

**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER  
AND  
SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

**ITA No.137/Ind/2022**  
**Assessment Year: 2018-19**

<b>M/s. Laurels School and Management Institutions Pvt. Ltd. 7, Press Complex, A.B. Road, Behind Dainik Bhaskar Press, Indore. PAN-AAACL4970D</b>	v.	<b>The Deputy Commissioner of Income Tax, CPC, Bangalore.</b>
(Appellant)		(Respondent)
Assessee by:	Anil Kumar Garg & Arpit Gaur, CA	
Respondent by:	Sh. Ashish Porwal, Sr. DR	
Date of hearing:	01.03.2023	
Date of pronouncement:	06.04.2023	

**ORDER**

**SHRI VIJAY PAL RAO, J.M.:**

This appeal by the assessee is directed against the order dated 22<sup>nd</sup> December, 2021 arising from the order passed under Section 143(1) by CPC, Bangalore for the Assessment Year 2018-19.

2. There is a delay of 66 days in filing the present appeal, the Ld. AR of the assessee has submitted that the delay in filing the appeal is covered by the judgment of Hon'ble Supreme Court in suo-moto cognizance of extension of limitation **writ petition (C) No. 3 of 2020) reported in 441 ITR 722**. Thus, the Learned AR has submitted that the appeal has been filed within the period of 90 days from 01.03.2022 as allowed by the Hon'ble Supreme Court. On the other hand, Ld. DR has not disputed that the appeal has been

filed by the assessee within the extended period of limitation as per the judgment of Hon'ble Supreme Court.

3. We have considered the rival submissions of the Learned AR as well as Learned DR and carefully gone through the relevant records. The impugned order was passed on 22.12.2021 which was Covid-19 pandemic period and Hon'ble Supreme Court in suo-moto cognizance for extension of limitation cited supra has finally issued the following direction in Para 5 as under:

*"5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:*

*(i) The order dated 23-3-2020 is restored and in continuation of the subsequent orders dated 8-3-2021, 27-4-2021 and 23-9-2021, it is directed that the period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.*

*(ii) Consequently, the balance period of limitation remaining as on 3-10-2021, if any, shall become available with effect from 1-3-2022.*

*iii. In cases where the limitation would have expired during the period between 15-3-2020 till 28-2- 2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall apply.*

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*IV. It is further clarified that the period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”*

4. The limitation for filing the appeal in the present case was expired in the month of February, 2022 and the assessee has filed the present appeal on 25<sup>th</sup> May, 2022 but within the period of 90 as provided by the Hon'ble Supreme Court being extension of limitation for the cases where the limitation was either expired or going to expire having less than 90 days from 28<sup>th</sup> February, 2022. Accordingly, in view of the judgment of Hon'ble Supreme Court in suo-moto cognizance for extension of the limitation, the appeal of the assessee is treated as filed within the period of limitation.

5. The assessee has raised following grounds of appeal:

*“1. That, the learned CIT(A) grossly erred, both on facts and in law, in upholding the action of the AO in making addition of Rs.16,93,719/-, which is quite unjustified, unwarranted, excessive, arbitrary and bad-in-law.*

*2a). That, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.16,93,719/- made by the AO in the appellant's income, on account of delay deposition of Employees Contribution towards Provident Fund at Rs.15,00,686/- and ESIC at Rs.1,93,033/- by invoking the provisions of section 36(1)(va) r.w.s. 2(24)(x) of the Income-Tax Act, 1961, without considering the material fact that the appellant had made the entire*

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*payment before the due date prescribed under s. 139(1) of the Act for furnishing of return of income.*

*2b). That, the learned CIT(A) grossly erred, both on facts and in law, in not considering and appreciating the material fact that the entire payment of the impugned sum made by the appellant was also eligible for deduction under s.37(1) of the Act.*

*3. That, the appellant further craves leave to add, alter or amend the foregoing ground of appeal as and when considered necessary.”*

5.1. The solitary issue arises from the grounds of appeal is whether the CIT(A) is justified in confirming the addition/adjustment made by the CPC, Bangalore while processing the return of income under Section 143(1) on account of delay in making payment of employees' contributions towards PF & ESI. Though, the payment was made before the due date filing the income under Section 139(1) of the Income Tax Act?

6. On the merits of this issue, the Ld. AR of the assessee has fairly submitted that the issue now covered by the judgment of Hon'ble Supreme Court in case of **Checkmate Services (P.) Ltd. v. CIT-1 448 ITR 518**. However, the Ld. AR of the assessee has argued at length on the issue that the CPC, Bangalore has no jurisdiction under Section 143(1) to make the addition/adjustment on account of delay in payment of employees contribution towards PF & ESI when the same was paid before the due date of filing of the return of income under Section 139(1) of the Act. He has referred to the various decisions of the Tribunal as under:

*“Judgment of the Hon'ble ITAT, Mumbai 'H' Bench in the case of **Kalpesh Synthetics Pvt. Ltd. vs. DCIT, CPC [Appeal No. ITA-1785/Mum/2021; Order dated 27-04-2022].***

*Judgment of the Hon'ble ITAT, Mumbai 'SMC' Bench in the case of **P.R. Packaging Service vs. ACIT, [Appeal No. ITA-2376/Mum/2022; Order dated 07-12-2022].***

*Judgment of the Hon'ble ITAT, Jaipur Bench in the case of **Paris Elysees India Pvt. Ltd. vs. DCIT [Appeal No. ITA-357/JPR/2022; Order dated 20-02-2023].**”*

6.1. The Learned AR has thus submitted that the scope of Section 143(1) is very limited and narrowed and adjustment while processing the return of income under Section 143(1)(a) can be made as provided under sub clause (i) to (vi) Clause (a) which are specific being arithmetical error, incorrect claim which is apparent from return of income and a claim of expenditure which is indicated in the Audit Report as not allowable but not taken into account while computing the total income. He has further submitted that sub-clause (4) of Section 143(1)(a) has been amended vide Finance Act, 2021 w.e.f 01.04.2021 and therefore, the amended sub-clause (iv) is not applicable for the assessment year under consideration. Thus, relying on the decisions of the Tribunal as referred above, the Learned AR has submitted that the AO has no jurisdiction while processing the return of income under Section 143(1) to make an adjustment/disallowance on account of delay in payment of employees' contributions towards PF & ESI and consequently, the

adjustment made by CPC, Bangalore under Section 143(1) is liable to be deleted.

7. On the other hand, the Ld. DR has submitted that the issue is covered by the judgment of Hon'ble Supreme Court in case of **Checkmate Services (P.) Ltd. v. CIT (supra)** and the information regarding delay in payment of employees' contributions towards PF&ESI is very much available in the return of income and particularly in the tax Audit Report. Therefore, the adjustment on this account is within the scope and jurisdiction of the AO while processing the return of income under Section 143(1)(a) of the Act. He has relied upon the various decisions of this Tribunal on this point as under:

1. *Cemetile Industries Vs. ITO in ITA No. 693/Pun/2022, order dated 23.11.2022.*
2. *Itek Packz in ITA No. 995/Bang/2022 & 1079/Bang/2022, order dated 28.12.2022.*

7.1. The Ld. DR has thus, submitted that there are series of decisions by the Tribunal wherein, it has been held that making adjustment on account of delay in payment of employees' contributions towards PF & ESI is proper and justified while processing the return of income under Section 143(1)(a) of the Act.

8. Having considered the rival submissions, it is noted that there are divergent views of different Benches of this Tribunal on the scope and jurisdiction of AO while processing the return of income under Section 143(1)(a) particularly for making adjustment on

account of belated payment of employees' contribution towards PF & ESI. However, in the appeal before us, the assessee has not raised any such ground of challenging the jurisdiction of the AO. Even no such ground was raised by the assessee before the CIT(A) as per the grounds of appeal reproduced in Para 3 of the impugned order as under:

*“(1) That, on the facts and in the circumstances of the case, determination of total income u/s 143(1) of the Income-Tax Act, 1961 at Rs.1,56,29,710/- as against the Returned Income of Rs.1,39,35,990/- thereby making additions of Rs., is quite unjustified, unwarranted, excessive, arbitrary and bad-in-law.*

*(2) That, the learned DCIT (CPC) grossly erred, both on facts and in law, in making an addition of Rs. 15,00,686/- in the appellants income on account of delay deposition of Employees Contribution towards Provident Fund and addition of Rs.1,93,033 was made on account of delay deposition of Employees Contribution towards ESIC by invoking the provisions of section 36(1)(va) r.w.s. 2(24)(x) of the Income-Tax Act, 1961, without considering the material fact that the appellant had made the entire payment before the due date prescribed under s. 139(1) of the Act for furnishing of return of income.*

*(3) That, the learned DCIT (CPC) grossly erred in not considering and appreciating the material fact that the entire payment of the impugned sum made by the appellant was also eligible for deduction under s. 37(1) of the Act.*

*(4) That, the appellant further craves leave to add, after and/or amend any of the foregoing grounds of appeal as and when considered necessary.”*

Therefore, when the assessee has not raised this issue either before the CIT(A) or in the grounds of appeal in Form No. 36 or in the shape of any additional grounds then, this issue does not germane to

the subject matter of appeal before us. Hence, we do not propose to express any opinion on this issue.

9. On the merits of this issue, the Ld. AR of the assessee has not disputed that the issue is now covered by the judgment of Hon'ble Supreme Court in case of **Checkmate Services (P.) Ltd. v. CIT (supra)** wherein, it has been decided in favour of the assessee in Para 51 to 55 as under:

*"51. The analysis of the various judgments cited on behalf of the assessee i.e., CIT v. Aimil Ltd. [2010] 188 Taxman 265/321 ITR 508 (Delhi); CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.); CIT v. Pamwi Tissues Ltd. [2009] 313 ITR 137 (Bom.); CIT v. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. [2013] 35 taxmann.com 616/217 Taxman 64 (Mag.)/[2014] 366 ITR 163 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 is to 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 assessee is 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 latter 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*

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*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 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."*

Respectfully, following the judgment of Hon'ble Supreme Court, we do not find any error or illegal impugned order of the CIT(A), the same is upheld.

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

Order pronounced on 06/04/2023 in open court.

**Sd/-**  
**(B.M. BIYANI)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**[VIJAY PAL RAO]**  
**JUDICIAL MEMBER**

Dated: 06/04/2023

Indore/Allahabad

K.D. Azmi

Copy forwarded to:

1. Appellant- M/s. Laurels School and Management Institutions Pvt.
2. Respondent- The DCIT CPC, Bangalore
3. CIT(A),
4. CIT
5. DR

By order  
Sr. P.S.

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		Date	Initials	
	Original dictation pad is enclosed at the end of file			
1.	Draft dictated on:	21.03.2023		Sr. PS/PS
2.	Draft placed before author:	24.03.2023		Sr. PS/PS
3.	Draft proposed & placed before the second member:	.03.2023		JM/AM
4.	Draft discussed/approved by Second Member:	.03.2023		JM/AM
5.	Approved Draft comes to the Sr. PS/PS:			Sr. PS/PS
6.	Order pronounced on:	.03.2023		Sr. PS/PS
7.	File sent to the Bench Clerk:			
8.	Date on which file goes to the Head Clerk:			Sr. PS/PS
9.	Date on which file goes to AR			
10.	Date of dispatch of Order:			
11.	Order uploaded on	.03.2023		