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## C N K News Flash - Income-Tax implications on delayed payment of employees' contribution to Employee Welfare Funds

### In Brief

*WHETHER EMPLOYEES' CONTRIBUTION TO ANY EMPLOYEE WELFARE FUNDS BEYOND THE STIPULATED DUE DATE OF PAYMENT IS ALLOWABLE AS A DEDUCTION AS PER SECTION 43B OF THE INCOME-TAX ACT, 1961 ('THE ACT') GIVEN THE STIPULATION PROVIDED AS PER SECTION 36(1)(VA) OF THE ACT.*

Deduction under Section 36(1)(va) of the Act would be available only if a sum received by the assessee from any employee in respect of Employees' contribution to any fund for welfare of the employee, is deposited by the assessee on or before the due date specified in the relevant employee welfare act.

The Central Board of Direct Taxes ('CBDT') following the decision of the Hon'ble Supreme Court in Alom Extrusions Ltd. 185 taxman 416 vide Circular no. 22 of 2015 dated 17<sup>th</sup> December 2015 clarified that if the assessee deposits any sum payable by it by way of tax, duty, cess or any sum payable by the assessee as an employer by way of contribution to any fund for the welfare of employees, on or before the '*due date*' for furnishing the return of income under Section 139(1) of the Act, no disallowance can be made under Section 43B of the Act.

**However, the said circular also clarifies that it 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 Act.**

Therefore, whenever there is a delay in depositing employee's share of welfare fund beyond its due date, specified in the relevant employee welfare Act, the tax department, following the above circular is disallowing the entire delayed employees' contribution. The stand taken by the tax department is that the due date of payment as prescribed under the provisions of Section 43B of the Act cannot be considered in light of stipulation on allowablity of deduction under Section 36(1)(va) of the Act.

Therefore, a delay of even one day in depositing employee's contribution to the welfare fund could result in the entire delayed contribution being disallowed.

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## ***Court's View:***

There are conflicting decisions of various courts on whether deduction under Section 36(1)(va) of the Act would be available in case of delay in depositing employees contribution beyond the stipulated due date of its payment but before the due date of furnishing the return of income.

## ***In favour of Assessee:***

<b>Case Law</b>	<b>Decision</b>
Karnataka High Court in EssaeTeraoka P. Ltd. Vs. Deputy Commissioner of Income-Tax, (2014) (366 ITR 408).	The word "contribution" used in clause (b) of Section 43B of the Act means the contribution of employer and employee both, and that being so, if contribution is deposited on or before due date for furnishing Return of Income under sub-section (1) of Section 139 of the Act, employer is entitled for deduction.
Punjab & Haryana High Court in Commissioner of Income Tax Vs. Hemla Embroidery Mills (P.) Ltd. (2014) (366 ITR 167)	Section 43B of the Act shall apply to both 'contributions' i.e. employers' and employees'.
High Court of Uttarakhand in case of CIT Vs. Kiccha Sugar Ltd. (356 ITR 351)	Employee's contribution towards Provident Fund if paid before due date of filing return is allowable under Section 36(1)(va) to employer assessee
Bombay High Court in case of CIT Vs. GhatgePatil Transports Ltd. (368 ITR 749) (Bombay)	Both employees and employers' contribution are covered under amended Section 43B w.e.f 1 <sup>st</sup> April 2004. In coming to the said decision, the Bombay High court relied on the decision of the Supreme Court in case of Alom Extrusions Ltd. 319 ITR 306
High Court of Delhi in case of CIT Vs. Aimil Ltd (2010) 229 CTR 118 (Delhi)	The employees' contribution if not deposited by the due date prescribed under the relevant Acts and is deposited late; the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the relevant welfare Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement Ltd. 213 CTR 268

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Case Law	Decision
High Court of Himachal Pradesh in case of CIT Vs. Nipso Polyfabriks Ltd. (2013) (350 ITR 327) (Himachal Pradesh)	There was no reason to make any distinction between the employees' contribution and the employers' contribution. When the employer does not deposit the same within the time prescribed under the Welfare Acts, he may face consequences under the said Welfare Act (prosecution, interest, penalty, etc.). However, that is no reason to deny benefit of Section 43B, which starts with a non obstante clause and clearly lays down that assessee can take benefit of deduction of such contributions, if the same are paid before furnishing the return.

## ***Against the Assessee:***

Case Law	Decision
Gujarat High Court in Commissioner of Income-Tax Vs. Gujarat State Road Transport Corporation,(2014) 366 ITR 170	Employees' contribution if paid after the due date specified in Section 36(1)(va) has to be disallowed.
Kerala High Court in Commissioner of Income-Tax Vs. Merchem Ltd., (2015) 378 ITR 443	Deduction of amount as provided under Section 36(1)(va) would be available only if the said contribution is credited in specified account within due date as provided under relevant statute

## CNK Comments:

The tax audit report requires mentioning of the due date of deposit, actual date of deposit and delay if any in employees' contribution to various welfare funds.

For AY 2017-18, the software used by income-tax authorities for processing the tax returns is capturing the said delay and communication is sent to the tax payer stating the mismatch in Tax Audit report and the ITR filed. To resolve the said mismatch, principally the tax payer has the following options:

- a. Accept the disallowance and file revised return or
- b. Raise an objection to the said disallowance by stating the reasons therein.

Once the taxpayer exercises option (b) by raising the objection, the possibility of the matter being selected for scrutiny by the income-tax authorities cannot be ruled out. Those cases whose last date for selection of scrutiny has expired, the intimation generated under Section 143(1)(a) may disallow the delayed contribution.

Since there are conflicting decisions on the given matter, the taxpayer may consider objecting to the said disallowance so as to keep the issue alive instead of accepting the disallowance and filing a revised tax return.

Clearly this will lead to litigation going forward and a blow to ease of doing business.

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