IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SHRI A. MOHAN ALANKAMONY,
ACCOUNTANT MEMBER
AND
SHRI S.S. GODARA, JUDICIAL MEMBER

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| | ITA No.237/Hyd/2019 | | |
| | (AY: 2015-16) | | |
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| Café D Lake Private Limited,<br>Hyderabad.<br>PAN: AACCC 2044 F | Vs. | Income Tax Officer,<br>Ward-1(4),<br>Hyderabad. | |
| (Appellant) | | (Respondent) | |

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| Assessee by: | Shri P. Murali Mohana Rao |
| Revenue by: | Shri Rohit Mujumdar, DR |
| | |
| Date of hearing: | 12/01/2021 |
| Date of pronouncement: | 03/02/2021 |

ORDER

PER A. MOHAN ALANKAMONY, AM:

This appeal is filed by the assessee against the order of the Ld. CIT (A)-1, Hyderabad in appeal No.0174/CIT(A)-1, Hyd/2017-18/2018-19, dated 03/10/2018 passed U/s. 143(3) r.w.s 250(6) of the Act for the AY 2015-16.

2. The assessee has raised several grounds in its appeal; however the cruxes of the issues are that:-

1. The Ld.CIT(A) has erred in upholding the order of Ld.AO, who had made addition of Rs.10,27,979/- and Rs.

2,24,261/- U/s. 36(i)(va) of the Act, being the employee's contribution to provident fund and ESI respectively which was deducted from the employee's salary and not remitted into the Government treasury within the period stipulated under the relevant Act.

2. The Ld.CIT(A) has erred in upholding the order of Ld.AO, who had invoked the provisions of section 40(a)(ia) of the Act and disallowed the amount of Rs.2,10,873/- being 30% of Rs. 7,02,910/- debited to the P & L Account towards audit fees of Rs. 4,32,586/- and towards interest of Rs. 2,70,324/- against which tax was not deducted at source.

3. The brief facts of the case are that the assessee is a Private Limited Company engaged in the business of rendering Hospitality Services, filed its return of income for the AY 2015-16 on 27/9/2015 declaring total income of Rs. 73,22,170/- under normal provisions and Rs. 31,82,596/- U/s. 115JB of the Act. The case was selected for scrutiny under CASS and thereafter assessment was completed on 29/12/2017 wherein the Ld. AO apart from disallowance U/s. 40(a)(ia) of the Act for Rs.2,10,873/-, also disallowed the amount of Rs. 10,27,979/- and Rs. 2,24,261/- U/s. 36(i)(va) of the Act being the employee's contribution to Provident Fund and ESI fund respectively which was deducted from the

employee's salary however, not remitted in the Government Treasury within the stipulated period as provided under the relevant Act.

4. On appeal, the Ld. CIT (A) confirmed the order of the Ld. AO by observing as under with respect to addition made towards non remittance of employee's contribution to provident fund and ESI.:-

> "*6.3. The submissions of the appellant have been carefully considered. There is no dispute that Employee's contribution to PF, has been made after the statutory due date as prescribed by the Provident Fund Act and ESI Act. The appellant has submitted that if the payments are made before the filing of return of income, they should be allowed. However, it should be noted that section 43B(b) refers to the 'Employer's contribution' to the Provident Fund or ESI and not 'Employee's contribution' to Provident Fund or ESI. This distinction has been understood in light of the CBDT Circular No. 22/2015 dated 17/12/2015. In this background, the contention of the appellant is not accepted as it is not allowable as per Income Tax Act. The disallowance made by the Assessing Officer is upheld."*

5. Before us, the Ld. AR submitted that the assessee had remitted the employee's contribution towards PF and ESI which was deducted from their salary within the due date of filing the return under the Income Tax Act, 1961 and therefore, the disallowance is not warranted. It was therefore pleaded that the addition made by the Ld. AO on those grounds may be deleted. The Ld. AR also relied on certain decisions of the Judiciary. The Ld. DR on the other hand vehemently argued in support of the orders of the Ld. Revenue Authorities and pleaded for confirming the same.

6. We have heard the rival submissions and carefully perused the materials on record. We do not find any merit in the submission of the assessee on this issue. Section 36(1)(va) of the Act specifically provides that if the assessee remits the employee's contribution to Provident Fund/ESI within the due date mentioned in the relevant Act P.F Act, then the deduction will be allowable. The relevant portions of Section 36(1)(va) is reproduced herein below for reference:-

> *36(1)(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 assessee to the employee's account in the relevant fund or funds on or before the due date.*
>
> *Explanation:- For the purposes 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 there-under or under any standing order, award, contract of service or otherwise;*

7. Further Section 43B of the Act, only provides that deduction will be allowed with respect to employer's contribution to provident fund if the same is remitted within the due date of filing the return of income. The relevant portion of Section 43B is extracted herein below for reference:-

> *"[Certain deduction to be only on actual payment.] 43B "notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act in respect of ---*
>
> *(a)----------*
>
> *(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 the employees"*
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*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."*

8. Thus Section 36(1)(va) of the Act refers to employee's contribution to P.F/ESI while as Section 43B of the Act refers to employer's contribution to P.F. Hence Section 43B of the Act has no application with respect to employee's contribution to P.F./ESI. Accordingly Section 43B of the Act will not override the provisions of Section 36(1)(va) of the Act with respect to employee's contribution to provident fund. It is pertinent to mention that though employee's & employer's contribution to P.F/ESI are remitted by the employer into the Government treasury, they are separate and distinct for which independent provisions have been cast under the Act. Employee's contribution to P.F./ESI, is nothing but appropriation of a portion of the salary which is legitimately due to the employee and remitted by the employer in the Government treasury on behalf of the employee in accordance with the provisions of the relevant P.F., Act. Hence it is crystal clear from Section 36(1)(va) of the Act that with respect to remittance of employee's contribution to recognized Provident Fund/ESI, deduction will be allowable to the assessee only if the same is remitted within the due date mentioned in the relevant P.F. Act and with respect to employer's contribution to

recognized Provident Fund, Section 43B of the Act makes it clear that deduction will be allowable if the remittance is made with in the due date of filing the return of income. The Hon'ble Gujarat High Court in the case CIT vs. Gujart State Road Transport Corporation reported in [2014] 366 ITR 170 (Guj.) has observed as under on the issue:-

> *"Under section 2(24)(x) of the Income Tax Act, 1961 any sum received by the assessee-employer from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948, or any other fund for the welfare of such employees shall be treated as an "Income". Under section 36(1)(va) the assessee shall be entitled to the deduction in computing the income referred to in section 28 with respect to any sum received by the assessee from the 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 employees' accounts in the relevant fund or funds on or before the "due date". As per the Explanation to section 36(1)(va) for the purpose of clause (x), "due date" means the date by which the assessee is required as an employer to credit the employees' contribution to the employees account in the relevant fund under the Act, Rule, order or notification issued thereunder or under any standing order, award, contract or service or otherwise. Section 43B is with respect to certain deductions only on actual payment. The deletion of the second proviso to section 43B and the amendment in the first proviso to section 43B alone and the deletion of the second proviso to section 43B by the amendment pursuant to the Finance Act, 2003, cannot be made applicable with respect to section 36(1)(va) of the Act. Therefore, with respect to any sum with respect to the employees' contribution as mentioned in section 36(1)(va) of the Act, the assessee shall be entitled to the deduction of such sum towards the employees' contribution if it is deposited in the accounts of the concerned employees and in the concerned fund such as provident fund, employees' State insurance contribution fund etc., provided the sum is credited by the assessee to the employees' accounts in the relevant fund or funds on or before the "due date" under the Provident Fund Act, Employees' State Insurance Act, Rule, Order or Notification issued thereunder or under any standing order, award, contract or service or otherwise. There is no amendment in section 36(1)(va) and even the Explanation to section 36(1)(va) is not deleted and is still on the statute and is required to be complied with. Merely because the second proviso to section 43B which provided that even with respect to the employer's contribution (section 43(b)), the assessee was required to credit the amount in the relevant fund under the Provident Fund Act or any other fund for the welfare of the employees on or before the due date under the relevant Act is deleted. It cannot be said that section 36(1)(va) is also amended or the Explanation to section 36(1)(va) has been deleted or amended. Therefore, if the assessee has not credit the employees' Contribution to the employees' account in the relevant fund or funds on or before the*

*due date mentioned in the Explanation to section 36(1)(va), the assessee shall not be entitled to deduction of such amount in computing the income referred in section 28".*

9. Similarly the Hon'ble Kerala High Court in the case of CIT vs. Merchem Ltd reported in [2015] 378 ITR 443 (Ker) held as under:-

*"on a reading of section 36(1)(va) of the Income Tax Act, 1961 along with section 2(24)(x), it is categoric and clear that the contribution received by the assessee from the employees alone was treated as income for the purpose of section 36(1)(va) and therefore, the assessee is entitled to get deduction for the sum received by the assessee from his employees towards contribution to the fund or funds so mentioned only if, the amount was credited by the assessee on or before the due date to the employees account in the relevant fund as provided under Explanation to section 36(1)(va) of the Act. So far as the section 43(b) is concerned, it takes care of only the contribution payable by the employer or the assessee to the respective funds. Therefore, sections 36(1)(va) and 43B(b) operate in different fields, i.e., the former takes care of the employees' contribution and the latter the employer's contribution. The assessee is entitled to get the benefit of deduction under section 43B(b) as provided under the proviso thereto only with regard to the portion of the amount paid by the employer to the contributory fund.*

*Held, allowing the appeal, that since the assessee had admittedly not paid the remittance of the employees' contribution to the provident fund and ESI within the dates prescribed under the respective Act, the assessee was not entitled to deduction U/s. 43B of the amounts deducted thereunder for and on behalf of the employees."*

10. Similar view was vented by the Hon'ble Madhya Pradesh High Court in the case of B.S. Patel vs. DCIT reported in [2010] 326 ITR 457 (MP).

11. For the above stated reasons, We do not find any infirmity in the orders of the Ld. Revenue Authorities. Accordingly, We hereby confirm the Orders of the Revenue Authorities on these issues. Accordingly, Ground No.1 is held against the assessee.

12. With respect to disallowance U/s. 40(a)(ia) of the Act, the Ld. AO had disallowed 30% of Rs. 7,02,910/- as allowable deduction because the assessee has not deducted tax at source as per the provisions of the Act towards audit fees and interest expenditure debited to P & L Account for Rs. 4,32,582/- and Rs. 2,70,324/- respectively. On appeal, the ld. CIT (A) has deleted the addition made by the Ld. AO. Therefore, this ground raised by the assessee does not survive.

13. In the result, appeal of the assessee is dismissed.

Pronounced in the open Court on the third February, 2021.

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| Sd/- | Sd/- |
| (S.S. GODARA) | (A. MOHAN ALANKAMONY) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Hyderabad, Dated: 03rd February, 2021.

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Copy to:-

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| 1. | Café D Lake Private Limited C/o. P. Murali & Co., Chartered Accountants, 6-3-655/2/3, Somajiguda, Hyderabad – 500 082. |
| 2. | Office of the Income Tax Officer, Ward-1(4), Hyderabad. |
| 3. | The Commissioner of Income Tax (Appeals)-1, Hyderabad. |
| 4. | The Principal Commissioner of Income Tax-1, Hyderabad. |
| 5. | The Departmental Representative, ITAT, Hyderabad. |
| 6. | Guard File |