आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'B' BENCH, CHENNAI
श्री वी दुर्गा राव न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
Before Shri V. Durga Rao, Judicial Member &
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./**I.T.A. No.663/Chny/2022**
निर्धारण वर्ष/Assessment Year: 2020-21

M/s. O Clock Software Private Limited, No. 1, Eighth Floor A Wing, Parsn Manere, Anna Salai, Chennai 600 006. **[PAN:AABCO2328M]**	Vs.	The ACIT, CPC, Bengaluru/ The Joint Commissioner of Income Tax (OSD), LTU Circle – 1, Chennai.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Y. Sridhar, CA
प्रत्यर्थी की ओर से/Respondent by	:	Shri AR V Sreenivsan, Addl. CIT
सुनवाई की तारीख/ Date of hearing	:	03.11.2023
घोषणा की तारीख /Date of Pronouncement	:	03.11.2023

आदेश /O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

This appeal filed by the assessee is directed against the order of the ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), New Delhi dated 13.06.2022 relevant to the assessment year 2020-21. Vide order in M.P. No. 89/Chny/2023 dated 03.11.2023, the captioned appeal order dated 26.09.2022 has been recalled and restored for fresh adjudication.

2. Brief facts of the case are that the assessee filed its return of income for the assessment year 2020-21 on 07.01.2021 admitting a

total income at ₹.14,17,790/-. The CPC, Bengaluru has completed the assessment under section 143(1) of the Income Tax Act, 1961 ["Act" in short] dated 24.12.2021 and made disallowance of ₹.1,57,008/- for belated payment of PF/ESI. On appeal, after considering the submissions of the assessee, the ld. CIT(A)-NFAC confirmed the disallowance.

3. On being aggrieved, the assessee is in appeal before the Tribunal. The ld. Counsel for the assessee has submitted that the assessee company has remitted the payment towards employee's contribution of EPF before the due date of filing of return and also submitted that the issue is squarely covered in favour of the assessee and prayed for allowing the deduction.

4. On the other hand, the ld. DR has submitted that the issue involved in this appeal is squarely covered against the assessee by the decision of the Hon'ble Supreme Court in the case of M/s. Checkmate Services P. Ltd. v. CIT [in Civil Appeal No. 2833 of 2016 dated 12.10.2022] and pleaded that the same shall be followed.

5. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, the

CPC, Bengaluru disallowed the delayed remittance of employee's contribution towards EPF/ESI. On appeal, the ld. CIT(A) NFAC has confirmed the addition of ₹.1,57,008/- made towards disallowance of delayed remittance of PF/ESI.

6. We find that in a recent judgement in the case of M/s. Checkmate Services P. Ltd. v. CIT (supra), the Hon'ble Supreme Court has considered the issue of disallowance of belated remittances of employee's contribution to PF & ESI under section 36(1)(va) r.w.s. 2(24)(x) of the Act, and after considering relevant provisions and also by relying upon various judicial precedents held that in order to get deduction under section 36(1)(va) r.w.s. 43B of the Act, timely payment of employee's contribution to PF & ESI is necessary and in case, there is a delay in remittance of such contribution to respective funds, then, the assessee is not entitled for deduction and further said sum is income of the assessee in terms of section 2(24)(x) of the Act. The relevant findings of the Hon'ble Supreme Court are as under:

> *Section 43B falls in Part-V of the IT Act. What is apparent is that the scheme of the Act is such that sections 28 to 38 deal with different kinds of deductions, whereas sections 40 to 43B spell out special provisions, laying out the mechanism for assessments and expressly prescribing conditions for disallowances. In terms of this scheme, section 40 (which too starts with a non obstante clause overriding sections 30-38), deals with what cannot be deducted in computing income under the head "Profits and Gains of Business and Profession". Likewise, section 40A(2) opens with a non obstante clause and spells out what expenses and payments are not deductible in certain circumstances. Section 41 elaborates conditions which apply with respect*

to certain deductions which are otherwise allowed in respect of loss, expenditure or trading liability etc. If this scheme is considered, sections 40- 43B, are concerned with and enact different conditions, that the tax adjudicator has to enforce, and the assessee has to comply with, to secure a valid deduction. [Para 31]

The scheme of the provisions relating to deductions, such as sections 32-37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfilment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection. In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of section 36(iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, section 36(1)(va) was specifically inserted by the Finance Act, 1987, with effect from 1-4-1988. Through the same amendment, by section 3(b), section 2(24) - which defines various kinds of "income" - inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., section 36(1)(iv)). [Para 32]

The significance of this is that Parliament treated contributions under section 36(1)(va) differently from those under section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of section 36(1)(va) differs from section 36(1)(iv), it enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date. [Para 33]

It is therefore, manifest that the definition of contribution in section 2(c) is used in entirely different senses, in the relevant deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of section 36(1). All these establish that Parliament, while

introducing section 36(1)(va) along with section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two. [Para 34]

It is evident that the intent of the lawmakers was clear that sums referred to in clause (b) of section 43B, i.e., "sum payable as an employer, by way of contribution" refers to the contribution by the employer. The reference to "due date" in the second proviso to section 43B was to have the same meaning as provided in the explanation to section 36(1)(va). Parliament therefore, through this amendment, sought to provide for identity in treatment of the two kinds of payments: those made as contributions, by the employers, and those amounts credited by the employers, into the provident fund account of employees, received from the latter, as their contribution. Both these contributions had to necessarily be made on or before the due date. [Para 37]

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. 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(1)(va)) was maintained - and continues to be maintained. On the other hand, section 43B covers all deductions that are permissible as expenditures, or outgoings 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. [Para 52]

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. [Para 53]

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.

6.1 In this view of the matter and by respectfully following the decision of the Hon'ble Supreme Court in the case of M/s. Checkmate Services P. Ltd. v. CIT (supra), we are of the considered view that there is no error in the reasons given by the ld.CIT(A) to sustain the addition made towards disallowance of employee's contribution to PF & ESI under section

36(1)(va) r.w.s.2(24)(x) of the Act, and thus, we are inclined to uphold the findings of the Ld.CIT(A) (NFAC) and dismiss the appeal filed by the assessee.

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

Order pronounced in the open Court on 03rd November, 2023 at Chennai.

Sd/-	Sd/-
(G. MANJUNATHA)	(V. DURGA RAO)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, 03.11.2023

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2.प्रत्यर्थी/ Respondent, 3. आयकर आयुक्त/CIT, 4. विभागीय प्रतिनिधि/DR & 5. गार्ड फाईल/GF.