IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 443/MUM/2022
(ASSESSMENT YEAR: 2018-19)

Fortive India Private Limited,
Unit No. FF-A-07, First Floor,
Art Guild House, Phonix Market City,
LBS Marg, Kurla-West,
Mumbai - 400070
[PAN: AAECC6713H] ..... Appellant

Vs

Commissioner of Income Tax (Appeal),
National Faceless Centre, Delhi ..... Respondent

Appearances
For the Appellant/ Assessee : Shri Ninad Patade

For the Respondent/Department : Ms. Vranda U Matkarni

Date of conclusion of hearing : 30.06.2022
Date of pronouncement of order : 30.06.2022

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. The present appeal arises out of the order, dated 07.01.2022 passed by the Ld. Commissioner of Income Tax (Appeals) National Faceless Appeal Centre (NFAC) (hereinafter referred to as 'the CIT(A)') in appeal [ITBA/NFAC/S/250/2021-22/1038521796(1)] filed by the Appellant/Assessee against the intimation/order, dated 16.10.2019, passed under Section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as Act) by the ld. Dy. Commissioner of Income Tax, CPC.

2. The grounds raised in appeal are taken up seriatim hereinafter.

3. Grounds No.1 is general in nature and does not require adjudication.

4. Ground No. 2 to 2.6 are directed against addition of INR 24,19,670/-made under Section 43B of the Act while processing return under Section 143(1) of the Act. In the return of income for the relevant Assessment Year 2018-19 the Appellant had claimed deduction in respect of payment for Gratuity amounting to INR 2,77,077/- and payment of Leave Encashment amounting to INR 21,42,593/-.

5. The Ld. Authorised Representative for the Appellant appearing before us submitted that during the Appellant had claimed deduction for INR 2,77,077/- and INR 21,42,593/- towards gratuity and Leave Encashment, respectively, on basis of actual payment made within the timelines provided under Section 43B of the Act. In this regard, he relied upon Serial No. 3 of Clause 26(i)(B)(a) of tax audit report in Form 3CD. He further submitted that the authorities below failed to appreciate that the Appellant had disallowed INR 55,07,155/- and INR 21,42,593/- being provisions created for gratuity and Leave Encashment, respectively in the return of income, and therefore, no further disallowance was warranted. On the basis of the aforesaid, the Ld. Authorised Representative for the Appellant submitted that the Appellant was entitled to deduction for INR 24,19,670/- (INR 2,77,077/- + INR 21,42,593/-) as per Section 43B of the Act. However, the same was not granted while processing return under Section 143(1) of the Act. Further, the CIT(A) has also failed to adjudicate this issue in appeal. Therefore, he submitted that the issue be remanded to the file of the Assessing Officer for adjudication after verification of records. The Ld. Departmental Representative was not able to controvert the submissions of the Appellant that the CIT(A) has failed to adjudicate of the ground raised by the Appellant regarding

claim of Gratuity and Leave Encashment payments aggregating to INR 24,19,670/-. In view of the aforesaid, we deem it appropriate to accept the submission made by the Ld. Authorised Representative for the Appellant. Accordingly, in the interest of justice, we remand this issue to the file of the Assessing Officer with the directions to allow deduction for INR 2,77,077/- and INR 21,42,593/- towards gratuity and leave encashment, respectively, provided the Assessing Officer is satisfied, after due verification, that actual payments have been made by the Appellant within the timelines provided under Section 43B of the Act as claimed by the Appellant. Accordingly, the Ground No. 2 to 2.6 are disposed off with the aforesaid directions and are treated as partly allowed.

6. Ground No. 3 to 3.6 are directed against the addition of INR.4,13,912/- made while processing return under Section 143(1) of the Act being the payments made towards employees' contribution to Employees State Insurance Corporation (ESI) and Provident Fund (PF) after the due date specified in the applicable statute but before the due date of filing income tax return prescribed under Section 139(1) of the Act.

7. The Ld. Authorised Representative for the Appellant submitted that the issue stands covered in favour of the Appellant by the decisions of this Tribunal. Per contra, the Ld. However, the Ld. Departmental Representative submitted that Circular 22 of 2015 issued by the Central Board of Direct Taxes clearly states that employee's contribution to welfare funds are governed by Section 36(l)(va) of the Act. Further, the amendments to Section 36(l)(va) made vide Finance Act 2021 are also applicable to the facts of the present case and are to be applied retrospectively as the same are curative/declaratory in nature. She relied upon the order passed by the CIT(A) to support the aforesaid disallowance of INR 4,13,912/-.

8. We have heard rival submissions and perused the material available on record. It is not in dispute that Appellant had deposited the employees' contribution of PF and ESI before the due date of filing of Return under Section 139(1) of the Act, though the same were deposited belatedly beyond the due date specified under the respective statutes. The intimation/order under Section 143(1) of the Act was issued/passed on 16.10.2019. The CIT(A) has sought to justify the additions/adjustments made under Section 143(1) of the Act vide order/intimation dated 16.10.2019 by placing reliance upon the amendments introduced by the Finance Act, 2021 which was passed much later on 28.03.2021 by contending that the amendments are to be interpreted as being clarificatory in nature and therefore, applicable retrospectively. We note that the date on which intimation/order under Section 143(1) of the Act was passed the issue stood decided in the favour of the Appellant by virtue of the decisions of the jurisdictional High Court in the case of CIT vs. Ghatge Patil Transporters Ltd. (2015) 53 taxmann.com 141 (Bom HC) and CIT vs. M/s Hindustan Organics Chemicals Ltd. 48 taxmann.com 421 (Bom HC) cited by the Ld. Authorised Representative of the Appellant in proceedings before CIT(A). Further, even after the introduction of amendments to Section 36(1)(va)/43B of the Act by way of Finance Act, 2021, Hyderabad Bench of the Tribunal had, vide order dated 15.06.2021, in the case of Salzgitter Hydraulics (P.) Ltd. vs ITO, Ward 3(1), Hyderabad : 189 ITD 676 (Hyderabad - Trib.) held that the aforesaid amendments are applicable from Assessment Year 2021-2022. Accordingly, the adjustments/additions made by the Deputy Commissioner of Income Tax, CPC in respect of employees contribution to ESI and PF fell outside the scope of Section 143(1) of the Act. Identical view has been taken by the Tribunal view has been taken by the Mumbai Bench of the Tribunal in the case of M/s. Salasar Balaji Ship Breakers Pvt. Ltd vs. ACIT, Circle-4(3)(2),

Mumbai: ITA No. 1947/Mum/2021 (Assessment Year 2018-19, dated 14.06.2022). Even otherwise, the issue is squarely covered in favour of the assessee by the decision of co–ordinate bench in case of **Kalpesh Synthetics Pvt. Ltd., vs. DCIT, CPC, Bangalore**, dated 27.04.2022 reported in 137 taxmann.com 475 (supra) wherein it has been held as under:

> "*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 quasi-judicial 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. In view of the above, Ground No. 3.2, 3.3, 3.4 and 3.6 are allowed. Addition/disallowance of INR 4,13,912/- pertaining to deposit of employees' contribution to ESI and PF after the due date specified in the applicable statute but before the due date of filing income tax return prescribed under Section 139(1) of the Act stands deleted. In view of the aforesaid, Ground No. 3.1 and 3.5 are disposed off as being infructuous.

10. Ground No.4 pertaining to interest under Section 234C is disposed of as being consequential.

11. Ground No. 5 is disposed off as being general in nature.

12. In the result, appeal filed by the Appellant is partly allowed.

Order pronounced on 30.06.2022.

Sd/-	*Sd/-*
(B.R. Baskaran)	(Rahul Chaudhary)
Accountant Member	Judicial Member

मुंबई Mumbai; दिनांक Dated : 30.06.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai