IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. No.23/Asr/2023
Assessment Year: 2019-20

Ess Ess Kay Engineering Co. Pvt. Ltd. Factory Area, Jalandhar. [PAN: AAACE5057G] **(Appellant)**	**Vs.**	NFAC, Delhi/C/o Asstt. Commissioner of Income Tax Circle-4, Jalandhar. **(Respondent)**

I.T.A. No.24/Asr/2023
Assessment Year: 2020-21

Kay Switchgears India Pvt. Ltd. Factory Area, Jalandhar. [PAN: AAACK9954A] **(Appellant)**	**Vs.**	NFAC, Delhi/ C/o Asstt. Commissioner of Income Tax Circle-4, Jalandhar. **(Respondent)**

I.T.A. No.14/Asr/2023
Assessment Year: 2020-21

M.K. Hotels & Resorts Ltd. Distt. Shopping Complex, Ranjit Avenue, Amritsar. [PAN: AABCM0913G] **(Appellant)**	**Vs.**	Dy. Commissioner of Income Tax, CPC, Bengaluru. **(Respondent)**

Appellant by	**Sh. S. K. Vatta, & Sh. Ashwani Kalia, CAs.**
Respondent by	**Sh. Amit Jain, Sr. DR**

Date of Hearing	**22.03.2023**
Date of Pronouncement	**11 .04.2023**

ORDER

Per: Bench:

Batch of three appeals of the different assessees are directed against the order of the ld. Commissioner of Income Tax (Appeals), NFAC, Delhi [in brevity the 'CIT (A)'] order passed u/s 250of the Income Tax Act 1961, [in brevity the Act] for A.Y. 2019-20 & 2020-21. Originally the order of the CPC, Bangalore[in brevity the AO] was framed u/s 143(1) by disallowing the payment u/s 36(1)(va) r.w.s. 43B of the Act.

2. All appeals are clubbed together, heard together and disposed of by this common order for the sake of convenience. For brevity, we consider grounds in ITA No.23/Asr/2023 for the AY 2019-20&ITA No.14/Asr/2023 for the AY 2020-21, where there is only change in figures in other appeals, which are reproduced below:.

ITA No. 23/Asr/2023

3. The assessee has raised the following grounds:

"1. That the worthy CIT(Appeals), NFAC was absolutely wrong, unjustified and erred both on facts and in law to have upheld, the additions/disallowances made u/s 36(l)(va) read with 43B of the Income Tax Act applying the ratio of the judgement of the Hon'able Supreme Court of India of 12.10.2022 in Civil Appeal No. 2833 of 2016 in CHECKMATE SERVICE PRIVATE LIMITED vs CIT-1,(2022) Taxman. Com 178(SC), ignoring the following facts/intent/objective of prospective legislative Amendments vide Finance Act, 2021, as under:

(a) The specific Legislature Amendment as brought about in the provisions of section 36(l)(va) read with section 43B vide Finance Act, 2021, whereby the Legislature intent is clear, specific & unambiguous to have prospective applicability of the said provisions from the Asstt. Year 2021-22 & onwards only and not applicable in respect of any such disallowances/additions, as made, under the provisions of section 36(l)(va), read with section 43B, in respect of any Asstt. Year/s prior to Asstt. Year 2021-22 and consequently shall ipso facts would have a prospective application from Asstt. year 2021-22 onwards only;

(b) That the intent of the specific Amendment as brought about by Legislature in the Finance Act, 2021 is clear, specific and unambiguous was to resolve allowability of the said

additions/disallowances as were being made under section 36(l)(va)/ 43B of the Act; with specific objective to settle all such disputes, difference of opinions/ interpretations by the Hon'able Courts, by bringing about the said specific Amendments in the Finance Act, 2021 whereby any such disallowance/additions u/s 36(l)(va) read with 43B of the Act, will have prospective applicability from Asstt. Year 2021-22 and onwards asstt. year/s only.

2. That the Worthy CIT(Appeals) NFAC, was also unjustified and erred both on facts and in law to have upheld the disallowances/additions in respect of delayed deposit of ESI/EPF, ignoring /disregarding the subject issue of specific Legislature Amendments as brought about by the Finance Act, 2021 to be effective from 2021-22 and onwards, thus wrongly invoking /applying the ratio of the Flon'able Apex Court judgement in the case of Checkmate Services Private Limited vs CIT-1,(2022) Taxman. Com 178(SC), vide Civil Appeal No. 2833 of 2016, since there is no reference, grounds, mention deliberations in the said judgement in respect of or with regard to the said specific Legislative Amendment, as brought about by the Finance Act, 2021; with prospective application from Asstt. Year 2021-22 & onwards only.

3. That whereas various Hon'able Appellate Tribunals including jurisdictional ITAT Amritsar Bench have already held that the said disallowances/additions as made u/s 36(l)(va) read with section 43B

of the Act, would be applicable from Asstt. Year 2021-22 and onwards in view of the clear Legislature intent and provisions as brought about in the Finance Act, 2021 w.e.f. Asstt. Year 2021-22 & onwards only, and as such worthy CIT(A) was absolutely wrong and unjustified to have upheld the impugned additions/disallowances.

4. The assessee craves to add, modify, delete any grounds of appeal during the appeal proceedings."

The assessee has taken additional ground before the ITAT which is reproduced as below:-

Additional Ground

4. The assessee has also taken the following additional grounds:

"1. That the Ld. CPC Cell, was wrong and unjustified in law and on facts to have passed orders u/s 143(1) for disallowing the delayed payments of ESI/EPF of Rs. 1,20,59,110/- which duly stood paid u/s 43B of the Act before the due date of filing the Income Tax Return u/s 139(1) as submitted on 31.10.2019 and the impugned intimation order have been passed on 01.07.2020, before any adverse judgment of the jurisdictional Court including Supreme Court and thus intimation as passed was without any basis and premises.

2. That the impugned additions/disallowances of Employee's share of ESI/EPF was otherwise eligible for deduction u/s 37 of the Act being

expenditure incurred in due course of carrying on business activities and being a direct charge of expenditure in carrying business activity. Reliance is this regard is placed on decisions of the Hon'able Courts:

(i) CIT vs Birla Cotton Spinning & weaving Mills Limited/Birla Bros. (P) Limited (1971) 82 UTR 166 (SC);

(ii) Mysore Kirloskar Limited vs CIT 166 UR 836 (Kerala)

(iii) SRMT Limited vs Dy. CIT (2005) 97 TTJ 580 Visakhapatnam Tribunal."

ITA No. 14/Asr/2023

5. The assessee has taken the following grounds:

"1. That the Ld commissioner of Income Tax (Appeals) has erred in law & facts on file in upholding the disallowance of Rs. 427919 on a/c of late deposit of ESI & PF during the year.

2. That the Ld commissioner of Income tax appeal has wrongly passed his orders applying the amendments made in Section 36(1) & 43B which are effective from 01.04.2021 and the appeal of the assessee is for Ass. Yr. 2020-21.

3. The orders of the Ld CIT (Appeals) may kindly be set aside in respect to disallowance of Late payment of ESI & PF and addition confirmed by CIT (A) be deleted."

6. Brief fact of the case is that all the assessees are filed the appeals with a common issue for disallowance of payment of ESI and EPF u/s 36(1)(va) r.w.s. 43B of the Act. The assessee has taken an additional ground. The ld. Sr. DR had not made any objection for acceptance of additional ground. After detail argument before the bench, additional ground is accepted and taken for adjudication. The addition was made by the ld. AO during processing of the return by disallowing the claim of deduction for payment of employees' share EPF and ESI amount to Rs.1,18,28,616/-. The said amount was paid before due date of filing return of income u/s 139(1) of the Act but not before the respective due dates as stipulated under the Act. The assessee challenged the order of the ld. AO before the ld. CIT(A). The ld. CIT(A) by considering the order of the Hon'ble Apex Court in the case of **Checkmate Services P. Ltd. vs. CIT, 143 Taxmann.com 178 (SC)** rejected the assessee's ground. Being aggrieved assessee filed an appeal before us.

7. The ld. counsel for the assessee has filed written submissions which are kept in the record. The assessee placed the issue before the bench with the orders of the different judicial authorities. The relevant submission of the assessee is extracted as below:

"(i) That on the subject matter following the decisions of the ***Hon'able Supreme Court in the case of CIT VS Alom Extrusions Limited reported in 319 ITR 306 (SC) & CIT vs Vinay Cement Limited 213 ITR 268; the jurisdictional Punjab & Haryana High Court in the case of CIT vs Hernia Embroidery Works (P)Ltd reported in 366 ITR 167 (P8iH) and CIT vs. Mark Auto Industries reported at 358 ITR 43 (Pb. & Haryana High Court)*** *have held in favour of the assessee, wherein it has been held that Second proviso to section 43B of the Act as omitted by the Finance Act, 2003 with effect from 1.4.2004 was clarificatory in nature and was to operate retrospectively and the respondent assessee was entitled to deduction in respect of Employers as well as Employee's contribution to ESI and EPF as the same have been deposited prior to filing of Return u/s 139(1) of the Act.*

(ii) The Hon'abe Punjab & Haryana High Court in the case of CIT vs Lakshmi India Limited reported at 188 Taxmann 132: have also held that the said EPF/ESI deductions are admissible where the payments have been made u/s 43B of the Income Tax Act on or before filing the return of income within time u/s 139(1) of Income Tax Act.

(iii) That even the jurisdictional ITAT Amritsar Bench in the case of Dy. CIT vs 3 & K Housing Corp. Ltd vide ITA No. 479, 495, 496

(ASR/2020) following the afore referred decision of the jurisdictional Punjab & Haryana High Court have held in favour of the assessee in respect of such disallowances/additions made in account Employee's share of EPF / ESI granting due relief to the assessee for payments having been made u/s 43B of the Income Tax Act before the due date of filing of the income tax return u/s 139(1) of the Income Tax Act.

(iv) That in this context relevant would also be the decision of the Hon'able Supreme Court in the case of Commissioner of Income Tax, Jaipur vs Rajasthan State Beverages Corporation Ltd (2017) 84 Txmann.com 185 (SC), wherein deciding a special leave petition, the Hon'able Supreme Court, on the subject matter in question have held as under:

"ESI and EPF contribution: Amount claimed on payment of ESI 8i EPF having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(l)(va); SLP dismissed"

(v) That since the assessee appellant falls within the jurisdiction of the Hon'able Punjab & Haryana High Court, therefore, the decision of the jurisdictional High Court necessarily have to prevail even if there are contrary decisions/judgment of other High Court having a different opinion.

(vi) That on the subject issue of binding nature of the decision of the jurisdictional High Court which necessary would governs/apply within the jurisdictional territory of the relevant jurisdictional High Court, your kind attention is also drawn to the another decision of worthy CIT NFAC in the case of Puri Brothers vs ACIT, Circle Palampur for the Asstt. year 2018-19, copy of the decision is annexed, wherein worthy CIT, NFAC, following the orders of the jurisdictional Himachal Pradesh High Court in the case of CIT VS Nipso Polyfabriks Limited reported in 350 ITR 327 (HP), have duly allowed relief for such EPF/ESI paid u/s 43B of the Act before filing of the Return of Income u/s 139(1) of the Act."

8. The ld. Sr. DR vehemently argued and relied on the order of the **Hon'ble Apex Court in Checkmate Services P. Ltd. vs. CIT, Civil Appeal No. 2833/2016 dated 12.10.2022 (2022) 143 Taxmann.com 178 (SC).**

9. We heard the rival submission and relied on the documents available in the record. The issue was already stated by the bench in relation to the order of the **Hon'ble Apex Court in Checkmate Services P. Ltd. (supra).** All the issues are duly covered in the order of the ITAT Amritsar Bench. The ld. counsel for the assessee has mentioned the order of the jurisdictional High Court in the case of **CIT vs. Mark Auto Industries Ltd. 358 ITR 43 (P & H)**. The issue is already

taken care during passing of the appeal order by the same bench in the case of **Navodaya Times Private Ltd.in ITA No. 192/Asr/2022 for A.Y. 2018-19 order dated 31.01.2023.** The relevant para 6 to 10 of the said order is extracted as below:

> *"6. We heard the rival submission and relied on the documents available in the records. The bench has already been taken the view in the case of Royal Furnishers Residency vs. CIT(A), in ITA No. 54/Asr/2022 date of order 20/12/2022 which are as under: -*
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> *"4. Tersely we advert the fact of the case. The addition was made for delayed payment of PF and ESI amount of Rs. 4,16,169/-before the close of the financial year and Rs.71,818/- on 18.04.2018 related to EPF payable. The assessee filed an appeal before the ld. CIT(A) with explanation to section 36(1)(va) and 43B and confirmed the addition amount of Rs.4,87,990/- (Rs.4,16,169/- (+) Rs.71,818/-). Aggrieved assessee filed an appeal before the ld. CIT(A), and has taken the following grounds on basis of the explanation of section 36(1)(va) and 43B which was observed in retrospectively and request for application in legal way. The ld. CIT(A) upheld the order of the ld.AO. Aggrieved assessee filed an appeal before us. The assessee was called for hearing but none was present on behalf of the assessee. Considering the gravity of the issue, the matter was taken ex parte qua for assessee. After hearing the submission of the Sr. DR. The matter will be adjudicated accordingly.*
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> *5. The grievance of the assessee is that confirmation of disallowance of Employees' Contribution to PF / ESI in terms of Sec.43B r.w.s. 36(1)(va) as well as Sec.2(24)(x). Till now, this issue was being decided by us in assessee'sfavour, inter-alia, by relying upon the decision of Hon'ble High Court of Punjab &Haryana,**CIT vs Mark Auto Industries Ltd ITA no 57 of***

2009, 358 ITR 43. *However, the position has materially been altered after recent decision of Hon'ble Supreme Court in bunch of appeals titled as* ***Checkmate Services P. Ltd. Vs CIT (Civil Appeal No.2833 of 2016 dated 12.10.2022), [2022] 143 taxmann.com 178 (SC).***
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 Apex Court in revenue's favour as under: -

"*Analysis and Conclusions*

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. 1-04-1988. 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 1-4-1989 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. v. CIT [2021] 129 taxmann.com 145/282 Taxman 281/436 ITR 582 (SC)/2021 SCC Online SC 575.*

"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) [employer(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 assessees 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 aforestated 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.

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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

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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 Corpn. v. CIT [2010] 193 Taxman 193/326 ITR 642 (SC)/[2010] 8 SCC 739 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 CIT v. Calcutta Knitwears, Ludhiana [2014] 6 SCC 444. Recently, in Union of India v. Exide Industries Ltd. [2020] 116 taxmann.com 378/273 Taxman 189/425 ITR 1 (SC)/2020 (5) SCC 274 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:*

"20. Section 43B, however, is enacted to provide for deductions to be availed by the Assessee in lieu of liabilities accruing in previous year without making actual payment to discharge the same. It is not a provision to place any embargo upon the autonomy of the Assessee in adopting a particular method of accounting, nor deprives the Assessee of any lawful deduction. Instead, it merely operates as an additional condition for the availment of deduction qua the specified head.

21. Section 43B bears heading "certain deductions to be only on actual payment". It opens with a non-obstante clause. As per settled principles of interpretation, a non obstante clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless specifically provided for. Out of the allowable deductions, the legislature consciously earmarked certain deductions from time to time and included them in the ambit of Section 43B so as to subject such deductions to conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of mercantile system of accounting on accrual of liability basis qua the specific head of deduction covered therein and not to other heads. But that is a matter for the legislature and its wisdom in doing so.

22. The existence of Section 43B traces back to 1983 when the legislature conceptualised the idea of such a provision in the 1961 Act. Initially, the provision included deductions in respect of sum payable by Assessee by way of tax or duty or any sum payable by the

employer by way of contribution to any provident fund or superannuation fund. It is noteworthy that the legislature explained the inclusion of these deductions by citing certain practices of evasion of statutory liabilities and other liabilities for the welfare of employees..."

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23. With the passage of time, the legislature inserted more deductions to section 43B including cess, bonus or commission payable by employer, interest on loans payable to financial institutions, scheduled banks etc., payment in lieu of leave encashment by the employer and repayment of dues to the railways. Thus understood, there is no oneness or uniformity in the nature of deductions included in section 43B. It holds no merit to urge that this Section only provides for deductions concerning statutory liabilities. Section 43B is a mix bag and new and dissimilar entries have been inserted therein from time to time to cater to different fiscal scenarios, which are best determined by the government of the day. It is not unusual or abnormal for the legislature to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to override regulations or conditions.

24. The leave encashment scheme envisages the payment of a certain amount to the employees in lieu of their unused paid leaves in a year. The nature of this payment is beneficial and pro-employee. However, it is not in the form of a bounty and forms a part of the conditions of service of the employee. An employer seeking deduction from tax liability in advance, in the name of discharging the liability of leave encashment, without actually extending such payment to the employee as and when the time for payment arises may lead to abhorrent consequences. When time for such payment arises upon retirement (or otherwise) of the employee, an employer may simply refuse to pay. Consequently, the innocent employee will be entangled in litigation in the evening of his/her life for claiming a hard-earned right without any fault on his part. Concomitantly, it would entail in double benefit to the employer - advance deduction from tax liability without any burden of actual payment and refusal to pay as and when occasion arises. It is this mischief clause (f) seeks to subjugate."

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 Eagle Flask Industries Ltd. v. CCE 2004 taxmann.com 350 (SC)/2004 Supp. (4) SCR 35. 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 Cement 2005 taxmann.com 1352 (SC)/[2005] 1 SCC 368 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."
This was also reaffirmed in a number of judgments, such as CIT v. Ace Multi Axes Systems Ltd. [2017] 88 taxmann.com 69/[2018] 252 Taxman 274/400 ITR 141 (SC)/[2018] 2 SCC 158.
***50.** The Constitution Bench, in Commissioner of Customs v. Dilip Kumar & Co. [2018] 95 taxmann.com 327/69 GST 239 (SC)/[2018] 9 SCC 1 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.

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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.,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 DugdhUtpadakSahakari Sangh Ltd. [2013] 35 taxmann.com 616/217 Taxman 64 (Mag.)/[2014] 366 ITR 163 and NipsoPolyfabriks (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, AlomExtrutions 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 assessees' 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 assessees 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 assessees are 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 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."*

6. In our considered view that It has finally been held by Hon'ble Apex Court 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 part is 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 been clarified 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 favour of revenue and we respectfully follow the same.

7. In the result appeal of the assessee bearing ***ITA No. 54/Asr/2022*** *is dismissed."*

7. During hearing the ld. counsel has respectfully relied on the order of the ITAT, Mumbai Bench, in the case of **M/s P R Packaging Service in ITA No. 2376/Mum/2022 order dated 07/12/2022** the relevant paragraphs 5& 6are extracted as below:

"5. We are conscious of the fact that the issue on merits is decided against the assessee by the recent decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd vs CIT reported in 143 taxmann.com 178 (SC) dated 12/10/2022. This decision was rendered in the context where assessment was framed under section 143(3) of the Act and not under section 143(1)(a).

6. Hence we direct the Ld.Assessing Officer to delete the addition made in respect of employees' contribution to

Provident Fund, in the facts and circumstances of the instant case. Accordingly, grounds 1 to 3 raised by the assessee are allowed."

8. The assessee further relied on the order of the ITAT Cuttack Bench in the case of ***Nirakar Security & Consultancy Services Pvt. Ltd. vs. ITO, Ward 2(3), Cuttack in ITA 98/CTK/2022, date of order 17.10.2022.***

9. The grievance of the assessee which was emphasized by the ld. Counsel that the revenue has no jurisdiction to add back the amount U/s 143(1). 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).

9.1. We fully agree with the proposition argued by the ld. Councel for assessee 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'

9.2. 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;'

9.3. Now we focus on 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. 1-04-2021. As such, this part of the provision cannot be considered for application during the years under consideration, which are prior 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. Point 20(b) of the audit report gives the 'Sum received from employees','Due date for payment' and 'The actual date of payment to the concerned authorities'. 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 for deduction u/s 36(1)(va), the actual payment is delayed and deposited. 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. Considering 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.

The action of revenue is in accordance with the law laid down by Hon'ble Supreme Court in the cited decision.

10. In the result, the appeal of the assessee bearing ***ITA 192/Asr/2022*** *is dismissed."*

10. We fully relied on the order of ITAT-Amritsar Bench. We respectfully considered the orders which are relied by the ld. Counsel. But all are no more *res integra* with order of the Hon'ble Apex Court in the case of Checkmate services Pvt Ltd, *supra.* So, the Grounds of the appeal of assessee is dismissed. Related to Additional Ground of the assessee it was claimed that the amount of deduction is subject to claim of Section 37 of the Act. The ld. DR had not made any strong objection in this issue. But the Additional Ground is first time agitated before the bench. In considered view the Additional Ground of the assessee is remanded back

to ld. CIT(A) for adjudication. Needless to say, the assessee should get reasonable opportunity of hearing in the set aside proceeding.

11. In the result, the appeal bearing **ITA Nos.23/Asr/2023, 24/Asr/2023 and 14/Asr/2023** are allowed for statistical purpose.

Order pronounced in the open court on 11.04.2023

Sd/-	**Sd/-**
(Dr. M. L. Meena)	**(ANIKESH BANERJEE)**
Accountant Member	**Judicial Member**

AKV
Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

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By Order