IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE

Before Shri George George K, JM & Shri Laxmi Prasad Sahu, AM

ITA No.985/Bang/2022 : Asst.Year 2018-2019

M/s.Technocon Constructions & Infrastructure Private Limited SF 9 & 10 Karuna Complex Sampige Road, Malleshwaram Bengaluru – 560 003. **PAN : AADCT0284F.**	v.	The Deputy Commissioner of Income-tax, Circle 7(1)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Rajgopal, AR
Respondent by : Sri.K.R.Narayana, Addl.CIT-DR

Date of Hearing : 15.11.2022		**Date of Pronouncement : 15.11.2022**

O R D E R

Per George George K, JM :

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 28.07.2021. The relevant assessment year is 2018-2019.

2. The grounds raised read as follows:-

"1. The impugned order passed by the learned Commissioner of Income Tax (Appeals) under section 250 of the Income Tax Act, 1961 to the extent which is against the Appellant is opposed to law, without jurisdiction, weight of evidence, probabilities, facts and circumstances of the case.

2. The intimation of the learned assessing officer in so far it is prejudicial to the interest of the appellant is bad, erroneous in law and contrary to the facts and circumstances of the case and the Ld. Commissioner (Appeals) erred in upholding the same.

3. The learned Assessing Officer has erred, in law and in

facts, by disallowing the employees contribution to provident fund and employees state insurance amounting to Rs.4,27,837/-paid by the Appellant, though, the same was remitted before the due date of filing of return under section 139(1) of the Act.

4. The learned Assessing Officer has erred, in law and in facts, by not considering the provisions of Section 30 and Section 32 of the Employees' Provident Fund Scheme, 1952 wherein it is provided that the remittance of employees' contribution and employer's contribution to provident fund is to be paid by the employer in the capacity of employer.

5. The learned Assessing Officer has erred, in law and in facts, by applying section 36(l)(va) instead of Section 438 of the Income Tax Act, 1961.

6. The learned Assessing Officer has erred, in law and in facts, by not considering and passing an intimation/ order contrary to the decision of Hon'ble Supreme Court and the jurisdictional Karnataka High Court.

7. The Ld. Commissioner (Appeals) is erred in sustaining the addition made by the Ld. AO in his order by taking recourse to the amendment by way of insertion of Explanation 2 to section 36(1)(va) and Explanation 5 to the section 43B which takes effect from 1st April 2021 and is applicable to the AY 2021-22 onwards and hence not applicable to the current AY 2018-19, such amendment was substantive in nature and not formed part of statute books of the current FY 2017-18, application of law retrospectively is bad in law.

8. The Appellant submits that each of the above grounds are mutually exclusive and without prejudice to one another.

9. The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of objection at any time before or at the time of hearing before the Honourable Income Tax Appellate Tribunal ('Tribunal'), so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law. For these and other grounds that may be urged at the time of hearing of appeal, the Appellant prays that the appeal may be allowed for the advancement of substantial cause of justice and equity."

3. The brief facts of the case are as follows:

For the assessment year 2018-2019, the return of income was filed on 31.10.2018, declaring total income of Rs.1,45,57,700. The assessee was served with an intimation u/s 143(1) of the I.T.Act by assessing the total income at Rs.1,49,85,533. The reasons for the difference between the returned income and the assessed income u/s 143(1) of the I.T.Act was on account of disallowance of sum of Rs.4,27,837 being late remittance of employees' contribution to PF and ESI under the respective Acts.

4. Aggrieved by the intimation u/s 143(1) of the I.T.Act, the assessee preferred an appeal before the first appellate authority. It was stated that the assessee had paid the employees' contribution to PF and ESI prior to the due date of filing of the return u/s 139(1) of the I.T.Act. Therefore, it was submitted that the assessee is entitled to deduction of employees' contribution to PF and ESI having regard to the provisions of section 43B of the I.T.Act. In this context, the assessee relied on the judgment of the Hon'ble jurisdictional High Court in the case of *Essae Teraoka Pvt. Ltd Vs. DCIT, reported in 366 ITR 408 (Kar.).* The CIT(A), however, rejected the appeal of the assessee. The CIT(A) noticed the difference between employer and employees' contribution to PF and ESI and held that only employers contribution to PF and ESI is entitled to deduction u/s 43B of the I.T.Act, if the same is paid prior to due date of filing of return of income u/s 139(1) of the Act. It was further held that the amendment to section

36(1)(va) and 43B of the I.T.Act by Finance Act, 2021 is clarificatory and has got retrospective operation.

5. Aggrieved, assessee has filed this appeal before the Tribunal. The learned AR submitted that the payment of employees' contribution to PF & ESI though belated, but was before the due date of fling the return of income u/s. 139(1) of the I.T.Act and otherwise allowable u/s. 43B of the I.T.Act.

6. The learned Departmental Represent, on the other hand, brought to our attention the latest decision of the Hon'ble Supreme Court in the case of *Checkmate Services (P.) Ltd. Vs CIT-1, [2022] 143 taxmann.com 178 (SC)* where the Hon'ble Apex Court has held that Section 43B(b) of the I.T.Act does not cover employees' contributions to PF, ESI etc. deducted by employer from salaries of employees and that employees' contribution has to be deposited within the due date u/s 36(1)(va) of the I.T.Act, i.e. due dates under the relevant employees welfare legislation like PF Act, ESI Act etc. failing which the same would be treated as income in the hands of the employer u/s.2(24)(x) of the I.T.Act.

7. We have heard rival submissions and perused the material on record. We notice that the Hon'ble Supreme Court in the case of *Checkmate Services (P.) Ltd. v. CIT (supra)* has considered the issue of whether the employees contribution paid before due date for filing the return of income u/s.139(1) of the I.T.Act whether otherwise allowable u/s.43B of the I.T.Act, putting to rest the contradicting decisions of various High Court. The relevant finding of the Hon'ble Supreme Court reads as follows:-

> *"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 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. 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 isto 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 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(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 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."

8. In view of the above judgment of the Hon'ble Supreme Court, we hold that the employees' contribution to PF and ESI should be remitted before the due date as per explanation to section 36(1)(va) of the I.T.Act, i.e. on or before the due date under the relevant employee welfare legislation like PF Act, ESI Act etc., for the same to be otherwise allowable

u/s.43B of the I.T.Act. We, therefore, see no reason to interfere with the order of the CIT(Appeals). It is ordered accordingly.

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

Order pronounced on this 15th day of November, 2022.

Sd/-	**Sd/-**
(Laxmi Prasad Sahu)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 15th November, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-NFAC Delhi
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore