involved in that case as dealt by ITAT Pune is identical with the adjustment made in the case of this appellant and SLA, terms of payments, TPO not finding any clear finding that services were not rendered, similarly holding the services provided as shareholder activity which it was not empowered to and without application of prescribed methods of ALP determination holding the same at NIL is very similar. Hence following the case of ITAT Pune in the case of INA Bearings, in this case also the adjustment of Rs 6,72,66,305/- paid as Management fees to Schaeffler India is directed to be deleted."

27. On going through the facts of the instant case, we are of the considered view that Ld. CIT(A) has not erred in facts and in law in holding the determination of Management Fees to be at Arm's Length Price. In our considered view, Ld. CIT(A) has correctly observed that the aforesaid activities / services do not qualify as stewardship / shareholder activity. Notably, in assessee's own case for A.Ys. 2013-14 and 2014-15, the TPO has not made any Transfer Pricing Adjustment in respect of aforesaid services and accepted the payment of Management Fees to be at Arm's Length Price. Further, we also observe that Ld. CIT(A) has made a detailed comparison between the decision rendered by ITAT, Pune Bench in the case of a group company (INA Bearings) in respect of management services and after a detailed comparison and looking into the facts of the assessee's case, has held that the assessee has correctly determined the Arm's Length Price in respect of the aforesaid Management Fees by using TNMM method. Accordingly, looking into the instant facts, we are of the considered view that Ld. CIT(A) has not erred in facts and in law in deciding this issue in favour of the assessee.

28. In the result, Ground Nos. 4 to 6 of the Department's appeal are dismissed."

12. In view of the above order passed by ITAT Ahmedabad Bench in assessee's own case, the appeal of the Department is hereby dismissed.

Now we shall take up assessee's appeal for A.Y. 2019-20 (in ITA No. 692/Ahd/2024)

13. The assessee has raised the following grounds of appeal:

"1. The learned Additional/Joint Commissioner of Income Tax (Appeals), Prayagraj ("the CIT(A)") erred in fact and in law in passing order u/s 250 of the Income Tax Act, 1961 ("the Act") without granting proper opportunity of being heard.

Provident Fund - Rs 93,17,864

2. The learned CIT(A) erred in fact and law in confirming the action of the learned Assistant Director of Income Tax, Centralized Processing Centre, Bengaluru ("the AO") in disallowing deduction amounting to Rs. 93,17,864/- towards deposit of employee's contribution to Provident Fund (PF) and Employee State Insurance (ESI) u/s 36(1)(va) of the Act.

3. The learned CIT(A) erred in fact and in law in confirming the action of the learned AO in disallowing employee's contribution to PF by making adjustment while processing the return of income u/s 143(1) of the Act.

4. The learned CIT(A) erred in fact and law in confirming the action of the learned AO in not appreciating the fact that the Appellant had deposited the employee's contribution to PF and ESI before the due date of filing the return of income u/s 139(1) of the Act.

5. The learned CIT(A) erred in fact and in law in confirming the action of learned AO in making disallowance u/s 36(1)(va) of the Act without appreciating the fact that the explanation to section36(1)(va) is not applicable for the year under consideration.

6. Without prejudice to the above, the learned CIT(A) erred in fact and in law in confirming the action of the learned AO in disallowing employee's contribution to PF without appreciating the fact that delay in payment of PF was due to genuine reasons.

7. The learned CIT(A) erred in fact and in law in confirming the action of the learned AO in levying interest u/s 234C of the Act."

14. 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 ₹ 93,17,864/- in the intimation issued under Section 143(1) of the Act.

15. The Counsel for the assessee placed reliance on the case of **Arihant Automobiles vs. ITO 137 Taxman.com (Jaipur ITAT)** in the case of **Jasbir Singh vs. ADIT in ITA No. 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)of the Act.

16. However, we are unable to agree with the above argument of Counsel for the assessee. We observe that ITAT 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 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 latedeposit 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."

17. 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.

18. 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 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.

19. 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.

20. In view of the above observations respectfully following the decision of the Hon'ble Supreme Court in the case of Checkmate Services Private Ltd. *supra* and Harrisons Malayalam Ltd. *supra* and in the light of our observations, we hereby dismiss the assessee's appeal on this issue.

21. In the combined result, the appeals filed by the assessee are partly allowed for statistical purposes and the appeal filed by the Department is dismissed.

This Order is pronounced in the Open Court on 27/11/2024

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 27/11/2024

TANMAY, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/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, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad