

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

डॉ. एस.सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 37/JPR/2023  
निर्धारण वर्ष / Assessment Years : 2018-19

Ocean Exim India Private Limited D-138, Basant Marg, Bani Park, Jaipur-302006.	बनाम Vs.	ITO, Ward-1(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAACO 2215 J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Prabha Rana (Adv.)  
राजस्व की ओर से / Revenue by : Ms Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख / Date of Hearing 23/02/2023  
उदघोषणा की तारीख / Date of Pronouncement : 28/02/2023

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This is an appeal filed by the assessee against the order of the National Faceless Appeal Centre, Delhi [hereinafter referred to as "NFAC/CIT(A)"], dated 16.12.2022 for the assessment years 2018-19.

2. The assessee has raised the following grounds:-

*“1. The ld. CIT(A) erred in confirming the addition of Rs. 3,96,908/- made by the Assessing Officer representing delay in remittance of employees contribution towards provident fund.*

*2. The ld. CIT(A) erred in confirming the addition of Rs. 1,31,254/- made by the Assessing Officer representing delay in remittance of employees contribution towards ESI.”*

3. Briefly the facts of the case are that the assessee is a private limited company and filed its return of income for the A.Y. 2018-19 on 30.10.2018 declaring total income of Rs. 7,60,410/- which was processed U/s 143(1) of the IT Act and in terms of intimation dated 16.10.2019 issued by CPC, it made disallowance of Rs. 5,28,162/- towards employee's contribution towards ESI and PF. On appeal, the ld. CIT(A)/NFAC has confirmed the disallowance made U/s 143(1) on account of assessee's failure to pay the employee's contribution of PF/ESI within the prescribed due dates as per Section 36(1)(va) of the Act.

4. Being aggrieved by the order issued U/s 154 of the IT Act, the assessee preferred an appeal before the ld. CIT(A). The assessee filed complete details of the entire payments i.e. employee's PF & ESI contribution paid before the due date of filing of return of income which are produced in CIT(A) order at pages 2 to 4.

5. In first appeal the assessee carried the matter before the CIT(A) who confirmed the disallowance made by AO by observing as under:-

“8. I view of the aforesaid, it is amply clear that even prior to insertion of Explanation 2 in section 36(1)(va) and Explanation 5 in section 43B by the Finance Act, 2021 w.e.f. 01.04.2021, section 43B will not apply to employees contributions to PF, ESI etc as claimed by the appellant. In case contributions collected from the salaries of the employees are not deposited within the due date prescribed under the respective EPF/ESI Acts, then the addition of the said amount as income of the employer u/s 2(24(x) read with section 36(1)(va) of the Act is automatic and mandatory. Therefore, the AO has rightly acted in accordance with law while making the addition/disallowance of Rs. 5,28,162/- in the case on hand at the time of processing the return u/s 143(1)(a)(iv) as well as u/s 143(1)(a)(ii) of the Act and therefore is, thus, no scope left for the appellant to avail the deduction of the said amount u/s 43B of the Act, In this view of the matter, I find no infirmity in the action of the A.O. and therefore, the action of the A.O. is hereby upheld.

9. In the result, the appeal of the appellant is dismissed.”

6. Being aggrieved by the CIT(A) order, the assessee is in appeal before us. Before the CIT (A), the assessee has reiterated its submissions. Before us the Ld AR for assessee submitted a detailed Written submissions which are as under :-

“2. Facts in Brief

The sole substantive issue of ESI and PF disallowance of Rs. 1,31,254/- and Rs. 3,96,908/-, the assessee's and Revenue's plea that the same has been paid before the due date of filing Sec. 139(1) return and after the due date prescribed in the corresponding statutes; respectively.

SUBMISSION

This appeal is filed by the assessee against order dated 16.12.2022 passed by the National Faceless Appeal Centre ("NFAC" for short) relating to the assessment year 2018-19.

2. THE INTIMATION ISSUED UNDER SECTION 143(1) DATED 16.10.2019 IS AGAINST FIRST PROVISIO TO SECTION 143(1)(A), AND THEREFORE, THE ENTIRE 143(1) PROCEEDINGS IS INVALID IN LAW.

a) Brief facts of the case is that the assessee is a Private Limited Company. For the Asst.Year 2018-19, the assessee filed its return of income on 30-10-2018 declaring total income at Rs.7,60,410/-. The return of income was processed under section 143(1) of the Income-tax Act, 1961 ("the Act" for short) and on 16.10.2019 by the Centralized Processing Centre and determined total income at Rs. 12,88,570/-thereby making an addition of Rs. 5,28,160/- on the returned income. Ld. CIT Appeal confirmed the addition.

b) Aggrieved against the intimation, the assessee filed an appeal before Your Honour vide acknowledgement no. 1674212958 on date 23.01.2023. The only issue is that the addition of Rs. 5,28,160/-being the late payment of employees contribution of PF and ESI which were disallowed under section 36(1)(va) of the Act.

c) The AR for the assessee requests that Ld. AO has grossly erred in deciding the debatable issue viz. disallowance made under section 36(1)(va) of the Act in 143(1)(a). Further, there are divergent views being expressed by various High Courts on late payment of PF & ESI. As against the decision in the case of Gujarat State Road Transport Corporation (supra), SLP filed by the assessee before the Hon'ble Apex Court was pending, therefore, the Ld. AO was totally not correct in making the additions made in the assessment framed under section 143(1) of the Act, wherein debatable issues cannot be considered.

d) The said intimation is in the form of calculation in tabulated columns running into nine pages. There are two main columns; one column description showed "as provided by Taxpayer in Return of Income" and another column showed "As computed under section 143(1)". There is no description in this intimation or explanation/note why such disallowance or addition made by the CPC in the 143(1) proceedings. For better understanding of the intimation proceedings, section 143(1) of the IT Act is reproduced as follows:

*"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 82[or increase ill income] indicated in the audit report but not taken into account in computing the total income in the return;*

*(v) disallowance of deduction claimed tinder 83[section 10AA or under any of the provisions of Chapter VI-A under the heading "C—Deductions in respect of certain incomes", yl 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:*

*Provided that no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode: (underline is ours)*

*Provided further that the response received from the assessee, if any, shall be considered before making any adjustment, and in a case where no response isreceived within thirty days of the issue of such intimation, such adjustments shall be made:*

*Provided also that no adjustment shall be made under sub-clause (vi) in relation to a return furnished for the assessment year commencing on or after the 1st day of April, 2018;*

- e) Hence, your honour, on going through the above section and proviso attached therein, the total income or loss shall be computed after making the following adjustment, mainly of any arithmetical error in the return. Incorrect claim, if such incorrect claim is apparent from any information in the return, etc. Thus, it is clear that a return can be processed u/s.143(1) by making adjustments on six types of adjustments only. The first proviso to section 143(1)(a) make it very clear that no such adjustment shall be made unless an intimation is given to the assessee of such adjustment either in writing or in electronic mode. Your honour, in the case of the assessee, no intimation was given to the assessee for making any adjustment or disallowance either in writing or in electronic mode. Thus, the CPC center has failed to follow the first proviso to section 143(1)(a) of the Act.
- f) Your honour can verify that in the intimation made under section 143(1), CPC has not followed the above provisos by giving proper opportunity to the assessee to defend its case as per the first proviso to section 143(1)(a). Therefore, your honour, the intimation issued under section 143(1) dated 16-10-2019 is against the first proviso to section 143(1)(a), and therefore, the entire 143(1) proceedings is invalid in law.
3. The above addition has been made by the Ld. A.O. on the basis of amendment in Sections 36(1)(va) as well as 43B vide Finance Act, 2021. The staled adjustment made in summary proceedings u/s 143(1) of 1961 Act is bad in law and fact as the scope given is restricted and limited scope of proceedings u/s 143(1).The A/R submits as under:-
- a) The AR relied on the CBDT Circular 1/2009 on scope of permissible adjustment u/s 143(1). On jurisdictional grounds of validity of the staled adjustment made in summary proceedings u/s 143(1) of 1961 Act given restricted and limited scope of proceedings u/s 143(1): Reference is made to CBDT Circular 1/2009 on scope of permissible adjustment u/s 143(1)relevant text of CBDT Circular 1/2009 on restricted /limited /narrow scope of permissible adjustment u/s 143(1):

*"28. Correction of arithmetical mistakes and adjustment of incorrect claim under sub-section (I) of section 143 through Centralised Processing of Returns*

*28.1. Generally. tax administrations across countries adopt a two-stage procedure of assessment as part of risk management*

*strategy. In the first stage, all tax returns are processed to correct arithmetical mistakes, internal inconsistency. tax calculation and verification of tax payment. At this stage, no verification of the income is undertaken. In the second stage, a certain percentage of the tax returns are selected for scrutiny/audit on the basis of the probability of detecting tax evasion. At this stage, the tax administration is concerned with the verification of the income.*

*28.2. In India, the scheme of summary assessment being in force since the 1st day of June, 1999 does not contain any provision allowing for prima facie adjustment. The scope of the present scheme is limited only to checking as to whether taxes have been correctly paid on the income returned. Under the existing provisions of sub-section (1) of section 143, there is no provision for correcting arithmetical mistakes or internal inconsistencies. This leads to avoidable revenue loss. With an objective to reduce such revenue loss, sub-section (1) of section 143 of the Income-tax Act has been amended to provide that the total income of an assessee shall be computed under sub-section (1) of section 143 after making the following adjustments to the total income in the return:—*

- a) any arithmetical error in the return; or*
- b) an incorrect claim, if such incorrect claim is apparent from any information in the return.*

*28.3. Further, the meaning of the term "an incorrect claim apparent from any information in the return" has been defined by inserting an explanation in the said section. This term shall mean such claim on the basis of—*

- a) of an item, which is inconsistent with another entry of the same or some other item in such return;*
- b) in respect of which, information required to be furnished under this act to substantiate such entry has not been furnished; or*
- c) 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.*

28.4. Further, it is clarified that above adjustments would be made only in the course of computerized processing without any human interface. In other words, the software would be designed to detect arithmetical inaccuracies and internal inconsistencies and make appropriate adjustments in the computation of the total income. For this purpose, the Department is in the process of establishing a system for Centralized Processing of Returns. To facilitate this, sub-sections (1A), (1B) and (1C) have been inserted in section 143 to provide that —

- a) the Board may make a scheme with a view to expeditiously determine the tax payable by, or refund due to, the assessee;
- b) the Central Government may issue a notification in the Official Gazette, directing that any of the provisions of Act relating to processing of returns shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification. However, such direction shall not be issued after 31-3-2009;
- c) Every notification shall be laid before each House of Parliament as soon as such notification is issued. Along with the notification, the scheme referred above is also required to be laid before each House of Parliament.

28.5. Similar amendment has also been carried out in section 115WE of the Income-tax Act. relating to fringe benefits.

*Applicability - These amendments have been made applicable with effect from 1-04-2008."*

- b) The A/R relied the decision held by Hon'ble SC decision in case of Vodafone Idwa Limited vs ACIT 424 ITR 664 (on scope of sec 143(1) vis a vis sec 143(2): The For your honour ready reference the relevant scanned portion is as under:-

clause (a) of sub-section (1) of section 143 has six sub-clauses specifying the kinds of adjustments which are required to be made for computing the total income or loss. Such adjustments are in the nature of "arithmetical error in the return; incorrect claim "apparent from any information in the return; disallowance of loss if the return of the previous year with respect to which such loss is claimed was furnished "beyond the due date; disallowance of expenditure indicated in the audit report if it has "not taken into account in computing the total income; disallowance of deductions specified in sub-clause if the"return is furnished beyond the due date; and addition of income

as specified in sub-clause (vi) if it was not "included in computing the total income. All these features deal with matters which are apparent from the return and the inconsistency is evident on the face of it. Upon causing such adjustments after due intimation or notice to the assessee, the element of tax, interest and fee is to be computed in terms of clause (b). Thereafter, in terms of clause (c), due credit to the amount of tax paid and any relief that is allowable is to be given and the net amount payable or to be refunded, is to be computed. The intimation to be generated under clause (d) is on the basis of such exercise and if any refund is due, the same has to be granted in terms of clause (e). Thus, at every stage in sub-section (1) the return submitted by the assessee forms the foundation, with respect to which, if any of the inconsistencies referred to in various sub-clauses of clause (a) are found, appropriate adjustments are to be made.

On the other hand, the exercise of power under sub-section (2) of section 143, leading to the passing of an order sub-section (3) thereof, is to be undertaken, where it is considered necessary or expedient to ensure that the assessee:

- has not understated the income, or
- has not computed excessive loss, or
- has not under-paid the tax in any manner.

The issuance of notice and consequent proceedings are premised on any of the aforesaid three postulates. In other words, the return filed by the, assessee itself calls for or requires a further probe and deeper consideration. The guiding principle is to ensure that the income is not understated or the loss is not overstated, or the tax is not under paid in any manner. Upon issuance of notice, the assessee is entitled to produce evidence in support of his case. After hearing the assessee and considering the evidence so produced, by an order in writing, assessment of total income or loss is to be made. [Para 121

The nature of exercise of power under sub-section (1) as against that under sub-sections (2) and (3) is thus completely different. In the former case, the matter is processed, only to check whether any apparent inconsistencies are evident on the face of the return and connected material which may call for any adjustment while in the latter case, the matter is scrutinized after taking into account such evidence as the assessee may produce. The exercise in the latter case is to ensure that there is no understating of income or overstating of loss or underpayment of the tax in any manner. In other words, the

veracity of the return is checked threadbare rather than considering mere apparent inconsistencies from the return.

The power under sub-section (1) of section 143 is summary in nature designed to cause adjustments which are apparent from the return while that under sub-sections (2) and (3) is to scrutinize the return and cause deeper probe to arrive at the correct determination of the liability of the assessee.  
[Para 13]

Held precisely : The power under sub-section (1) of Section 143 of the Act is summary in nature designed to cause adjustments which are apparent from the return while that under sub-sections(2) and (3) is to scrutinize the return and cause deeper probe to arrive at the correct determination of the liability of the assessee.

- c) The A/R further relied the specific decisions of Delhi bench of ITAT in case of : SVS Guarding Services Pvt Ltd ITA231/De<sup>1</sup>/<sub>2</sub>022 (order dated 24.05.2022: In the present appeal before us, addition of aforesaid amount of Rs. 29,52,674/- has been made by way of adjustments and intimation u/s 143(1) of Income Tax Act, on a debatable and controversial issue, and Ld. CIT(A) did err in law, in not deleting this addition) and Ahmadabad bench ITAT in the case of Arham Pumps (ITA 206/Ahd/2021 order dated 27.04.2022 Held : On going through the above intimation made under section 143(1), CPC has not followed the above provisos by giving proper opportunity to the assessee to defend its case as per the first proviso to section 143(1)(a) . Further, the NFAC order is also silent about the intimation to the assessee. Therefore, we find that the intimation issued under section 143(1) dated 19.10.2019 is against first proviso to section 143(1)(a), and therefore, the entire 143(1) proceedings is invalid in the bench ITAT decision in Maskat Technologies Pvt Ltd decision in ITA 1540/De1/2020 order dated 30.06.2021. Further, relied the judicial pronouncement on limited & restricted scope of sec 143(1):Bombay high court 196 ITR 55; Calcutta High court 228 CTR 72)
- d) Thus on the above ground the A/R submits that if adjustment on account of employee contribution disallowance is made in intimation u/s 143(1) then same is bad in law and facts in light of above jurisprudence.
- b) Your honour, kindly notice in this factual backdrop that the legislature has not only incorporated necessary amendments in Sections 36(1)(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued a

Memorandum of Explanation that the same applies w.e.f. 1.4.2021 only. It is further not an issue that the foregoing legislative amendments have proposed employers' contribution/ disallowance u/s 43B as against employee's contribution u/s 36(1) (va) of the Act; respectively. Hence, your honour the fact that the same has been clarified to be applicable only with prospective effect from 1.4.2021, and therefore the A.R request that the impugned disallowance is not sustainable in view of all these latest developments.

- c) Vide Finance Bill 2021, the Government has further proposed to amend the law to bring certainty in the issue. It is proposed to add another Explanation to section 36(1)(va) clarifying that provision of section 43B does not apply and deemed to never have been applied for the purpose of determining the "due date" under this clause; and amend Section 43B, by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of 2(24)(x) applies. This makes amply clear that the provisions will be applied retrospectively, but the memorandum explaining the finance bill says that these amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years, which creates ambiguity about the applicability of the said explanations.

d) The memorandum explaining the provision states that this amendment will take effect from Ist April , 2021 and will , accordingly , apply in relation to the assessment year 2021 -22 and subsequent assessment years (2021) 430 ITR 214 (st) (243). In the case of CIT vs. Hindustan Organics Chemicals Ltd [2014] 366 ITR 1 (Born.) (Para 9) held that where assessee company made payment of employees contribution towards provident fund, assessee's claim could not be disallowed on account of delayed payment in view of amendment to section 43B. In CIT v. Vatika Township (2014) 367 ITR466 (SC) (Five Judges Bench) Levy of surcharge on block assessment years pertaining prior to ist June 2002 is held to be not valid. The court held that proviso to section 113 of the Income —tax Act, 1961, by the Finance Act, 2002, w.e.f 1-6 — 2002 , it is clearly a substantive provision and is to be construed as prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. The same principle is requested to apply for interpretation of an amendment to section 43B of the Act.

e) The addition has been made u/s 143(1)(a). Your honour kind attention is invited to the scope of addition under section 143(1)(a)

i. Of late the CPC is making additions to the returned income of assessee u/s 143(1)(a)(iv) on account of late deposit of employee contribution to PF and ESI while processing the return of income. Section 143(1)(a)(iv) provides that where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, then such return shall be processed and the total income or loss shall be computed after making the adjustments for disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return.

20. (b) Details of contributions received from employees for various funds as referred to in section 36(1)(va):

Serial number	Nature of fund	Sum received from employees	Due date for payment	The actual amount paid	The actual date of payment to the concerned authorities

- f) Your honour, a cursory look at the above table shows that the auditor is required to report only the facts of the due date of the payment and the actual date of the payment. Nowhere the auditor is required to indicate the amount of disallowance of expenditure on the above counts. Therefore, when the CPC makes the adjustment by disallowing the late payment, then it can be said that the revenue is wrong in invoking the provision of section 143(1)(a)(iv) of the Income Tax Act on the fallacy of presumption that the auditor has disallowed the employee contribution to EPF /ESI. Moreover, there are contradictory judgements of the State High Courts and therefore the issue is highly debatable and as such the CPC is not authorised to disallow all claims of late payment. The question of jurisdiction is very important here but the same is being ignored.
- g) The Mockery of Judicial Discipline and the binding effect of Judicial Precedent

- i. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. If this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws.
- ii. The doctrine of judicial discipline obligates each quasi-judicial authority to follow the decision of a jurisdictional higher authority and, in the absence of the same, even the decision of a non jurisdictional authority must be followed.
- iii. The department, once having accepted the principles laid down in the earlier case, cannot be permitted to take a contra stand in the subsequent cases.
- iv. The Courts of co-ordinate jurisdiction, should have consistent opinions in respect of an identical set of facts or on questions of law.

h) The Binding Effect of the Judicial Precedent:

- i. What is binding as a judicial precedent is 'ratio decidendi' viz., the general reasons upon which the decision has been made.
- ii. The Law declared by the Supreme Court shall be binding on all courts within the territory of India. The decision of the Supreme Court in taxation matters amounts to a declaration of law.
- iii. A subordinate court is bound by the enunciation of law made by the superior courts.
- iv. In income tax matters which are governed by an All India Statute, when there is a decision of a High Court interpreting a statutory provision, it would be a wise judicial policy and practice not to take a different view, except under exceptional circumstances, and that too, by a speaking order.
- v. The decision of Jurisdictional High Court decision, even if not correct, is binding on the Revenue authorities within the State.
- vi. Though legally, the judgment of another High Court is not a binding precedent, judicial comity or judicial discipline is invoked by a court that in respect of interpretation of Central Statutes, a decision of

another High Court should be followed, though a judge may have a different view.

- vii. In *State of Orissa v. M. D. Illyas* [2006] 1 SCC 275 the Supreme Court has held that a decision is a precedent on its own facts and that for a judgment to be a precedent it must contain the three basic postulates. A finding of material facts, direct and inferential. An inferential finding of fact is the inference which the judge draws from the direct or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the individual effect of the above.
- viii. Having said that, let us observe whether the Doctrine of Judicial Discipline or the binding effect of a Judicial Precedent is discernible from the above judgments w.r.t the disallowance of employees' contribution to PF, ESIC etc. u/s 36(1)(va) and the allowance of the same u/s 43B.
- h) Your honour, the Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and has not been made retrospectively so the law laid down by the Jurisdictional Hon'ble High Court will apply. Hence, in view of the decision of the Supreme Court in the case of *Commissioner of Income Tax vs. Alom Extrusion Ltd.*, reported in 2009 Vol.390 ITR 306, held that the deletion was justified. The ITAT-Kolkata in the case of *Harendra Nath Biswas, Kolkata vs Dcit, Cir. 29, Kolkata* on 16 July, 2021 ITA No.186/Ko<sup>1</sup>/<sub>2</sub>2021 decided the issue in favour of the assessee ITAT-Hyderabad : *Crescent Roadways Private ... vs Dy. CIT, ...* on 1 July, 2021 ITA No. 1952/Hyd./2018, ITAT- Hyderabad: *Secunderabad Hotels Private ... vs ACTT*, on 29 June, 2021 ITA No. 268/Hyd./2020 and ITAT- Hyderabad: *Chiphercloud India Private ... vs Income Tax Officer, Ward-1(2), ...* on 29 June, 2021 ITA No. 1367/Hyd./2018, ITAT-'Hyderabad: *Chiphercloud India Private ... vs ITO, Ward-1(2), ...* on 29 June, 2021 ITA No. 1367/Hyd./2018 and ITAT- Hyderabad *Sundar Tajmahal Hotels Private ... vs DCIT..* on 16 June, 2021 ITA No. 605/Hyd/2020. It was held that the legislature has not only incorporated necessary amendment in Sections 36(1)(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 1.4.2021 only. Keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1.4.2021, we hold that the impugned disallowance is not sustainable in view of all these latest developments. The impugned ESI/PF disallowance is deleted therefore.

j) The Explanation 5 was inserted by the Finance Act, 2021, with effect from 01.04.2021 and the relevant assessment year before us is AY 2018-19. Therefore, the law laid down by the Jurisdictional Hon'ble High Court will apply and since this Explanation-5 has not been made retrospectively. Hence, in view, a subordinate court is bound by the enunciation of law made by the superior courts. In Income tax matters which are governed by an All India Statute, when there is a decision of a High Court interpreting a statutory provision, it would be a wise judicial policy and practice not to take a different view, except under exceptional circumstances, and that too, by a speaking order. The decision of Jurisdictional High Court decision, even if not correct, is binding on the Revenue authorities within the State.

k) Your honour, kind attention is invited to the following High Court decision in favour of deleting the addition made by the Ld. A.O. on the above ground :-

i) Rajasthan Renewable Energy Corp. Ltd .- August 6, 2019 (Raj HC)

Contribution towards provident fund — HELD THAT:- It is not in dispute that this Court in Commissioner of Income Tax vs. M/s. State Bank of Bikaner and Jaipur [2014] Rajasthan High Court] binds and covers the dispute against the revenue. However, the learned counsel for the revenue informs that the Special leave to Petition filed by the revenue against the aforesaid judgement is pending before the Supreme Court. Even though these questions with respect to interpretation of Section 43B of the Act were answered against the revenue, but they are subject to the final order of the Supreme Court on these questions.

ii. Shailendra Garg, C/O Garment Craft India (P) Ltd. February 15, 2018 (Raj HC)

Delayed payment of PF & ESI contribution- ITAT deleted the addition-held that :- As decided in State bank of Bikaner and Jaipur [2014(5) TMI 222- Rajasthan High Court] where the PF and/or EPF, CPC, GPF etc., if paid after the due date under respective Act but before filing of the return of income u/s 139(1), cannot be disallowed u/s 43B or u/s 36(1)(va) of the IT Act.

iii. Other Raj HC decision: All in favour of the assessee

1. CIT vs. State Bank of Bikaner & Jaipur 99 DTR 131

2. CIT vs. Jaipur Vidyut Vitran Nigam Ltd. 363 ITR 307

3. CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. 366 ITR 163
  4. Principal commission of Income –Tax v/s Rajasthan State Seed Corporation Ltd. [2016] 386 ITR 267 (Raj.)
  5. Income Tax vs. M/s State Bank of Bikaner and Jaipur (2014) 363 ITR 70 (Raj)
- iv. DCIT vs. Jaipur Vidyut Vitran Nigam Ltd. the ITAT Jaipur Bench ‘B’ ITA No. 1287/JP/2019 Jan 18, 2021 (2021) 61CCH 0057 Jaipur Trib
- v. So your honour the impugned ESI/PF disallowance is requested to order to delete the addition.

Kindly allow the assessee’s appeal”

7. Per contra, the ld. Sr. DR supported the contentions raised in the order of the ld. CIT(A) and vehemently argued that the disallowance are evidently not paid in time the same is disallowable and for that he has relied upon the decision of Hon’ble Apex Court in case of Checkmate Services P. Ltd. vs CIT Appeal No. 2833 of 2016 dated 12.10.2022.

8. We have considered the rival contention and perused the orders of the authorities and the material available on record. We find that now this issue has been decided by Hon’ble Supreme Court in favor of revenue in its recent decision in bunch of appeals titled as Checkmate Services P. Ltd. vs. CIT (Civil Appeal No.2833 of 2016 dated 12.10.2022). In this decision, it was noted by Hon’ble Court that there

was divergent of opinion amongst various Hon'ble High Courts viz. High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi favoring the interpretation beneficial to the assessee on one hand whereas High Courts of Kerala and Gujarat favoring interpretation in favour of the Revenue on the other hand. Taking note of legislative history, the matter has finally been put to rest by Hon'ble Court in revenue's favor as under: -

“30. The factual narration reveals two diametrically opposed views in regard to the interpretation of Section 36(1)(va) on the one hand and proviso to Section 43(b) on the other. If one goes by the legislative history of these provisions, what is discernible is that Parliament's endeavour in introducing Section 43B [which opens with its non-obstante clause] was to primarily ensure that deductions otherwise permissible and hitherto claimed on mercantile basis, were expressly conditioned, in certain cases upon payment. In other words, a mere claim of expenditure in the books was insufficient to entitle deduction. The assessee had to, before the prescribed date, actually pay the amounts – be it towards tax liability, interest or other similar liability spelt out by the provision.

31. Section 43B falls in Part-V of the IT Act. What is apparent is that the scheme of the Act is such that Sections 28 to 38 deal with different kinds of deductions, whereas Sections 40 to 43B spell out special provisions, laying out the mechanism for assessments and expressly prescribing conditions for disallowances. In terms of this scheme, Section 40 (which too starts with a non obstante clause overriding Sections 30-38), deals with what cannot be deducted in computing income under the head “Profits and Gains of Business and Profession”. Likewise, Section 40A(2) opens with a non-obstante clause

and spells out what expenses and payments are not deductible in certain circumstances. Section 41 elaborates conditions which apply with respect to certain deductions which are otherwise allowed in respect of loss, expenditure or trading liability etc. If we consider this scheme, Sections 40- 43B, are concerned with and enact different conditions, that the tax adjudicator has to enforce, and the assessee has to comply with, to secure a valid deduction.

32. The scheme of the provisions relating to deductions, such as Sections 32-37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfilment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection. In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of Section 36 (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of “income” – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee’s income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date.

The last expression “due date” was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer’s contribution (i.e., Section 36(1)(iv)).

33. The significance of this is that Parliament treated contributions under Section 36(1)(va) differently from those under Section 36(1)(iv). The latter (hereinafter, “employers’ contribution”) is described as “sum paid by the assessee as an employer by way of contribution towards a recognized provident fund”. However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that “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 essential character of an employees’ contribution, i.e., that it is part of the employees’ income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

34. It is therefore, manifest that the definition of contribution in Section 2 (c) is used in entirely different senses, in the relevant deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

35. It is instructive in this context to note that the Finance Act, 1987, introduced to Section 2(24), the definition clause (x), with effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill, 1987, presented to the Parliament, is extracted below:

“Measures of penalising employers mis-utilising contributions to the provident fund or any funds set up under the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees –

12.1. The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section 43B). The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. “Due date” means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise. (Explanation to Section 36 (1) of the Finance Act) 12.2. In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due date. Where such income is not chargeable to tax under the head “profits and gains of business or profession” it will be assessed under the head “income from other sources.”

36. Significantly, the same Finance Act, 1987 also introduced provisos to Section 43B, through amendment (clause 10 of the Finance Bill). The memorandum explaining the Bill, pertinently states, in relation to second proviso to Section 43B that:

“...The second proviso seeks to provide that no deduction shall be allowed in regard to the sum referred to in clause (b) unless such sum has actually been paid during the previous year on or before the due

date. The due date for the purposes of this proviso shall be the due date as under Explanation to clause (va) of sub-section (1) of Section 36.”

37. It is evident that the intent of the lawmakers was clear that sums referred to in clause (b) of Section 43B, i.e., “sum payable as an employer, by way of contribution” refers to the contribution by the employer. The reference to “due date” in the second proviso to Section 43B was to have the same meaning as provided in the explanation to Section 36(1)(va). Parliament therefore, through this amendment, sought to provide for identity in treatment of the two kinds of payments: those made as contributions, by the employers, and those amounts credited by the employers, into the provident fund account of employees, received from the latter, as their contribution. Both these contributions had to necessarily be made on or before the due date.

38. This court had occasion to consider the object of introducing Section 43B, in *Allied Motors*. The court held, after setting out extracts of the Budget speech of the Finance Minister, for 1983-84, that:

"Section 43B was, therefore, clearly aimed at curbing the activities of those tax-payers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that Section 43B was inserted.”

39. Original Section 43B(b) enabled the assessee/employer to claim deduction towards contribution as an employer, “by way of contribution to any provident fund”. The second proviso was substituted by Finance Act, 1989 with effect from 01.04.1989 and read as under: “...Provided further that no deduction shall in respect of any sum referred to in clause (b) be allowed unless such sum has actually been paid in cash or to by issue of a cheque or draft or by any other mode on or before the due date as defined in the explanation below Clause (va) of sub-section (1) of Section 36, and where

such payment has been made otherwise than in cash, the same has been realised within 15 days from the due date."

40. The position in law remained unchanged for 14 years. The Central Government then constituted the Kelkar Committee, to suggest tax reforms. The report suggested amendments inter alia, to Section 43B. The relevant extract of the report is as follows:

"In terms of the provisions of section 43B of the Income-tax Act, deduction for statutory payments relating to labour, taxes and State and public financial institutions are allowed as deductions, if they are paid during the financial year. However, under the provisions payment of taxes and interest to State and public financial institution are deemed to have been paid during the financial year even if they are paid by the due date of filing of return. Further if the liability is discharged in the subsequent year after the due date of filing of return, the payment is allowed as a deduction in the subsequent year. In the case of statutory payment relating to labour, the deduction for the payment is disallowed if such payment is made any time after the last date of payment of the about related liability. Trade and industry across the country represented that the delayed payment of statutory liability related to labour should be accorded the same treatment as delayed payment of taxes and interest, i.e. they should be allowed in the year of account. Since the objective of the provision is to ensure that a tax-payer does not avail of any statutory liability without actually making a payment for the same, we are of the view that these objectives would be served if the deduction for the statutory liability relating to labour are allowed in the year of payment. The complete disallowance of such payments is too harsh a punishment for delayed payments. Therefore, we recommend that the deduction for delayed payment of statutory liability relating to labour should be allowed in the year of payment like delayed taxes and interest."

Based on the report, the Union introduced amendments to the IT Act, including an amendment to Section 43B; the memorandum explaining the provisions in the Finance Bill, 2003 in the matter of Section 43B. inter alia, reads thus:

"The Bill also proposes to provide that in case of deduction of payments made by the assessee as an employer by way of contribution to any provident fund or superannuation fund or any other fund for the welfare of the employees shall be allowed in computing the income of the year in which such sum is actually paid. In case the same is paid before the due date of filing the return of income for the previous year, the allowance will be made in the year in which the liability was incurred. These amendments will take effect from 1st April, 2004 and will accordingly apply in relation to the assessment year 2004-05 and subsequent years."

41. The Notes on Clauses inter alia, reads as follows:

"It is also proposed to amend the first proviso to the said section so as to omit the references of clause (a), clause (c), clause (d), clause (e) and clause (f) which is consequential in nature.

It is also proposed to omit the second proviso to the said section. These amendments will take effect from 1st April, 2004 and will, accordingly, apply in relation to the assessment year 2004-2005 and subsequent years."

42. The rationale for introduction of Section 43B was explained by this court in M.M. Aqua Technologies Ltd. vs. Commissioner of Income Tax, Delhi:

"19. The object of Section 43B, as originally enacted, is to allow certain deductions only on actual payment. This is made clear by the non obstante Clause contained in the beginning of the provision, coupled with the deduction being allowed irrespective of the previous years in which the liability to pay such sum was incurred by the Assessee according to the method of accounting regularly employed by it. In short, a mercantile system of accounting cannot be looked at when a deduction is claimed under this Section, making it clear that incurring of liability cannot allow for a deduction, but only "actual payment", as contrasted with incurring of a liability, can allow for a deduction."

43. This condition, i.e., of payment of actual amount on or before the due date to enable deduction, continued for 14 years. By the amendment of 2003, the second proviso was deleted. This court interpreted the law, in the light of these developments,

in Alom Extrusions. The court considered the effect of omission of the second proviso, and observed as follows:

“10. “Income” has been defined under Section 2(24) of the Act to include profits and gains. Under Section 2(24)(x), any sum received by the assessee from his employees as contributions to any provident fund/superannuation fund or any fund set up under the Employees’ State Insurance Act, 1948, or any other fund for the welfare of such employees constituted income. This is the reason why every assessee(s) was entitled to deduction even prior to 1-4-1984, on mercantile system of accounting as a business expenditure by making provision in his books of accounts in that regard. In other words, if an assessee(s) [employer(s)] is maintaining his books on accrual system of accounting, even after collecting the contribution from his employee(s) and even without remitting the amount to the Regional Provident Fund Commissioner (RPFC), the assessee(s) would be entitled to deduction as business expense by merely making a provision to that effect in his books of accounts. The same situation arose prior to 1-4-1984, in the context of assessee(s) collecting sales tax and other indirect taxes from their respective customers and claiming deduction only by making provision in their books without actually remitting the amount to the exchequer. To curb this practice, Section 43-B was inserted with effect from 1-4-1984, by which the mercantile system of accounting with regard to tax, duty and contribution to welfare funds stood discontinued and, under Section 43-B, it became mandatory for the assessee(s) to account for the aforesaid items not on mercantile basis but on cash basis. This situation continued between 1-4-1984 and 1-4-1988, when Parliament amended Section 43-B and inserted the first proviso to Section 43-B.

11. By this first proviso, it was, inter alia, laid down, in the context of any sum payable by the assessee(s) by way of tax, duty, cess or fee, that if an assessee(s) pays such tax, duty, cess or fee even after the closing of the accounting year but before the date of filing of the return of income under Section 139(1) of the Act, the assessee(s) would be entitled to deduction under

Section 43-B on actual payment basis and such deduction would be admissible for the accounting year. This proviso, however, did not apply to the contribution made by the assessee(s) to the labour welfare funds. To this effect, the first proviso stood introduced with effect from 1-4-1988. \*\*\*

15. By the Finance Act, 2003, the amendment made in the first proviso equated in terms of the benefit of deduction of tax, duty, cess and fee on the one hand with contributions to the Employees' Provident Fund, superannuation fund and other welfare funds on the other. However, the Finance Act, 2003, bringing about this uniformity came into force with effect from 1-4-2004. Therefore, the argument of the assessee(s) is that the Finance Act, 2003, was curative in nature, it was not amendatory and, therefore, it applied retrospectively from 1-4-1988, whereas the argument of the Department was that the Finance Act, 2003, was amendatory and it applied prospectively, particularly when Parliament had expressly made the Finance Act, 2003 applicable only with effect from 1-4-2004.

\*\*\* 18. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of the Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by Parliament only with effect from 1-4-2004, would become curative in nature, hence, it would apply retrospectively with effect from 1-4-1988.

19. Secondly, it may be noted that, in *Allied Motors (P) Ltd. v. CIT* [(1997) 3 SCC 472 : (1997) 224 ITR 677], the scheme of Section 43-B of the Act came to be examined. In that case, the question which arose for determination was, whether sales tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant sales tax law should be disallowed under Section 43-B of the Act while computing the business income of the previous year? That was a case which related to

Assessment Year 1984-1985. The relevant accounting period ended on 30-6-1983. The Income Tax Officer disallowed the deduction claimed by the assessee which was on account of sales tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed under Section 43-B which, as stated above, was inserted with effect from 1-4-1984

\*\*\* 22. It is important to note once again that, by the Finance Act, 2003, not only is the second proviso deleted but even the first proviso is sought to be amended by bringing about a uniformity in tax, duty, cess and fee on the one hand vis-à-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003 is retrospective in operation. Moreover, the judgment in Allied Motors (P) Ltd. [(1997) 3 SCC 472 : (1997) 224 ITR 677] was delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that the Finance Act, 2003 will operate retrospectively with effect from 1-4-1988 (when the first proviso stood inserted).

23. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that the Finance Act, 2003, to the above extent, operated prospectively. Take an example, in the present case, the respondents have deposited the contributions with RPFC after 31st March (end of accounting year) but before filing of the returns under the Income Tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under Section 43-B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right up to 1-4-2004, and who pays the contribution after 1-4-2004, would get the benefit of deduction under Section 43-B of the Act.”

44. There is no doubt that in *Alom Extrusions*, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available.

45. A reading of the judgment in *Alom Extrusions*, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed. The court observed inter alia, that:

“15. ...It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in *Allied Motors (P) Limited* (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003 will operate retrospectively with effect from 1st April, 1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year] but before filing of the Returns under the Income Tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under Section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the

contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under Section 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003”.

46. A discussion on the Principles of interpretation of tax statutes is warranted. In *Ajmera Housing Corporation & Ors. vs. Commissioner of Income*<sup>17</sup> this court held as follows:

“27. It is trite law that a taxing statute is to be construed strictly. In a taxing Act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. (See: *Cape Brandy Syndicate v. Inland Revenue Commissioners* (1921) 1 KB 64 and *Federation of A.P. Chambers of Commerce and Industry and Ors. v. State of A.P. and Ors.*(2000) 6 SCC 550. In interpreting a taxing statute, the Court must look squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute. (Also see: *Commissioner of Sales Tax, Uttar Pradesh v. The Modi Sugar Mills Ltd.* 1961 (2) SCR 189.)”

47. Likewise, this court underlined the rule, regarding interpretation of taxing statutes, in *Commissioner of Income Tax-III v Calcutta Knitwears, Ludhiana*. 18 Recently, in *Union of India & Ors. vs. Exide Industries Limited & Ors*, this court examined, and repelled a challenge to the constitutionality of Section 43B, especially the provision requiring actual payment, in respect of leave encashment benefit of employees. The court observations in this regard are relevant:

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48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be

strictly complied with. 20 This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations.

49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in *State of Jharkhand v Ambay Cements* 21 as follows:

23.... In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein.” 20 See for e.g., *Eagle Flask Industries Ltd. v. Commissioner of Central Excise*, 2004 Supp (4) SCR 35. 21 *State of Jharkhand v Ambay Cements*, (2005) 1 SCC 368. 30 This was also reaffirmed in a number of judgments, such as *Commissioner Income Tax v. Ace Multi Axes Systems Ltd.*

50. The Constitution Bench, in *Commissioner. of Customs v. Dilip Kumar & Co.* 23 endorsed as following:

“24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution [ “265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law.”] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature.

\*\*\* 34. The passages extracted above, were quoted with approval by this Court in at least two decisions being *CIT v. Kasturi & Sons Ltd.* [*CIT v. Kasturi & Sons Ltd.*, (1999) 3 SCC 346] and *State of W.B. v. Kesoram Industries Ltd.* [*State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201] (hereinafter referred to as “*Kesoram Industries case* [*State of W.B. v. Kesoram Industries Ltd.*, (2004) 10 SCC 201]”, for brevity). In the later decision, a Bench of five Judges, after citing the above passage from Justice G.P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute:

‘(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency;

(ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and

(iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly.”

51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd. 24; Commissioner of Income-Tax and another v. Sabari Enterprises<sup>25</sup>; Commissioner of Income Tax v. Pamwi Tissues Ltd. 26; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. 27 and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrusions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.

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 isto 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 assessee's 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 assesseees 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 assessee is 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 34 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.”

It has finally been held by Hon'ble Court that there is clear distinction between 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 from its employees' [in terms of Sec. 36(1)(va)]. 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) and therefore, subjected to conditions spelt out by Explanation to Section 36(1)(va) 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 contributions – the employer's liability is to be paid out of its income whereas the second is deemed to be 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. If the same is not deposited as per mandate of Sec.36(1)(va), the deduction of the same would not be available to the assessee. Thus, this issue stands in favor of revenue and we respectfully follow the same.

9. At the same time, we are of the considered opinion that this decision of Hon'ble Court would relate back to the date of consequential amendment brought in by legislatures in respective provisions of the act

and it was to be presumed that the legal position was always like that i.e., both the contributions were to be treated differently since inception and the Employee's contribution was always subjected to rigors of Sec.36(1)(va). If the assessee complies with the same only then the deduction would be allowed to the assessee otherwise the same would continue to form the income of the assessee. The said decision, in our opinion, is to be given full consequential effect.

10. Respectfully following the recent decision of Hon'ble Supreme Court in case of Checkmate Services P. Ltd Vs. CIT (Civil appeal No. 2833 of 2016 dated 12.10.2022) and considering our findings and adjudication in preceding paragraphs, the impugned disallowances stand confirmed.

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

Order pronounced in the open Court on 28 /02/2023.

Sd/-

( राठोड कमलेश जयन्तभाई )  
(RATHOD KAMLESH JAYANTBHAI)  
लेखा सदस्य / Accountant Member

Sd/-

( डॉ.एस.सीतालक्ष्मी )  
(Dr. S. Seethalakshmi)  
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 28/02/2023.

**\*Santosh**

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

1. अपीलार्थी / The Appellant- Ocean Exim India Private Limited, Jaipur.

2. प्रत्यर्थी / The Respondent- ITO, Ward-1(2), Jaipur.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
5. गार्ड फाईल / Guard File { ITA No. 37/JPR/2023 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar