IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.1016/Bang/2022
Assessment year : 2018-19

Shri P. Harshavardhana Reddy, No.401/4, 14th Main, Venkateshwara Layout, Madiwala, Bengaluru – 560 068. **PAN: AEBPR 8378D**	Vs.	The Assistant Director of Income Tax, CPC, Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri, S.V. Ravishankar, Advocate
Respondent by	:	Smt. Priyadarshini Baseganni, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	12.01.2023
Date of Pronouncement	:	17.01.2023

O R D E R

Per Padmavathy S., Accountant Member

This appeal by the assessee is against the order of CIT(Appeals), National Faceless Assessment Centre, Delhi [NFAC], Delhi dated 26.11.2021 passed for the assessment year 2018-19.

2. There is a delay of 144 days in filing this appeal before the Tribunal, after excluding the 90 days period of limitation on account of COVID-19 as per the Supreme Court decision in MA No.665 of 2021 in Suo Moto WP(C) No.3 of 2020 dated 10.1.2022. The assessee has

filed an application for condonation of delay along with affidavit stating that the first appellate orders for AYs 2018-19 and 2019-20 were received and the assessee approached his counsel for the next course of action and accordingly appeal for AY 2019-20 was filed, but inadvertently the appellate for AY 2018-19 was not discussed. The assessee was under a bona fide impression that appeals for both the years were filed before the Tribunal. This came to light during the further course of discussion of the assessee with his counsel after which the appeal for AY 2018-19 was filed with application for condonation of delay. In the light of the decision of the Supreme Court in the case of *Mst. Katiji and Ors. [1987] 167 ITR471 (SC)* and other decisions relied on by the ld. AR, it is prayed that delay in filing the appeal may be condoned.

3. Having heard both the parties and perused the material on record, we are of the view that there is a reasonable and sufficient cause for the delay in filing the appeal before the Tribunal and therefore following the Hon'ble Supreme Court decision in the case of *Mst. Katiji and Ors. (supra)*, we condone the delay of 144 days in filing the appeal and admit the appeal for adjudication.

4. The assessee is an individual and filed return of income on 6.10.2018 for the impugned assessment year. Though various grounds are raised in this appeal, the only issue pertains to disallowance of belated payment of Rs.1,27,31,281 towards Provident Fund and ESI.

5. The ld. AR submitted that the disallowance made by the AO invoking provisions u/s 143(1) of the Act is without jurisdiction. The CIT(Appeals) upheld the disallowance without appreciating that Explanation 2 to section 36(va) and Explanation 5 to section 43B of the Act inserted by the Finance Act, 2021 is prospective in nature and same is applicable from the AY 2021-22 onwards and not applicable to the impugned AY 2018-19. The ld. AR submitted that the decision rendered by the Apex Court in the case of *Checkmate Services Pvt. Ltd. v. CIT, 143 taxmann.com 178 (SC)* has not appreciated the amendment of section 36(1)(va) nor a reference is made to the amendment where the amendment was prospective from AY 2021-22 onwards. The ld. AR further submitted that the impugned disallowance u/s. 143(1) while processing the return is beyond the scope of the Act. Under clause (ii) an incorrect claim apparent from the return alone could be disallowed and there is no instance of an incorrect claim in the return and thus clause (ii) cannot be applied to make a disallowance. Insofar as clause (iv) of section 143(1) is concerned, disallowance of any expenditure indicated in the audit report shall be permissible. The ld. AR placed reliance on the decision of the Kalpesh Synthetics Pvt. Ltd. v. DCIT in ITA No.1785/Mum/2021 dated 27.4.2022 and *P.R. Packaging Service v. ACIT in ITA No.2376/Mum/2022 dated 7.12.2022* rendered after the decision of the Apex Court in *Checkmate Services Pvt. Ltd. (supra)*.

6. The ld. DR relied upon the orders of the lower authorities.

7. We have considered the rival submissions and perused the material on record. We find that this issue is covered against the assessee by the decision of Supreme Court in the case of *Checkmate Services [2022] 143 taxmann.com 178 (SC)*. The relevant extract of the decision is as given below –

> "52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to

be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of

these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed."

8. In view of the above decision of the Hon'ble Supreme Court, we hold that the employees contribution to PF should be remitted before the due date as per explanation to section 36(1)(va) i.e., on or before the due date under the relevant employee welfare legislation like PF Act., for the same to be otherwise allowable u/s.43B.

9. The ld AR submitted that the Hon'ble ITAT, Mumbai Bench, in the case of M/s. P R Packaging Services (supra) 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."

10. The Tribunal in coming the aforesaid conclusion placed reliance on another Co-ordinate 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 whereas 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).

11. On the aforesaid argument, 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. 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. However when 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.

12. In the result, the appeal of the assessee is dismissed.

Pronounced in the open court on this 17th day of January, 2023.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 17th January, 2023.

/Desai S Murthy /

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.