THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH

Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 100/Ahd/2022 **Assessment Year 2017-18**

M/s. M M Vora Automobiles Pvt. Ltd., Opp. Octroi Naka Dabhoi Road, Pratap Nagar, Vadodara PAN: AABCM5919N (Appellant)	Vs	The DCIT, CPC, Bangalore (Respondent)

Assessee by: **None**
Revenue by: **Shri Abhimanyu Singh Yadav, Sr. D.R.**

Date of hearing : 03-06-2022
Date of pronouncement : 08-06-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the National Faceless Appeal Centre (NFAC), Delhi in DIN & Order No. ITBA/NFAC/S/250/2022-23/1042692581(1) vide order dated 11/04/2022 passed for the assessment year 2017-18.

2. The assessee has taken the following grounds of appeal:-

> *"1. The Learned CIT (A) has erred in law and on facts of the appellant's case in confirming an adjustment of Rs. 23,20,076/- U/s 143(l)(a)(iv) of the Act made by Learned A.O.*
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> *2. The Learned CIT (A) has erred in law and on facts of the appellant's case in confirming an addition of Rs. 23,20,076/- being employees contribution under PF and ESI Act made by Learned A.O. on the erroneous ground that it is not deposited within the due date as per the respective Act and the same is disallowable U/s 36(l)(va) of the Act.*
>
> *3. Both the lower authorities have erred in law and on facts & circumstances of the appellant's case in not appreciating the fact that neither such adjustment nor addition can be made to the returned income.*
>
> *4. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before hearing of the appeal."*

3. The brief facts of the case are that the assessee is a private limited company engaged in the business as automobile dealer of " Mahindra and Mahindra ". Intimation was issued by CPC dated 11.12.2019 u/s 143(1)(a) of the Act on the basis of tax audit report filed under section 44AB of the Act in respect of ESIC/PF not having been paid before due date under the respective Acts, amounting to ₹ 23,20,076/-. The assessee filed an appeal against the addition before the Ld. CIT(A), and submitted firstly that no prior intimation was given before making such adjustments either in writing or in electronic mode by the Ld. Assessing Officer. Further, on merits the assessee submitted that both in facts and in law, no part of the said amount is

disallowable under section 36(1)(va) r.w.s. 43B of the Act as a same has been paid before due date of filing return of income.

4. The Ld. CIT(A) dismissed the assessee's appeal both on the challenge of jurisdiction as well as on merits. The Ld. CIT(A) held that communication regarding proposed adjustment was sent by CPC on 20 November 2018 and also on 12 September 2019 to the email ID. As there was no response to the proposed adjustments, CPC went ahead with the adjustments of ₹ 23,20,076/- as per the provisions of section 143(1)(a) of the Act. On merits, the Ld. CIT(A) made the following observations:

> *5.26. In the case of* ***Commissioner of Income Tax II Vs Gujarat State Road Transport Corporation [2014] 41 taxmann.com 100/366 ITR 170/223*** *the Hon'ble Gujarat High Court had considered the decision in the case of Alom Extrusions Ltd rendered by the Hon'ble Supreme Court in detail and the difference between employees' contribution and employers' contribution as under:*
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> *"7.07. Now so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case* ***of Alom Extrusions Ltd.*** *(supra), by the learned IT AT as well as learned advocates appearing on behalf of the assesses in support of their submission that in view of amendment in section 43B pursuant to Finance Act, 2003, by which the second proviso to section 43B has been deleted and therefore even with respect to employees contribution despite section 36(1)(va), and explanation to section 36(1)(va), if the employees' contribution is*

credited after the due date mentioned in the particular Act but credited on or before the due date by filing return under section 139 of the Act, assessee shall be entitled to the deduction of such amount, is concerned, on considering the controversy before the Hon'ble Supreme Court in the case of Atom Extrusions Ltd. (supra), the said decision would not be applicable to the facts of the present case.

In the said case before ***Alom Extrusions Ltd.,*** *the controversy was whether the amendment in section 43B of the Act, vide Finance Act, 2003 would operate retrospectively w.e.f. 1/4/1988 or not. It is also required to be noted that in the case before the Hon'ble Supreme Court, the controversy was with respect to employers' contribution as per section 43(B)(b) of the Act and riot with respect to employees' contribution under section 36(1)(va).*

Before the Hon'ble Supreme Court in ***the case of Alom Extrusions Ltd.*** *(supra) the Hon'ble Supreme Court had no occasion to consider deduction under section 36(1)(va) of the Act and with respect to employees' contribution. As stated above, the only controversy before the Hon'ble Supreme Court was with respect to amendment (deletion) of the Second Proviso to section 43(B) of the Income Tax Act, 1961 by the Finance Act, 1963 operates w.e.f. 1/4/2004 or whether it operates retrospectively w.e.f. 1/4/1988.*

Under the circumstances, the learned tribunal has committed an error in relying upon the decision of the Hon'ble Supreme Court in the case

of Alom Extrusions Ltd. (supra) while passing the impugned judgement and order and deleting disallowance of the respective sums being employees' contribution to PF Account / ESI Account, which were made by the AO while considering the proviso to section section 36(1)(va) of the Income Tax Act.

8.00. In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it is held that with respect to the sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or funds on or before the "due date" mentioned in explanation to section 36(1)(va).

Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account / ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation lo section,36(1)(va) of the Act i.e. date by which the concerned assessee was required as an employer to credit employees' contribution to the employees' account in the Provident Fund under the Provident Fund Act and /or the ESI Fund under the ESI Act."

…….

5.46 From the discussions above, it is also clear that the clarificatory amendment brought in by the Finance Act, 2021 applies to the issue in the instant appeal also. The amendment clarifies that provisions of section 43B does not apply and deemed to have never been applied for the purpose of determining the due date for employee's contribution to PF/ESI. From the above judicial decisions and also the unambiguous wording of the now amended provisions of section 36(1) and 43B, it is clear that the employee's contribution can be allowed as a deduction only if it had been paid within the prescribed due dates under the relevant welfare funds and this position of law is and has always been the case and the clarifications brought about by the amendment clearly apply retrospectively. The case laws relied on by the appellant which were rendered prior to clarificatory amendments, therefore are not applicable to the present case, Therefore, the sum of Rs 23,20,076/~ being the employee's contribution to the PF and ESI, not deposited by the appellant within the due date as per the respective Act in accordance with the section 36((1)(va) of the I T Act, 1961, cannot be allowed and accordingly, this ground is ***dismissed.***

6.0 It is therefore, held that the disallowance made u/s.143(1) by CPC on account of appellant's failure to pay the employee's contribution of PF/ESI within the prescribed due dates as per section 36(1)(va) is strictly in accordance with law and clearly comes under the prima

facie adjustments as envisaged u/s.143(1)(a)(iv). The order u/s. 143(1) issued by CPC is therefore, ***confirmed.*** *Appellant's Ground on the issue fails.*

5. Before us, none appeared on behalf of the assessee. The Ld. Departmental Representative placed reliance on the observations made by the Ld. CIT(A) in the appeal order. We have heard the rival contentions and perused the material on record. The Supreme Court in the case of **ACIT v. Saurashtra Kutch Stock Exchange Ltd [2008] 173 Taxman 322 (SC)** has held that non-consideration of a decision of Jurisdictional High Court or of Supreme Court can be said to be a 'mistake apparent from record' which can be rectified under section 254(2) of the Act. Again, the Delhi ITAT in the case of **Vijay Sachdev Vs JCIT (ITAT Delhi) in ITA No. 5344 and 5345/Del/2016** has held that it is well settled law that non-consideration of decision of Jurisdictional High Court is mistake apparent from record. Further, the Bombay HC in the case of **KhatauJunkarLtd.[1992] 61 Taxman 157 (Bom.)** observed as below:

"Further, as the illustration list in CBDT Circular No. 549 dated 31-10-1989 shows that only adjustments which are, on the basis of the return and documents accompanying it, allowable or disallowable, can be adjusted. Further, the Board's Circular No. 581 dated 28-9-1990 makes it clear that the Board itself has viewed the power to make adjustments as co-terminus with the power to rectify mistake apparent from the record under section 154. In the absence of any specific provision in the Act, which disallows a deduction because a

specific document specified in that section is not annexed to the return, the ITO cannot, under clause (iii) of the proviso to section 143(1)(a), disallow a claim or a deduction because, in his view, adequate evidence in support of such a claim or deduction is not before him. He can disallow a claim for deduction only if he is satisfied, on the basis of the material which is before him, that the assessee is not entitled to such a deduction"

Thus, from the above decision, it evident that CBDT Circular No. 581 dated 28-9-1990 makes it clear that the Board has viewed the scope of the powers to make prima facie adjustments under section 143(1)(a) as co-terminus with the power to rectify a mistake apparent from the record under section 154. Further, it would be useful to reproduce language of section 143(1) of the Act:

Assessment.

143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—
(a) the total income or loss shall be computed after making the following adjustments, namely:—
(i) ……..
(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;
(iii) ……

(iv) disallowance of expenditure[or increase in income] indicated in the audit report but not taken into account in computing the total income in the return;

6. In view of the above discussion, we are of the considered view that in the instant set of facts, the Ld. CIT(A) has not erred in facts and law in confirming the disallowance of late deposit of employees Provident fund/ ESIC contribution under section 36(1)(va) of the Act. The Supreme Court in the case of **ACIT v. Saurashtra Kutch Stock Exchange Ltd[2008] 173 Taxman 322 (SC)** has held that not following decision of the Supreme Court or the jurisdictional High Court would constitute a mistake apparent from record. The jurisdictional High Court in case of **Gujarat State Road Transport Corporation** *supra* has directly ruled on this issue against the assessee and has held that employees' contribution (PF/ ESIC) to specified fund will not be allowed as deduction u/s.36(1)(va) if there is delay in deposit as per the due dates mentioned in the respective legislation, in our view, the Department is bound to follow the decision of the jurisdictional High Court. Further, the Tax Audit Report furnished by the assessee also specifically gives the suggestion of disallowance under section 36(1)(va) of the Act i.e. due dates as prescribed under section 36(1)(va) of the Act and the actual dates of payment reported, thus clearly indicates the deviation which attracts such disallowance. A plain reading of section 143(1)(iv) of the Act also specifically states that that an adjustment can be made in respect of disallowance of expenditure/increase in income indicated an audit report but not taken into account in computing the total income of the assessee in the return of income. Therefore, so far as the present facts are concerned, in

our considered view, Ld. CIT(A) has not erred in facts and law in coming to the conclusion that disallowance made by the CPC u/s 143(1) of the I.T. Act on account of appellant's failure to pay the employee's contribution of PF/ESI of Rs. 23,20,076/- within the prescribed due dates as per section 36(1)(va) is strictly in accordance with law.

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

Order pronounced in the open court on 08-06-2022

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 08/06/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद