REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2833 OF 2016

CHECKMATE SERVICES P. LTD. …APPELLANT(S)

VERSUS

COMMISSIONER OF INCOME TAX-1 …RESPONDENT(S)

WITH
C.A. No. 2830/2016
C.A. No.159/2019
C.A. No.2832/2016
C.A. No.2831/2016
C.A. _____2022
(Arising out of SLP(C) No.23388/2019)
C.A._____2022
Arising out of SLP(C) No.23295/2019
C.A. _____2022
(Arising out of SLP(C) Nos.4971-4973/2020)
C.A. _____2022
(Arising out of SLP(C) No.4241/2020)
C.A. _____2022
(Arising out of SLP(C) No.17739/2019)
C.A. _____2022
(Arising out of SLP(C) No.3250/2019)
C.A. _____2022
(Arising out of SLP(C) No.1358/2019)
C.A. _____2022
(Arising out of SLP(C) No.25483/2019)
C.A. _____2022
(Arising out of SLP(C) No.32361/2015)
C.A. _____2022
(Arising out of SLP(C) No.24548/2016)

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Date: 2022.10.13 10:56:35 IST
Reason:

J U D G M E N T

S. RAVINDRA BHAT, J.

1. Leave granted. *Berger Paints India Ltd. v Commissioner of Income Tax, Kolkata-IV & Anr.*[1] was the lead matter while hearing this batch of appeals. However, the parties agreed to treat *Checkmate Services Pvt. Ltd. v Commissioner of Income Tax-I*[2] as the lead appeal, for convenience. In all these appeals, the common question involved is with respect to the interpretation of Section 36(1)(va) and Section 43B of the Income Tax Act, 1961 (hereinafter, "IT Act"), and whether the appellant assessees are entitled to deduction of amounts deposited by them towards contribution in terms of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter, "EPF Act"), The Employees' Provident Funds Scheme, 1952 (hereinafter, "EPF Scheme"), The Employees' State Insurance Act, 1948 (hereinafter, "ESI Act"), The Employees' State Insurance (Central) Regulations, 1950 (hereinafter, "ESI Regulations") or any other provident or superannuation fund.

2. In the years under consideration, the Assessing Officers (hereinafter, "AO") had ruled that the appellants had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant acts and regulations. Consequently, the AO ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". Those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective acts. In other words, as per the AO, as such sums were paid beyond the due dates as prescribed under the respective acts, the right to claim such sums as allowable deduction while

[1] *Berger Paints India Ltd. v Commissioner of Income Tax, Kolkata-IV & Anr.*, Civil Appeal No. 2830 of 2016.
[2] *Checkmate Services Pvt. Ltd. v Commissioner of Income Tax-I,* C.A. No. 2383 of 2016.

computing the income was lost forever. The assessees' pleas were unsuccessful before the Income Tax Appellate Tribunal (hereafter, "ITAT"). Ultimately, in the case of the impugned judgment, the Gujarat High Court too rejected its pleas.[3]

3. Noticing a division of opinion on the issue, with the High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi favouring the interpretation beneficial to the assesses on the one hand, and the High Courts of Kerala and Gujarat preferring the interpretation in favour of the Revenue on the other, this court granted special leave to appeal in all these cases.

The relevant statutory provisions of the IT Act

4. The relevant provisions of the IT Act, with amendments, made from time to time, are as extracted below:

> *"**Section 2. Definitions.***
> *In this Act, unless the context otherwise requires, -*
> ***
> *(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;…"*[4]
>
> ***
> *"**Section 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-*
> ***
> *(iv) any sum paid by the assessee as an employer by way of contribution towards a recognized provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognizing the provident fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions*

[3] *Commissioner of Income Tax-I v Checkmate Services P. Ltd.,* Tax Appeal No. 680 of 2014, dated 14.10.2014.
[4] Inserted by the Finance Act, 1987 (11 of 1987), w.e.f. 01.04.1988.

are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head "Salaries" or to the contributions or to the number of members of the fund;"

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(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 1. -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 thereunder or under any standing order, award, contract of service or otherwise.*"

Explanation 2.-For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause."[5]

(Emphasis supplied)

5. With effect from 01.04.1984, Section 43B was inserted. It reads *inter alia*, as follows:

*"****Section 43B. Certain deductions to be only on actual payment.*** *Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of--*

*****

(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, or

****

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) ***only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him****:*

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*

[5] Explanation 2 inserted by Act No. 13 of 2021, w.e.f. 01.04.2021.

> *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.*[6]
>
> *Explanation : For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him."*
>
> (Emphasis supplied)

By Section 9 of the Finance Act, 1989, the following second proviso was added:

> *"Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date."*

By Section 21 of the Finance Act, 2003, the above second proviso was omitted.

Thereafter, by Finance Act, 2021 the following Explanation 5 was added, w.e.f. 01.04.2021:

> "*Explanation 5.-For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies."*

6. The time limit for deposit of employees' contribution under the relevant acts / regulations are follows:

A. <u>EPF Scheme:</u>

Chapter VI: Declaration, Contribution Cards, and Returns

38. *Mode of payment of contributions*

[6] Second proviso w.e.f. 1989.

> *"(1) The employer shall, before paying the member his wages in respect of any period or part of period for which contribution are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee and in respect of which provident fund contributions are payable, as the Central Government may fix, he shall within fifteen days of the close of every month pay the same to the Fund electronic through internet banking of the State Bank of India or any other Nationalised Bank or through PayGov platform or through scheduled banks in India including private sector banks authorized for collection on account of contributions and administrative charge:*
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> (Emphasis supplied)

7. In addition to the above, a five-day grace period was allowed to employers in terms of the Manual of Accounting Procedure (Part-I General). However, the grace period was discontinued by circular bearing No. WSU/9(1)(2013)/Settlement/35631 dated 08.01.2016, made applicable to contributions for January 2016 onwards.

B. ESI Regulations:

> *"31. **Time for payment of contribution** - An employer who is liable to pay contributions in respect of any employee shall pay those contributions within 21 days of the last day of the calendar month in which the contributions fall due"*
>
> (Emphasis supplied)

8. A circular[7] had explained the *rationale* for introduction of Section 43B:

> *"Disallowance of unpaid statutory liability - Section 43B*
>
> ***
>
> *35.2 Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, Employees' State Insurance Scheme, etc., for long periods of time, extending sometimes to several years. For the purpose of their income-tax assessments, they claim the liability as deduction on the ground that they maintain accounts on mercantile or accrual basis. On the other hand, they dispute the liability and do not discharge the same. For some reason or the other,*

[7] Circular No. 372 dated 08-12-1983.

> *undisputed liabilities also are not paid.*
>
> *35.3 To curb this practice, the Finance Act has inserted a new section 438 to provide that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force or 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 shall irrespective of the previous year in which the liability to pay such sum was incurred, be allowed only in computing the income of that previous year in which such sum is actually paid by the assessee."*

9. The scope and effect of the newly inserted Section 36(1)(va) and the newly inserted provisos to Section 43B of the IT Act were elaborated in a Central Board of Direct Taxes (hereinafter, "CBDT") circular bearing No. 495.[8] Relevant extracts of the circular are as follows:

> *"**Measures of penalising employers who misutilise contributions to the provident fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948, or any other fund for welfare of employees***
>
> ***12.1** The existing provisions provide for a deduction in respect of any payment by way of contribution to a provident fund or superannuation fund or any other fund for welfare of employees in the year in which the liability is actually discharged [section 438]. The effect of the amendment brought about by the Finance Act, is that no deduction will be allowed in the assessment of the employer(s) unless such contribution is paid to the fund on or before the "due date". Due date means the date by which an employer is required to credit the "contribution" to the employee's account in the relevant fund under the provisions of any law or term of contract of service or otherwise [Explanation to section 36(1)(va) of the Finance Act])."*

Appellants' Contentions

10. Mr. Arvind P. Datar, learned senior counsel appearing for some of the appellants, relied upon the judgment of this court in *Commissioner of Income Tax v. Alom Extrusions Ltd.*[9] It was urged that this decision had considered the effect

[8] Circular No. 495 dated 22.09.1987.
[9] *Commissioner of Income Tax v. Alom Extrusions Ltd*., (2010) 1 SCC 489.

of deletion of the second proviso to Section 43B of IT Act (by Finance Act, 2003) and whether the same operated prospectively. The court rejected the Revenue's appeal and held that the omission of the second proviso to Section 43B was curative and therefore operated retrospectively. Mr. Datar urged that in *Alom Extrusions*, the court took note of the fact that the law as existing prior to the omission of the second proviso to Section 43B restricted deductions in respect of any sums payable by an employer as contribution to the PF / superannuation fund etc. for employees' welfare unless they were paid within the specified due date. Under the second proviso to Section 43B, a further constraint was placed on the employer – it was eligible for deduction only if it paid the contribution *before* the date for filing of return of income, and necessarily enclosed with the return of income, which resulted in a lot of hardship to the employers. On a representation to the Government about this, the Kelkar committee was setup by the Central Government, which considered the issue, and based upon its recommendation, the relevant provisions of the Finance Act, 2003 were introduced, resulting in the deletion of the second proviso of Section 43B. Mr. Datar also highlighted that the court in *Alom Extrustions* took note of the fact that the first proviso which came into force from 01.04.1988 was not on the statute book when the assessments were made in the previous decision of *Allied Motors (P) Ltd. v Commissioner of Income Tax.*[10]

11. Reliance was placed upon the judgment in *Alom Extrustions* to say that this court was alive to the inconvenience caused to the assesses, if the Revenue's contention was to be accepted that the Finance Act, 2003 was operative prospectively. It was submitted that the ratio and logic in *Alom Extrustions* was followed by no less than forty High Courts. Examples include the Allahabad High Court in *Sagun Foundry Pvt Ltd v. Commissioner of Income Tax*[11]*;* the Rajasthan

[10] *Allied Motors (P) Ltd. v Commissioner of Income Tax*, (1997) 3SCC 472.
[11] *Sagun Foundry Pvt Ltd v. Commissioner of Income Tax*, ITA/87/2006.

High Court in *Commissioner of Income Tax v. State Bank of Bikaner*[12]*;* the Karnataka High Court in *Essae Teraoka Pvt. Ltd. v. Deputy Commissioner of Income Tax*[13]*;* and the Himachal Pradesh High Court in *Commissioner of Income Tax v. Nipso Polyfabriks Ltd.*[14]

12. It was submitted that only the impugned judgments of the Gujarat High Court and Kerela High Court in *Commissioner of Income Tax v. Merchem Ltd.*[15] have taken a different view and distinguished *Alom Extrusions*. It was submitted that views of the Gujarat and Kerela High Court were incorrect. Counsel urged that Section 43B had to be understood in the context of the existing laws. Mr. Datar emphasized that under the EPF Act and ESI Act, the employer was liable to make a composite payment. The liability comprised of the employer's contribution and the contribution collected from the employee. If this were to be kept in mind, the deletion of the second proviso to Section 43B, and the opening non-obstante clause in Section 43B had to be given full meaning. As a consequence, under Section 43B, at the time of paying the employers' contribution, the employer is under legal obligation to pay not only its contribution but also that of the employee, as a single payment to the PF authority under the governing law. The insistence upon payment of actual payment of employees' contribution in Explanation to Section 36(1)(va) was expressly overridden by the non obstante clause.

13. It was argued that the Parliament was alive to the fact that both explanation to Section 36(1)(va) and second proviso to Section 43B were brought in together in 1989. Therefore, the deletion of the latter i.e., second proviso to Section 43B was intended to give relief to the assesses. The interpretation in the impugned judgment of the Gujarat High Court and that of the Kerala High Court, focusing

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[12] *Commissioner of Income Tax V. State Bank of Bikaner*, (2014) 363 ITR 70.
[13] *Essae Teraoka Pvt. Ltd. v. Deputy Commissioner of Income Tax*, (2014) 366 ITR 408.
[14] *Commissioner of Income Tax v. Nipso Polyfabriks Ltd*., (2013) 350 ITR 327.
[15] *Commissioner of Income Tax v. Merchem Ltd.*, ITA No. 402/2009.

only on Section 36(1)(va) is contrary to what Parliament intend. It was argued by learned counsel that *Alom Extrusions* correctly found that the law hindered and caused practical difficulties to assesses; as a result, it was omitted. To give full effect to the omission was that amendment declared to be retrospective in effect by this court. Further, the non-obstante clause in the opening phrase in Section 43B was deemed sufficient to override other provisions, including Section 36(1).

14. Lastly, it was submitted that the scheme of the IT Act was such that business income or its deductions were spelt out under Section 36, and Section 37 was a residual deduction clause whereby expenditures other than those falling within Sections 28-36, expressly laid out for commercial or business purposes, were allowed as deductions. If the scheme of the IT Act were to be kept in mind, the restrictive condition in Section 36(1)(va) i.e., the stipulation that the employees' contribution must be paid within the time specified, failing which no deduction was permissible, was in fact intended to be expressly overridden by Section 43B. The philosophy behind Section 43B (which was introduced 01.04.1984) was to ensure actual payment of certain specified and statutory dues, before a particular date. These dues either by way of tax or other levies, (including interest-payment towards loan or contributions deducted by statutes such as EPF Act) were to be made within a specified date under such enactments which cast those obligations. This was only a condition for the grant of deduction. The second proviso to Section 43B had imposed further restrictive condition which was omitted in 2003. Therefore, the non-obstante clause of Section 43B was operative *propriae vigore* entitling the assessees to claim deduction made by them in respect of contributions to PF authorities provided the entire amounts were paid before the return of income was filed.

15. Mr. Tushar Hemani, learned senior counsel appearing on behalf of Suzlon Energy Ltd. supported the submissions of Mr. Datar. He relied upon Section 2(c) of the EPF Act and highlighted that the contribution payable by the employer was

a composite amount - referred to as *the amount payable* in respect of an employee under the scheme. It was submitted that similarly Section 6 of the Act and paragraphs 28, 30 & 38 of the EPF Scheme establish that what was payable as contribution by the employer was not only the contribution in respect of its obligation to deposit amounts in the account of the employee, but its contribution as well as the contribution of the employee. Pointedly, Mr. Hemani referred Section 30 of EPF Act:

> *"30 (1) The employer shall in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in the scheme referred to as the member's contribution):*
>
> *(2) In respect of employee employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges.*
>
> *(3) It shall be the responsibility of the principal employer to pay both the contributions payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges."*

Likewise, Regulation 31 of the ESI Regulations spells out the time for payment – within 21 days of the last day of the calendar month in which the contribution was due.

16. Learned senior counsel referred to clause 2(c) of the fourth schedule of the IT Act:

> *"**Part A***
>
> ***Recognized Provident Funds***
>
> ***Definitions.***
>
> *2. In this Part, unless the context otherwise requires, --*
>
> ***

> *(c) "contribution" means any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own moneys, to the individual account of an employee, but does not include any sum credited as interest."*

The EPF Act, EPF Scheme, ESI Act and ESI Regulations as well as provisions of the IT Act refer to employee's contribution as part of the contribution that the employer has to make under the relevant Act. Parliament was alive to this: consequently, the term *'sum payable by the assessee as an employer by way of contribution"* in Section 43B(b) of the IT Act means both its contribution and the sum collected from the employees as the latter's contribution.

17. An alternative submission was that any sum paid by the employer / assessee as contribution included both employee's and employer's contributions and was allowed as deduction under Section 36(1)(iv) of the IT Act. What was contemplated under Section 36(1)(va) was the amount which was *received* and not *deducted* by the employer assessee from its employees. Both Sections 2(24)(x) read with Section 36(1) (va) refer to *any sum received by the assessee* from its employees as contributions as against any sum deducted by the assessee from the payments made to employees. *Received* and *deducted* are two different terms and cannot be used interchangeably.

18. Again, reference was made to Clause 30 of the EPF Scheme and Regulations under the ESI Act, and it was submitted that under both the EPF & ESI Acts, when employees were employed by or through a contractor, the latter was supposed to recover the contribution payable by such employee, with the amount of such member's contribution paid to the principal employer, deducted together with an equal amount of its contribution along with administrative charges. Such contribution was received by the principal employer. But for Section 2(24)(x) read with Section 36(1)(va) of the IT Act, such transaction would remain in the Balance Sheet as receivable and payable. However, by deeming fiction, such receipt was treated as income first and upon payment of the

said sum so received by the due date so defined under the respective statutes, the same was allowed as deduction while computing the income under the provisions of the IT Act. Therefore, Section 36 (1)(va) of the IT Act had limited operation to allow such sum so received from the employees. The deduction from the employees' salary as contribution was governed by Section 36(1)(iv) of the IT Act. Contributions of employees engaged as contract labour were to be recovered by such contractor and then paid over to the principal employer. This, coupled with the principal employer contribution along with administrative charges, was to be remitted to the EPF account within the specified time.

19. Mr. Preetesh Kapoor, learned senior counsel appearing for one of the appellants, adopted the submissions of the other senior counsels. He urged, besides, that the Parliamentary concern in omitting the second proviso to Section 43B was to avoid the difficulties faced by the assessees which they would now re-experience ifw the Gujarat and Kerala High Court views were to be accepted. He urged that the Kelkar's Committee's recommendations resulted in the 2003 amendments, the object and purport of which would be negated if the Revenue's views were to prevail.

20. Mr. Kapoor urged this court to adopt an interpretation that would be pragmatic and in consonance with fairness. So long as the assessee concerned deposited PF and other dues *before* the date of filing the return, no fiscal consequence of it being taxed should take place. Counsel submitted that deposit *after* due date would be visited with fine or other adverse consequences under the relevant statute.

Revenue's Contentions

21. The learned Additional Solicitor General (hereinafter, "ASG"), Mr. Balbir Singh, for the Revenue argued that in *Alom Extrusions,* the issue involved was with respect to the employer's contribution to PF account. In the present cases,

the issue involved was with respect to employees' contribution to PF account. It was urged that the IT Act differentiated between employees' contribution and employers' contribution to PF account. With respect to employers' contribution, Section 43B was applicable. However, with respect to employees' contribution, Section 36(1)(va) was applicable, as it was specific and pointed to the kind of contribution, and when it could be made, to qualify as a deductible expense. Both the provisions i.e., Section 43B and Section 36(1)(va) operated in different fields, with respect to different contributions. Consequently, Section 43B was inapplicable and could not override Section 36(1)(va).

22. The learned ASG further submitted that by Section 2(24)(x), any sum *"received by the assessee*" from the employees *as contribution to any provident fund* or superannuation fund etc. the welfare of such employees was deemed to be included in the income of the assessee. This was introduced in the Finance Act of 1988. This inclusion, and the amendments to Section 36 and 43B were part of the scheme. Therefore, the deletion of second proviso to Section 43B could not result in that provision overriding the conditions imposed for obtaining deduction, specifically that were part of Section 36.

23. It was argued that it was with introduction of Section 43B with effect from 01.04.1984, that the law insisted upon actual payment of amounts claimed as deductions, enumerated under the provision. Section 43B(b) spoke of sum payable by the employer by way of contribution to a welfare or provident fund. It could be understood that the provision took in both employee's and employer's contribution. Parliament then took note of the circumstance that many assessees claimed deductions on the ground of their maintaining accounts on mercantile or accrual basis and failed to discharge the liability. Consequently, by Finance Act 1987, Section 2(24) (x), and Section 36(1) (va) as well as second proviso to Section 43B were inserted. From that date the statute treated employee's and employer's contribution differently.

24. It was urged that but for the above interpretation there was no *rationale* to bring within the fold of "income" – by Section 2(24)(x) – employee's contribution received by the employer and providing a deduction by Section 36 (1)(va) and permitting the deduction only if that contribution were paid in accordance with the statute governing the fund (EPF/ESI Act). The second proviso to Section 43B then underwent a cosmetic change and later was deleted. There was also a new proviso added under Section 43B for permitting deduction on contributions paid before the returns were filed.

25. This took in only the employer's contribution especially since Section 2(24) and sub-clause (va) were retained. The employee's contributions, as *Merchem Ltd*. noticed, stood on a different footing, since it was *collected* from the employee as a deduction in their salary itself. This would in effect be *deemed* income of the assessee, as had been specifically indicated in the definition of "income" under Section 2(24)(x), a provision introduced w.e.f. 01.04.1988 under the Finance Act, 1987.

26. The Revenue further contended that in terms of provisions of Section 36(1)(va) with respect to any sum received by the assessee from any of its employees to which provision of Section 2 (24 (x) applied, if credited by the assessee to the employees' account in the relevant fund or funds on or before the due date, the assessee was entitled to the deduction. It was submitted that even the Explanation to Section 36(1) (va) made it clear that for the purpose of that provision, "due date" meant the date by which the assessee, as an employer, had to credit the employees' contribution to the employees' account in the relevant fund under any law or rule or regulation issued thereunder or under any standing order, etc. Therefore, during the relevant assessment year, if the employer did not deposit the entire amount towards employees' contribution with the PF authorities on or before the due date under the EPF/ESI Act, to the extent there was shortfall

in deposit of the employees' contribution/ESI contribution, the assessee was not entitled to the deduction.

27. The learned ASG further submitted that Section 43B which was applicable to employers' contribution to any provident fund or any other fund for the welfare of the employees, and the amendment to Section 43B, which enacted that any such amount of employers' contribution was deposited by the employer on or before the due date of filing of the return under Section 139 was entitled to deduction in the relevant year, was not applicable with respect to employees' contribution. It was argued therefore, that when the assessee did not deposit the employees' contribution in the PF account before the due date provided under the EPF/ESI Act, the assessee was disentitled to deduction under Section 36 in the relevant assessment order, though the assessee might have deposited the employees' contribution on or before the due date of filing of the return under Section 139 of the IT Act.

28. It was also urged that the difference in language between Sections 36 and 43B was because the two provisions had differing objectives. Whereas Section 36 dealt with deductions that were not covered in the previous provisions, Section 36(1)(va), with its Explanations, was directly concerned with the meaning of "due date" which was the date by which the assessee was required as an employer *"to credit an employee's contribution to the employee's account in the relevant fund under any Act."* On the other hand, Section 43B was introduced to ensure that sums that could otherwise be treated as deductions, particularly, those shown as payable, based on the mercantile method of accounting, would not be eligible to such treatment, unless those payments were actually made when they fell due: such as tax dues, statutory or interest liabilities. The limited exception carved out by the proviso to Section 43B was that if such amount wa[s 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" and the assessee furnished evidence of such payment along with the return, there would be entitlement for deduction.

29. It was urged that Section 43B spoke of *sum payable by the employer* or the 'employer's contribution', payable by the employer without deduction from the salary of the employee. Employees' contribution was remitted to the fund by the employer, and they were deducted from the employees' salary. Such deduction was statutorily enabled. Deduction from the salary of the employee, no doubt, was the responsibility of the employer, as was the remittance, to the fund. That nevertheless, did not change the basic nature of the contribution, which was of the *employee*. A contribution deducted from the employee's salary and deposited by the employer, could not be termed as employer's contribution. A distinction existed so far as contributions payable under the EPF Act and the ESI Act. The employer's contribution had to be paid by the employer itself. In that case there was no deduction from the employees' salary. The employee's contribution, on the other hand, was to be deducted from the salary payable to the employee into the relevant fund.

Analysis and Conclusions

30. The factual narration reveals two diametrically opposed views in regard to the interpretation of Section 36(1)(va) on the one hand and proviso to Section 43(b) on the other. If one goes by the legislative history of these provisions, what is discernible is that Parliament's endeavour in introducing Section 43B [which opens with its non-obstante clause] was to primarily ensure that deductions otherwise permissible and hitherto claimed on mercantile basis, were expressly conditioned, in certain cases upon payment. In other words, a mere claim of expenditure in the books was insufficient to entitle deduction. The assessee had to, before the prescribed date, actually pay the amounts – be it towards tax liability, interest or other similar liability spelt out by the provision.

31. 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 we consider this scheme, *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.*

32. 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, w.e.f. 01-04-1988. 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)).

33. 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.

34. 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.

35. It is instructive in this context to note that the Finance Act, 1987, introduced to Section 2(24), the definition clause (x), with effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill, 1987, presented to the Parliament, is extracted below:

> *"Measures of penalising employers mis-utilising contributions to the provident fund or any funds set up under the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees -*
>
> *12.1. The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section 43B). The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. "Due date" means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise.*
> *(Explanation to Section 36 (1) of the Finance Act)*
>
> *12.2. In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due date. Where such income is not chargeable to tax under the head "profits and gains of business or profession" it will be assessed under the head "income from other sources."*

36. Significantly, the same Finance Act, 1987 also introduced provisos to Section 43B, through amendment (clause 10 of the Finance Bill). The

memorandum explaining the Bill, pertinently states, in relation to second proviso to Section 43B that:

> *"…The second proviso seeks to provide that no deduction shall be allowed in regard to the sum referred to in clause (b) unless such sum has actually been paid during the previous year on or before the due date. The due date for the purposes of this proviso shall be the due date as under Explanation to clause (va) of sub-section (1) of Section 36."*

37. 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.

38. This court had occasion to consider the object of introducing Section 43B, in *Allied Motors*. The court held, after setting out extracts of the Budget speech of the Finance Minister, for 1983-84, that:

> *"Section 43B was, therefore, clearly aimed at curbing the activities of those tax-payers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that Section 43B was inserted."*

39. Original Section 43B(b) enabled the assessee/employer to claim deduction towards contribution as an employer, *"by way of contribution to any provident fund"*. The second proviso was substituted by Finance Act, 1989 with effect from 01.04.1989 and read as under:

> "*…Provided further that no deduction shall in respect of any sum referred to in clause (b) be allowed unless such sum has actually been*

> *paid in cash or to by issue of a cheque or draft or by any other mode on or before the due date as defined in the explanation below Clause (va) of sub-section (1) of Section 36, and where such payment has been made otherwise than in cash, the same has been realised within 15 days from the due date."*

40. The position in law remained unchanged for 14 years. The Central Government then constituted the Kelkar Committee, to suggest tax reforms. The report suggested amendments *inter alia,* to Section 43B. The relevant extract of the report is as follows:

> *"In terms of the provisions of section 43B of the Income-tax Act, deduction for statutory payments relating to labour, taxes and State and public financial institutions are allowed as deductions, if they are paid during the financial year. However, under the provisions payment of taxes and interest to State and public financial institution are deemed to have been paid during the financial year even if they are paid by the due date of filing of return. Further if the liability is discharged in the subsequent year after the due date of filing of return, the payment is allowed as a deduction in the subsequent year. In the case of statutory payment relating to labour, the deduction for the payment is disallowed if such payment is made any time after the last date of payment of the about related liability. Trade and industry across the country represented that the delayed payment of statutory liability related to labour should be accorded the same treatment as delayed payment of taxes and interest, i.e. they should be allowed in the year of account.*
>
> *Since the objective of the provision is to ensure that a tax-payer does not avail of any statutory liability without actually making a payment for the same, we are of the view that these objectives would be served if the deduction for the statutory liability relating to labour are allowed in the year of payment. The complete disallowance of such payments is too harsh a punishment for delayed payments. Therefore, we recommend that the deduction for delayed payment of statutory liability relating to labour should be allowed in the year of payment like delayed taxes and interest."*

Based on the report, the Union introduced amendments to the IT Act, including an amendment to Section 43B; the memorandum explaining the provisions in the Finance Bill, 2003 in the matter of Section 43B. *inter alia*, reads thus:

> *"The Bill also proposes to provide that in case of deduction of payments made by the assessee as an employer by way of contribution to any provident fund or superannuation fund or any other fund for the welfare of the employees shall be allowed in computing the income of the year in which such sum is actually paid. In case the same is paid before the*

> *due date of filing the return of income for the previous year, the allowance will be made in the year in which the liability was incurred.*
>
> *These amendments will take effect from 1st April, 2004 and will accordingly apply in relation to the assessment year 2004-05 and subsequent years."*

41. The Notes on Clauses *inter alia*, reads as follows:

> *"It is also proposed to amend the first proviso to the said section so as to omit the references of clause (a), clause (c), clause (d), clause (e) and clause (f) which is consequential in nature.*
>
> *It is also proposed to omit the second proviso to the said section. These amendments will take effect from 1st April, 2004 and will, accordingly, apply in relation to the assessment year 2004-2005 and subsequent years."*

42. The *rationale* for introduction of Section 43B was explained by this court in *M.M. Aqua Technologies Ltd. vs. Commissioner of Income Tax, Delhi:*[16]

> "*19. The object of Section 43B, as originally enacted, is to allow certain deductions only on actual payment. This is made clear by the non-obstante Clause contained in the beginning of the provision, coupled with the deduction being allowed irrespective of the previous years in which the liability to pay such sum was incurred by the Assessee according to the method of accounting regularly employed by it. In short, a mercantile system of accounting cannot be looked at when a deduction is claimed under this Section, making it clear that incurring of liability cannot allow for a deduction, but only "actual payment", as contrasted with incurring of a liability, can allow for a deduction."*

43. This condition, i.e., of payment of actual amount on or before the due date to enable deduction, continued for 14 years. By the amendment of 2003, the second proviso was deleted. This court interpreted the law, in the light of these developments, in *Alom Extrusions*. The court considered the effect of omission of the second proviso, and observed as follows:

> *"10. "Income" has been defined under Section 2(24) of the Act to include profits and gains. Under Section 2(24)(x), any sum received by the assessee from his employees as contributions to any provident fund/superannuation fund or any fund set up under the Employees' State Insurance Act, 1948, or any other fund for the welfare of such employees constituted income. This is the reason why every assessee(s)*

[16] *M.M. Aqua Technologies Ltd. vs. Commissioner of Income Tax, Delhi,* 2021 SCC OnLine SC 575.

[employer(s)] was entitled to deduction even prior to 1-4-1984, on mercantile system of accounting as a business expenditure by making provision in his books of accounts in that regard. In other words, if an assessee(s) [employer(s)] is maintaining his books on accrual system of accounting, even after collecting the contribution from his employee(s) and even without remitting the amount to the Regional Provident Fund Commissioner (RPFC), the assessee(s) would be entitled to deduction as business expense by merely making a provision to that effect in his books of accounts. The same situation arose prior to 1-4-1984, in the context of assessees collecting sales tax and other indirect taxes from their respective customers and claiming deduction only by making provision in their books without actually remitting the amount to the exchequer. To curb this practice, Section 43-B was inserted with effect from 1-4-1984, by which the mercantile system of accounting with regard to tax, duty and contribution to welfare funds stood discontinued and, under Section 43-B, it became mandatory for the assessee(s) to account for the aforestated items not on mercantile basis but on cash basis. This situation continued between 1-4-1984 and 1-4-1988, when Parliament amended Section 43-B and inserted the first proviso to Section 43-B.

11. By this first proviso, it was, inter alia, laid down, in the context of any sum payable by the assessee(s) by way of tax, duty, cess or fee, that if an assessee(s) pays such tax, duty, cess or fee even after the closing of the accounting year but before the date of filing of the return of income under Section 139(1) of the Act, the assessee(s) would be entitled to deduction under Section 43-B on actual payment basis and such deduction would be admissible for the accounting year. This proviso, however, did not apply to the contribution made by the assessee(s) to the labour welfare funds. To this effect, the first proviso stood introduced with effect from 1-4-1988.

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15. By the Finance Act, 2003, the amendment made in the first proviso equated in terms of the benefit of deduction of tax, duty, cess and fee on the one hand with contributions to the Employees' Provident Fund, superannuation fund and other welfare funds on the other. However, the Finance Act, 2003, bringing about this uniformity came into force with effect from 1-4-2004. Therefore, the argument of the assessee(s) is that the Finance Act, 2003, was curative in nature, it was not amendatory and, therefore, it applied retrospectively from 1-4-1988, whereas the argument of the Department was that the Finance Act, 2003, was amendatory and it applied prospectively, particularly when Parliament had expressly made the Finance Act, 2003 applicable only with effect from 1-4-2004.

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18. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of the 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 Parliament only with effect from 1-4-2004, would become curative in nature, hence, it would apply retrospectively with effect from 1-4-1988.

19. Secondly, it may be noted that, in Allied Motors (P) Ltd. v. CIT [(1997) 3 SCC 472 : (1997) 224 ITR 677] , the scheme of Section 43-B of the Act came to be examined. In that case, the question which arose for determination was, whether sales tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant sales tax law should be disallowed under Section 43-B of the Act while computing the business income of the previous year? That was a case which related to Assessment Year 1984-1985. The relevant accounting period ended on 30-6-1983. The Income Tax Officer disallowed the deduction claimed by the assessee which was on account of sales tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed under Section 43-B which, as stated above, was inserted with effect from 1-4-1984

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22. It is important to note once again that, by the Finance Act, 2003, not only is the second proviso deleted but even the first proviso is sought to be amended by bringing about a uniformity in tax, duty, cess and fee on the one hand vis-à-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003 is retrospective in operation. Moreover, the judgment in Allied Motors (P) Ltd. [(1997) 3 SCC 472 : (1997) 224 ITR 677] was delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that the Finance Act, 2003 will operate retrospectively with effect from 1-4-1988 (when the first proviso stood inserted).

23. 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 the Finance Act, 2003, to the above extent, operated prospectively.

Take an example, in the present case, the respondents have deposited the contributions with RPFC after 31st March (end of accounting year) but before filing of the returns under the Income Tax 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 Section 43-B 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 up to 1-4-2004, and who pays

> *the contribution after 1-4-2004, would get the benefit of deduction under Section 43-B of the Act."*

44. There is no doubt that in *Alom Extrusions,* this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available.

45. A reading of the judgment in *Alom Extrusions,* would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed. The court observed *inter alia*, that:

> *"15. ...It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in Allied Motors (P) Limited (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003 will operate retrospectively with effect from 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, 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 Income Tax 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 Section 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 Section 43B of the Act. In our view, therefore, Finance*

> *Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003".*

46. A discussion on the Principles of interpretation of tax statutes is warranted. In *Ajmera Housing Corporation & Ors. vs. Commissioner of Income*[17] this court held as follows:

> *"27. It is trite law that a taxing statute is to be construed strictly. In a taxing Act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. (See: Cape Brandy Syndicate v. Inland Revenue Commissioners (1921) 1 KB 64 and Federation of A.P. Chambers of Commerce and Industry and Ors. v. State of A.P. and Ors.(2000) 6 SCC 550. In interpreting a taxing statute, the Court must look squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute. (Also see: Commissioner of Sales Tax, Uttar Pradesh v. The Modi Sugar Mills Ltd. 1961 (2) SCR 189.)"*

47. Likewise, this court underlined the rule, regarding interpretation of taxing statutes, in *Commissioner of Income Tax-III v Calcutta Knitwears, Ludhiana.*[18] Recently, in *Union of India & Ors. vs. Exide Industries Limited & Ors*,[19] this court examined, and repelled a challenge to the constitutionality of Section 43B, especially the provision requiring actual payment, in respect of leave encashment benefit of employees. The court observations in this regard are relevant:

> *"20. Section 43B, however, is enacted to provide for deductions to be availed by the Assessee in lieu of liabilities accruing in previous year without making actual payment to discharge the same. It is not a provision to place any embargo upon the autonomy of the Assessee in adopting a particular method of accounting, nor deprives the Assessee of any lawful deduction. Instead, it merely operates as an additional condition for the availment of deduction qua the specified head.*

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[17] *Ajmera Housing Corporation & Ors. vs. Commissioner of Income*, 2010 (8) SCC 739.
[18] *Commissioner of Income Tax-III v Calcutta Knitwears, Ludhiana* 2014 (6) SCC 444.
[19] *Union of India & Ors. vs. Exide Industries Limited & Ors*., 2020 (5) SCC 274.

21. Section 43B bears heading "certain deductions to be only on actual payment". It opens with a non-obstante clause. As per settled principles of interpretation, a non obstante Clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless specifically provided for. Out of the allowable deductions, the legislature consciously earmarked certain deductions from time to time and included them in the ambit of Section 43B so as to subject such deductions to conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of mercantile system of accounting on accrual of liability basis qua the specific head of deduction covered therein and not to other heads. But that is a matter for the legislature and its wisdom in doing so.

22. The existence of Section 43B traces back to 1983 when the legislature conceptualised the idea of such a provision in the 1961 Act. Initially, the provision included deductions in respect of sum payable by Assessee by way of tax or duty or any sum payable by the employer by way of contribution to any provident fund or superannuation fund. It is noteworthy that the legislature explained the inclusion of these deductions by citing certain practices of evasion of statutory liabilities and other liabilities for the welfare of employees..."

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23. With the passage of time, the legislature inserted more deductions to Section 43B including cess, bonus or commission payable by employer, interest on loans payable to financial institutions, scheduled banks etc., payment in lieu of leave encashment by the employer and repayment of dues to the railways. Thus understood, there is no oneness or uniformity in the nature of deductions included in Section 43B. It holds no merit to urge that this Section only provides for deductions concerning statutory liabilities. Section 43B is a mix bag and new and dissimilar entries have been inserted therein from time to time to cater to different fiscal scenarios, which are best determined by the government of the day. It is not unusual or abnormal for the legislature to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to override regulations or conditions.

24. The leave encashment scheme envisages the payment of a certain amount to the employees in lieu of their unused paid leaves in a year. The nature of this payment is beneficial and pro-employee. However, it is not in the form of a bounty and forms a part of the conditions of service of the employee. An employer seeking deduction from tax liability in advance, in the name of discharging the liability of leave encashment, without actually extending such payment to the employee as and when the time for payment arises may lead to abhorrent consequences. When time for such payment arises upon retirement (or otherwise) of the employee, an employer may simply refuse to pay. Consequently, the innocent employee will be entangled in litigation in the evening of his/her life for claiming a hard-earned right without any fault on his part. Concomitantly, it would entail in double benefit to the employer - advance deduction from tax liability without any burden of

> *actual payment and refusal to pay as and when occasion arises. It is this mischief Clause (f) seeks to subjugate."*

48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with.[20] This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations.

49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in *State of Jharkhand v Ambay Cements*[21] as follows:

> *"23…. In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.*
>
> *24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.*
>
> *25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.*
>
> *26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."*

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[20] *See* for e.g., *Eagle Flask Industries Ltd. v. Commissioner of Central Excise*, 2004 Supp (4) SCR 35.
[21] *State of Jharkhand v Ambay Cements*, (2005) 1 SCC 368.

This was also reaffirmed in a number of judgments, such as *Commissioner of Income Tax v. Ace Multi Axes Systems Ltd.*[22]

50. The Constitution Bench, in *Commissioner. of Customs* v. *Dilip Kumar & Co.* [23] endorsed as following:

> *"24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution ["265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law."] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature.*
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> ***
>
> *34. The passages extracted above, were quoted with approval by this Court in at least two decisions being CIT v. Kasturi & Sons Ltd. [CIT v. Kasturi & Sons Ltd., (1999) 3 SCC 346] and State of W.B. v. Kesoram Industries Ltd. [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201] (hereinafter referred to as "Kesoram Industries case [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201]", for brevity). In the later decision, a Bench of five Judges, after citing the above passage from Justice G.P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute:*
>
> *'(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency;*
>
> *(ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and*
>
> *(iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing*

[22] *Commissioner of Income Tax v. Ace Multi Axes Systems Ltd.*, 2018 (2) SCC 158
[23] *Commissioner. of Customs* v. *Dilip Kumar & Co*, 2018 (9) SCC 1.

unjust in a taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly.'"

51. The analysis of the various judgments cited on behalf of the assessee i.e., *Commissioner of Income-Tax v. Aimil Ltd.*[24]; *Commissioner of Income-Tax and another v. Sabari Enterprises*[25]; *Commissioner of Income Tax v. Pamwi Tissues Ltd.*[26]; *Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd*.[27] and *Nipso Polyfabriks* (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in *Alom Extrusions*. As noticed previously, *Alom Extrutions* did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.

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

[24] *Commissioner of Income-Tax Vs. Aimil Ltd.*, [2010] 321 ITR 508 (Delhi High Court).
[25] *Commissioner of Income-Tax and another Vs. Sabari Enterprises*, [2008] 298 ITR 141 (Karnataka High Court).
[26] *Commissioner of Income Tax Vs. Pamwi Tissues Ltd*., [2009] 313 ITR 137 (Bombay High Court).
[27] *Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd*., [2013] 35 taxmann.com 616 (Rajasthan High Court).

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.

.....CJI.
[UDAY UMESH LALIT]

….....J.
[S. RAVINDRA BHAT]

.....J.
[SUDHANSHU DHULIA]

New Delhi,
October 12, 2022.