

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No. 45/Bang/2023
Assessment Year : 2018-19

Shri Girish Somappa Poojary, Sy No. 03/01, Sree Muneshwara Estate, 1 st Floor, Tumkur Road, Peenya Industrial Estate, Bengaluru – 560 058. PAN: AMYPP8436B	Vs.	The Income Tax Officer, Ward – 6 (2)(3), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Prathik.P, CA
Revenue by	:	Dr. Shankar Prasad K, Addl. CIT (DR)

Date of Hearing	:	14-03-2023
Date of Pronouncement	:	14-03-2023

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal by the assessee has been filed by assessee against the order dated 28/11/2022 u/s. 250 passed by the National Faceless Appeal Centre (NFAC), Delhi relating to Assessment Year 2018-19 on following grounds of appeal:

- “1. The order passed by the Learned Commissioner of Income Tax (Appeals) in the case of the appellant, in the facts and under the circumstances, is grossly opposed to law, erroneous, and therefore unsustainable.*
- 2. The learned Commissioner of Income Tax (Appeals) was in error in confirming the adjustment made to the returned income under Sec.143(1) by way of addition of the*

deduction claimed by the appellant under Sec.36(1)(va) of the Act.

3. The learned Commissioner of Income-tax (Appeals), in the facts and under the circumstances, ought to have allowed the deduction claimed by the appellant under Sec.36(1)(va) of the Act.

4. Without prejudice, no adjustment was permissible in respect of the deduction claimed by the appellant under Sec.36(1)(va) when the audit report revealed that there was no "indication" by the tax auditor to disallow such expenditure, as envisaged under Sec.143(1)(a)(iv) of the Act.

5. The appellant craves for leave to add to, to delete from or to amend the grounds of appeal."

2. The brief facts of the case are as follows:

The assessee is an individual engaged in the business of providing catering services. For the assessment year 2018-19, return of income was e-filed on 31/10/2018 declaring total income of Rs.2,38,26,773/-. The return was processed u/s 143(1) of the I.T.Act. In the intimation issued u/s 143(1) of the I.T.Act, the CPC disallowed the employees' contribution to PF and ESI to the tune of Rs.54,32,233/-. The reason for making the disallowance was that the assessee did not remit the employees' contribution to PF and ESI within the due date specified under the respective Acts.

3. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), it was submitted that the assessee remitted the employees contribution to PF and ESI before the due date of filing of the return u/s 139(1) of the I.T.Act and in view of the judgment of the *Hon'ble jurisdictional High Court Pr.CIT vs. Hind Filter Ltd.* in ITA No. 662 of 2015. The assessee is entitled to deduction of the same. The Ld.CIT(A), however, dismissed the appeal of the assessee by relying on decision of *Hon'ble Supreme Court* in case of *Checkmate Services (P.) Ltd. Vs CIT-1* reported in [2022] 143 taxmann.com 178 (SC). The CIT(A) noticed the difference between the employees' contribution and the employer's

contribution and held insofar as the employees' contribution to ESI and PF, the same need to be remitted within the due date as mentioned in the respective Acts. The CIT(A) also relied on the amendment brought about to section 36(1)(va) and 43B of the I.T.Act.

4. Aggrieved, the assessee has filed this appeal before the *Tribunal*.

4.1 The Ld.AR submitted that an identical issue is decided in favour of the assessee by the *coordinate Bench* of this *Tribunal* in following cases:

- *M/s. Packaging Services vs. ACIT in ITA No. 2376/Mum/2022 for A.Y. 2019-20 by order dated 07.12.2022.*
- *M/s. The Continental Restaurant & Café Co. v. ITO in ITA No.388/Bang/2021 (order dated 11.10.2021)*
- *M/s. Nirmal Enviro Solutions Pvt. Ltd. vs. DCIT in ITA No. 315/Bang/2021 (order dated 12.10.2021)*
- *Shri Gopalkrishna Aswini Kumar vs. ACIT in ITA No. 359/Bang/2021 (order dated 13.10.2021)*

5. The learned Departmental Representative supported the orders of the Income Tax Authorities.

6. We have heard rival submissions and perused the material on record.

7. The learned Counsel for the assessee submitted that the Hon'ble ITAT, Mumbai Bench, in the case of M/s. P R Packaging Services Vs. ACIT in ITA No.2376/Mum/2022, for Assessment Year 2019-20, order dated 07.12.2022 has taken the view that while processing return under section 143(1) of the Income Tax Act, 1961 (hereinafter called 'the Act'), the CPC cannot disallow employees' contribution to PF and ESI which are paid beyond the due dates for payment under the relevant laws relating to ESI and PF contribution while processing return under section 143(1) of the Act. In this regard, we find that the Hon'ble ITAT had

taken the aforesaid view on the basis that the CPC has made the addition based on the provisions of section 143(1)(a)(iv) of the Act which lays down that :

“disallowance of expenditure (or increase in income) indicated in the audited report but not taken into account in computing the total income in the return.”

8. The *Tribunal* in coming to the aforesaid conclusion placed reliance on another Co-ordinate Bench in the case of Kalpesh Synthetics Pvt Ltd Vs. DCIT 195 ITD 142 (Mumbai) wherein the ITAT, Mumbai Bench took the view that where CPC while processing return u/s.143(1)(a) cannot disallow Employee's contributions (PF/ESI) claimed as deduction by an assessee-employer in respect of employee's contribution towards PF by invoking section 143(1)(iv)(a). The *Tribunal* held that the said disallowance was based on observations made by tax auditor in audit report which stated that payments of employee contribution were made by assessee after due date specified under respective acts whereas judicial decisions have taken the view that said disallowance would not come into play when payment was made well before due date of filing income tax return under section 139(1) and therefore information provided in tax audit report would cease to be relevant and no disallowance can be made during assessment proceedings under section 143(1)(iv)(a).

9. On the aforesaid argument, it is to be noticed that the decision was rendered by the ITAT Mumbai Bench in the case of Kalpesh Synthetics (P) Ltd. (supra) on 27.4.2022 prior to the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd., (supra) and therefore not applicable. The decision rendered by ITAT Mumbai Bench in the case of M/s. P. R. Packaging Services, follows the decision in the case of Kalpesh

Synthetics (supra). In paragraph 5 of the order, a reference has been made to the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd., (supra) but has been distinguished on the ground that the said decision was rendered in the context of assessment framed u/s.143(3) of the Act and therefore not relevant for processing returns u/s.143(1) of the Act. The basis of decision of ITAT Mumbai in the case of Kalpesh Synthetics (supra) is that clause (iv) of Sec.143(1)(a) cannot be invoked to disallow delayed payment of employee's contribution to ESI and PF made by the assessee beyond the due date as prescribed under the relevant law relating to ESI and PF for deposit of employees share of contribution, by invoking the provisions of section 36(1)(va) of the Act, if the said contributions are paid within the due date for filing return of income u/s.139(1) of the Act, owing to decision of High Court in favour of the assessee. However when those decisions of High Courts stand overruled by decision of Supreme Court in the case of Checkmate Services Pvt. Ltd., (supra) with retrospective effect, then the very basis of the decision rendered in the case of Kalpesh Synthetics(supra) no longer survives. Alternatively, the adjustment can be justified on the basis of the provisions of section 143(1)(a)(ii) of the Act which lays down that adjustment can be made to the total income in the event of "an incorrect claim, if such incorrect claim is apparent from any information in the return". The form of return contains clause with regard to amounts disallowable u/s.36 of the Act. The aforesaid view of ours is also supported by a decision rendered by the ITAT, Bengaluru Bench in the case Itek Packz Vs. ITO ITA No.995/Bang/2022, order dated 28.12.2022. In that decision, the

Tribunal, after considering the decision rendered in the case of P R Packaging (supra) held following the decision of Cemtile Industries Vs ITO in ITA No.693/Pun/2022, order dated 23.11.2022 that disallowance can be made under section 143(1)(a) of the Act of employees' share of ESI and PF paid beyond the due date under the relevant law relating to PF contribution and ESI contribution. The Tribunal has placed reliance on the decision of the Hon'ble Madras High Court in the case of Veerappampalayam Primary Agricultural Cooperative Credit Society Vs. DCIT (2022) 138 taxmann.com 571. The Hon'ble Madras High Court took the view that while processing a return under section 143(1)(a) of the Act, apparent incorrect claim can be disallowed. We are of the view that the decisions cited by the learned Counsel for the assessee proceed on the assumption that the disallowance of employees' share of PF and ESI paid beyond the due dates under relevant law has been made only under section 143(1)(a)(iv) of the Act, while in the intimation under section 143(1)(a) of the Act, no such basis has been given and therefore the disallowance can be justified even in terms of section 143(1)(a)(ii) of the Act.

In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 14th March, 2023.

Sd/-
(PADMAVATHY S)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 14th March, 2023.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. DR, ITAT, Bangalore
5. Guard file

By order

Assistant Registrar,
ITAT, Bangalore