

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.98/Ind/2022 (Assessment Year:2018-19)

Shri Arun Kumar Shrivastava, 9, Shakti Nagar, Kanadia Road, Indore	Vs.	ADIT, CPC, Bangalore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AOPPS 9595 H		
Assessee by	Shri Soumya Bomb, AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	31.01.2023	
Date of Pronouncement	13.03.2023	

O R D E R

Per B.M. Biyani, AM:

Feeling aggrieved by appeal-order dated 14.07.2022, passed by learned Commissioner of Income-Tax (Appeals)-NFAC, Delhi [**Ld. CIT(A)**], which in turn arises out of assessment-order passed by DCIT, CPC, Bangalore [**Ld. AO**] u/s 143(1) of Income-tax Act, 1961 [**the act**] for assessment-year [**AY**] 2018-19, the assessee has filed this appeal on following the grounds mentioned in the Appeal-Memo.

2. Heard the learned Representatives of both sides and case records perused.
3. Briefly stated the facts are such that return of income filed by assessee was processed by Ld. AO u/s 143(1) of the Act after making a

disallowance of Rs. 1,38,09,990/- on account of delayed payment of employees' contributions to Provident Fund/Employees State Insurance ("PF/ESI") after the due dates prescribed under PF / ESI laws. The assessee challenged disallowance in first-appeal to Ld. CIT(A). However, Ld. CIT(A) confirmed the disallowance and dismissed assessee's appeal. Against the order of Ld. CIT(A), the assessee has now preferred this appeal before us.

4. Thus, the sole issue involved is related to the disallowance u/s 2(24)(ix) read with section 36(1)(va) of the Act in respect of delayed payment of employee's contributions to PF / ESI made by CPC through intimation issued u/s 143(1).

5. Ld. AR representing the assessee referred to the orders of lower authorities, the grounds raised in Appeal-Memo and Written-Submission filed by him and submitted that the impugned disallowance of Rs. 1,38,09,990/- consists of two components, viz. (i) Rs. 64,44,849/- on account of employee's contributions; and (ii) Rs. 73,65,142/- on account of employer's contributions. He further submitted that the auditors had wrongly reported a total sum of Rs. 1,38,09,990/- in "Tax Audit Report" in the space provided for "employee's contributions". He further submitted that the Ld. AO has made disallowance in the intimation u/s 143(1) because of late payment by assessee beyond the prescribed dates under PF / ESI laws whereas no such disallowance is called for because the assessee has made payments, though after due dates under PF/ESI laws but upto due date u/s 43B read with section 139(1) for filing of return. Ld. AR further submitted that in any case, no such disallowance can be made in the proceeding of section 143(1). Lastly, the Ld. AR also pleads that in any case, the component of "employer's contribution" is not statutorily disallowable at all because the same does not fall in the clutches of section 2(24)(x) read with section 36(1)(va); the same is governed by section 36(1)(iv) read with section 43B according to which the deduction is allowed if the assessee pays upto due date for filing of return u/s 139(1).

6. Per contra, the Ld. DR supported the orders of lower authorities.

7. We first discuss the legal position of the component of “**employee’s contribution**” paid after due date under PF/ESI laws but upto due date u/s 139(1). We note that identical issue is recently decided **against assessee** by the Co-ordinate Bench of **ITAT, Indore in ITA No. 171/Ind/2021 M/s Prashanti Engineering Works (P) Ltd. Vs. ADIT, CPC, Bangalore, order dated 22.02.2023**, after taking into account the latest decision of Hon’ble Supreme Court in **Checkmate Services (P.) Ltd. [2022] 143 taxmann.com 178 (SC)**, the legal provision of section 143(1) of the Act and various judicial rulings. The order of Hon’ble Co-ordinate Bench is extracted below:

“5. The assessee is in appeal before us against the order passed by Ld. CIT(Appeals). Before us, the counsel for the assessee submitted that firstly, in the audit report, the auditor has not made any specific observation regarding inadmissibility of the claim u/s 36(1)(va) of the Act which was required to be made by the auditors in the Tax Audit Report and the Auditors have only mentioned the “actual dates” and “due dates” of remittance. Accordingly, in view of the Mumbai ITAT decisions in the case of PR Packaging in ITA number 2376/Mum/2022 and Kalpesh Synthetics 137 Taxmann.com 475 (Mumbai), this claim of deduction u/s 36(1)(va) of the Act cannot be disallowed u/s 143(1) of the Act (more specifically under sub-clause (d) to 143(1) of the Act). Secondly, the counsel argued that the issue at the time when the disallowance was made, issue was debatable and accordingly could not be the subject matter of disallowance under section 143(1) of the Act. In response, DR relied upon the observations made by the Ld. CIT(Appeals) in the appellate order.

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

Assessment.

