

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.10.2018

Reserved on 04.10.2018
Delivered on 23.10.2018

C O R A M

THE HON'BLE Mr.JUSTICE K.RAVICHANDRABAABU

W.P.No.5264 of 2018

and

WMP No.6461 of 2018

M/s.Unifac Management Services (India)
Private Ltd.,
Rep. by its Managing Director,
R.Saravanan,
No.148, Valluvar Kottam High Road,
Nungambakkam, Chennai 600 034. ...Petitioner

vs

The Deputy Commissioner of Income Tax,
Corporation Circle 3(2),
Office of the Deputy Commissioner of Income Tax,
Room No.414, 4th Floor,
Wanaparthi Block,
Aayakar Bhavan, No.121 MG Road,
Nungambakkam,
Chennai 600 034. ...Respondent

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorari to call for the records relating to respondent's order under Section 143(3) of the Income Tax Act dated 29.06.2017 in respect of the petitioner and consequential letter of the respondent dated 16.02.2018 and quash the same.

For petitioner : Mr.K.Sakthivel

For Respondents : Mr.Rajkumar Jhabakh
Standing Counsel (I.T.)

O R D E R

The petitioner is aggrieved against the assessment order of the respondent passed under Section 143(3) of the Income Tax Act dated 29.06.2017 and consequential letter of the respondent dated 16.02.2018.

2.The case of the petitioner is as follows:

The petitioner is a Company registered under the Companies Act. It is an assessee under the respondent. For the assessment year 2015-2016, the petitioner filed its return of income on 31.10.2015, admitting an income of Rs.8,16,570/-. A sum of Rs.12,25,257/- paid by the petitioner towards Employees Provident Fund and ESI beyond the due date, but prior to filing of return, was treated by the petitioner company as deduction towards EPF and ESI under Section 36(1)(va) and Section 43B of the Income Tax Act. The return filed by the petitioner was processed under Section 143(3) of the said Act and the impugned order was passed by the respondent, disallowing the said sum of Rs.12,25,257/- paid by the petitioner towards employees provident fund and ESI on the reason that it was paid beyond the due date mentioned in the relevant enactment. The petitioner sent a letter dated 28.07.2017 to the respondent informing that though the said contribution was remitted beyond the due date, but the same has been done in accordance with the respective acts and that the remittance was before the due date for filing the returns of income for the assessment year 2015-2016. Therefore, the petitioner requested the respondent to reconsider the disallowance. However, the respondent sent a notice dated 16.02.2018 impugned in this writ petition demanding payment of the amount determined in the assessment order. Hence, the present writ petition.

3. The respondent filed a counter affidavit, wherein it is stated as follows:

The writ petition is not maintainable, since an efficacious and statutory alternative remedy of appeal is available to the petitioner. A cumulative reading of Section 2(24)(x) with Section 36(1)(va) would show that it can be interpreted that the employees' contribution towards the Social Security Schemes shall be treated as income for the employer, if such contributions are not deposited within the due date specified under the relevant legislation. In Finance Act, 2003, with effect from the assessment year 2004-05, second proviso to Section 43B of the said Act was deleted also by amending the first proviso, which states that no disallowance will be called for if the payment is made before the due date of filing of

return of income under Section 139(1) of the said Act. A plain reading of Section 43B as amended would show that the deduction shall be allowable on the employers' contribution made before the due date for filing the return of income. The petitioner company not having complied with Section 36(1)(va) read with the provisions of Section 2 (24)(x) of the Act in accordance with the Circular No.22 of 2015 dated 17.12.2015, the belated payment made towards the contribution was credited back to the total income of the petitioner company. In the present case, there can be only one view that can be carved out taking into consideration the applicability of the said circular dated 17.12.2015 and therefore, reliance placed on several other High Court Judgments is incorrect, since interpretation of the circular is not taken into consideration at all in those cases.

4. Learned counsel for the petitioner Mr.K.Sakthivel submitted as follows:

Even though the petitioner did not pay the contribution before the concerned authority within the due date stipulated under the relevant enactment, admittedly, the petitioner had paid the same before filing the return of income before the respondent/Assessing Officer. Therefore, as contained in the proviso to Section 43B(b) of the Income Tax Act, the petitioner's interest is protected for getting deduction. Even otherwise, the delayed payment of the contribution before the concerned authority would only attract interest and penalty. Therefore, such payment cannot be termed not as a payment at all to deny the deduction under Section 36(1)(va) of the Income Tax Act. He further contended that availability of alternative remedy is not a bar to entertain this writ petition, as the issue is covered by the decisions of the various High Courts as follows. In support of his contention, the learned counsel relied on the following decisions:

- i) 2010(1) SCC 489, Commissioner of Income Tax vs Alom Extrusion Ltd.
- ii) (2008) 298 ITR 41 (KAR), Commissioner of Income Tax vs Sabari Enterprises.
- iii) (2014) 366 ITR 167 (P&H), Commissioner of Income Tax vs Hemla Embroidery Mills (P) Ltd.,
- iv) (2017) 291 CTR (ALL) 557, Sagun Foundry Private Ltd. Vs Commissioner of Income Tax;

5. Per contra, Mr.Rajkumar Jhabak, the learned Standing Counsel appearing for the respondent submitted as follows:

The due date referred under section 36(1)(va) is very clear. It means the contribution should have been paid before

such due date contemplated under the relevant Act for the purpose of getting deduction. Payment made after the due date, however, before filing the return, is not entitled to get deduction under Section 36(1)(va). None of the decisions referred to by the learned counsel for the petitioner has considered the scope of Section 36(1)(va) and on the other hand, the Apex Court's decision relied on by the petitioner in Alom Exclusion Ltd.'s case is in respect of an issue relating to Section 43B only. Further, Circular No.22 of 2015 dated 17.02.2015 issued by the Central Board of Direct Taxes makes it very clear that the said circular does not apply to claim of deduction relating to employee's contribution to welfare funds, which are governed by Section 36(1)(va) of the Income Tax Act. In support of his contention, the learned counsel relied on (2014) 366 ITR 170 (Guj), Commissioner of Income Tax-II vs Gujarat State Road Transport Corporation and 2015 280 CTR 381 (KER), Commissioner of Income Tax vs Merchem Ltd.

6. Heard both sides and perused the materials placed before this Court.

7. The petitioner is aggrieved against the order of assessment made under Section 143(3) of the Income Tax Act, 1961. The only dispute is against disallowance of a sum of Rs.12,25,257/- paid by the assessee as employees contribution towards EPF and ESI, on the reason that such payment was made beyond the due date stipulated under the relevant enactment for making such payment. The core contention of the petitioner is that since the payment was made before filing the return, even though beyond the due date stipulated under the relevant enactment, the petitioner is entitled for deduction of such payment in view of amendment brought to Section 43B of the Income Tax Act, 1961. On the other hand, it is contended by the Revenue that the petitioner is not entitled to take shelter under Section 43B, which pertains to "employer's contribution" and on the other hand, the assessee's case would fall only under the purview of Section 36(1)(va), which specifically deals with "employees contribution". In other words, the contention of the Revenue is to the effect that the benefit of amendment brought to Section 43B cannot be extended to unamended provision under Section 36(1)(va).

8. No doubt, on this issue, the petitioner heavily sought to rely upon decision of the Apex Court reported in 2010(1)SCC 489, Commissioner of Income Tax vs. Alom Extrusion Ltd., and the decisions made by the High Court of Karnataka, Punjab and Haryana and Allahabad. On the other hand, the Gujarat and Kerala High Court have taken contra view that goes against the assessee. Before going to those decisions, let me first consider the factual aspect of the matter and statutory position pertains to the present issue.

9. Perusal of the impugned order of assessment would show that the assessee has admittedly made the payment towards EPF and ESI beyond due date and such payment represents "employees contribution" and not "employer's contribution". It is true that such payment was made by the assessee before filing the return. Therefore, the question is as to whether, based on such admitted position of the fact, the petitioner is entitled for deduction.

10. In order to answer the said question, it is better to quote the relevant provisions under the Income Tax Act, 1961 as follows:

11. Section 2(24)(x) defines the income as follows:

"2. Definitions.

(24) "income" includes -

(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees;]"

12. Section 36 of the said Act deals with other deductions out of which, section 36(1)(va) reads as follows:

"36. Other deductions:

(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in Section 28-

..[(va) 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 assess to the employee's account in the relevant fund or funds on or before the due date.

Explanation :- For the purpose of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise;]"

13. Section 43B(b) with first proviso reads as follows:

43B. Certain deductions to be only on actual payment:

..(b) any sum payable by the assessee as an

employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees.

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of Section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."

14. A careful perusal of Section 2(24)(x) would show that any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act or any other fund for welfare of such employees, shall be treated as income at the hands of the assessee. It is crucial to note at this juncture that the contribution towards the welfare funds scheme such as ESI or EPF is by two components viz., one by the employee and other by the employer. Therefore, the employee has to pay his part of contribution towards such scheme to the employer, who in turn, has to pay the same to the concerned authority along with his part of contribution. Till the assessee

pays the sum so received from the employee to the concerned authority along with his contribution, the said sum so received by the assessee will be treated as an income at the hands of the assessee. Moreover, it is mandatory on the part of the assessee to make such payment within the due date stipulated under the relevant enactment.

15. Section 36(1) (va) deals with deduction in respect of the sum received by the assessee from any of his employees to which the provisions of sub section 2(24)(x) applies, provided such sum is credited by the assessee to the employee's account in relevant fund on or before the due date. The "due date" is defined under the explanation to Section 36(1)(va) by stating that the due date referred under the relevant Act and certainly not the due date for filing the return. There is no dispute to the fact that this provision has not been amended.

16. A combined reading of Section 2(24)(x) and Section 36(1)(va) would thus clearly indicate that both are in respect of employees contribution received by the assessee and not the employer's contribution, which alone is dealt with under Section 43B(b). A careful perusal of Section 43B(b) would undoubtedly show that it deals with the sum payable by the assessee as an employer by way of his contribution to any provident fund or

superannuation fund or gratuity fund or any other fund for welfare of employees. It is relevant to note at this juncture that Section 43B, which deals with certain deductions to be only on account of actual payment, does not include the payment made by the assessee of the sum, he received from his employees towards such contribution fund. In other words, Section 43B excludes from its scope the sum so received by the assessee from his employees. The reason is obvious. I have already stated supra that the sum received by the assessee as an employer from the employee is treated as an income at the hands of the assessee, as defined under Section 2(24)(x) and would be entitled for deduction only when it is paid to the concerned authority within the due date. Certainly, the sum payable by the assessee as an employer by way of his contribution towards the beneficial fund cannot be treated as an income at his hand but only as an expenditure allowable for deduction. When such payment is made in accordance with Section 43B(b), then the same is entitled for deduction. Therefore, there is a clear distinction between the scope of Section 43B(b) and Section 36(1)(va).

17. It is true that Section 43B was amended and consequently the deduction is to be allowed based only on the actual date of payment. But the facts of the present case is otherwise. The belated payment made by the assessee in this case is not "employers contribution" and on the other hand, it is "employees contribution", which they received already. Therefore, the Assessing Officer is justified in disallowing the said payment on the reason that the same was made beyond the due date and consequently, treating the same as an income at the hands of the assessee in view of Section 2(24)(x). While Section 36(1)(va) has to be read along with Section 2(24)(x), in my considered view, Section 43B cannot be read into Section 36(1)(va), as both are operating on different obligatory field.

18. It is a known fact that the employees contribution towards the welfare fund is being deducted by the employer periodically from the salary of such employee. Therefore, such accumulated contribution of the employee for that year, available at the hands of the employer, has to be paid to the concerned authority within the time stipulated under the relevant enactment. The employer is holding such amount in trust and not as beneficiary. Therefore, it is his bounden duty to pay the said amount towards such fund within time. Then only the onus on the part of the employer is said to have been discharged. When the relevant enactment as well as the Income Tax Act, 1961 in Section 36(1)(va) specifically contemplate and mandate that such payment should be made on or before the due date fixed at the relevant enactment only, the employer is not entitled to claim benefit of deduction towards such payment, merely he made the same before filing return. Time limit stipulated for making such payment under both enactments is not

directory and on the other hand, mandatory. If the payment was not done within the stipulated time prescribed under the relevant enactment, the benefit of deduction cannot be claimed, since such belated payment is not a valid payment to attract deduction, under the purview of the Income Tax Act. However, insofar as the employer's contribution is concerned, no doubt, an amendment has been introduced to Section 43B, whereby the actual date of payment is enough for considering deduction, if such date falls before the date for filing return. The provisions under the Income Tax itself viz., Section 43B gives such scope and benefit to the employer/assessee in respect of the employers contribution alone, specifically by not extending such benefit in respect of payment made towards employees contribution. Therefore, in the absence of any amendment made to Section 36(1)(va), I am of the firm view that both contributions viz., "employees" and "employers" cannot be brought under the same scope and ambit of Section 43B to claim deduction.

19. Further, the Revenue itself has made the above position very clear in Circular No.22 of 2015 dated 17.12.2015, wherein it is stated that the said Circular does not apply to claim of deduction relating to employees contribution to welfare fund which are governed by Section 36(1)(va) of the Income Tax. It is pertinent to note that the said circular was issued in consequence of the amendment made to Section 43B to inform the settled position that if the assessee deposits the contribution before the due date for furnishing the return, no disallowance can be made under Section 43B of the said Act. Therefore, it is evident that the said Circular has specifically dealt with the employers contribution and the scope of Section 43B after amendment, specifically excluding the extension of such scope to the employees contribution governed by Section 36(1)(va) of the said Act. Neither the said provision under Section 36(1)(va) nor the said Circular is challenged by the petitioner. In such circumstances, the petitioner is not entitled to contend otherwise.

20. Learned counsel for the petitioner strongly relied on Alom Extrusion Ltd.'s case of the Supreme Court. However, as rightly pointed out by the Gujarat High Court in (2014) 366 ITR 170 (Guj), Commissioner of Income Tax-II vs Gujarat State Road Transport Corporation, the Hon'ble Supreme Court in the Alom Extrusion Ltd.'s case, did not have an occasion to consider the scope of Section 36(1)(va) and the said decision was purely by considering the scope of amendment made to Section 43B only. Moreover, the issue before the Apex Court was whether the amendment made to Section 43B has any retrospective effect.

21. In 2010(1) SCC 489, Commissioner of Income Tax vs Alom Extrusion Ltd., the Hon'ble Supreme Court has held at paragraphs 3 and 15 as follows:

"...3.A short question which arises for determination in this batch of civil appeal is: whether omission (deletion) of the second proviso to Section 43-B of the Income Tax Act, 1961, by the Finance Act, 2003, operated with effect from 1st April, 2004, or whether it operated retrospectively with effect from 1st April, 1988?

...15. We find no merit in these civil appeals filed by the Department for the following reasons: firstly, as stated above, Section 43-B [main section], which stood inserted by Finance Act, 1983, with effect from 1st April, 1984, expressly commences with a non-obstante clause, the underlying object being to disallow deductions claimed merely by making a Book entry based on Merchantile System of Accounting. At the same time, Section 43-B [main section] made it mandatory for the Department to grant deduction in computing the income under Section 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act [octroi] and other Tax laws. Therefore, by way of first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the Return under the Income Tax Act [due date], the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under Social Welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned herein above, and which resulted in the enactment of Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by the Parliament only with effect from 1st April, 2004, would

become curative in nature, hence, it would apply retrospectively with effect from 1st April, 1988."

22. In (2008) 298 ITR 141 (KAR), Commissioner of Income Tax vs Sabari Enterprises, it is held at paragraphs 1 and 8 as follows:

"..1. Whether the Tribunal was correct in holding that the contributions made by the assessee to PF and ESI are allowable deduction even though it is made beyond the stipulated period as contemplated under the mandatory provisions of Section 36(1)(va) read with Section 2(24)(X) and Section 43B of the Act as the same was paid by the assessee on or before the due date for furnishing the return of income as per Section 139(1) of the Act?"

..8. The learned Counsel Sri Parthasarathy and Dr. Krishna, appearing for respondents, also drew our attention to the deletion of second proviso to Section 43B of the Income Tax Act by Finance Act, 2003 which provision has come into force, with effect from 1-4-2004. The reliance placed upon the decision of the Apex Court in Allied Motors (P) Ltd. v. CIT (supra) and also on the decision in General Finance Co. v. CIT (supra) in respect of applicability of Section 43B(b) and also omission of Clause (a) or (c) or (d) or (f) referred to above occurred in the first proviso to Section 43B, supports the case of the assesseees and also relevant paras extracted from Allied Motor's case (supra) and para 59 referred to supra in this judgment from the Finance Bill with all fours support the case of the assesseees/respondents. Therefore, we have to answer the substantial question of law No.1 framed by this Court in these appeals at the instance of the revenue against them, viz., in the negative (sic). Accordingly, we answer the substantial question No.1 framed in these appeals in the negative (sic)."

23. In (2014) 366 ITR 167 (P&H), Commissioner of Income Tax vs Hemla Embroidery Mills (P) Ltd., it is held at paragraph No.4 as follows:

"4. Learned counsel for the appellant could not dispute that the issue raised herein finally stands settled by the Apex Court judgment in Commissioner of Income Tax v. Alom Extrusions Ltd. [2009] 319 ITR 306 (SC) and this Court in Income Tax Appeal No. 663 of 2005 (The Commissioner of Income Tax, Patiala v. M/s Rai Agro Industries Ltd. Sangrur), decided on 30.11.2010 wherein it has been held that Second Proviso to Section 43B of the Act omitted by Finance

Act, 2003 with effect from 1.4.2004 was clarificatory in nature and was to operate retrospectively. Once that is so, in the present case, the respondent-assessee was entitled to deduction in respect of employer and employee's contribution to ESI and Provident Fund as the same had been deposited prior to the filing of the return under Section 139(1) of the Act. In view of the above, the substantial questions of law are answered against the revenue and in favour of the assessee. Consequently, the appeals are dismissed."

24. In (2017) 291 CTR (ALL) 557, Sagun Foundry Private Ltd. Vs Commissioner of Income Tax, it is held at paragraphs 22, 25, 26, 28 and 29 as follows:

"22. It also said that the word "contribution" used in clause (b) of Section 43B of Act 1961 means the contribution of employer and employee, both, and that being so, if contribution is deposited on or before due date for furnishing Return of income under sub-section (1) of Section 139 of Act 1961, employer is entitled for deduction.

..25. Before following a particular view when there is divergence in views of different High Courts, we find it appropriate to examine Supreme Court judgment in Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra) to find out whether it can be confined only in respect to employers' contribution or is applicable to both 'contributions', whether by employer or employee.

26. The question, whether benefit under Section 43B, as a result of amendment of Finance Act, 2003, is retrospective or not, came to be considered in Commissioner of Income-Tax Vs Alom Extrusions Ltd. (supra). Court considered the intent, purpose and object in the historical back drop of insertion of Section 43B and its progress by way of various amendments. Referring Section 2(24)(X) it said, income is defined under Section 2(24) which includes profits and gains. Further in clause (x) of Section 2(24) any sum received by Assessee from employees as 'contributions' to any provident fund/superannuation fund or any fund set up under Act 1948, or any other Assessee/Employer was entitled to deduction even prior to April, 1, 1984, keeping books on mercantile system of accounting, as a business expenditure, by making provision in his books of account in that regard. Assessee was capable of keeping money with him and just by mentioning in accounts, was able to claim

deduction as business expenses. Section 43B was inserted to check this practice and it resulted in discontinuing mercantile system of accounting with regard to tax, contributions, etc. With induction of Section 43B an Assessee could claim deduction on actual payment basis. By Finance Act, 1988 Parliament inserted first proviso w.e.f. 01.04.1988 which inter alia provides that any sum payable by Assessee by way of tax, duty, cess or fee, if payment is made after closing of accounting year but before date of filing of Return under Section 139(1), Assessee would be entitled to deduction on actual payment basis. This proviso did not include within its ambit, contributions under labour welfare statutes. By Finance Act, 1988, Second Proviso thus Second Proviso was further amended by Finance Act, 1989, w.e.f. 01.04.1989.

..28. From the aforesaid judgment, we find that irrespective of the fact that deduction in respect of sum payable by employer contribution was involved, but Court did not restrict observations, findings and declaration of law to that context but looking to the objective and purpose of insertion of Section 43B applied it to both the contributions. It also observed clearly that Section 43B is with a non-obstante clause and therefore over ride even if, anything otherwise is contained in Section 36 or any provision of Act 1961.

29. Therefore, we are clearly of the view that law laid down by High Courts of Karnataka, Rajasthan, Punjab & Haryana, Delhi, Bomaby and Himachal Pradesh have rightly applied Section 43B in respect to both contributions i.e. Employer and employee. Otherwise view taken by Gujarat High Court and followed by Kerala High Court, with great respect, we find expedient to dissent therewith."

25. In (2014) 366 ITR 170 (Guj), Commissioner of Income Tax-II vs Gujarat State Road Transport Corporation, it is held at paragraphs 6.01 and 6.11 as follows:

"6.01. Short question which is posed for consideration of this court is with respect to the disallowance of the amount being employees' contribution to PF account/ESI Contribution which admittedly which the concerned assessee did not deposit with the PF Department/DSI Department within due date under the PF Act and/or ESI Act.

...6.11. Now, so far as the reliance placed upon the

decision of the Himachal Pradesh High Court in the case of Nipso Polyfabrics Ltd. (supra); decision of the Karnataka High Court in the case of Spectrum Consultants India (P) Ltd. (supra); decision of the Rajasthan High Court in the case of Udaipur Dugdh Utpadak Sahakari Sandh Ltd. (supra) and decision of the Punjab and Haryana High Court in the case of Hemla Embroidery Mills (P) Ltd. (supra) taking view that where the assessee deposited employees' contribution to ESI and Provident Fund before the due date of filing the return under section 139(1) of the Act, the same would be allowable as deduction, are concerned, With respect and for the reasons stated hereinabove, we are not in agreement with the view taken by the aforementioned High courts. As discussed hereinabove, as there is no amendment in Section 36(1)(va) of the Income Tax Act and considering section 36(1)(va) of the Income Tax Act as it stands, with respect to any sum received by the assessee from any of his employees to which the provisions of clause (x) of sub-section (24) of section 2 applies, assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28 if such sum is not credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as per explanation to section 36(1)(va) of the Act. Merely because Second Proviso to Section 43B of the Act in which there was a reference to due date as defined in explanation below clause (va) of sub-section (1) of section 36, it cannot be held that even section 36(1)(va) is amended and/or even explanation below clause (va) of sub-section (1) of section 36 is also deleted. It can be said that there was a reference to explanation below clause (va) of sub-section (1) of section 36 in second proviso of section 43B (which has been deleted by Finance Act, 2003), only for the purpose of defining due date as per explanation below clause (va) of sub-section (1) of section 36. Therefore, by deleting Second Proviso to section 43B by Finance Act, 2003, it cannot be said that Section 36(1)(va) is amended and/or explanation below clause (va) of sub-section (1) of section 36 is deleted, which is with respect to employees' contribution. Under the circumstances, we are not in agreement with the view expressed by the Himachal Pradesh High Court; Karnataka High Court; Rajasthan High Court and Punjab and Haryana High Court in the cases referred to hereinabove."

26. In 2015 280 CTR 381 (KER), Commissioner of Income Tax vs Merchem Ltd. , it is held at paragraphs 24 and 26 as follows:

"...24. So also, the learned counsel for the assessee contended that since s.43B commences with a non obstante clause, Expln.1 to s.36(1)(va) was excluded. But in Alom Extrusions' case' (supra), the apex Court had held that the underlying object of the non obstante clause was to disallow deductions claimed merely by making the book entry under mercantile system of accounting. Therefore, the contention of the learned counsel for the assessee that since s.43B commences with a non obstante clause, s.36(1)(va) stood excluded, cannot be sustained. According to us, the findings of the apex Court towards the latter part of para 15 makes the intention and purpose behind the amendment brought about to s.43B clear and it reads thus:

"15..... Accordingly, we hold that Finance Act, 2003, will operate retrospectively w.e.f. 1st April, 1988 (when the first proviso stood inserted). Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, to the above extent, operated prospectively. Take an example-in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March (end of accounting year) but before filing of the returns under the IT Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under s.43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under s.43B of the Act."

According to us, it is thus clear that the decision rendered by the apex Court in Alom Extrusions (supra) did not consider the question involved in this case.

...26. Therefore, in our view, when s.43B as it stood prior to the amendment and s.36(1)(va) Expln.1 thereto r/w s.2(24)(x) are considered together, it is

clear that they operate in different fields. So far as the employee's contribution received is concerned, it should have been paid on or before the due date prescribed under the relevant statutes. Then again the learned counsel contended that on a reading of s.43B (b), any sum "payable by the assessee as an employer" by way of contribution to any provident fund meant payment of both employees contribution and employer's contribution, by the employer and therefore the assessee was entitled to pay both contributions together on or before the filing of the return under s.139(1) of the Act. We are unable to accept the said contention advanced by the learned counsel. If such a contention is accepted, that would make s.36(1)(va) and the Explanation thereto otiose. According to us, there was no indication in s.43B as it stood prior to the amendment and thereafter also to deface s.36(1)(va) and the Explanation thereto from the IT Act. Thus, it means that both provisions are operative and the contributions have to be paid in accordance with the mandate contained under s.36(1)(va) and Explanation thereto and under s.43B, respectively."

27.I have already pointed out that the scope of Section 43B and Section 36(1)(va) are different and thus, there is no question of reading both provisions together to consider as to whether the assessee is entitled to deduction in respect of the sum belatedly paid towards such contribution, especially when such sum is, admittedly, a sum received by the assessee/employer from his employee. Therefore, for considering such question, application of Section 36(1)(va) read with Section 2(24)(x) alone is the proper course and any other interpretation would only defeat the object and scope of both the provisions viz., 43B and 36(1)(va).

28.In view of the above stated facts and circumstances, I am in full agreement with the decisions rendered by the Gujarat and Kerala High Court reported in (2014) 366 ITR 170 (Guj), Commissioner of Income Tax-II vs Gujarat State Road Transport Corporation and 2015 280 CTR 381 (KER), Commissioner of Income Tax vs Merchem Ltd. Consequently, with great respect, I am not in agreement with the other decisions rendered by the High Courts of Karnataka, Punjab and Haryana and Allahabad, which in my view, did not consider the distinction of the scope and ambit of Section 36(1)(va) and Section 43B. Accordingly, I find no error apparent on the face of the order passed by the Assessing Authority, based on the admitted facts. Accordingly, the writ

petition fails and the same is dismissed. No costs. The connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

vri

To

The Deputy Commissioner of Income Tax,
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+1cc to Mr.P.Rajkumar Jhabakh, Advocate, S.R.No.72357

+1cc to Mr.K.Sakthivel, Advocate, S.R.No.72576

(CO)
GSP(01/11/2018)

W.P.5264 OF 2018VD

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