

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
(Conducted Through Virtual Court)

**Before: Shri T.R. Senthil Kumar, Judicial Member
And Shri B.M. Biyani, Accountant Member**

**ITA No. 342/Ind/2022
Assessment Year: 2018-19**

Anil Prakash Tyagi 455/12, Grenadiers Regt, Cantt, Jabalpur Cantt, Jabalpur-482001, M.P. PAN: AAMPT1851A (Appellant)	Vs	The ADIT, C.P.C., Bengaluru (Respondent)
--	----	--

**Assessee Represented : Ms. Shradha Piplodia, Adv.
Revenue Represented : Shri Ashish Porwal, Sr. DR**

Date of hearing : 21-02-2023
Date of pronouncement : 28-04-2023

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Assessee as against the order dated 11.07.2022 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, (in short referred to as "NFAC"), arising out of the Intimation passed under section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2018-19.

2. The solitary issue involved in this appeal is late payment of PF and ESIC contribution by the assessee but deposited before the due date of filing of the Income Tax Return and can it be disallowed in the intimation passed u/s. 143(1) intimation.

2.1. The brief facts of the case is that the assessee is an ex-army person and Proprietor of Security Agency Services. For the Assessment Year 2018-19, the assessee filed its Return of Income declaring total income of Rs. 43,80,110/- on 09.01.2020 by making disallowance of Rs. 36,76,118/- on account of late payment of PF and ESIC beyond the monthly due dates but the same were paid before filing of Return of Income.

3. Aggrieved against the same, the assessee filed an appeal before Ld. NFAC. The Ld. NFAC by a very detailed order confirmed the disallowance made u/s. 36(1)(va) and thereby dismissed the appeal filed by the assessee.

4. Aggrieve against the same, the assessee is in appeal before us raising the following Grounds of Appeal:

1. That the Ld. CIT(A), NFAC was not justified in confirming the order u/s 143(1) issued by CPC dated 09.01.2020, which is bad in law and facts and therefore may be quashed.

2. The Ld. CIT(A), NFAC was not justified in confirming the enhancement of returned income in the intimation u/s 143(1) by adjusting and making an arbitrary addition of Rs.36,76,118/- on account of payment of PF & ESIC beyond the due date as per section 36(1)(va).

3. The Ld. CIT(A), NFAC erred in not appreciating that the addition could not have been made u/s 143(l)(a) in any case, as the issue was debatable.

4.1. Ld. Counsel Ms. Shradha Piplodia appearing for the assessee filed before us a small Paper Book containing the original Return of

Income filed by the assessee along with the Tax Audit Report an intimation made by CPC and thus submitted the tax auditor has not suggested for any disallowance. However the Ld. CPC made the disallowance and demanded the tax which is against the provisions of law. The Ld. Counsel relied upon the Co-ordinate Bench Decision in the case of P.R. packaging Service in ITA No. 2376/Mum/2022 dated 07.12.2022 wherein after considering the reasons Supreme Court judgment in the case of Checkmate Services Pvt. Ltd. 143 taxmann.com 178 (SC) it is held that it is not permissible to make the adjustment of employee contribution u/s. 143(1) intimation which is debatable matter on the date of passing of the intimation.

5. Per contra, Ld. Sr. D.R. Shri Ashish Porwal appearing for the Revenue supported the order passed by the Lower Authorities and requested to uphold the same.

6. We have given our thoughtful consideration and perused the materials available on record. We note that identical issue is recently decided **against assessee** by the Co-ordinate Bench of **ITAT, Indore in ITA No. 171/Ind/2021 M/s Prashanti Engineering Works (P) Ltd. Vs. ADIT, CPC, Bangalore, order dated 22.02.2023**, after taking into account the latest decision of Hon'ble Supreme Court in **Checkmate Services (P.) Ltd. [2022] 143 taxmann.com 178 (SC)**, the legal provision of section 143(1) of the Act and various judicial rulings. The order of Hon'ble Co-ordinate Bench is extracted below:

"5. The assessee is in appeal before us against the order passed by Ld. CIT(Appeals). Before us, the counsel for the assessee submitted that firstly, in the audit report, the auditor has not made any specific observation

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

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

Assessment.

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

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

i) any arithmetical error in the return;

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

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

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

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

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

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

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

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

6.3 With regards to the second argument of the counsel for the assessee that at the time when the disallowance was made, the issue was debatable, we observe that the position on this issue has now been unambiguously clarified by the Hon'ble Supreme Court with respect to all assessment years prior to AY 2021-22 in the case of **Checkmate Services (P.) Ltd. [2022] 143 taxmann.com 178 (SC)** wherein the Supreme Court held that for assessment years prior to AY 2021-22, non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. The Supreme Court observed that there is a marked difference between nature and character of assessee-employer's

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

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

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

7. Respectfully following the same view, we are also inclined to hold that the employees' contributions to PF / ESI paid after due

date under PF / ESI laws is not an allowable deduction in computing taxable income of business and the revenue-authorities have rightly disallowed the same. Therefore, we uphold the action of lower-authorities in making/confirming the impugned disallowance.

8. In the result, the appeal filed by the Assessee is dismissed.

Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963/open court on 28/04/2023.

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER
Indore: Dated 28/04/2023

Sd/-

(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order

Assistant Registrar
Income Tax Appellate Tribunal,
Indore Bench, Indore

Strengthened preparation & delivery of orders in the ITAT	
1) Date of dictation	18/04/2023
2) Date on which the typed draft is placed before the Dictating Member & Other Member	/04/2023
3) Date on which the approved draft comes to the Sr. P.S./P.S.	/04/2023
4) Date on which the fair order is placed before the Dictating Member for pronouncement	/04/2023
5) Date on which the fair order comes back to the Sr. P.S./P.S.	/04/2023
6) Date on which the file goes to the Bench Clerk	/04/2023
7) Date on which the file goes the Head Clerk	
8) Date on which the file goes to the Assistant Registrar for signature on the order	
9) Date of Dispatch of the order	