143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—

(a) the total income or loss shall be computed after making the following adjustments, namely:—

i) any arithmetical error in the return;

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;

(iv) disallowance of expenditure [or increase in income] **indicated in the audit report** but not taken into account in computing the total income in the return;

(v) disallowance of deduction claimed under 69[section 10AA or under any of the provisions of Chapter VI-A under the heading "C.—Deductions in respect of certain incomes", if] the return is furnished beyond the due date specified under sub-section (1) of section 139; or

(vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:

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

6.1 Therefore, there is no specific requirement under section 143(1) of the Act that the auditor has to make a specific observation regarding “admissibility/inadmissibility” with regard to any claim of expenditure and all that is required under section 143(1) of the Act is that disallowance of such expenditure should be “**indicated in the audit report**”. Now, on going through the specific clauses of the Tax Auditors Report in Form Number 3CD issued under section 44AB of the Act, we observe that serial number 20(b) of Form Number 3CD, which is specific to allowability of claim of deduction u/s 36(1)(va) of the Act, does not require the auditor to make any specific observation regarding admissibility of the amount under section 36(1)(va) of the Act. At the same time, when we observe several other parts of the tax audit report viz. serial number 21(b)-**amounts inadmissible** under section 40(a), serial number 21(c)-**amounts inadmissible** under section 40(b)/40(a)(ia) of the Act (ba), serial number 21(e)- the provision for payment of gratuity **not allowable** under section 40A(7), serial number 21(f)- any sum paid by the assessee as an employer **not allowable** under section 40A(9), serial number 21(h) amount of **deduction inadmissible** in terms of section 14A etc, there is a specific requirement that the auditor has to mention whether the expenditure is admissible/allowable or not. However, so far as section 36(1)(va) of the Act, the audit report does not require the auditor to make a specific observation regarding “admissibility/inadmissibility” of the above expenditure.

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

6.3 With regards to the second argument of the counsel for the assessee that at the time when the disallowance was made, the issue was debatable, we observe that the position on this issue has now been unambiguously clarified by the Hon'ble Supreme Court with respect to all assessment years

prior to AY 2021-22 in the case of **Checkmate Services (P.) Ltd. [2022] 143 taxmann.com 178 (SC)** wherein the Supreme Court held that for assessment years prior to AY 2021-22, non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. The Supreme Court observed that there is a marked difference between nature and character of assessee-employer's contribution and amounts retained by assessee from out of employee's income by way of deduction wherein one is liability to be paid by employer and second is deemed income as per section 2(24)(x) which is held in trust by assessee-employer, thus, said marked difference was to be borne while interpreting obligation of assessee-employer under section 43B of the Act. The Hon'ble Supreme held that the non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was not part of assessee-employer's income, thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. Again the Supreme Court in the case of **Harrisons Malayalam Ltd. [2022] 145 taxmann.com 608 (SC)**, dismissed the SLP of the Assessee against order of High Court that where assessee-company failed to pay employees' contribution towards EPF and ESI within due date prescribed in respective Acts, deduction under section 36(1)(va) was not allowable. Recently in the case of **Ms. Nalina Dyave Gowda [2023] 146 taxmann.com 420 (Bangalore - Trib.)** the assessee during, financial year 2018-19 (assessment year 2019-20) made payment of employees' contribution to ESI and PF beyond due date specified under relevant Act and claimed deduction of same under section 36(1)(va). The Assessing Officer made disallowance of employees' contribution to ESI and PF **while electronically processing return of income under section 143(1)(a) of the Act.** The ITAT held that disallowance under section 143(1)(a) was valid in view of Supreme Court's decision in case of *Checkmate Services (P.) Ltd. v. CIT* [2022] 143 taxmann.com 178 and the assessee will not be entitled to deduction of belated payment of ESI and PF of employees' share of contribution as per provisions of section 36(1)(va) of the Act. Again, recently Pune ITAT in the case of **Cemetile Industries v. ITO [2022] 145 taxmann.com 209 (Pune-Trib.)** held that where assessee-employer deposited amount of employees contribution towards employees' provident fund and employees' state insurance corporation beyond due date stipulated in respective Acts, disallowance made under section 36(1)(va) was justified. The ITAT further held that adjustment under section 143(1)(a) by means of disallowance made for late deposit of employees' share to relevant funds beyond date prescribed under respective Acts was proper.

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

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

8. Now, we turn to the legal position of the component of “**employer’s contribution**” paid after due date under PF/ESI laws but upto due date u/s 139(1). On a careful study of Income-tax provisions, we agree with the submission of Ld. AR that the said component does not fall within the ambit of section 2(24)(x) read with section 36(1)(va). In fact, it falls under the provision of section 36(1)(iv) read with section 43B, the effect of which is such that if the assessee makes payment upto due date u/s 139(1) for filing of return, the deduction is very allowable and no disallowance is called for.

9. Having discussed this legal position, when we look at the order of first-appellate authority, we observe that the Ld. CIT(A) has not paid attention to this difference in the treatment of “employee’s contribution” and “employer’s contribution”, which was though argued by assessee before him; thus the point is left open for adjudication. Further, this difference in treatment would involve verification of the fact and figures with necessary evidences in support from assessee’s side. Since that exercise is not done at first-appellate stage, we think it appropriate to remand this case to Ld. CIT(A) who would give opportunities to assessee, examine the evidences of employee’s contribution and employer’s contribution as may be adduced before him and thereafter take a final view on the disallowance in accordance with the legal position discussed above. Accordingly, we remand this issue back to Ld. CIT(A).

10. Resultantly, this appeal of assessee is allowed for statistical purpose.

Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 13/03/2023.

Sd/-
(SUCHITRA KAMBLE)
Judicial Member

Sd/-
(B.M. BIYANI)
Accountant Member

Indore, 13.03. 2023

Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore