IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER AND SH. NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER

ITA No. 460/Del/2022
(Assessment Year : 2017-18)

M/s. Incedo Technology Solutions Limited A-47, Lower Ground Floor, Hauz Khas, New Delhi-16 **PAN No. AACCI 6243 C**	Vs.	DCIT, CPC New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Nem Singh, Adv.
Revenue by	Shri Anuj Garg, Sr. D.R.

Date of hearing:	13.03.2023
Date of Pronouncement:	16.03.2023

ORDER

PER ANIL CHATURVEDI, AM:

This appeal filed by the assessee is directed against the order dated 09.12.2021 passed by the Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre (NFAC), Delhi relating to Assessment Year 2017-18.

2. Brief facts of the case as culled out from the material on record are as under :-

3. Assessee is a company stated to be engaged in the business of consultancy in the field of information technology services such as application, system integration, product engineering, custom software development, IT infrastructure development services, trading of computer hardware and software in India and abroad and also in BPO service etc. Assessee filed its original return of income on 30.03.2019 for A.Y. 2017-18 declaring total income of Rs.1,45,81,600/-. In the intimation issued u/s 143(1) of the Act (document Identification No. CPC/1718/V6/1903605279) dated 22.09.2019 the total income was computed at Rs.1,56,65,100/- as against the returned income of Rs.1,45,81,600/-. Thereafter, in the intimation issued u/s 154 of the Act by CPC, Bangalore vide Identification No. CPC/1718/U6/1972281778 dated 07.01.2020, the total income was determined at Rs. 1,56,65,100/-. Aggrieved by the intimation issued u/s 154 of the Act, assessee carried the matter before CIT(A) who vide order dated 09.12.2021 in Appeal No.CIT(A), Delhi-4/10953/2019-20 dismissed the appeal of the assessee. Aggrieved by the order of CIT(A), assessee is now in appeal and has raised the following grounds:

1. *"The order of the Ld. CIT(A), NFAC Delhi read with the order of the AO, CPC passed u/s 143(1)/154 is bad in law & wrong on facts as the same is passed without following the principle of natural justice hence liable to be quashed in the interest of justice.*

2. *(i) The Ld. CIT(A) has erred in confirming the disallowance of Rs 10,83,500/- made by CPC in respect of employees contribution towards PF & ESI wrongly*

interpreting the provisions of section 43B r.w.s 36(1)(va) of the Act and invoking the provisions of section 143(1)(a)(iv) of the Act.

(ii) The Ld. CIT(A) has failed to appreciate that section 43B begins with a non obstante clause and as per the settled principles of interpretation, a non obstante clause assumes an overriding effect over the other provisions of the Act in respect of deduction and allowance of an expenditure hence the due date referred in section 36(1)(va) of the Act should be read in conjunction with section 43B of the Act.

(iii) The Ld. CIT(A) has failed to appreciate the judicial pronouncements of various High Courts including jurisdiction High Court and Hon'ble Apex Court in the case of Pr. CIT vs Rajasthan State Beverages Corporation Ltd, wherein it has held that the "Due date" in section 36(1)(va) for payment of employees' Provident Fund, ESIC etc contribution should be read with section 43B(b) to mean "due date" for filing ROI.

(iv) The Ld. CIT(A) has failed to appreciate the principle reasoning laid down by the Hon'ble Apex Court in the case of CIT vs. Vegetable Products Ltd 81 ITR 192 (SC) that if two reasonable constructions of a taxing provisions are possible, that construction which favors the assesse must be adopted.

3. *(i) The Ld CIT(A) has erred in observing that amendment in Finance Act, 2021 is clarificatory and apply retrospectively without appreciating the explanatory note to the Finance Act, 2021 which provides that the amendment in section 36(1)(va) as well as section 43B is applicable only from 01.04.2021 i.e. from AY 2021-22 and subsequent assessment years.*

(ii) Also failed to appreciate that these provisions impose a liability on an assessee and therefore cannot be construed as applicable with retrospective effect unless the legislature specifically says so.

4. *That the assessee craves the leave to add, amend, vary, withdraw or modify all or any of the grounds on or before the date of hearing."*

4. Before us, at the outset, Learned AR submitted that though the assessee has raised several grounds but the sole grievance of the assessee is the additions made on account of delay in deposit of employee's contribution towards provident fund and ESI fund by AO and upheld by CIT(A).

5. Before us, Learned AR reiterated the submissions made before the AO and CIT(A) and further submitted that CIT(A) was not justified in upholding the action of AO whereby the adjustment of Rs.10,83,500/- was made on account of delayed deposit of employees share of Provident Fund & ESI dues as the same was deposited before the due date of filing of the return of income u/s 139(1) of the Act. He further submitted that CIT(A) was not justified in making the addition as the aforesaid addition does not fall within the purview of Section 143(1) as it is a debatable issue. He further submitted that there is no application of mind by CIT(A) in disposing of the ground taken by assessee.

6. Learned DR on the other hand supported the order of lower authorities and further submitted that the issue of delayed payment has now been settled by Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd. and others vs. CIT & others (2022) 448 ITR 518 (SC).**

7. 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 in the intimation passed u/s 143(1) of the Act. 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. Further the Co-ordinate Bench of Tribunal of ITAT, Delhi Bench on identical issue decided the issue. We find that identical issue of disallowance of delayed deposit of PF/ESI dues in the intimation issued u/s 143(1) of the Act 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.

5. Adverting to the facts of the case, it is seen that the assessee claimed the deduction for the employees' share for depositing the same in the relevant funds beyond the due date as given in Explanation 1 to section 36(1)(va) on the strength of section 43B. The latter section opens with a non-obstante clause and provides that a deduction otherwise allowable in respect of: `(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any

other fund for the welfare of employees' shall be allowed only in that previous year in which such sum is actually paid. The first proviso to section 43B states that: `nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.' The main provision of section 43B, providing for the deduction only on actual payment basis, has been relaxed by the proviso so as to enable the deduction even if the payment is made before the due date of furnishing the return u/s 139(1) of the Act for that year. The claim of the assessee is that the deduction becomes available in the light of section 36(1)(va) read with section 43B on depositing the employees' share in the relevant funds before the due date u/s 139(1) of the Act. This position was earlier accepted by some of the Hon'ble High Courts holding that the deduction is allowed even if the assessee deposits the employees' share in the relevant funds before the date of filing of return u/s.139(1) of the Act. This was on the analogy of treating the employee's share as having the same character as that of the employer's share, becoming deductible u/s 36(1)(iv) read in the hue of section 43B(b). Recently, the Hon'ble Supreme Court in Checkmate Services P. Ltd. & Ors. VS. CIT & Ors. (2022) 448 ITR 518 (SC) has threadbare considered this issue and drawn a distinction between the parameters for allowing deduction of employer's share and employees' share in the relevant funds. It has been held that the contribution by the employees to the relevant funds is the employer's income u/s.2(24)(x), but the deduction for the same can be allowed only if such amount is deposited in the employee's account in the relevant fund before the date stipulated under the respective Acts. The hitherto view taken by some of the Hon'ble High Courts in allowing deduction even where the amount was deposited in the employee's account before the time allowed u/s.139(1), ergo, got overturned. The net effect of this Apex Court judgment is that the deduction u/s.36(1)(va) can be allowed only if the employees' share in the relevant funds is deposited by the employer before the due date stipulated in respective Acts and further that the due date u/s.139(1) of the Act is alien for this purpose.

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.

12. Another argument point was put forth on behalf of the assessee that the assessee did not claim any deduction in the Profit and loss account of the amount under consideration and hence no disallowance should have been made. This argument is again bereft of force. The assessee claimed deduction for salary on gross basis, inclusive of the employees' share to the relevant funds. To put it simply, if gross salary is of Rs.100, out of which a sum of Rs.10 has been deducted as contribution to relevant fund, then the debit of Rs.100 in the Profit and loss account means deduction has been claimed for Rs.10 as well. Ex consequenti, if deduction of Rs.10 is not allowed u/s 36(1)(va) for late deposit of the amount before the due date under the respective Act, it would mean that the claim of Rs.10 included in Rs.100 is not allowed deduction.

13. The ld. AR referred to section 5 of the Payment of Wages Act, 1936, to contend that deduction made from an employee's salary for the month of October should suffer disallowance only if it is not paid by 15th December. This argument was premised on the language of section 5, which says that the wages of every person employed upon or in any railway, factory or industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before expiry of the seventh day, after the last day of the wage-period in respect of which the wages are payable. It was contended that salary for the month of October, 2022 will be paid before the 7th of November, which will result into income of the employer only at the time of payment, making the due date of payment into relevant fund as on or before 15th December and not 15th November.

14. There is no merit in the contention of linking the date of deposit of the employees' share in the relevant funds with the date of payment of wages. Section 5 of the Payment of Wages Act simply deals with the 'Time of payment of wages'. It does not stipulate any time limit for deposit of the employees share in the

relevant funds. For that purpose, the relevant Acts give a window for depositing the contribution within 15 days of the last month's salary. Thus, contribution to the relevant fund towards the salary for the month of October-ending should be deposited before 15th November.

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.

16. Both the sides are agreeable that the facts and circumstances of all the appeals except the two, which will be taken up hereinafter, are similar. We, ergo, countenance the disallowance.

17. The first case which involves some different facts is IT Cube Solutions Pvt. Ltd. (ITA No.702/PUN/2022). The ld. AR submitted that the information in audit report in point 20(b) was wrongly given pertaining to preceding year. He pointed out this fact from the audit report for the financial year 2016-17, which refers to due date of payment as 15-05-2015 and the actual date of payment as 12-05-2016. This shows that inadvertently the auditor recorded due dates for payment as pertaining to the preceding year and actual date of payment for the current year for the purposes of indicating the disallowance of expenditure u/s.36(1)(va). The AO is directed to verify this fact and make the disallowance u/s.36(1)(va), if warranted, as per the correct figures.

18. The second case is Exfo Electro Optical Engineering (I) Pvt. Ltd., (ITA No.523/PUN/2022). The ld. AR contended that the auditor inadvertently mentioned the amount of employees' share as well as the employer's share in point 20(b) of the audit report. The AO is directed to verify the factual position in this regard and make disallowance only in respect of employees' share.

19. In the result, the appeals in ITA No.523/PUN/2022 and ITA No.702/PUN/2022 are allowed for statistical purposes and all other appeals are dismissed."

8. Before us, Learned AR has not pointed to any contrary binding decision on the issue nor has placed on record to demonstrate that the order of Pune Bench of Tribunal in the case of Cemetile Industries (supra) has been set aside, stayed or overruled by higher judicial forum. In such a situation, we following the reasoning given by the ITAT of Pune Benches and for similar reasons find no reason to interfere with the order of CIT(A) and **thus the grounds of assessee are dismissed.**

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

Order pronounced in the open court on 16.03.2023

Sd/-	**Sd/-**
(NARENDER KUMAR CHOUDHRY)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 16.03.2023
PY*

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI