



2. The assessee has taken the following grounds of appeal:-

<i>Grounds of Appeal</i>		<i>Tax effect relating to each Ground of appeal (see note below)</i>
1.	<i>On the facts and in the circumstances of the case, the Hon'ble Commissioner of Income Tax (Appeals) has erred in law and on facts by disallowing payment of Rs. 2,02,462/- of employees contribution to Provident Fund. The payment to PF is an expense and not income in the hands of the appellant and the same was paid well in time i.e. much before the due date of filing of return under section 139(1).</i>	<i>Rs. 45,216/-</i>
2.	<i>On the facts and in the circumstances of the case, the Hon'ble Commissioner of Income Tax (Appeals) has erred in law and on facts by disallowing payment of Rs. 24,605 /-of employees contribution to ESI. The payment to Employees state insurance is an expense and not income in the hands of the appellant and the same was paid well in time i.e. much before the due date of filing of return under section 139(1).</i>	<i>Rs. 5,494/-</i>
3.	<i>The Hon'ble Commissioner of Income Tax (Appeals) has erred in law by not allowing the appellant a reasonable opportunity of being heard.</i>	<i>Legal Ground</i>
4.	<i>The Hon'ble Commissioner of Income Tax (Appeal) erred in not considering the fact the appellant has filed revised return which was duly accepted by the Ld. CPC Bengaluru and due refund was granted without any modification.</i>	<i>Legal Ground</i>
5.	<i>The appellant craves leave to make any addition, alteration, modification and/ or deletion in grounds of appeal arising out of this order.</i>	<i>General Ground</i>
<i>Total tax effect (see note below)</i>		<i>Rs. 50,710/-</i>

3. The brief facts of the case are that the assessee is a private limited company. The income tax return was electronically filed on 25-10-2019, showing total income of ₹ 11,86,250/-. Thereafter, CPC Bangalore processed the return and an intimation under section 143(1) of the Act was passed on 18-04-2020. The income was assessed at ₹ 14,13,310/- in the said intimation by making disallowance of claim of ₹ 2,27,067/- in respect of employee's contribution towards provident fund and ESIC which was paid beyond the period prescribed.

4. In appeal, Ld. CIT(Appeals) dismissed assessee's appeal holding that the Finance Act 2021 has clarified this aspect related to the operation of the section. The Ld. CIT(Appeals) made the following observations while dismissing the assessee's appeal:

*“6.9 In view of the above discussions and also keeping in view of the clarificatory amendments brought in by the Finance Act, 2021 vide*

*(a) Explanation 2 in section 36(1)(va)*

*(b) Explanation 5 in section 43B*

*Keeping in view of the above clarificatory explanations and following the ratio of the above decisions, the order of the Assessing Officer is upheld and ground No.1 of appeal of appellant is **dismissed.**”*

5. The assessee is in appeal before us against the order passed by Ld. CIT(Appeals). Before us, the counsel for the assessee submitted that firstly, in the audit report, the auditor has not made any specific observation regarding inadmissibility of the claim u/s 36(1)(va) of the Act which was required to be made by the auditors in the Tax Audit Report and the Auditors have only mentioned the “actual dates” and “due dates” of

remittance. Accordingly, in view of the Mumbai ITAT decisions in the case of PR Packaging in ITA number 2376/Mum/2022 and Kalpesh Synthetics 137 Taxmann.com 475 (Mumbai), this claim of deduction u/s 36(1)(va) of the Act cannot be disallowed u/s 143(1) of the Act (more specifically under sub-clause (d) to 143(1) of the Act). Secondly, the counsel argued that the issue at the time when the disallowance was made, issue was debatable and accordingly could not be the subject matter of disallowance under section 143(1) of the Act. In response, DR relied upon the observations made by the Ld. CIT(Appeals) in the appellate order.

6. We have heard the rival contentions and perused the material on record. Regarding the argument that the auditors did not specifically mention in the audit report regarding inadmissibility of claim with respect to contributions received from the employees for various funds as referred to in section 36(1)(va) of the Act, it would be useful to reproduce section 143(1) of the Act, which reads as under:

*Assessment.*

*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:—*

*(i) any arithmetical error in the return;*

- (ii) *an incorrect claim, if such incorrect claim is apparent from any information in the return;*
- (iii) *disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;*
- (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;*
- (v) *disallowance of deduction claimed under 69[section 10AA or under any of the provisions of Chapter VI-A under the heading "C.— Deductions in respect of certain incomes", if] the return is furnished beyond the due date specified under sub-section (1) of section 139; or*
- (vi) *addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:*

A perusal of section 143(1) of the Act shows that the words used are “(iv) disallowance of expenditure ...**indicated in the audit report**”

6.1 Therefore, there is no specific requirement under section 143(1) of the Act that the auditor has to make a specific observation regarding “admissibility/inadmissibility” with regard to any claim of expenditure and all that is required under section 143(1) of the Act is that disallowance of such expenditure should be “**indicated in the audit report**”. Now, on going through the specific clauses of the Tax Auditors Report in Form Number 3CD issued under section 44AB of the Act, we observe that serial number

20(b) of Form Number 3CD, which is specific to allowability of claim of deduction u/s 36(1)(va) of the Act, does not require the auditor to make any specific observation regarding admissibility of the amount under section 36(1)(va) of the Act. At the same time, when we observe several other parts of the tax audit report viz. serial number 21(b)-**amounts inadmissible** under section 40(a), serial number 21(c)-**amounts inadmissible** under section 40(b)/40(a)(ia) of the Act (ba), serial number 21(e)- the provision for payment of gratuity **not allowable** under section 40A(7), serial number 21(f)- any sum paid by the assessee as an employer **not allowable** under section 40A(9), serial number 21(h) amount of **deduction inadmissible** in terms of section 14A etc, there is a specific requirement that the auditor has to mention whether the expenditure is admissible/allowable or not. However, so far as section 36(1)(va) of the Act, the audit report does not require the auditor to make a specific observation regarding “admissibility/inadmissibility” of the above expenditure.

6.2 Therefore, once the auditor has mentioned the “actual” dates of ESI/PF remittance and the “due” dates of ESI/PF remittance by the assessee u/s 36(1)(va) of the Act at serial number 20(b) of the audit report, then, in our considered view, the requirement of section 143(1) of the Act viz. “disallowance of expenditure ....**indicated** in the tax audit report” stands satisfied and the Department is permitted to make disallowance in terms of section 143(1) of the Act.

6.3 With regards to the second argument of the counsel for the assessee that at the time when the disallowance was made, the issue was debatable,

we observe that the position on this issue has now been unambiguously clarified by the Hon'ble Supreme Court with respect to all assessment years prior to AY 2021-22 in the case of **Checkmate Services (P.) Ltd. [2022] 143 taxmann.com 178 (SC)** wherein the Supreme Court held that for assessment years prior to AY 2021-22, non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. The Supreme Court observed that there is a marked difference between nature and character of assessee-employer's contribution and amounts retained by assessee from out of employee's income by way of deduction wherein one is liability to be paid by employer and second is deemed income as per section 2(24)(x) which is held in trust by assessee-employer, thus, said marked difference was to be borne while interpreting obligation of assessee-employer under section 43B of the Act. The Hon'ble Supreme held that the non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was not part of assessee-employer's income, thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. Again the Supreme Court in the case of **Harrisons Malayalam Ltd. [2022] 145 taxmann.com 608 (SC)**, dismissed the SLP of the Assessee against order of High Court that where assessee-company failed to pay employees' contribution towards EPF and ESI within due date prescribed in

respective Acts, deduction under section 36(1)(va) was not allowable. Recently in the case of **Ms. Nalina Dyave Gowda [2023] 146 taxmann.com 420 (Bangalore - Trib.)** the assessee during, financial year 2018-19 (assessment year 2019-20) made payment of employees' contribution to ESI and PF beyond due date specified under relevant Act and claimed deduction of same under section 36(1)(va). The Assessing Officer made disallowance of employees' contribution to ESI and PF **while electronically processing return of income under section 143(1)(a) of the Act.** The ITAT held that disallowance under section 143(1)(a) was valid in view of Supreme Court's decision in case of Checkmate Services (P.) Ltd. v. CIT [2022] 143 taxmann.com 178 and the assessee will not be entitled to deduction of belated payment of ESI and PF of employees' share of contribution as per provisions of section 36(1)(va) of the Act. Again, recently Pune ITAT in the case of **Cemetile Industries v. ITO [2022] 145 taxmann.com 209 (Pune - Trib.)** held that where assessee-employer deposited amount of employees contribution towards employees' provident fund and employees' state insurance corporation beyond due date stipulated in respective Acts, disallowance made under section 36(1)(va) was justified. The ITAT further held that adjustment under section 143(1)(a) by means of disallowance made for late deposit of employees' share to relevant funds beyond date prescribed under respective Acts was proper.

6.4 In view of the above observations respectfully following the decision of the Honourable Supreme Court in the case of Checkmate Services Private Ltd *supra* and Harrisons Malayalam Ltd *supra* and in the light of our observations, we hereby dismiss the assessee's appeal.

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

Order pronounced as per Rule 34 of I.T.A.T Rules, 1963 on 22/02/2023
Order pronounced in the open court on ...../...../2023

**Sd/-**  
**(B.M. BIYANI)**  
**ACCOUNTANT MEMBER**  
**Ahmedabad : Dated 22 /02/2023**

**Sd/-**  
**(SIDHHARTHA NAUTIYAL)**  
**JUDICIAL MEMBER**

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Sr. Private Secretary,  
Income Tax Appellate Tribunal,  
Indore

Strengthened preparation & delivery of orders in the ITAT	
1) Date of dictation	13/02/2023 (dictation on dragon)
2) Date on which the typed draft is placed before the Dictating Member & Other Member	13/02/2023
3) Date on which the approved draft comes to the Sr. P.S./P.S.	/02/2023
4) Date on which the fair order is placed before the Dictating Member for pronouncement	/02/2023
5) Date on which the fair order comes back to the Sr. P.S./P.S.	/02/2023
6) Date on which the file goes to the Bench Clerk	/02/2023
7) Date on which the file goes the Head Clerk	
8) Date on which the file goes to the Assistant Registrar for signature on the order	
9) Date of Dispatch of the order	

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