

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND  
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 86/Srt/2022 (Assessment Year: 2017-18)

(Physical hearing)

Cube Constructions Engineering Limited, 1, Chandamani Nagar, Vidhya Vihar, Subhanpura, Vadodara, 390020. <b>PAN No. AACCC 8103 D</b>	Vs.	The Pr.CIT, (Central), Surat.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	None
Department represented by	Shri Ashok B Koli, CIT-DR
Date of hearing	17/11/2022
Date of pronouncement	22/11/2022

**Order under Section 254(1) of Income Tax Act**

**PER: PAWAN SINGH, JUDICIAL MEMBER:**

1. This appeal by the assessee is directed against the order of the learned Principal Commissioner of Income Tax, (Central), Surat (in short, the Id. Pr.CIT) dated 02/03/2022 passed under Section 263 of the Income Tax Act, 1961 (in short, the Act) for the Assessment year (AY) 2017-18. The assessee has raised following grounds of appeal:

*"1. The assessee company is engaged in the business of construction activity and hotel industry. The assessee e-filed its return of income on 28/10/2017 declared total income at Rs. 33,29,09,880/-. The case was selected for scrutiny and assessment u/s 143(3) was finalized on 31/12/2019 determining total income of Rs. 39,67,06,200/-. Aggrieved by the order of the assessing officer, the mater went to CIT(Appeals). Presently the assessee company is in appeal with respect to the additions on account of donation made to scientific research institute and disallowance of depreciation.*

*The Principal officer observed that the assessee company had not credited Rs. 73,75,495/- in employees accounts in the relevant funds within the prescribed time limit. The principal officer who set aside the original assessment order and passed order u/s 263.*

*Your appellant submits that same is not justified and therefore, be deleted.*

*Your appellant craves leave to add, to alter, to amend or to delete any or all the grounds of appeal.”*

2. Brief facts of the case are that the assessee is a company engaged in the business of construction activity and hotel industry. The assessee filed its return of income for the A.Y. 2017-18 on 28/10/2017 declaring income of Rs. 33.29 crores. The case was selected for scrutiny. The Assessing Officer passed the assessment order on 31/12/2019 under Section 143(3) of the Act. The Assessing Officer while passing the assessment order, made disallowance of expenditure made to scientific research institute of Rs. 3.00 crores and weighted deduction claimed under Section 35(1)(ii) of Rs. 2.25 crores. Subsequently, the assessment order was verified by the Id. Pr.CIT vide his order dated 02/03/2022 passed under Section 263 of the Act.
3. The Id. Pr.CIT while revising the assessment order, held that the assessee failed to deposit contribution of its employee towards Provident Fund and ESI amounting to Rs. 73,74,495/- within due date prescribed under the relevant statutory provision and was not entitled for deduction under Section 36(1)(va) of the Act. The Assessing Officer allowed the said deduction without making enquiries or verification and

allowed the relief to the assessee. Thus, the assessment order is erroneous in so far as it is prejudicial to the interests of the revenue. Further aggrieved, the assessee has filed the present appeal before this Tribunal.

4. This appeal came up for hearing on 17/11/2022. None appeared on behalf of assessee. However, on perusal of record, we find that the assessee has already filed written submission which is on record, wherein the assessee contended that the appeal may be decided after considering their submissions. Therefore, we have considered the written submissions of the assessee and heard the submissions of Id CIT-DR for the revenue.
5. In the written submission, the assessee submitted that the action under Section 263 of the Act is not justified as the Assessing officer has not disallowed the employee's contribution of ESI and PF in view of decision of Hon'ble Supreme Court in CIT Vs Vinay Cement Limited (2007) 213 CTR 268-SC. Without prejudice submission, it is contended that the assessee made later payment of employees' contribution towards PF and ESI but the same was filed before filing the return of income. Therefore, by virtue of Section 43B, the same would be allowed as deduction as the amount is paid before due date of filing of return. To support their submission, the assessee relied upon the following case laws:

- (i) DCIT Vs M/s Eastern Power Distribution Company, ITA No. 609/Vizag/2014 order dated 29/07/2016.
  - (ii) CIT Vs Kicha Sugar Company Ltd. (Uttrakhand High Court) ITA No. 3108/Del/2010, ITA No. 4702/Del/2009, ITA No. 4621/Del/2011
  - (iii) DCIT Vs Page Point Service (India) Pvt. Ltd., ITA No. 3984/Del/2013 (date of pronouncement 22/05/2015)
  - (iv) CIT Vs Aimil Ltd. 321 ITR 508 (Del)
  - (v) CIT Vs Hindustan Organics Chemicals Ltd. ITA No. 399 of 2012 (Bombay High Court)
6. On the other hand, the Id. CIT-DR for the revenue submits that the grounds of appeal raised by assessee is squarely covered against the assessee by the recent decision of Hon'ble Apex Court in the case of Checkmate Services Private Limited Vs CIT in Civil Appeal No. 2833 of 2016 dated 12/10/2022 wherein the Hon'ble Apex Court held that it is an essential condition that for claiming such deduction that such amounts are deposited on or before due date. It was further held that non-obstante clause under Section 43B or in any content in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before due date as a condition for deduction.
7. We have considered the submissions of both the parties and have gone through the orders of lower authorities. We have also gone through the written submission of assessee placed on record. We find that the Assessing Officer during the assessment has not discussed the issue with regard to disallowance of employees' contribution of ESI and PF

thereby allowed such deduction without any discussion/assessment order. No evidence is filed before the Tribunal in the form of any notice or questionnaire if such issue was considered by the Assessing officer or not. The Id. Pr.CIT while revising the assessment order clearly held that the Assessing Officer allowed such deduction without making enquiry or verification which should have been made thereby allowed relief without enquiry into the claim and directed the Assessing Officer to pass fresh assessment order in accordance with law.

8. We find that the issue identified by the Id. Pr.CIT is directly covered by the recent decision of Hon'ble Apex Court in Checkmate Services Private Limited Vs CIT (supra) wherein the Hon'ble Apex Court held that it is an essential condition that for claiming such deduction that such amounts are deposited on or before due date. It was further held that non-obstante clause under Section 43B or in any content in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before due date as a condition for deduction. The case laws relied by the assessee in his submission are not helpful to the assessee after the decision of Hon'ble Apex Court in Checkmate Services Private Limited Vs CIT (supra). The ratio of case law in CIT Vs Vinay Cement Limited (supra) is also not helpful to the assessee as the said case law is based on law as it stood prior to the

amendment of section 43B. Therefore, we do not find any merit in the grounds of appeal and we dismiss the same.

9. In the result, this appeal of assessee is dismissed.

Order pronounced in the open court on 22<sup>nd</sup> November, 2022 and the result was also placed on the Notice Board.

Sd/-  
**(Dr. ARJUN LAL SAINI)**  
**ACCOUNTANT MEMBER**

Surat, Dated: 22/11/2022

*\*Ranjan*

Copy to:

1. Assessee –
2. Revenue -
3. CIT(A)
4. CIT
5. DR
6. Guard File

Sd/-  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

By order

Sr. Private Secretary, ITAT, Surat