IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "E": DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
And
SHRI NARENDER KUMAR CHOUDHARY, JUDICIAL MEMBER

ITA.No.1188/Del./2022
Assessment Year: 2018-19

Naresh Kumar Chawla, 2272, Sector-9, Faridabad, Haryana 121006 **PAN : AAUPC9820C**	vs.	The ACIT, Circle 2(1) Faridabad
(Appellant)		(Respondent)

For Assessee :	Shri Anuj Tiwari, CA
For Revenue :	Shri Jeetender Chand, Sr. DR

Date of Hearing :	14.12.2022
Date of Pronouncement :	09.02.2023

ORDER

PER ANIL CHATURVEDI, A.M.

This appeal by assessee has been directed against the order of the NFAC, Delhi, dated 01.04.2022, relating to the A.Y. 2018-19.

2. The relevant facts as culled out from the material on record are as under :

2.1. The assessee is an individual and proprietor of SAC Enterprises engaged in the business of supply of manpower. Assessee electronically filed his return of income

for A.Y. 2018-19 on 20.09.2018 declaring total income of Rs.84,87,910/-. CPC issued intimation u/s. 143(1) on 08.01.2020 vide order no. CPC/1819/A3/1919136541 and computed the total business of income of Rs. 1,30,76,760/- *inter alia* by disallowing of Rs. 45,88,351/- u/s. 36 (1)(va) on account of delayed deposit of employees contribution at PF & ESIC.

2.2. Aggrieved by the intimation issued u/s. 143(1), assessee filed appeal. The appeal was decided by NFAC vide order dated 01.04.2020 wherein the appeal was dismissed.

3. Aggrieved by the order passed by the NAFC, assessee is now in appeal before the Tribunal by raising the following grounds :

> *1. In view of the facts and circumstances of the case, the order dated 01/04/2022 passed by the National Faceless Appeal Centre, Delhi ("NFAC/CIT(A)") is erroneous in confirming the order passed by Asst. Director of Income Tax, Centralized Processing Centre ("CPC"/NFAC under Section 143(1) of the Income Tax*

Act, 1961 ("the Act"as the disallowance made therein is illegal, bad in law, without jurisdiction and void ab-initio. The disallowance made is erroneous, unjustified and illegal.

2. In view of the facts and in the circumstances of the case, the CIT(A) has erred in confirming addition/disallowance of Rs. 45,88,351/- and assessing the total income of the Assessee at Rs. 1,30,76,260/- as against the returned income of Rs. 84,87,910/-.

3. In view of the facts and circumstances of the case, the CIT(A) has failed to consider that the addition has been made under Section 143(1) of the Act and is beyond the scope of the said section and as such the CPC/NFAC had no power/authority/jurisdiction to make the said addition u/s 143(1) of the Act.

4. In view of the facts and circumstances of the case and in law, the CIT(A) has failed to appreciate that no disallowance is called for where employee's share of contribution is paid before the due date of filing the

return under Section 139(1) of the Act. Therefore, the disallowance amounting to Rs. 45,88,351/- made on this account is illegal, bad in law and liable to be deleted.

5. In view of the facts and circumstances of the case CIT(A) has failed to consider that the CPC has erred in making disallowance of Rs. 45,88,351/- u/s 36(1)(va) of the Act on account of contributions received from employees for funds referred in Section 36(1)(va) of the Act.

6. That the CIT(A)/CPChas failed to appreciate that the Finance Act, 2021 amendment is prospective in nature and are applicable from AY 2021-22 only and thus has no application to the facts under consideration for this AY.

7. In view of the facts and circumstances of the case, the CIT(A)/CPC has failed to appreciate that in the absence of issuance of any notice under Section 143(1) before making such an addition, the addition is illegal and bad in law. The same is against principles of

natural justice and is in gross violation of the statutory mandate of Section 143(1). Hence, the addition is liable to be deleted.

8. That the CIT(A)/CPC has failed to consider the material placed and available on record and has failed to judicially interpret the same as the same do not justify the addition/ disallowance made.

9. The Assessee craves leave to add to, alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing appeal.

4. Before us, at the outset learned AR submitted that though the assessee has raised various grounds but the sole controversy is with respect to the disallowance made by A.O u/s. 36(1)(va) on account of delayed deposit of PF & ESIC dues.

5. During the course of assessment proceeding AO noticed that there was delay in depositing employee's contribution pertaining to PF & ESIC for various months.

AO was of the view that on account of delay in deposit of employees contribution to PF & ESIC, the amounts cannot be allowed as deduction. He therefore by invoking provision of 36(1)(va) r.w.s 2(24)(x), disallowed Rs. 45,88,351/-.

6. Aggrieved by the intimation passed u/s. 143(1), assessee carried the before NFAC who upheld the action of A.O.

7. Aggrieved by the order NFAC assessee is now before us.

8. Before us, learned AR reiterated the submissions made before NFAC and further placed reliance on the decision rendered by Cuttack Bench of Tribunal in the case of **BBG Metal Syndicate Pvt. Ltd vs. DCIT** order dated 17.11.2022.

9. Learned DR on the other hand supported the order of lower authorities and further submitted that the addition made by AO needs to be upheld in view of the recent decision of Hon'ble Hon'ble Supreme Court in the

case of **Checkmate Services Pvt. Ltd. and others vs. CIT & others (2022) 448 ITR 518 (SC).**

10. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the disallowance of delayed deposit of employee's contribution of PF & ESI. It is an undisputed fact that during the year under consideration there was delay on the part of the assessee in depositing employee's share of PF/ESIC with the respective authorities but however the same were deposited before the filing of return of income. We find that Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (supra) has held that the contribution by the employees to the relevant funds is the employer's income u/s 2(24)(x) of the Act and 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. Thus the deduction u/s 36(1)(va) of the Act 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. We find that identical issue arose before the Pune Bench of Tribunal in the case of **Cemetile Industries vs. ITO in ITA No.693/PUN/2022 and others**. The Co-ordinate Bench of Tribunal vide order dated 23.11.2022 has observed as under:

> *"3. We have heard ……. 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.

..... 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.

……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.

11. Before us, learned AR has placed reliance on the decision of Hon'ble Cuttack Bench in the case of **BBG Metal Syndicate Pvt. Ltd (supra).** We find that the co-ordinate Bench has by placing reliance on his decision of Hon'ble Apex Court in the case of Checkmate Services P. Ltd. (supra) has held that delayed payment in respect of employees contribution to PF & ESI to be not allowable. However on the issue of the claim of assessee of its allowability u/s. 37(1) of the Act, it has for the reasons noted in the order restored the issue to the file of AO. We are not in agreement with this views expressed therein on the issue of allowability deduction u/s. 37(1) of the Act in view of the fact there is a prohibition in the Act itself for deducting the amounts falling within the scope of 36(1)(va) if the conditions mentioned therein are not satisfied. Various Courts have held once a payment is of the nature expressly dealt with in the particular provisions of the statute but does not qualify for deduction, since it does not fulfill the conditions prescribed in that particular statutory provision, the said payment cannot be allowed to be deducted on the general principle of ascertaining the profits and gains of

business commercially. Reference can be made to the decision of Hon'ble Madras High Court in the case of **CIT vs. Tube Investments (I) Ltd. (1991) 129 ITR 75 (Mad), CIT vs. Carborundum Universal Ltd (1997) 110 ITR 621 (Mad).** We are therefore of the view that reliance placed by learned AR on the decision of BBG Metal Syndicate (supra) is misplaced on the facts of the present case and therefore not applicable to the present facts.

12. Considering the aforesaid, and in the absence of any contrary binding decision placed on record in support of the assessee, we find no reason to interfere with the order of NAFC and **thus the grounds of assessee are dismissed**.

13. **In the result, appeal of the assessee is dismissed.**

Order pronounced in the open court on 09.02.2023.

Sd/-	Sd/-
[N.K. CHOUDHARY]	[ANIL CHATURVEDI]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Delhi, Dated 09th February, 2023

NV/-

Copy to

1.	The appellant
2.	The respondent
3.	Ld. CIT(A) concerned
4.	CIT concerned
5.	DR ITAT "E" Bench, Delhi
6.	Guard File

//By Order//

Assistant Registrar, ITAT, Delhi Benches,
Delhi.