आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"A" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 34 & 35/JP/2023
निर्धारण वर्ष/Assessment Year : 2018-19 & 2019-20

M/s. Swastic Oil Industries F-5-F8, Industrial Area Newai, Tonk 304 021	बनाम Vs.	The ACIT Circle-7 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAJFS 8180 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Devang Gargieya, Adv.
राजस्व की ओर से/Revenue by: Shri A.S. Nehra, Addl. CIT

सुनवाई की तारीख/Date of Hearing : 20/04/2023
उदघोषणा की तारीख/Date of Pronouncement: 02/05/2023

आदेश/ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

Both these appeals have been filed by the assessee against two different orders of the ld. CIT(A), National Faceless Appeal Centre (for short ''NFAC''), Delhi dated 31-12-2022 for the assessment year 2018-19 & 2019-20 respectively wherein the assessee has raised the grounds of appeal as under:-

ITA NO.34/JP/2023 – A.Y. 2018-19

''1.The impugned addition/disallowance by way of adjustments made in the order u/s 143(1) of the Act are bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly ne deleted.

2. The ld. CIT(A) erred in law as well as on facts of the case in disallowing Rs.4,08,447/- on account of alleged delay in making the payment towards Employee's Contribution of PF & ESI before the respective due dates u/s s36(1)(va). The disallowance so made without jurisdiction and contrary to the provisions of law, hence may kindly be deleted in full.

3. The ld. CIT(A) erred in law as well as on facts of the case in not considering that the expenditure so incurred was wholly and exclusively incurred for the purpose of business fully allowable u/s 37(1) of the Act. The appellant, therefore, may kindly be held eligible and entitled to get the deduction u/s 37(1) of the Act.

4. The ld. CIT(A) further erred in law as well as on the facts of the case in charging interest u/s 234A, 234B, 234C and 234F of the Act. The appellant totally denies its liability of charging and without any such interest. The interest so charged/withdraw being contrary to the provisions of law and facts, kindly be deleted in full.''

ITA NO.35/JP/2023 – A.Y. 201920

''1.The impugned addition/disallowance by way of adjustments made in the order u/s 143(1) of the Act are bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly ne deleted.

2. The ld. CIT(A) erred in law as well as on facts of the case in disallowing Rs.1,15,155/- on account of alleged delay in making the payment towards Employee's Contribution of PF & ESI before the respective due dates u/s 36(1)(va). The disallowance so made without jurisdiction and contrary to the provisions of law, hence may kindly be deleted in full.

3. The ld. CIT(A) erred in law as well as on facts of the case in not considering that the expenditure so incurred was wholly and exclusively incurred for the purpose of business fully allowable u/s 37(1) of the Act. The appellant, therefore, may kindly be held eligible and entitled to get the deduction u/s 37(1) of the Act.

4. The ld. CIT(A) further erred in law as well as on the facts of the case in charging interest u/s 234A, 234B, 234C and 234F of the Act. The appellant totally denies its liability of charging and without any such interest. The interest so charged/withdraw being contrary to the provisions of law and facts, kindly be deleted in full.''

2.1 As regards Ground No. 1 and 2 of the assessee for A. Y. 2018-19 in ITA No. 34/JPR/2023 the brief facts of the case that the assessee is engaged in the business of manufacturing and trading of edible oil and oil and oil cake from Mustard,

Taramira and Groundnut seeds. The assessee filed Return of income on 6-10-2018 declaring total income of Rs.99,03,850/-. The AO during the course of assessment proceedings noticed that the assessee had deposited the amount of Rs.4,08,447/- employee's contribution towards PF and ESI beyond the due date stipulated in the PF and ESI Act. The AO thus made disallowance by holding that the employees contribution towards PF/ESI is governed by the provisions of Section 36(1)(va) r.w.s. 2(24(x) of the Act and not by the provisions of Section 43B of the Act.

2.2 In first appeal, the ld.CIT(A) has confirmed the action of the AO by observing as under:-

> ''I have carefully considered the appellant's submissions, the judicial pronouncement quoted by the appellant and other relevant latest judgement in this regard.
>
> The appellant has relied upon the judgement of Supreme Court in the case of PCIT vs Rajasthan State Beverages Corporation Ltd., Judgement of Rajasthan H.C. in the case of CIT vs Jaipur Vidyut Vitran Nigam Ltd. (2014) and CIT vs Manglam Arts (2017, ITAT, Mumbai Bench Judgement in the case of Tokeim India (P) Ltd. vs DCIT (2018), ITAT, Jaipur Bench in the cae of CIT vs M/s. Anil Special Steel Industries Ltd., Jaipur (2014), ITAT, Jaipur Bench, Judgement in the case of Zuberi Engineering Company vs DCIT (2019) in support of the contention that addition made by the AO on account of late deposit of employees share/contribution towards ESI/PF after its due date but paid before the due date of filing of return of income u/s 139 (1) of the Income Tax Act, is bad in law and therefore liable to be delete3d. In this regard, it is important to note that that judgement of Supreme Court of India in the case of Checkmate Services (P) Ltd. vs CIT((supra) , the issue under consideration is finally settled and has become the law of land. Further in para 55 of the Judgement (supra) itself the Hon'ble Supreme Copurt has held that the decision of the other High Court holding the contrary, do not lay down the correct law.
>
> In the instant case, the appellant has deposited employees contribution to ESI/PF beyond the due date specified in the relevant Act. Therefore, keeping in view the facts and circumstances of the instant case and respectfully following the judgement of Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd.vs CIT-1 (supra), the addition of Rs.4,08,447/- on account of employees contribution towards

ESI/PF deposited after due date is upheld. Under these circumstances, I do not find any infirmity in the order of theAO.

5. Therefore , keeping in view the above narrated facts and circumstances, the appeal of the assessee is dismissed.''

2.3 During the course of hearing, the ld. AR of the assessee filed a following written submission.

''1.1 It is not disputed that though the assessee could not deposit the amount of PF and ESI on the due date specified in the related Act, but all the contributions were duly deposited before the due date (as evident from the table given hereunder) of filing of return u/s 139. Hence, the same are fully allowable. The original due date for filing of ROI was 30.09.2018 which was extended to 30.10.2018 vide CBDT Order u/s 119 dated 24.09.2018.

Payment of Employee State Insurance (ESI)

S.N.	Month of deduction	Amount paid	Due date of payment	The actual date of payment
1	April, 2017	16121	21-05-17	17-05-17
2.	May, 2017	16226	21-06-17	15-06-17
3.	June, 2017	16671	15-07-17	17-07-17
4.	July,2017	16507	15-08-17	17-08-17
5.	August, 2017	13738	15-09-17	15-09-17
6.	Sept. 2017	12196	15-10-17	12-10-17
7.	Oct. 2017	15239	15-11-17	14-11-17
8.	Nov2017	17837	15-12-17	17-01-18
9.	Dec. 2017	15044	15-01-18	17-01-18
10.	January, 2018	17236	15-02-18	17-02-18
11.	Feb. 2018	17144	15-03-18	15-03-18
12	Marcuh, 2018	17837	15-04-18	16-04-18

Payment of Employees Provident Fund (PF)

S.N.	Month of deduction	Amount paid	Due date of payment	The actual date of payment
1	April, 2017	5076	15-05-17	17-05-17
2.	May, 2017	51176	15-06-17	15-06-17
3.	June, 2017	52890	15-07-17	17-07-17
4.	July,2017	52258	15-08-17	17-08-17

5.	August, 2017	38647	15-09-17	15-09-17
6.	Sept. 2017	32680	15-10-17	12-10-17
7.	Oct. 2017	44478	15-11-17	14-11-17
8.	Nov2017	51618	15-12-17	30-01-18
9.	Nov. 2017	2886	15-12-17	17-02-18
10.	Dec. 2017	42267	15-01-18	30-01-18
11.	Dec. 2017	1527	15-01-18	17-02-18
12	January, 2018	53108	15-02-18	17-02-18
13	Feb. 2018	51832	15-03-18	15-03-18
14	March, 2018	54509	15-04-18	13-04-18

1.2 Adjustment beyond the scope of S. 143(1): At the outset it is submitted Ld AO (CPC, Bangalore) made adjustment while processing return filed by the assessee u/s 143(1) of the Act disallowing the employee's contribution of PF/ESI deposited beyond the date in the relevant law

Under Section 143(1)(a)(iv), it is asserted that only those claims or expenses, which have been identified as disallowable in the audit report but have not been considered while calculating the total income in the tax return, can be adjusted during the processing of the income tax return.

The amendment made in S. 143(1)(a)(iv) by the Finance Act, 2021, which added the term 'increase in income,' was effective from April 1, 2021. It is important to note that the processing in question took place on 30.04.2020, and pertains to the A.Y. 2018-19. The current addition can be considered an increase in income as per S. 2(24)(x). However, the authority to increase income u/s 143(1)(a)(iv) was granted only from April 1, 2021. Consequently, using this clause to adjust the reported income lacks proper jurisdiction.

In facts of the present case, the auditor specified details of employee contributions to various funds as mentioned in S. 36(1)(va) under clause 20(b). The auditor provided only the required factual reporting and did not express any opinion concerning disallowance. Furthermore, disallowance cannot be made solely based on reporting in the audit report. Instead, it must be made in accordance with applicable laws and considering the judicial views on the matter.

Additionally, it is important to clarify that under clause 20(b), the auditor's responsibility is to report the details of the contributions, rather than the disallowance amount or any late payments made to the respective funds.

The Ld. AO (CPC) merely compared the due dates of payment and the actual dates of payment during the processing of the income tax return, and any discrepancy between these dates was presumed to be a disallowance. However, in reality, there is no disallowance; the difference only pertains to the due date and the actual date of payment.

Therefore, when no disallowance exists, the provisions of S. 143(1)(iv) of the Act cannot be invoked.

1.3.1 Reliance is placed on recent judgement of Hon'ble ITAT, Delhi Bench in the case of Garg Heart Centre & Nursing Home Private Limited ITA No.1700/Del/2022 wherein it has been held as under:

"At the very least, Revenue should have given due consideration to the fact that the issue was highly debatable and controversial. As already discussed earlier, adjustments u/s 143(1) of Income Tax Act by way of intimation u/s 143(1) of Income Tax Act, on debatable and controversial issues, is beyond the scope of section 143(1) of Income Tax Act.

Revenue was clearly in error, in making the aforesaid adjustments u/s 143(1) of Income Tax Act on a debatable and controversial issue"

1.3.2. In the judgement of the judgement of Hon'ble ITAT, Mumbai Bench in the case of Kalpesh Synthetics (P.) Ltd. Vs. DCIT, CPC Bengaluru [2022] 137 taxmann.com 475, it was held that:

"In the light of this ground reality, an auditee being presumed to have accepted, and concurred with, the audit observations, just because the appointment of auditor is done by the assessee himself, is too unrealistic and incompatible with the very conceptual foundation of independence of an auditor. On the one hand, the position of the auditor is treated so subservient to the assessee that the views expressed by the auditor are treated as a reflection of the stand of the assessee, and, on the other hand, the views of the auditor are treated as so sacrosanct that these views, by themselves, are taken as justification enough for a disallowance under the scheme of the Act. There is no meeting ground in this inherently contradictory approach. Elevating the status of a tax auditor to such a level that when he gives an opinion which is not in harmony with the law laid down by the Hon'ble Courts above as indeed in this case, the law, on the face of it, requires such audit opinion to be implemented by forcing the disallowance under section 143(1), does seem incongruous."

1.3.3 Similarly the Hon'ble ITAT in the case of P.R. Packaging Service vs. ACIT. 25(3), Mumbai ITA No. 2376/Mum/2022, addressed a situation identical to that of the assessee company. In this case, additions made with respect to S. 36(1)(va) under S. 143(1) were deleted by the Hon'ble ITAT, Mumbai Bench. The tribunal held that such adjustments during processing were beyond the scope of S. 143(1)(a)(iv). Notably, this decision was rendered by the Hon'ble ITAT, Mumbai Bench after the Hon'ble Supreme Court's ruling in Checkmate Services Private Limited (Supra).

In light of the above discussion, the adjustment deserves to be deleted and relief may kindly be granted.

2. Debatable issues are out of scope of prima facie adjustment: The law is well settled that no prima facie adjustment u/s143(1) is permissible on any issue which is a debatable issue on the day, when an intimation u/s 143(1) is passed irrespective of the nature of issue involved. It is well settled that no adjustment u/s 143(1) is permissible on a debatable/controversial issue being beyond its scope as has been repeatedly held in several decisions.

In this regard, we place reliance on the cases of ACIT vs. Haryana Telecom Pvt. Ltd. 14 taxman.com 122 (Delhi), George Williamson (Assam) Ltd. vs. CIT & Anr. [2006] 286 ITR 0533 (Gauhati). Tata Yadogawa Ltd. vs. CIT [2011] 335 ITR 0053 (Jharkhand): God Granites vs. Central Board of Direct Taxes & Ors. [1996] 218 ITR 0298 (Karnataka); Swamy Distributors vs. ACIT & Ors. [2003] 180 CTR 0290; 139 Taxman 0310 (Karnatka), CIT vs. Eicher Goodearth Ltd. [2008] 296 ITR 0125 (Delhi); Smt. Shanta Chopra vs. ITO [2004] 271 ITR 0132 (Delhi); Kvaverner John Brown Engg. (India) (P.) Ltd. vs. ACIT, [2008] 305 ITR 0103 (Supreme Court).

In the present case the addition had been made by way of adjustments, vide intimations issued u/s 143(1) of Income Tax Act on dt. 17.10.2019 However, at that point of time it is undisputed fact on record that this Hon'ble

Law of binding precedent:

However, at that point of time, it is undisputed fact on record that this Hon’ble Bench which is the Jurisdictional ITAT, in so many cases had already decided the issue in favour of assessee which was affirmed by several decision of Hon'ble Rajasthan High Court in favour of Assessee. Kindly refer CIT vs State Bank of Bikaner Jaipur (2014 265 CTR 471 (Raj)) CIT vs Jaipur Vidyut Vitran Nigam limited (2014) 265 CTR 62 (Raj) and many more.

Needless to say that the decisions of Hon'ble Rajasthan High Court were binding upon the sub-ordinate officers, with reference to the assessee situated in such jurisdiction. No doubt there were contrary decisions too but then the issue was highly debatable and controversial.

4. Further, it is also well settled that retrospective amendment cannot be invoked to make addition by way of adjustment and intimation u/s 143(1) of Income Tax Act. This view was taken by the Hon'ble Supreme Court in the case of CIT vs. Hindustan Electro Graphites Ltd. [2000] 243 ITR 0048 (SC), wherein the view of Hon'ble Kolkata High Court in of Modern Fibotex India Ltd. & Anr. Vs. DCIT & Ors.[1995] 212 ITR 0496 (Calcutta) was approved. In Modern Fibotex India Ltd it was held as under :.

"Assessment-Prima facie adjustment-Validity-Assessee had itself, in its return, drawn the attention of the IT authorities to the basis upon which the cash compensatory support had not been included as income and had clearly offered to include the same in any assessment if the basis is shown to exist- Additionally, the change in the law by amendment of s. 28 took place several months after the return was filed by the assessee-The jurisdiction under s 143(1)(a) is a summary one, whereas s. 143(2) precedes an assessment under s. 143/3) or what has been described as the scrutiny or regular assessment-Revenue's submission that the issuance of an intimation is compulsory is incorrect-To accept the submission would be to read the provisions of s. 143(1)(a) in a manner not warranted by the language-The context in which the word shall has been used in s. 143(2) has to be read in the background of the proviso to the section and that is where there is no scope for any adjustments in terms of the proviso, there would be no scope for sending any intimation-Once having found the return not immediately determinable or summarily, the Assessing Officer cannot discard this view and determine the matter under s. 143(1)(a) without there being any change in law or fact between the issuance of the notice under s. 143(2) and the adjustment under s. 143(1)(a)-Impugned adjustment and intimation were ultra vires the section and must accordingly be set aside.

Same view was taken by the Hon'ble Madhya Pradesh High Court in the case of CIT vs. Satish Traders [2001] 247 ITR 0119 (Madhya Pradesh).

5. Similarly, the decision in the case of Checkmate (2022) 329 CTR (SC) 1 was passed on 12.10.2022 i.e. much later to the subjected intimation dt. 17.10.2019) hence, on that day the binding law was not against the assessee. Therefore, the department /AO/ CPC has erred in making impugned adjustment u/s 143(1) of the Act, because the Apex Court decision was not available before them. It is not. the case that the adjudication of the appeal against scrutiny assessment order, is still open, before ITAT after the availability of the Apex Court decision and the situation prevailing on the date of intimation has to be considered which is a provision similar to S.154 of the Act.

Hence, the impugned adjustments made by the AO u/s 143(1) of IT Act were unjust bad in law and deserves to be deleted.''

It is noted that the ld. AR of the assessee while submitting the written submission put thrust through the table as to the due date of payment and actual date of payment of ESI & PF employees contribution and submitted in his submission that the AO (CPC) merely compared the due dates of payment and the actual dates of payment during the processing of the income tax return and any discrepancy

between these dates was presumed to be disallowance. However, in reality, there is no disallowance. The difference only pertains to due date and the actual date of payment. Therefore, when no disallowance exists, the provisions of Section 143(1)(iv) of the Act cannot be invoked. During the course of hearing, the ld. AR of the assessee relied upon various case laws (supra). The Bench has taken into consideration the written submission filed by the assessee while adjudicating upon the case.

2.4 On the other hand, the ld. DR supported the order of the ld. CIT(A) and also relied upon the order of ITAT Chennai Bench in the case of Sree Gokulam Chit and Finance Co. (P) Ltd. vs DCIT (ITA No.765/CHNY/2022 dated 21-12-2022)

2.5 We have heard both the parties and perused the materials available on record including the case laws cited by both the parties. In this case, it is noted that the AO disallowed the amount of Rs 4,08,447/- u/s 36(1)(va) of the Act on the ground that payments of employees contribution towards Employee's Provident Fund had not been made on or before the due date by the employer as per respective Act which has been confirmed by the ld. CIT(A). It is not imperative to repeat the facts of the case and the case laws cited by both the parties. The Bench has observed that the recently the Hon'ble Supreme Court has opined in the case of Checkmate Services Pvt. Ltd. vs CIT-1, 143 Taxmann.com 178 (SC)/Civil Appeal No. 2833 of 2016 held that the provision of Section 43B of the Act shall not apply to

employee's contribution to PF/ESI and the due date specified u/s 36(1)(va) of the Act shall apply for determination of deductibility of employee's contribution to PF/ESI. The relevant portion of the Judgement of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs CIT-1 (supra) is reproduced as under:-

''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.''

Similar issue has also been decided by the Hon'ble Supreme Court in the case of PCIT vs Strides Arcolab Ltd. vide its order dated 29-11-2022 (Civil Appeal No.9009 of 2021 [2023] 147 taxmann.com 202 SC)]. The relevant head note is reproduced as under:-

Section 36(1)(va), read with section 2(24) and 43B of the Income Tax Act – Employee's contributions (PF/ESI) – High Court by impugned order held that Tribunal was correct in deleting disallowance made under section 36(1)(va) being employee's contribution to Provident Fund and ESI even though same were not deposited in respective fund within stipulated time – Apex Court in case of Checkmate Services (P) Ltd. vs CIT [2022] 143 taxmann.com 178/ [2023] 290 Taxman 19/[2022] 448 ITR 518/2022 SCC Online Sc 1423, held that non obstante clause under section 43B could not apply in case of employee's contribution which were deducted from their income and was not part of assessee-employer's income and, 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. – Whether in view of the said judgement of Supreme Court, impugned order of High Court was to be set aside – Held , yes [Para 4) [In favour of Revenue]

For the sake of convenience and brevity of the case, the order passed by the Supreme Court in the case of PCIT vs Strides Arcolab Ltd. (supra) is also reproduced as under:-

''1.Leave granted.

2. As per the Office record, Service is complete on the sole respondent but none has entered appearance on behalf of the Respondnet Assessee.

3. Mr. Balbir Sharma, learned Additional Solicitor General appearing for the appellant submits that the issue involved in this appeal is squarely answered in favour of the Revenue by a Three-Judge Bench of this Court vide judgement dated 12-10-2022 in

Checkmate Services (P) Ltd. vs CIT [2022] 143 taxmann.com 178/[2023] 290 Taxman 19/[2022] 448 ITR 518/2022 SCC Online SC 1423

4. In view of the above, the impunged judgement dated 22-03-2019 passed by the High Court of Judicature at Bombay is set aside and the appeal is allowed in terms of the cited decision.''

It may be mentioned that similar issue has also been decided by the ITAT Delhi Bench in favour of the Revenue in the case of Salveen Kaur Vs Income Tax Office vide its order darted 9th January 2023 (in IT Appeal Nos. 2197,2249, 2250 and 2293 (Delhi) of 2022 – A.Y. 2017-18 to 2019-20 [2023] 147 taxmann.co. 402 (Delhi-Trib) by observing as under:-

''4. The undisputed fact in the captioned appeals is that there was a delay in depositing the employees' contribution and the contribution has been deposited beyond the date stipulated under the relevantFund Act.

5. Though the quarrel is no more res integra, as it has been settledby the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd 143 Taxmann.com 178. But, before us, the decision ofthe co-ordinate bench at Mumbai has been placed in the case of PRPackaging Service in ITA No. 2376/MUM/2022 and it has been seriouslyargued that the co-ordinate bench has considered the decision of theHon'ble Supreme Court and yet decided the quarrel in favour of theassessee and against the Revenue.

6. Another argument taken before us is that the disallowance made by the CPC Bengaluru while processing the return u/s 143(1) of the Act is beyond the scope of provisions of section 143(1(a) of the Act and,therefore, cannot be sustained.

7. We have carefully perused the decision of the co-ordinate bench in the case of M/s P R Packaging Services [supra]. We find that the co-ordinate bench has not given any independent finding but has simply relied upon another decision of the co-ordinate bench in the case of Kalpesh Synthetics Pvt Ltd 195 ITD 142 wherein the co-ordinate bench has based its decision on the interpretation and binding decision of the Hon'ble Jurisdictional High Court. In the case of Kalpesh Synthetics Pvt Ltd [supra], the Tribunal has held that the CPC Bengaluru cannot override the binding decision of the Hon'ble Bombay High Court while making the impugned disallowance on account of delay in the deposit of employees' contribution to PF/ESI.

8. It would be apt to refer to the relevant part of the decision of the Tribunal in the case of Kalpesh Synthetics [supra] followed in P R Packaging Service [supra] wherein it has been held as under:-

"8. When the law enacted by the legislature has beenconstrued in a particular manner by the Hon'ble jurisdictional High Court, it cannot be open to anyone in the jurisdiction of that Hon'ble High Court to read any other manner than as read by the Hon'ble jurisdictional High Court. The views expressed by the tax auditor in sucha situation, cannot be reason enough to disregard the binding views of the Hon'ble jurisdictional Court. To that extent, the provisions of section 143(1)(a)(iv) must be read down. What essentially follows is the adjustments under section 143(1)(a) in respect of" disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return" is to be read as, for example, subject to the rider "except in a situation in which the audit report has taken a stand contrary to the law laid down by Hon'ble Courts above". That is where the quasi judicial exercise of dealing with the objections of the assessee against proposed adjustments under section 143(1), assumes critical importance in the processing of returns, also important to bear in mind the fact that what constitutes jurisdictionalHigh Court will essentially depend upon the location of the jurisdictional Assessing Officer. While dealing with jurisdiction for the appeals, rule 11(1) of the Central Processing of Returns Scheme, 2011 states that "Where a return is processed at the Centre, the appeal proceedings relating to the processing of the return shall lie with Commissioner of Income Tax (Appeals) [CIT(A)] having jurisdiction over the jurisdictional Assessing Officer" Thensitus of the CPC or the Assessing Office CPC is thus irrelevant for the purpose of ascertaining the jurisdictional High Court. Therefore, in the present case, whether theCPC is within the jurisdiction of Hon'ble Bombay High Court or not, as for the regular Assessing Officer of the assesseeand the assessee are located in the jurisdiction of Hon'bleBombay High Court, the jurisdictional High Court, for all matters pertaining to the assessee, will be Hon'ble Bombay High Court. In our considered view, it cannot be open tothe Assessing Officer CPC to take a view contrary to the view taken by the Hon'ble jurisdictional High Court- moreso when his attention was specifically invited to bindingjudicial precedents in this regard. For this reason also, the inputs in question in the tax audit report cannot be reason enough to make the impugned disallowance. The assesseemust succeed for this reason as well."

9. With our utmost respect to the findings of the co-ordinate bench [supra], we are of the considered view that the co-ordinate bench has ignored the binding ratio decidendi of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd [supra]. It would be pertinent to refer to the most relevant observations of the Hon'ble Supreme Court on the impugned quarrel which read as under:-

"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

fulfillment 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. 01-04-1988. 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 upunder 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."

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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) foremployers' 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 fundsof employee(s) on the other. This is one more reason whywe 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 effectfrom 1st April, 1988 [when the first proviso stoodinserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to theassessee(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".

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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 Vs. Commissioner of Central Exercise 2004Supp (4) SCR 35. This rule is in line with the general principle that taxing statutes are to be construed strictly, and that thereis 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 Cements 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 onaccount 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."

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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.

54. 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."

10. In our understanding, the aforementioned binding observations of the Hon'ble Supreme Court cannot be brushed aside simply because the decision was rendered in the context where the assessment was framed u/s 143(3) and not u/s 143(1)(a) of the Act. In our considered opinion, the decision of the Hon'ble Supreme Court is in the context of allowability of deposit of PF/ESI after due date specified in the relevant Act.

11. The Hon'ble Supreme Court has categorically held that the employees' contribution deposited after respective due date cannot be allowed as deduction, and, therefore, it would be incorrect to say that the decision of the Hon'ble Supreme Court is applicable only in the case of an assessment farmed u/s 143(3) of the Act. In our considered view, the ratio decidendi is equally applicable for the intimation framed u/s 143(1) of the Act.

12. Now coming to the challenge that the impugned adjustment is beyond the powers of the CPC Bengaluru u/s 143(1) of the Act is also not correct. In light of the aforementioned decision of the Hon'ble Supreme Court [supra], as mentioned elsewhere, it cannot be stated that the impugned adjustment u/s 143(1) of the Act is beyond the powers of the CPC, Bengaluru.

13. The provisions of section 143(1)(a) read as under:-

"143(1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of Section143, 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 [section 10AA or under any of the provisions of Chapter VI-A under the heading "C.-Deductions in respect of certain income", 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;"

13.1 A perusal of the afore-stated provisions show that at every stage in sub-section (1) of the Act, the return submitted by the assessee forms the foundation, with respect to which, if any of the inconsistencies referred to in various sub-clauses are found,appropriate adjustments are to be made. It is an open secret that hardly 3 to 5% of the returns are selected for scrutiny assessment, out of which, more than 50% are because of AIR Information under CASS and the Assessing Officer cannot go beyond the reasons for scrutiny selection and such cases are called Limited Scrutiny cases and only the remaining returns are taken up for complete scrutiny u/s 143(3) of the Act.

13.2 Meaning thereby, that exercise of power under sub-section (2) of section 143 of the Act leading to the passing of an order under sub-section (3) thereof, is to be undertaken where it is considered necessary or expedient to ensure that the assessee has not understated income or has not computed excessive loss, or has not under paid the tax in any manner.

14. If any narrow interpretation is given to the decisions of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd [supra], it would not only defeat the very purpose of the enactment of the provisions of section 143(1) of the Act but also defeat the very purpose of the Legislators and the decision of the Hon'ble Supreme Court would be made redundant because there would be discrimination and chaos, in as much as, those returns which are processed by the CPC would go free even if the employees' contribution is deposited after the due date and in some cases the employer may not even deposit the employees' contribution and those whose returns have been scrutinized and assessed u/s 143(3) of the Act would have to face the disallowance.

15. This can neither be the intention of the Legislators nor the decision of the Hon'ble Supreme Court has to be interpreted in such a way so as to create such discrimination amongst the tax payers. Such interpretation amounts to creation of class [tax payer] within the class [tax payer] meaning thereby that those tax payers who are assessed u/s 143(3) of

> the Act would have to face disallowance because of the delay in deposit of contribution and those tax payers who have been processed and intimated u/s 143(1) of the Act would go scot- free even if there is delay in deposit of contribution and even if they do not deposit the contribution.
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> 16. We are of the considered view that the ratio decidendi of the Hon'ble Supreme Court is equally applicable to the intimation u/s 143(1) of the Act and, therefore, the decision of the co-ordinate bench relied upon by the assessee is distinguishable. Therefore, respectfully following the binding decision of the Hon'ble Supreme Court [supra], all the three appeals of the assessee are dismissed and that of the revenue is allow
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> 17.In the result, all the three appeals of the assessee in ITA No. 249/DEL/2022, 2250/DEL/2022 and 2197/DEL/2022 are dismissed whereas the appeal of the Revenue in ITA No. 2293/DEL/2022 is allowed.''

In view of the above deliberations and the decision taken by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1(supra), PCIT vs Strides Arcolab Ltd. and also the decision of ITAT Delhi Bench in the case of Savleen Kaur (supra), the Bench sustains the addition confirmed by the ld. CIT(A) and Ground Nos 1 & 2 of appeal of the assessee are dismissed.

3.1 As regards the Grounds No. 3 raised by the assessee in its appeal, it is noted that the ld. AR of the assessee has filed the following written submission.

> ''Submission: Alternatively, if the deduction claimed is not a allowed u/s 36(1)(va) r/w 2(24) (10), the same has be considered u/s 37 (1) of the Act in as much as intention of the legislature is not to completely disallow the entire amount forever or for never ever time to come, which is against the very concept of real income The gross receipt cannot be taxed unless the expenditure incurred by assessee businessmen to earn the same, are not allowed merely on technicalities. The default, if any, made by the assesse (if assumed so) in deposit of the PF/ESI therefore the due dates as prescribed under the laws, has already been made punishable under relevant Act, where under there are suitable provisions for imposition of penalty and compensating the government by the levy of interest Therefore, in addition thereto, making disallowance under Income Tax Act and creating demand cannot be the legislative intent. The above provisions of 36(1)(va) nowhere prohibits the

allowability u/s 37(1), which is a residuary category. Even in the case of Checkmate (Supra) there is no provision if the assessee is allowed u/s 37(1) of the Act. This contention is duly supported by the case of Trupti Enterprises (P) Ltd. Vs. DCIT (2022) 36 NYPTTJ 1280 (Cuttack)

In view of the submission, that the adjustment so made lacks proper jurisdiction and intimation u/s 143(1) deserves to be quashed.

3.2 After hearing both the parties and perusing the materials available on record, it is noted from the order of the ld. CIT(A) that this issue has neither been presented by the assessee in Form 35 before the ld. CIT(A) nor it has been taken into consideration by the ld. CIT(A) while adjudicating upon this appeal of the assessee. In this view of the matter, the Bench does not consider this ground of the assessee arising out of the order of ld. CIT(A) and the same is infructuous.

4.1 The Ground No. 4 of the assessee is regarding charging of interest u/s 234A, 234B, 234C and 234F which is mandatory and consequential relief, if any.

5. In the result the appeal of the assessee in ITA No. 34/JP/2023 stands dismissed.

6. As regards the appeal of the assessee in ITA No. 35/JP/2023, it is noted that similar facts, grounds and arguments of appeal have been raised by the assessee in ITA No. 34/JP/2023 which has been dismissed. Therefore the decision taken by the

Bench in ITA No. 34/JP/2023 shall apply mutatis mutandis in the appeal of the assessee in ITA No. 35/JP/2023 and the same is also dismissed.

7. Based on these observations both the appeals of the assessee are dismissed.

Order pronounced in the open court on 02/05/2023

Sd/-	Sd/-
(डा० एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 02/05/2023
*Mishra

आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. The Appellant- Swastic Oil Industries, Tonk
2. प्रत्यर्थी / The Respondent- The ACIT, Circle-07, Jaipur
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 34 &35/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar