

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 2329 & 2330/Mum/2021
(निर्धारणवर्ष / Assessment Year: 2018-19 & 2019-20)

M/S Oriental Trading Co. 1 st floor, Elite House, Punjab Foundry, Near Classic Studio, Mira Road East, Mumbai-400 107	बनाम/ Vs.	CIT(A) - NFAC Mumbai.
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAAFO7024L		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थीकीओरसे/ Appellant by	:	Shri Sanjay Parikh, Ld. AR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Nihar Ranjan Samal, Ld. DR
सुनवाईकीतारीख/ Date of Hearing	:	11.07.2022
घोषणाकीतारीख / Date of Pronouncement	:	11.07.2022

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeals have been filed by the assessee against the separate impugned order of even date 26.10.2021, passed by National Faceless Appeal Centre (NFAC), Delhi, in relation to adjustment made u/s 143(1) for the AY 2018-19 and 2019-20.

2. Since the issues raised in both the appeals are common therefore the same were heard together and are being disposed of by way of this consolidated order.

3. The ground taken before us is that, Ld. First Appellate Authority has erred in law and on facts in holding addition u/s 36(1)(va) on account of late deposit of employee's contribution of PF and ESI and crossed time line as specified in statute governing PF and ESI. Assessee has challenged the disallowance of Rs. 38,67,386/- in AY 2018-19 and Rs. 38,11,460/- in AY 2019-20.

4. In both the assessment years, CPC has made adjustment and disallowed u/s 143(1) wherein contribution of PF and ESI has been disallowed u/s 36(1)(va) r.w.s. 2(24(x) of the Act. NFAC has held that amendment brought by Finance Act 2021 w.e.f. 01.04.2021 to section 36(1)(va) by brining explanation 5 to section 43B and amendment in Clause 36(1)(va) held it to be retrospective.

5. It is admitted fact in both the assessment years that employee's contribution to PF and ESI has been made much before the due date from filing before income tax return

6. Now this issue has been covered by the decision of Tribunal in the case of **Kalpesh Synthetics (P.) Ltd. Vs. DCIT (2022) 137 taxmann.com 475 (Mum-Trib)** wherein it has been held that the said amendment is prospective. The aforesaid decision of the Tribunal is squarely applicable in both the appeals which reads as under:-

4. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

5. In our considered view, it is quite evident, from a careful look at the related statutory provisions, that there is a material difference in the scheme of processing the income tax return under section 143(1)(a) as it stands now vis-à-vis as it stood at the point of time when Khatau Junkar judgment (supra) by Hon'ble jurisdictional High Court was delivered. That was the time when incorrect claims could be disallowed only when such a deduction was "on the basis of information available in such return, accounts or documents is prima facie inadmissible" [see Section 143(1)(a)(iii) as it then stood] and it was in this context that the connotations of the expression "prima facie inadmissible" came up for consideration before Hon'ble Courts above. While the expression used in section 143(1)(a)(i) is materially similar inasmuch as its wordings are "an incorrect claim, if such incorrect claim is apparent from any

information in the return”, there are two important things that one must bear in mind- (a) firstly, the expression “an incorrect claim, if such incorrect claim is apparent from any information in the return” is well defined in Explanation to Section 143(1), and; (b) secondly, and perhaps much more importantly, that is just one of the permissible types of adjustments, denying a deduction, under section 143(1)(a) which goes well beyond such adjustments and includes the cases such as “(iii) disallowance of loss claimed, if the return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139; (iv) disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return; (v) disallowance of deduction claimed under sections 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, if the return is furnished beyond the due date specified under sub-section (1) of section 139; or (vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return”. So far as the first point is concerned, it must be noted that the expression “incorrect claim apparent from any information in the return”, for the purpose of Section 143(1)(a), is further defined, under Explanation to Section 143(1), and it means that a claim, on the basis of an entry, in the return,—(i) of an item, which is inconsistent with another entry of the same or some other item in such return; (ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or (iii) in respect

of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction. On the second point, it is useful to bear in mind the fact that the scheme of Section 143(1)(a) thus permits the processing of the income tax return in the manner that the total income or loss of the assessee is computed after making the adjustments for (i) any arithmetical error in the return; (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return; (iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139; (iv) disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return; (v) disallowance of deduction claimed under sections 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, if the return is furnished beyond the due date specified under sub-section (1) of section 139; or (vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return". The adjustments under clause (vi) above are no longer permissible after 1st April 2018. Clearly, thus, there is a significant paradigm shift in the processing of income tax returns under section 143(1), and the decisions rendered in the context of old Section 143(1)(a) cease to be relevant. Learned counsel thus derives no advantage from the judgments rendered in the context of old Section 143(1)(a)- such as Hon'ble jurisdictional High Court's judgment in the case of Khatau Junkar

(supra). To that extent, we must uphold the plea of the learned Departmental Representative.

6. Coming to the mechanism of application of Section 143(1), we find that the first proviso to Section 143 (1) mandates that “no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode” and, under the second proviso to Section 143(1), “the response received from the assessee, if any, shall be considered before making any adjustment, and in a case where no response is received within thirty days of the issue of such intimation, such adjustments shall be made”. The scope of permissible adjustments under section 143(1)(a) now is thus much broader, and, as long as an adjustment fits the description under section 143(1)(a) (i) to (v), read with Explanation to Section 143(1), such an adjustment, subject to compliance with first and second proviso to Section 143(1), is indeed permissible. It is, however, important to take note of the fact that unlike the old scheme of ‘prima facie adjustments’ under section 143(1)(a), the scheme of present section 143(1) does not involve a unilateral exercise. The very fact that an opportunity of the assessee being provided with an intimation of ‘such adjustments’ [as proposed under section 143(1)], in writing or by electronic mode, and “the response received from the assessee, if any” to be “considered before making any adjustment” makes the process of making adjustments under section 143(1), under the present legal position, an interactive and cerebral process. When an assessee raises objections to proposed adjustments under

section 143(1), the Assessing Officer CPC has to dispose of such objections before proceeding further in the matter- one way or the other, and such disposal of objections is a quasi-judicial function. Clearly, the Assessing Officer CPC has the discretion to go ahead with the proposed adjustment or to drop the same. The call that the Assessing Officer CPC has to take on such objections has to be essentially a judicious call, appropriate to facts and circumstances and in accordance with the law, and the Assessing Officer CPC has to set out the reasons for the same. Whether there is a provision for further hearing or not, once objections are raised before the Assessing Officer CPC and the Assessing Officer CPC has to dispose of the objections before proceeding further in the matter, this is inherently a quasi-judicial function that he is performing, and, in performing a quasi-judicial function, he has to set out his specific reasons for doing so. Disposal of objections cannot be such an empty formality or meaningless ritual that he can do so without application of mind and without setting out specific reasons for rejecting the same. Let us, in this light, set out the reasons for rejecting the objections. The Assessing Officer-CPC has used a standard reason to the effect that "As there has been no response/the response given is not acceptable, the adjustment(s) as mentioned below are being made to the total income as per provisions of Section 143(1)(a)", and has not even struck off the portion inapplicable. To put a question to ourselves, can such casually assigned reasons, which are purely on a standard template, can be said to be sufficient justifications for a quasi-

judicial decision that the disposal of objections inherently is? The answer must be emphatically in negative. It is important to bear in mind the fact that intimation under section 143(1) is an appealable order, and when consideration of objections raised by the assessee is an integral part of the process of finalizing the intimation under section 143(1) unless the reasons for such rejection are known, a meaningful appellate exercise can hardly be carried out. When the first appellate authority has no clue about the reasons which prevailed with the Assessing Officer- CPC, in rejecting the submissions of the assessee, because no such reasons are indicated by the Assessing Officer CPC anyway, it is difficult to understand on what basis the first appellate authority sits in judgment over correctness or otherwise of such a rejection of submissions. Whether the statute specifically provides for it or not, in our considered view, the need for disposal of objections by way of a speaking order has to be read into it as the Assessing Officer CPC, while disposing of the objections raised by the assessee, is performing a quasi-judicial function, and the soul of a quasijudicial decision making is in the reasoning for coming to the decision taken by the quasi-judicial officer. While on this aspect of the matter, we may usefully refer to the observations made by the Hon'ble Supreme Court, in the case of Union Public Service Commission v. Bibhu Prasad Sarangi and Ors., [2021] 4 SCC 516. While these observations are in the context of the judicial officers, these observations will be equally applicable to the decisions by the quasi-judicial officers like us as indeed the Assessing Officer CPC.

In the inimitable words of Hon'ble Justice Chandrachud, Hon'ble Supreme Court has made the following observations:

..... Reasons constitute the soul of a judicial decision. Without them, one is left with a shell. The shell provides neither solace nor satisfaction to the litigant. We are constrained to make these observations since what we have encountered in this case is no longer an isolated aberration. This has become a recurring phenomenon.How judges communicate in their judgments is a defining characteristic of the judicial process. While it is important to keep an eye on the statistics on disposal, there is a higher value involved. The quality of justice brings legitimacy to the judiciary

7. These observations of Their Lordships apply equally, and in fact with much greater vigour, to the quasi-judicial functionaries as well. Viewed thus, reasons in a quasi-judicial order constitute the soul of the quasi-judicial decision. A quasi-judicial order, without giving reasons for arriving at such a decision, is contrary to the way the functioning of the quasi-judicial authorities is envisaged. A quasi-judicial order, as a rejection of the objections against the proposed adjustments under section 143(1) inherently is, can hardly meet any judicial approval when it is devoid of the cogent and specific reasons, and when it is in a standard template text format with clear indications that there has not been any application of mind as even the inapplicable portion of the template text, i.e whether there was no response or whether the response is

unacceptable, has not been removed from the reasons assigned for going ahead with the proposed adjustment under section 143(1). In any event, there is no dispute that the precise and proximate reasons for disallowance in all these cases admittedly are the inputs based on the tax audit report. The question then arises about the status and significance of the tax audit report. Can the observations in a tax audit report, by themselves, be justifications enough for any disallowance of expenditure under the Act? As we deal with this question, we are alive to the fact section 143(1)(a)(iv) specifically an adjustment in respect of “disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return”. It does proceed on the basis that when a tax auditor indicates a disallowance in the tax audit report, for this indication alone, the expense must be disallowed while processing under section 143(1) by the CPC. It is nevertheless important to bear in mind the fact that a tax audit report is prepared by an independent professional. The fact that the tax auditor is appointed by the assessee himself does not dilute the independence of the tax auditor. The fact remains that the tax auditor is a third party, and his opinions cannot bind the auditee in any manner. As a matter of fact, no matter how highly placed an auditor is, and even within the Government mechanism and with respect to CAG audits, the audit observations are seldom taken an accepted position by the auditee- even when the auditor is appointed by the auditee himself. These are mere opinions and at best these opinions flag the issues which are required to be

considered by the stakeholders. On such fine point of law, as the nuances about the manner in which Hon'ble Courts have interpreted the legal provisions of the Income Tax Act in one way or the other, these audit reports are inherently even less relevant- more so when the related audit report requires reporting of a factual position rather than express an opinion about legal implication of that position. In the light of this ground reality, an auditee being presumed to have accepted, and concurred with, the audit observations, just because the appointment of auditor is done by the assessee himself, is too unrealistic and incompatible with the very conceptual foundation of independence of an auditor. On the one hand, the position of the auditor is treated so subservient to the assessee that the views expressed by the auditor are treated as a reflection of the stand of the assessee, and, on the other hand, the views of the auditor are treated as so sacrosanct that these views, by themselves, are taken as justification enough for a disallowance under the scheme of the Act. There is no meeting ground in this inherently contradictory approach. Elevating the status of a tax auditor to such a level that when he gives an opinion which is not in harmony with the law laid down by the Hon'ble Courts above- as indeed in this case, the law, on the face of it, requires such audit opinion to be implemented by forcing the disallowance under section 143(1), does seem incongruous. Learned Departmental Representative's contentions in this regard that the observations made in the tax audit report, in the light of the specific provisions of Section 143(1)(a)(iv), must prevail- more so

when the tax auditor is appointed by the assessee himself, is clearly unsustainable in law. While Section 143(1)(a)(iv) does provide for a disallowance based purely on the “indication” in the tax audit report, inasmuch as it permits “disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return”, and it is for the Hon’ble Constitutional Courts above to take a call on the vires of this provision, we are nevertheless required to interpret this provision in a manner to give it a sensible and workable interpretation. When the opinion expressed by the tax auditor is contrary to the correct legal position, the tax audit report has to make way for the correct legal position. The reason is simple. Under Article 141 of the Constitution of India, the law laid down by the Hon’ble Supreme Court unquestionably binds all of us, and the Hon’ble Supreme Court has, in numerous cases- including, for example, in the case of East India Commercial Co. Ltd. v. Collector of Customs [1963] 3 SCR 338, speaking through Hon’ble Justice Subba Rao observed, inter alia, as follows:

.....Under article 215, every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. Under article 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under article 227 it has jurisdiction over all Courts and Tribunals throughout the

territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that Court and start proceedings in direct violation of it. If a Tribunal can do so, all the subordinate Courts can equally do so, for there is no specific provision, just like in the case of the Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer

8. *When the law enacted by the legislature has been construed in a particular manner by the Hon'ble jurisdictional High Court, it cannot be open to anyone in the jurisdiction of that Hon'ble High Court to read it in any other manner than as read by the Hon'ble jurisdictional High Court. The views expressed by the tax auditor, in such a situation, cannot be reason enough to disregard the binding views of the Hon'ble jurisdictional High Court. To that extent, the provisions of Section 143(1)(a)(iv) must be read down. What essentially follows is that the adjustments under section 143(1)(a) in respect of "disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return" is to be read as, for example, subject to the rider "except in a situation in which the audit report has taken a*

stand contrary to the law laid down by Hon'ble Courts above". That is where the quasi-judicial exercise of dealing with the objections of the assessee, against proposed adjustments under section 143(1), assumes critical importance in the processing of returns. It is also important to bear in mind the fact that what constitutes jurisdictional High Court will essentially depend upon the location of the jurisdictional Assessing Officer. While dealing with jurisdiction for the appeals, Rule 11(i) of the Central Processing of Returns Scheme 2011 states that "Where a return is processed at the Centre, the appeal proceedings relating to the processing of the return shall lie with Commissioner of Income-tax (Appeals) [CIT(A)] having jurisdiction over the jurisdictional Assessing Officer". Then situs of the CPC or the Assessing Office CPC is thus irrelevant for the purpose of ascertaining the jurisdictional High Court. Therefore, in the present case, whether the CPC is within the jurisdiction of Hon'ble Bombay High Court or not, as long as the regular Assessing Officer of the assessee and the assessee are located in the jurisdiction of Hon'ble Bombay High Court, the jurisdictional High Court, for all matters pertaining to the assessee, will be Hon'ble Bombay High Court. In our considered view, it cannot be open to the Assessing Officer CPC to take a view contrary to the view taken by the Hon'ble jurisdictional High Court- more so when his attention was specifically invited to the binding judicial precedents in this regard. For this reason also, the inputs in question in the tax audit report can not be reason enough to

make the impugned disallowance. The assessee must succeed for this reason as well.

9. What a tax auditor states in his report are his opinion and his opinion cannot bind the auditee at all. In this light, when one considers what has been reported to be 'due date' in column 20 (b) in respect of contributions received from employees for various funds as referred to in Section 36(1)(va) and the fact that the expression 'due date' has been defined under Explanation (now Explanation 1) to Section 36(1)(va) provides that "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", one cannot find fault in what has been reported in the tax audit report. It is not even an expression of opinion about the allowability of deduction or otherwise; it is just a factual report about the fact of payments and the fact of the due date as per the Explanation to Section 36(1)(va). This due date, however, has not been found to be decisive in the light of the law laid down by Hon'ble Courts above, and it cannot, therefore, be said that the reporting of payment beyond this due date in the tax audit report constituted "disallowance of expenditure indicated in the audit report but not taking into account in the computation of total income in the return" as is sine qua non for disallowance of Section 143(1)(a)(iv). When the due date under Explanation to Section 36(1)(va) is judicially held to be not decisive

for determining the disallowance in the computation of total income, there is no good reason to proceed on the basis that the payments having been made after this due date is “indicative” of the disallowance of expenditure in question. While preparing the tax audit report, the auditor is expected to report the information as per the provisions of the Act, and the tax auditor has done that, but that information ceases to be relevant because, in terms of the law laid down by Hon’ble Courts, which binds all of us as much as the enacted legislation does, the said disallowance does not come into play when the payment is made well before the due date of filing the income tax return under section 139(1). Viewed thus also, the impugned adjustment is vitiated in law, and we must delete the same for this short reason as well.

10. In view of the detailed discussions above, we are of the considered view that the impugned adjustment in the course of processing of return under section 143(1) is vitiated in law, and we delete the same. As we hold so, we make it clear that our observations remain confined to the peculiar facts before us, that our adjudication is confined to the limited scope of adjustments which can be carried out under section 143(1) and that we see no need to deal with the question, which is rather academic in the present context, as to whether if such an adjustment was to be permissible in the scheme of Section 143(1), whether the insertion of Explanation 2 to Section 36(1)(va), with effect from 1st April 2021, must mean that so far as the assessment years prior to the assessment years 2021-22 are concerned, the provisions of Section

43B cannot be applied for determining the due date under Explanation (now Explanation 1) to Section 36(1)(va). That question, in our humble understanding, can be relevant, for example, when a call is required to be taken on merits in respect of an assessment under section 143(3) or under section 143(3) r.w.s. 147 of the Act, or when no findings were to be given on the scope of permissible adjustments under section 143(1)(a)(iv). That is not the situation before us. We, therefore, see no need to deal with that aspect of the matter at this stage.

7. Respectfully following the aforesaid decision, the disallowance made u/s 36(1)(va) on account of employee's contribution to PF and ESI is deleted.

8. In the result, both the appeals filed by the assessee are **allowed.**

Orders pronounced in the open court on 11th July, 2022.

Sd/-

(S. Rifaur Rahman)
Accountant Member

मुंबई Mumbai;दिनांक Dated : 11/07/2022

Sr.PS. Dhananjay

Sd/-

(Amit Shukla)
Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./ Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai