IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.846/Bang/2022
Assessment year : 2018-19

Legacy Global Projects Pvt. Ltd., 333, Thimmaiah Road, Bangalore – 560 052. **PAN: AABCL 5654P**	Vs.	The Assistant Director of Income Tax, CPC, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Arvind S., CA
Respondent by	:	Shri Gudimella V P Pavan Kumar, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	25.10.2022
Date of Pronouncement	:	27.10.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal is against the order of the Commissioner of Income Tax (Appeals) - 11, Bangalore dated 20.7.2022 for the assessment year 2018-19.

2. The assessee is a private limited company engaged in the business of residential property development. For the AY 2018-19, the assessee filed the original return of income on 31.10.2018 declaring a

total income of Rs.2,41,62,610. An intimation u/s. 143(1)(a) was sent to the assessee with the adjustment as given below:-

1. Delay in payment of Employee contribution to Provident Fund - Rs.20,11,696.
2. Club fees – Rs.9,52,420.

3. The assessee preferred an appeal against the intimation u/s. 143(1) before the CIT(Appeals). The assessee submitted before the CIT(Appeals) that the provisions of section 143(1)(a) were not applicable in the additions made in the instant case i.e., payment of Employee contribution to PF paid within the due date for filing the return of income u/s. 139(1) and the Club expenditure. The assessee also submitted that a mere disclosure of the amount in the tax audit report in Form3CD cannot *per se* qualify for disallowance since it is only a disclosure that is made in the tax audit report and were not expenditure or addition to the total income. On merits, the assessee submitted that the employee contribution to PF is before the due date for filing the return of income u/s. 139(1) is an allowable expenditure by relying on the various rulings in support of its claim. With regard to club expenditure, the assessee submitted that it is incurred wholly and exclusively for the purpose of business expenditure and therefore ought to be allowed as business expenditure u/s. 37. The CIT(Appeals) rejected the contentions of the assessee and confirmed the disallowances.

4. Aggrieved, assessee is in appeal before the Tribunal raising various grounds contending the above disallowances / additions made vide intimation u/s.143(1)(a).

Delayed remittance of Employee contribution to Provident Fund

5. The ld. AR submitted that the payment of employee contribution to PF & ESI though belated, was paid before the due date of filing the return of income u/s. 139(1) of the Act and therefore allowable u/s. 43B of the Act.

6. The ld. DR 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 Apex Court has held that Section 43B(b) 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) i.e. due dates under the relevant employee 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).

7. We have heard both the parties and perused the material on record. We notice that the Hon'ble Supreme Court in the case of *Checkmate Services (supra)* has considered the issue of whether the employees contribution paid before due date for filing the return of income u/s.139(1) whether otherwise allowable u/s.43B, putting to rest

the contradicting decisions of various High Court. The relevant extract of the decision is as given below –

> "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 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 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 decision 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) 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. We therefore see no reason to interfere with the order of the CIT(Appeals). The grounds taken by the assessee on this issue is dismissed.

Club fees

9. The AO noticed that an amount of Rs.9,68,075 disclosed as incurred towards club expenses in clause 21(a) of the tax audit report has not been disallowed in the computation of income by the assessee. The AO confirmed the disallowance while completing the assessment u/s.143(1) since the assessee did not file any response. The CIT(Appeals) confirmed the same on the same ground that the assessee did not file any details.

10. The ld.AR submitted that the lower authorities did not go into the factual details of the expenses, but have merely relied on what is reported in the tax audit report for making the disallowance. The ld. AR therefore prayed that the issue may be sent back for examination of the details factually.

11. The ld. DR did not raise any objections to the submissions of the ld. AR. We have heard rival submissions and perused the material on record. We notice that the lower authorities have not verified the details of club expenditure based on documents /details. The contention of the assessee that these expenditure are incurred wholly and exclusively for the purpose of business need to be factually verified before the deciding the allowability u/s.37 of the Act. In view of the same, we remit the issue back to the AO, to examine the nature of club expenditure i.e., whether the same is incurred for the purpose of business and decide the allowability in accordance with law, after giving reasonable opportunity of being heard to the assessee. The

assessee is directed to submit the required details and cooperate with the proceedings. It is ordered accordingly. This ground is allowed for statistical purposes.

12. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 27th day of October, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(PADMAVATHY S)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 27th October, 2022.

/*Desai S Murthy* /

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.