IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU (SMC) "A" BENCH, BENGALURU

Before Shri Chandra Poojari, Accountant Member

ITA No. 1142/Bang/2022 (Assessment Year: 2019-20)		
Shri Subramanya Karthik 6/252, Sri Dahanalakshmi Enterprises, Paper Town Bhadravathi 577302 PAN – AUUPK7121J	vs	The Income Tax Officer Ward - 1 & TPS Shri Gurunarasimha Krupa 1 Stage, Vinobanagar Shimoga 577204
(Appellant)		(Respondent)

Assessee by:	Shri I. Dinesh, Advocate
Revenue by:	Shri Ganesh R. Ghale, Standing Counsel

Date of hearing:	18.01.2023
Date of pronouncement:	18.01.2023

O R D E R

Per: Chandra Poojari, A.M.

This appeal by the assessee is directed against the order of the CIT(A)/NFAC, Delhi dated 26.10.2022 for the assessment year 2019-20.

2. The assessee is in appeal before us with regard to the disallowance of Rs. 16,26,688/- towards employees' contribution to PF and ESI under Section 36(1)(va) of the the Income Tax Act, 1961 (the Act) by way of the following grounds: -

> *"1. The order of the CIT(A) is wrong, untenable in law, opposed to facts and is liable to set aside.*
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> *2. The CIT(A) failed to consider the fact that the proceedings u/s.143(1)(a) permits only prima-facie adjustments and a debatable issue falls outside the ambit of adjustment contemplated u/s.143(1).*
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> *3. The CIT(A) merely placed reliance on the decision of the Hon'ble Supreme Court in* ***Chekamte Services (P) Ltd*** *to hold that the belated employees contribution to PF & ESI has to be*

disallowed without adverting to specific grounds raised before him pertaining to the assumption of jurisdiction to make such adjustments u/s.143(1)(a).

4. *The CIT(A) failed to appreciate the fact till 12.10.2022 (the day on which the Hon'ble Supreme court passed the order) the disallowance of belated employees contribution was a debatable issue and such adjustments cannot be made u/s.143(1)(a).*
5. *The CIT(A) failed to consider the fact that the day on which the impugned intimation was passed (i.e., 11.10.2021) there were divergent views taken by different high courts leaving such issue to be debatable one arid therefore falls outside the scope of adjustments u/s.143(1)(a).*
6. *The CIT(A) failed to appreciate the fact that the enabling provision having been given effect only from 01.04.2021 by way of amendment of sub-clause (iv) of Sec.143(1). Therefore, adjustment prior to A.Y.2020-21 on account of increase in income is not in accordance with law."*

3. The learned A.R. submitted as follows: -

3.1 Appellant filed its ROI on 07.11.2020. It was processed u/s.143(1) and the AO, CPC disallowed a sum of Rs.16,26,688/- vide intimation u/s.143(1) dated 11.01.2021. Aggrieved, an appeal was filed before CIT(A) wherein specific grounds on validity of 143(1) and also on merits was raised. The Ld. CIT(A) relying on the decision of the Hon'ble Supreme Court in the case of **Checkmate Services (P) Ltd** dismissed the appeal without adverting to the adjustments which fall outside the scope of Sec.143(1) of the IT Act.

3.2 It is submitted that the AO, CPC vide his standard communication for proposal dated 23.11.2020 proposed to disallow the belated contribution of employee's towards PF & ESI on the following counts;

(a) Sub-clause (i) of Sec.143(1)(a) on account of arithmetical error;

(b) Sub-clause (ii) of Sec.143(1)(a) on account of incorrect claim which is apparent from any information in the return;

(c) Sub-clause (iv) of Sec.143(1)(a) on account of disallowance of expenditure indicated in the audit report but not taken into account in computing total income;

3.3 It is submitted that the scope of section 143(1) is very limited and narrow:

(a) Adjustment under sub-clause (i) of Sec.143(1)(a) is unambiguous and clearly states that such an adjustment can only be made on account of arithmetical error; which is not the case on hand. Therefore, the proposal to disallow the aforesaid sum u/s.143(1)(a)(i) doesn't arise.

(b) Sec.143(1)(a)(ii) reads as under;

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

What amounts to incorrect claim is also inserted vide Explanation to Sec.143(1) which is 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;

(b) the acknowledgement of the return shall be deemed to be the intimation in a case where no sum is payable by, or refundable to, the assessee under clause (c), and where no adjustment has been made under clause (a).

3.4 The section restricts the AO, CPC to only deal with the claims that are **apparent from any information in the return.** The word "apparent" means something which appears to be so ex-facie and is incapable of argument or debate. Meaning, the debatable point of law or fact cannot be corrected by way of processing u/s.143(1). In the instant case, disallowance of deduction u/s.36(1)(v)(a) being belated remittance of employee's PF & ESI has been subject to debate and there are cleavage of opinion by the Jurisdictional High Court and other High Courts. It is a different matter, that the Hontle Supreme Court in **Checkmate Services (P) Ltd in Civil Appeal No.2833 of 2016** has

put a quietus to this issue on 12.10.2022. On the date (21.01.2021) of processing of the ROI u/s.143(1) the said claim of expenditure was a debatable issue which cannot be disallowed u/s.143(1). **Secondly, the ROI doesn't contain any information relating belated remittance of PF & ESI.** Therefore, the disallowance on this count doesn't stand in the eyes of law.

3.5 It is also to be seen that sub-clause (iv) of Sec. 143(1)(a) has been amended vide Finance Act, 2021 w.e.f.01.04.2021 by insertion of the expression **"or increase in income".**

(a) 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:

[sub-clause (iv) of Sec. 143(1)(a)]

Only after the amendment the AO, CPC is vested with the jurisdiction to make adjustment on account of increase in income indicated in the audit report but not taken into account in computing the total income.

3.6 The definition of income as per Sec.2(24)(x) includes any sum received from the employees as contributions to PF/ESI. Therefore, the receipt of such sum in the form of contribution from employees towards PF/ESI is treated as **income** of the Appellant employer. The enabling provision vide sub-clause (iv) came into force only w.e.f.01.04.2021 and as such the power to make such adjustment by AO, CPC is vested only w.e.f.01.04.2021. Therefore, adjustment prior to A.Y.2020-21 on account of increase in income is not in accordance with law.

3.7 Moreover, the tax audit report is not a certificate and therefore, the findings in the audit report are not conclusive. From A.Y.2020-21, the law entails the Assessee to furnish audit report one month prior to the due date of filing of ROI u/s.139(1). All the details in the audit report need not necessarily be accepted by the Assessee while filing his ROI. Therefore, the disallowance on this count doesn't stand in the eyes of law.

3.8 It is pertinent to note that the above Explanation to Sec.143(1) specifically states that the incorrect claim ought to be based on an **entry in the return of income.** Rule 12 of the IT Rules states that ROI shall not be accompanied by any statement showing computation of tax, though it calls for filing Audit Report u/s.44AB electronically. Moreover, the definition of "Specified date" in Explanation to Sec.44AB clearly states that the Audit report has to be filed one month prior to the due date of filing of ROI [w.e.f.01.04.2020]. Therefore, ROI is a separate document which may or may not expressly reflect what is in the audit report.

3.9 Reliance is placed on the following decisions;

(a) **Mintri Tea Co (P) Ltd Vs CIT 223 CTR 241 [2009] (Cal) —** AO couldn't make a disallowance in respect of Provident fund contribution in proceedings u/s.143(1)(a) or 154.

(a) **Kalpesh synthetics (P) Ltd Vs DCIT [2022] 137 taxmann.com 475 (Mum)** — Information provided in tax audit report would cease to be relevant and disallowance u/s.143(1)(a)(iv) is to be deleted in toto.

(c) **Lanjani Co-operative Agri Society Ltd [2022] 218 TR 14 (Chd) —** The enabling provision to invoke sec.143(1)(a)(v) came into force only w.e.f.01.04.2021 and the AO, CPC doesn't have power during AY.2018-19 to invoke sub-clause(v) in the absence of enabling provision.

(d) **Bajaj Auto Finance Ltd Vs CIT [2018] 93 taxmann.com 63 (Bom)** —Provision for bad debts u/s.36(1)(iii) being a debatable issue cannot be disallowed u/s.143(1)(a) of the IT Act.

10. It is further submitted that the Cuttack Bench of ITAT in the case of **Nirakar Security & Consultancy Services (P) Ltd in ITA No.98/2022** remanded the matter to the file of the AO to adjudicate the grounds of Assessee relating to claim of the said employee's contribution as business expenditure u/s.37. This decision was rendered after considering the decision of the Hon'ble Supreme Court in **Checkmate Services** which clearly demonstrates the fact that even after the Supreme Court decision supra, the said deduction remains debatable.

11. In view of the above, it is prayed that the adjustment viz., disallowance of deduction u/s.36(1)(v)(a) being beyond the scope of 143(1) be deleted in toto.

4. The learned D.R. relied on the orders of the lower authorities.

5. I have heard the rival contentions and perused the material on record. Similar issue came up for consideration before this Tribunal in the case of Itek Packz in ITA No. 995/Bang/2022 & 1079/Bang/2022 vide order dated 28.12.2022 the Tribunal held as under: -

> "5. I heard the rival submissions an perused the materials available on record. The main contention of ld. AR is that the AO precluded from making any additions or disallowance u/s 143(1) of the Act other than the amount disclosed by assessee in audit report filed u/s 44AB of the Act. According to him, the assessee has disclosed these details in audit report filed u/s 44AB of the Act along with return of income as Annexure – G as answers to question No.26 u/s 44AB of the Act report showing the amount not paid on or before the due date of respective Act was at Rs.69,833/-, which was duly disallowed by the assessee itself. Hence, no further disallowance could be made.
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> 5.1. On the contrary, ld. DR brought to my notice that the Annexure E which is relating to the answer to question No.20(b) in tax audit report showing the details of contribution received from employees for various funds as referred tin section 36(1)(va) of the Act that amount belatedly paid at Rs.13,48,410/- same was disallowed by AO u/s 143(1) of the Act and to be confirmed. In my opinion, the disallowance made by the AO is to be restricted to the expenditure of ESI & PF not paid within the due date of relevant provisions of the Act. The assessee has been listed these details in the Annexure E to tax audit report filed u/s 44AB of the Act along with return of income. Being so, I find no merit in the arguments of assessee's counsel that AO cannot make disallowance u/s 143(1) of the Act with regard to belated payment of employees' ESI & PF contribution within due date of respective Act and as held by the coordinate bench in the case of Cemetile Industries cited (supra) which is reproduced as under:
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>> 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 ld. AR') and Sh. Suhas Kulkarni, the ld. 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."

5.2 The coordinate bench of Bangalore in the case of Automac Diesels cited (supra) has decided the issue as follows:

> "On the rejoinder submitted by the ld.DR, the adjustments u/s 143(1)(a) of the Act can be made and in the section, it is very clear that which type of adjustments can he made. He also relied on judgment of the Hon'ble Madras High Court in the case of AA520 Veerappampalayam Primary Agricultural Cooperative Credit Society Ltd. Vs. Deputy Commissioner of Income-tax reported in (2022) 138 taxmann.com 571, wherein he also relied on the decision of the coordinate bench of the Tribunal in the case of M/s. IV Sanctum vs Asstt. Director of Income Tax CPC Bengaluru, in ITA No. 98.6/Bang/2022 vide order dated 24.11.22 for the AY 2O19-20."

5.3 This was squarely decided by the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT reported in 143 Taxmann.com178.

5.4 Further, the Hon'ble Madras High Court in the case of AA 520 Veerappampalayam Primary Agricultural Cooperative Credit Society Ltd. Vs. Deputy Commissioner of Income-tax reported in (2022) 138 taxmann.com 571 wherein held as under:

> _ In this case the assessee filed his return of income belatedly and return was processed under Section 143(1)(a) of the Act by observing that "in schedule Chapter VI-A, under Part-C deduction in respect of certain incomes, in SL.No. 2.1 deduction is claimed under Section 80P however return is not filed within due date". Against this observation the assessee

filed writ petition before the Hon'ble Madras High Court and the writ petition has been dismissed by observing as under: -

"7. The scope of an 'intimation' under section 143(1)(a) of the Act, extends to the making of adjustments based upon errors apparent from the return of income and patent from the record, Thus to say that the scope of 'incorrect claim' should be circumscribed and restricted by the Explanation which employs the term 'entry' would, in my view, not be correct and the provision must be given full and unfettered play. The explanation cannot curtail or restrict the main thrust or scope of the provision and due weightage as well as meaning has to be attributed to the purposes of section 143(1)(a) of the Act.

5.5 Further, the coordinate bench of the Tribunal in MP No.117/Bang/2022 dated 30.11.2022 in the case of ACIT Vs. M/s. Sunrise Freight Movers Pvt. Ltd. wherein held as under:

"5.6 Coming to the merit of the issues raised by the revenue in its miscellaneous petition, we not that Hon'ble Supreme Court in the case of CIT Vs. Saurashtra Kutch Stock Exchange case 219 CTR (SC) 90 has held that nonconsideration of the decision of the jurisdictional high court/Supreme Court constitutes mistake apparent from record and is rectifiable within the meaning of section 254(2) of the Act. In Honda Siel Power Products Ltd. v. CIT 295 ITR 466, the Hon'ble Supreme Court explained the scope of rectification powers u/s/254(2) of the Act, as follows:

"Scope of the Power of Rectification

12. As stated above, in this case we are concerned with the application under section 254(2) of the 1961 Act. As stated above, the expression "rectification of mistake from the record" occurs in section 154. It also finds place in section 254(2). The purpose behind enactment of section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal. In the present case, the Tribunal in its Order dated 10.9.2003 allowing the Rectification Application has given a finding that Samtel Color Ltd. (supra) was cited before it by the assessee but through oversight it had missed out the said judgment while dismissing the appeal filed by the assessee on the question of admissibility/allowability of the claim of the assessee for enhanced depreciation under section 43A. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record.

13. "Rule of precedent" is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254(2) of the Income-tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the coordinate bench was placed before

the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. The Tribunal has acknowledged its mistake, it has accordingly rectified its order. In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. We are simply proceeding on the basis that if prejudice had resulted to the party, which prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake, which had been done in the present case."

5.7. Article 141 of the Constitution of India provides that the law declared by Hon'ble Supreme Court shall be binding on all courts within the territory of India. The law laid down by Supreme Court operates retrospectively and is deemed to the law as it has always been unless, the Supreme Court, says that its ruling will only operate prospectively.

5.8 In the light of the law as explained above, there is a mistake apparent on record in view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt.Ltd. (supra) though rendered subsequent to the order passed by the Tribunal and has to be rectified by holding that the disallowance made by the revenue authorities u/s.36(1)(va) of the Act was justified. Consequently, the appeal by the Assessee will stand dismissed. The order of the Tribunal will stand modified /rectified accordingly."

5.6 Being so, in my opinion, the disallowance could be made u/s 143(1) of the Act, which has been shown in the audit report filed u/s 44 AB of the Act as not paid in respect of employees' share of contribution of PF/ESI within due date stipulated in the respective Act and there is no error committed by the AO in making such disallowance. Accordingly, we direct the AO to make such disallowance disclosed by assessee in his report filed u/s 44AB of the Act column no.20(b) as well as referred in Annexure E and 26(A) – Annexure G, if the assessee has made no suo motu disallowance by itself. Accordingly, I direct the AO to limit the disallowance to that extent. Ordered accordingly.

ITA No.1079/Bang/2022 (AY 2019-20):

6. On similar lines as adjudicated in the case of ITA No.995/Bang/2022 for the AY 2020-21, this appeal is also remitted back to the file of AO with direction to limit the disallowance to that extent. Ordered accordingly.

7. In the result, both the appeals filed by different assessees are partly allowed for statistical purposes."

6. As discussed above, the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT in Civil Appeal No. 2833/2016 vide judgement dated 12th October, 2022 decided the issue on allowability/ treatment of 'delayed' payment of employee's contribution to PF/ESI in hands of the assessee under the provisions of the Income Act and held that Section 36(1)(va) and Section 43B(b) operate on totally different equilibriums and

have different parameters for due dates, i.e. employees' contribution is linked to payment before the due dates specified in the respective Acts and employer's contribution is linked to the payment before the prescribed due date for filing of return of income under Section 139(1) of the Act. The result of any failure to pay within the prescribed dates also leads to different results. In case of employees' contribution, any failure to pay within the prescribed dates under the respective PF Act of Scheme, will result in negating the employer's claim for deduction permanently forever under Section 36(1)(va) of the Act. On the other hand, delay in payment of employer's contribution is visited with deferment of deduction on payment basis under Section 43B of the Act and is therefore not lost totally. Therefore, as per the above decision, the additions made by Revenue authorities were fully justified.

7. It is also noted that the Hon'ble ITAT, Mumbai Bench, in the case of M/s. P R Packaging Services Vs. ACIT in ITA No.2376/Mum/2022, for Assessment Year 2019-20, order dated 07.12.2022 has taken the view that while processing return under section 143(1) of the Income Tax Act, 1961 (hereinafter called 'the Act'), the CPC cannot disallow employees' contribution to PF and ESI which are paid beyond the due dates for payment under the relevant laws relating to ESI and PF contribution while processing return under section 143(1) of the Act. In this regard, we find that the Hon'ble ITAT had taken the aforesaid view on the basis that the CPC has made the addition based on the provisions of section 143(1)(a)(iv) of the Act which lays down that :

> *"disallowance of expenditure (or increase in income) indicated in the audited report but not taken into account in computing the total income in the return."*

The Tribunal in coming the aforesaid conclusion placed reliance on another Coordinate Bench in the case of Kalpesh Synthetics Pvt Ltd Vs. DCIT 195 ITD 142 (Mumbai) wherein the ITAT, Mumbai Bench took the view that

where CPC while processing return u/s.143(1)(a) cannot disallow Employee's contributions (PF/ESI) claimed as deduction by an assessee-employer in respect of employee's contribution towards PF by invoking section 143(1)(iv)(a). The Tribunal held that the said disallowance was based on observations made by tax auditor in audit report which stated that payments of employee contribution were made by assessee after due date specified under respective acts as judicial decisions have taken the view that said disallowance would not come into play when payment was made well before due date of filing income tax return under section 139(1) and therefore information provided in tax audit report would cease to be relevant and no disallowance can be made during assessment proceedings under section 143(1)(iv)(a).

8. The decision was rendered by the ITAT Mumbai Bench in the case of Kalpesh Synthetics (P) Ltd. (supra) on 27.4.2022 prior to the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd., (supra) and therefore not applicable. The decision rendered by ITAT Mumbai Bench in the case of M/s. P. R. Packaging Services, follows the decision in the case of Kalpesh Synthetics (supra). In paragraph 5 of the order, a reference has been made to the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd., (supra) but has been distinguished on the ground that the said decision was rendered in the context of assessment framed u/s.143(3) of the Act and therefore not relevant for processing returns u/s.143(1) of the Act. If the basis of decision of ITAT Mumbai in the case of Kalpesh Synthetics (supra) is that clause (iv) of Sec.143(1)(a) cannot be invoked to disallow delayed payment of employee's contribution to ESI and PF made by the assessee beyond the due date as prescribed under the relevant law relating to ESI and PF for deposit of employees share of contribution, by invoking the provisions of section 36(1)(va) of the Act, if the said contributions are paid within the due date for filing return of income u/s.139(1) of the Act, owing to decision of High Court in favour of the assessee and if those decisions of High Courts stand overruled by

decision of Supreme Court in the case of Checkmate Services Pvt. Ltd., (supra) with retrospective effect, then the very basis of the decision rendered in the case of Kalpesh Synthetics(supra) no longer survives. Alternatively, the adjustment can be justified on the basis of the provisions of section 143(1)(a)(ii) of the Act which lays down that adjustment can be made to the total income in the event of "an incorrect claim, if such incorrect claim is apparent from any information in the return". The form of return contains clause with regard to amounts disallowable u/s.36 of the Act. The aforesaid view of ours is also supported by a decision rendered by the ITAT, Bengaluru Bench in the case Itek Packz Vs. ITO ITA No.995/Bang/2022, order dated 28.12.2022. In that decision, the Tribunal, after considering the decision rendered in the case of P R Packaging (supra) held following the decision of Cemetile Industries Vs ITO in ITA No.693/Pun/2022, order dated 23.11.2022 that disallowance can be made under section 143(1)(a) of the Act of employees' share of ESI and PF paid beyond the due date under the relevant law relating to PF contribution and ESI contribution. The Tribunal has placed reliance on the decision of the Hon'ble Madras High Court in the case of Veerappampalayam Primary Agricultural Cooperative Credit Society Vs. DCIT (2022) 138 taxmann.com 571. The Hon'ble Madras High Court took the view that while processing a return under section 143(1)(a) of the Act, apparent incorrect claim can be disallowed. We are of the view that the decisions cited by the learned Counsel for the assessee proceed on the assumption that the disallowance of employees' share of PF and ESI paid beyond the due dates under relevant law has been made only under section 143(1)(a)(iv) of the Act, while in the intimation under section 143(1)(a) of the Act, no such basis has been given and therefore the disallowance can be justified even in terms of section 143(1)(a)(ii) of the Act.

9. Further the decision of the Cuttack Bench of ITAT in the case of Nirkar Security & Consultancy Services (P) Ltd. in ITA No. 98/2022 dated 17.10.2022 have no bearing on the present issue where the Tribunal observed

that as per the assessee in certain months the employee's contribution to PF & ESI has been paid within the grace period provided in the respective Acts and also in certain cases salary has been paid belatedly, consequently, there was a delay in payment of employees' contribution to PF & ESI. Hence, the issue was restored by the Tribunal to the file of the AO for re-examination. Further, with regard to the claim of assessee that delayed contribution of PF & ESI in respect of employees' contribution to be allowed as deduction under Section 27(1) of the Act, the Tribunal did not express any view on this issue. Hence, it can be safely said that the Tribunal has not laid down any ratio decendi on the issue before me in its order. Being so, the order in case of Nirkar Security & Consultancy Services (P) Ltd. have no application to the facts of the present case. Accordingly the issue in dispute is decided against the assessee and in favour of Department.01

9. In the result, the appeal filed by the assessee is dismissed.

Dictated and pronounced in the open Court on 18th January, 2023.

Sd/-
(Chandra Poojari)
Accountant Member

Bengaluru, Dated: 18th January, 2023

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -NFAC, Delhi*
4. *The CIT -*
5. *The DR, ITAT, Bengaluru*
6. *Guard File*

By Order

//True Copy//

Assistant Registrar
ITAT, Bengaluru

n.p.