

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

Sl. No.	ITA No.	Name of Appellant	Name of Respondent	Asst. Year
1	109/PUN/2022	B. S. Enterprises, Plot No.5, Saigram A, Shahu Nagar, CIDCO, Nashik- 422008. PAN : AALFB3075B	DCIT, CPC, Bengaluru.	2018-19
2	110/PUN/2022	HYT Engineering Co. P. Ltd., Plot No.29/10, 29/10/1, 29/10/2, D-II Block, MIDC, Pune City, Pune- 411019. PAN : AAACH5158H	DCIT (CPC), Bangalore	2019-20
3	134/PUN/2022	M/s. Enertech UPS P. Ltd., S. No.399, 1 2 Plot No.5, Bhare Village Pirangut, Pune- 412111. PAN : AAACE6766A	DCIT, CPC, Bengaluru.	2018-19
4	186/PUN/2022	Guru Enterprises, Sr. No.688-28 A 9541, Flat No.08, Bhosari, Pagaria Nelge Plaza, Pune- 411039. PAN : AARFG0436B	DCIT, CPC, Bengaluru.	2019-20
5	189/PUN/2022	Netscout Systems India Private Limited, Office No.700, 7 th Floor, Bajaj Brandview, Old Mumbai Pune Road, Village Bhamburda, Pune- 411003. PAN : AABCN2736Q	DCIT, CPC, Bengaluru.	2017-18

6-7	199/PUN/2022 200/PUN/2022	Expert Global Solutions P. Ltd., Plot No. T-11, MIDC Area, Chikalthana, Aurangabad- 431210. PAN : AAACE8345H	DCIT, CPC, Bangalore.	2017-18 2018-19
8	219/PUN/2022	Baliraja Sakhar Karkhana Ltd., Shraddha House, CTS No.1206, A1 PLT No.887A, Shirole Road, Shivaji Nagar, Pune- 411004. PAN : AACCB6360R	DCIT, CPC, Bengaluru.	2018-19
9-10	234/PUN/2022 235/PUN/2022	Ashoka Buildcon Limited, S.No.861, Ashoka House, Ashoka Marg, Wadala, Nashik- 422011. PAN : AABCA9292J	DCIT, CPC, Bangalore.	2018-19 2019-20
11	290/PUN/2022	Shree Ashtvinayak Glass Pvt. Ltd., Office No.A-520 Marvel Vista, CTS Lulla Nagar, Sahani Sujan, Kondhawa- 411048. PAN : AALCS8566K	DCIT, CPC, Bangalore.	2017-18

Assessee by : Shri Kishore B. Phadke (Sl.No.1, 5, 8)
Shri Rohit Biyani (Sl. No.2)
Shri C. V. Deshpande (Sl. No.3)
None (Sl. No.4, 6, 7)
Shri Pramod S. Shingte (Sl. No.9, 10, 11)

Revenue by : Shri Ramnath P. Murkunde

Date of hearing : 29.11.2022

Date of pronouncement : 29.11.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

These bunch of appeals preferred by the different assesseees for the various assessment years mentioned in the caption emanates from the orders of the Learned Commissioner of Income Tax (Appeals) as per the respective grounds of appeal on record.

2. Since the identical facts and common issues are involved in all the above eleven appeals of the different assesseees, we proceed to dispose of the same by this common order.

3. For the sake of convenience and clarity, the facts relevant to the appeal in ITA No.109/PUN/2022 for the assessment year 2018-19 are stated herein.

ITA No.109/PUN/2022, A.Y. 2018-19 :

4. Briefly, the facts of the case are that during the course of proceedings for the assessment year under consideration, Dy. Commissioner of Income Tax, CPC, Bengaluru made disallowance of Rs.1,08,22,672/- in the intimation u/s 143(1) of the Income Tax Act, 1961 ('the Act') dated 02.10.2019 on the ground that the appellant had not deposited the employees' share of PF and ESIC etc within due date prescribed under respective Statutes, but paid before due date for filing Return of Income under the provisions of

section 139(1) of the Act. On appeal before the Id. CIT(A), the Id. CIT(A) confirmed the said disallowance.

5. Being aggrieved, the appellant is in appeal before us in the present appeal.

6. We heard the rival submissions and perused the material on record. The only issue relates to the confirmation of disallowance of Rs.1,08,22,672/- made by the Dy. Commissioner of Income Tax, CPC, Bengaluru u/s 36(1)(va) of the Act on account of late deposit of the Employees' share of PF and ESIC etc. We find that an identical issue has been decided in recent decision of Co-ordinate Bench of this Tribunal in the case of CEMETILE INDUSTRIES vs. ITO vide ITA No.693/PUN/2022 for A.Y. 2018-19 and others vide order dated 23.11.2022, wherein, the Tribunal held as under :-

“3. We have heard Sh. Pramod Singte, Ms. Deepa Khare, Sh. Sanket Joshi, Sh. Sharad A. Vaze, Sh. Mahavir Jain, Sh. M.K. Kulkarni, Sh. S.N. Puranik and Sh. Burhanuddin Vora (hereinafter commonly referred to as 'the Id. AR') and Sh. Suhas Kulkarni, the Id. Departmental Representative (DR). It is undisputed that the audit report filed by the assessee indicated the due dates of payment to the relevant funds under the respective Acts relating to employee's share and the said amounts were deposited by the assessee beyond such due dates but before the filing of the return u/s 139(1) of the Act. The case of the assessee before the authorities below has been that such payments before the due date as per section 139(1) of the Act amounts to sufficient compliance of the provisions in terms of section 43B of the Act, not calling for any disallowance. Per contra, the Department has set up a case that the disallowance is called for because of the per se late deposit of the employees' share beyond the due date under the respective Act and section 43B is of no assistance.

4. Before proceeding further, it would be apposite to take note of the relevant statutory provision in this regard. Section 2(24) provides that 'income' includes: '(x) any sum received by the assessee from his

employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees'. Thus, contribution by employees to the relevant funds becomes income of the employer. Instantly, there is no dispute as to the taxability of such income in the hands of the assessee. Once such an amount becomes income of the employer-assessee, then section 36(1)(va) comes into play for providing the deduction. This provision provides that: '(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.'. The term 'due date' for the purposes of this clause has been defined in Explanation 1 to this provision to mean: '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.'

Thus, it is axiomatic that deposit of the employees' share of the relevant funds before the due date under the respective Acts is sine qua non for claiming the deduction. Au Contraire, if the contribution of the employees to the relevant funds is not deposited by the employer before the due date under the respective etc., then the deduction u/s.36(1)(va) is lost notwithstanding the fact that the share of the employees had already crystallized as income of the employer u/s.2(24)(x) of the Act.

5. *Adverting to the facts of the case, it is seen that the assessee claimed the deduction for the employees' share for depositing the same in the relevant funds beyond the due date as given in Explanation 1 to section 36(1)(va) on the strength of section 43B. The latter section opens with a non-obstante clause and provides that a deduction otherwise allowable in respect of: '(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees' shall be allowed only in that previous year in which such sum is actually paid. The first proviso to section 43B states that: 'nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.' The main provision of section 43B, providing for the deduction only on actual payment basis, has been relaxed by the proviso so as to enable the deduction even if the payment is made before the due date of furnishing the return u/s 139(1) of the Act for that year. The claim of the assessee is that the deduction becomes available in the light of section 36(1)(va) read with section 43B on depositing the employees' share in the relevant funds before the due date u/s 139(1) of the Act. This position was earlier accepted by some of the Hon'ble High Courts*

holding that the deduction is allowed even if the assessee deposits the employees' share in the relevant funds before the date of filing of return u/s.139(1) of the Act. This was on the analogy of treating the employee's share as having the same character as that of the employer's share, becoming deductible u/s 36(1)(iv) read in the hue of section 43B(b). Recently, the Hon'ble Supreme Court in *Checkmate Services P. Ltd. & Ors. VS. CIT & Ors. (2022) 448 ITR 518 (SC)* has threadbare considered this issue and drawn a distinction between the parameters for allowing deduction of employer's share and employees' share in the relevant funds. It has been held that the contribution by the employees to the relevant funds is the employer's income u/s.2(24)(x), but the deduction for the same can be allowed only if such amount is deposited in the employee's account in the relevant fund before the date stipulated under the respective Acts. The hitherto view taken by some of the Hon'ble High Courts in allowing deduction even where the amount was deposited in the employee's account before the time allowed u/s.139(1), ergo, got overturned. The net effect of this Apex Court judgment is that the deduction u/s.36(1)(va) can be allowed only if the employees' share in the relevant funds is deposited by the employer before the due date stipulated in respective Acts and further that the due date u/s.139(1) of the Act is alien for this purpose.

6. There is no quarrel that the enunciation of law by the Hon'ble Supreme Court is always declaratory having the effect and application *ab initio*, being, the date of insertion of the provision, unless a judgment is categorically made prospectively applicable. The *ld. AR* candidly admitted that this judgment will equally apply to the disallowance u/s.36(1)(va) anent to all earlier years as well for the assessments completed u/s.143(3) of the Act. He, however, accentuated the fact that the instant batch of appeals involves the disallowance made u/s.143(1) of the Act. It was argued that no *prima facie* adjustment can be made in the Intimation issued u/s 143(1) of the Act unless a case is covered within the specific four corners of the provision. It was stressed that the action of the AO in making the extant disallowance does not fall in any of the clauses of section 143(1).

7. We fully agree with the proposition bolstered by the *ld. AR* that adjustment to the total income or loss can be made only in the terms indicated specifically u/s.143(1) of the Act. Now, we proceed to examine if the case falls under any of the clauses. The rival parties are consensus *ad idem* that the case can be considered as falling either under clause (ii) or (iv) of section 143(1). For ready reference, we are extracting the relevant provision as under:

'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:—

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(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'

8. Sub-section (1) of section 143 states that a return shall be processed to compute total income by making six types of 'adjustments' as set out in sub-clauses (i) to (vi). As noted supra, we are concerned only with the examination of two sub-clauses, viz., (ii) and (iv). Sub-clause (ii) talks of 'an incorrect claim, if such incorrect claim is apparent from any information in the return'. The expression "an incorrect claim apparent from any information in the return" has not been generally used in the provision. Rather, it has been specifically defined in Explanation (a) to section 143(1) as under:

Explanation.—For the purposes of this sub-section,—

(a) "an incorrect claim apparent from any information in the return" shall mean 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;'

9. Clause (i) of Explanation (a) refers to a situation in which there is a claim of income or expenditure at two places in the return of income and there is inconsistency in them. For example, if deduction is claimed under a specific section for a sum of Rs.100/- in the Profit and loss account accompanying the return, but in the computation of income, the amount has been taken as Rs.110/-, leading to inconsistency, requiring an adjustment. Clause (ii) of Explanation (a) covers a situation in which claim is made, say, for a deduction u/s.80IA for which audit report is required to be furnished, but such report has not been furnished along with the return. Clause (iii) contemplates a situation in which deduction exceeds specified statutory limit. For example, section 24(a) provides for a standard deduction for a sum equal to 30% of the annual value, but the assessee has claimed deduction at 40%. These situations warrant an adjustment. It is obvious that none of the three clauses of Explanation (a), defining an incorrect claim apparent from any information in the return, gets magnetized to the facts of the present case.

10. Now we turn to clause (iv) of section 143(1)(a) which provides for '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'. The words "or increase in income" in the above provision were inserted by the Finance Act, 2021 w.e.f. 01-04-2021. As such, this part of the provision cannot be considered for application during the years under consideration, which are anterior to the amendment. We are left with ascertaining if the disallowance made u/s 36(1)(va) in the Intimation under section 143(1)(a) can be construed as a 'disallowance

of expenditure indicated in the audit report not taken into account in computing the total income in the return'. Point 20(b) of the audit report in Form 3CA has columns – Serial number; Nature of fund; Sum received from employees; Due date for payment; The actual amount paid; and The actual date of payment to the concerned authorities. A copy of audit report in one of the cases under consideration, namely, S.M. Auto Stamping Pvt. Ltd. (ITA No.521/PUN/2022) has been placed on record. Point 20(b) of the audit report gives the 'Sum received from employees' at Rs.21,800/-. 'Due date for payment' has been reported as 15-07-2017 and 'The actual date of payment to the concerned authorities' has been given as 20-07-2017. Similar is the position regarding other items disallowed u/s.36(1)(va) having 'The actual date of payment' after the 'Due date for payment'. Thus, it is manifest that the audit report clearly points out that as against the due date of payment of the employees' share in the relevant fund on 15.7.2017 for deduction u/s 36(1)(va), the actual payment is delayed and deposited on 20.7.2017. The legislature, for the disallowance under sub-clause (iv) of section 143(1)(a), has used the expression 'indicated in the audit report'. The word 'indicated' is wider in amplitude than the word 'reported', which envelopes both the direct and indirect reporting. Even if there is some indication of disallowance in the audit report, which is short of direct reporting of the disallowance, the case gets covered within the purview of the provision warranting the disallowance. However, the indication must be clear and not vague. If the indication in the audit report gives a clear picture of the violation of a provision, there can be no escape from disallowance. Turning to the facts of the case, it is clear from the mandate of section 36(1)(va) that the employees' share in the relevant funds must be deposited before the due date under the respective Acts. If the audit report mentions the due date of payment and also the actual date of payment with specific reference in column no. 20(b) having heading: 'Details of contributions received from employees for various funds as referred to in section 36(1)(va)', it is an apparent indication of the disallowance of expenditure u/s 36(1)(va) in the audit report in a case where the actual date of payment is beyond the due date. Though the audit report clearly indicated that there was a delay in the deposit of the employees' share in the relevant funds, which was in contravention of the prescription of u/s.36(1)(va), the assessee chose not to offer the disallowance in computing the total income in the return, which rightly called for the disallowance in terms of section 143(1)(a) of the Act.

11. The ld. AR vehemently argued that it was a case of "increase in income" which has been enshrined in clause (iv) of section 143(1)(a) w.e.f. 01-04-2021 and hence cannot be take note of for the year under consideration. In our considered opinion, the contention is ill-founded. We have noted above that clause (iv) of section 143(1)(a) talks of two different limbs, namely, 'disallowance of expenditure' and 'increase in income' by means of indication in the audit report. Both the limbs are independent of each other. The indication in the audit report for

'Increase of income' should be qua some item of income and not increase of income because of the 'disallowance of expenditure'. Every disallowance of expenditure leads to increase of income. If the contention of the ld. AR is taken to a logical conclusion, then the second expression 'or increase in income' inserted by the Finance Act, 2021 would be rendered a redundant piece of legislation. It is trite interpretation has to be given to the statutory provisions in such a manner that no part of the Act is rendered nugatory. Distinction in the scope of the two aspects can be understood with the help of the present context only. We have noted that point no. 20(b) of the audit report, dealing with section 36(1)(va), has columns, inter alia, (i) 'Sum received from employees'; (ii) 'Due date for payment'; and (iii) 'The actual date of payment to the concerned authorities'. The column (i) having details of the amounts received from employees indicates about the 'increase in income' as per sub-clause (iv) of section 143(1)(a) if the assessee does not take this sum in computing total income. The columns (ii) and (iii) having details of due date for payment and the actual date of payment indicate about 'disallowance of expenditure' if the assessee does not make suo motu disallowance in computing total income. Right now, there is no case of 'increase in income' because the AO did not make adjustment for non-offering of income of the 'Sums received from employees', but made the adjustment for 'disallowance of expenditure' with the remarks that : 'Amounts debited to the profit and loss account, to the extent disallowance under section 36 due to non-fulfillment of conditions specified in relevant clauses'. Thus, it is evident that it is a case of 'disallowance of expenditure' and not 'increase of income'. Further, the entire challenge by the assessee throughout has been to the disallowance of expenditure made by the AO. It set up a case before the authorities below, including the ld. CIT(A), taking shelter of section 43B of the Act by arguing that the disallowance cannot be made because such payment was made before the due date u/s.139(1) of the Act. As such, the contention of adjustment u/s 143(1)(a)(iv) due to 'increase in income' is jettisoned.

12. Another argument point was put forth on behalf of the assessee that the assessee did not claim any deduction in the Profit and loss account of the amount under consideration and hence no disallowance should have been made. This argument is again bereft of force. The assessee claimed deduction for salary on gross basis, inclusive of the employees' share to the relevant funds. To put it simply, if gross salary is of Rs.100, out of which a sum of Rs.10 has been deducted as contribution to relevant fund, then the debit of Rs.100 in the Profit and loss account means deduction has been claimed for Rs.10 as well. Ex consequenti, if deduction of Rs.10 is not allowed u/s 36(1)(va) for late deposit of the amount before the due date under the respective Act, it would mean that the claim of Rs.10 included in Rs.100 is not allowed deduction.

13. The ld. AR referred to section 5 of the Payment of Wages Act, 1936, to contend that deduction made from an employee's salary for the month of October should suffer disallowance only if it is not paid by

15th December. This argument was premised on the language of section 5, which says that the wages of every person employed upon or in any railway, factory or industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before expiry of the seventh day, after the last day of the wage-period in respect of which the wages are payable. It was contended that salary for the month of October, 2022 will be paid before the 7th of November, which will result into income of the employer only at the time of payment, making the due date of payment into relevant fund as on or before 15th December and not 15th November.

14. There is no merit in the contention of linking the date of deposit of the employees' share in the relevant funds with the date of payment of wages. Section 5 of the Payment of Wages Act simply deals with the 'Time of payment of wages'. It does not stipulate any time limit for deposit of the employees share in the relevant funds. For that purpose, the relevant Acts give a window for depositing the contribution within 15 days of the last month's salary. Thus, contribution to the relevant fund towards the salary for the month of October-ending should be deposited before 15th November.

15. In view of the foregoing discussion, we are satisfied that the ld. CIT(A) was justified in sustaining the adjustment u/s 143(1)(a) by means of disallowance made in these cases for late deposit of employees' share to the relevant funds beyond the date prescribed under the respective Acts."

7. We are in agreement with above decision of this Tribunal (supra). The ratio of above decision of this Tribunal (supra) is squarely applicable to the facts of the present case. Therefore, we do not find any merit in the grounds of appeal filed by the assessee.

8. In the result, the appeal filed by the assessee in ITA No.109/PUN/2022 stands dismissed.

ITA Nos.110, 134, 186, 189, 199, 200, 219, 234, 235, 290/PUN/2022, A.Y. 2017-18, 2018-19, 2019-20 respectively :

9. Since the facts and issues involved in remaining ten appeals are identical, therefore, our decision in ITA No.109/PUN/2022 for A.Y. 2018-19 shall apply *mutatis mutandis* to the remaining appeals

of the assessee in ITA Nos.110, 134, 186, 189, 199, 200, 219, 234, 235, 290/PUN/2022, A.Y. 2017-18, 2018-19, 2019-20 respectively. Accordingly, the appeals of the assessee in ITA Nos.110, 134, 186, 189, 199, 200, 219, 234, 235, 290/PUN/2022, A.Y. 2017-18, 2018-19, 2019-20 respectively stands dismissed.

10. To sum up, all the above eleven appeals filed by the different assesseees stands dismissed.

Order pronounced on this 29th day of November, 2022.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 29th November, 2022.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-NFAC, Delhi.
4. The Pr. CIT concerned.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.