

Section 36(1)(va) with Section 43B

Section 36(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)⁴ 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 thereunder or under any standing order, award, contract of service or otherwise;]

Further as per Section 43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

- (a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or
- (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,

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 :

1[Provided that nothing contained in this section shall apply in relation to any sum 2[***] 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.

Section 43B was inserted by Finance Act, 1983, with effect from 1-4-1984, whose sole object was to disallow deductions claimed merely by making a book entry based on mercantile system of accounting and allowed deduction on cash Basis. The parliament took cognizance of the fact that accounting year of a company did not always tally with due dates under Provident fund Act, Municipal Corporation Act and other Tax laws. Vide Finance Act 1987, first proviso to Section 43B was inserted, which stated that if tax, duty, cess or fee was paid after the closing of accounting year but before due date of filling of Return of Income under the Income Tax Act, 1961, the same would be allowed as a deduction for the same accounting year. However, the proviso did not apply to contribution to labour welfare funds. The reason was that employer should not sit on collected contribution of employees and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to welfare funds. In view thereof, vide Finance Act 1988, second proviso came to be inserted which 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 during the previous year on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36."

Thereafter, the said second proviso was further amended vide Finance Act 1989 which 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 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."

The said proviso made amply clear that Assessee-employers would be entitled to deduction only if the contributions to any fund for the welfare of the employees stood credited on or before the due date given in the relevant Act.

However second proviso created difficulty for assessee- employers, which led to an amendment. Finance Act, 2003 which came into force with effect from 1st April 2004 made changes to Section 43B. Two changes were made in section 43B 'viz. deletion of the second proviso to section 43B and further amendment in the first proviso which reads' as under:—

"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 alone with such return."

Therefore, the amendments introduced by the Finance Act. 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employee's Welfare Funds on the other.

The section referred to above viz. section 43B and the amendments thereto came up for consideration before the Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306/185 Taxman 416 where the Hon'ble Supreme Court held that amendment as enacted by Finance act 2003 led to equating tax, duty, cess, and fee with contributions to welfare funds. The Hon'ble Supreme Court also held that the amendments to the said section brought about by the Finance Act, 2003 with effect from 1st April 2004 were retrospective in nature and would operate from 1st April 1988.

Hon'ble Bombay High Court in the case of CIT vs Hindustan Organics Chemicals Ltd. 366 ITR 1(Bombay) followed the above order of Hon'ble Supreme Court and allowed Assessee claim on account of employee contribution.

The Government vide Circular No. 22/2015 dt. 17th December 2015, clarified that no disallowance shall be made for employer's share of contribution which is deposited before 'due date' of filling of return of Income. It further clarified that this 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 IT Act.

Hon'ble Madras High Court in Unifac Management Services (India) (P.) Ltd. vs DCIT in 409 ITR 225 stated 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). [Para 27]

Vide Finance Bill 2021, the Government has further proposed to amend the law to bring certainty in the issue. It is proposed to add another Explanation to section 36(1)(va) clarifying that provision of section 43B does not apply and deemed to never have been applied for the purpose of determining the “due date” under this clause; and amend Section 43B, by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of 2(24)(x) applies. This makes amply clear that the provisions will be applied retrospectively but the memorandum explaining finance bill says that these amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years which creates ambiguity about the applicability of the said explanations.

CA Anmol Singh Sodhi