आयकरअपीलीय अधिकरण, जयपुरन्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES, ''B" JAIPUR

श्रीसंदीपगोसाई,न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ITA No. 86/JP/2023
निर्धारणवर्ष/AssessmentYear : 2014-15

<table>
<tr><td>M/s. Dhruv Buildcon Pvt. Ltd.
531,Shastri Nagar, Dadabari
Kot5a – 324 -009 (Raj)</td><td>बनाम
Vs.</td><td>The DCIT
Central Circle
Kota</td></tr>
<tr><td colspan="3">स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AACCD 2663 H</td></tr>
<tr><td>अपीलार्थी/Appellant</td><td></td><td>प्रत्यर्थी/Respondent</td></tr>
</table>

निर्धारिती की ओर से/Assessee by : Shri B.A. Maheshwari, CA
राजस्व की ओर से/Revenue by: Smt. Runi Pal, Addl.CIT

सुनवाई की तारीख/Date of Hearing : 25/04/2023
उदघोषणा की तारीख/Date of Pronouncement: 10 /05/2023

आदेश/ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the assessee is directed against order of the ld. CIT(A),Udaipur-2, dated 29-12-2022 for the assessment year 2014-15wherein the assessee has raised the following grounds of appeal.

> ''1. The AO grossly erred on law and facts in issue of notice and passing order u/s 154 of I.T. Act, 1961. The debatable issue cannot be taken up in Section 154. The ld. CIT(A) also erred to hold that this PF, ESI issue is not debatable issue.
>
> 2. The AO grossly erred in doing ex-parte order. The assessee made submission before AO who ignored the same.

The ld. CIT(A) has also not considered the ground seriously8 and rejected the ground.

3. The AO grossly erred in disallowing the payment of ESI and PF Rs.75,100/- though paid in time as per Section 43B of the I.T. Act. The ld. CIT(A) also erred in not allowing the ground mentioning the decision of Hon'ble Supreme Court in the case of Checkmate Service (P) Ltd.

2.1 Apropos Ground Nos. 1 to 3 of the assessee, brief facts of the case are that the assessee company e-filed its return of income u/s 139 of the Act on 28-11-2014 for the Assessment Year 2014-15 declaring total income of Rs.64,98,490/-.The assessment u/s 143(3) of the Act was completed by the AO on 24-12-2016 at an income of Rs. 70,24,250. Further, order u/s 154/143(3) of the Act was passed by the AO on 29-01-2018 determining total income of Rs.71,45,678/-. On perusal of the assessment record, the AO noticed that during the year the assessee did not deposit the PF/ESI of Rs.75,100/- by the due date which is not allowable deduction u/s 36(1)(va) of the Act. In order to initiate action u/s 154 of the Act, the AO further issued show caused notice to the assessee on 30-012018 fixing the date of hearing on 7-12-2018. In compliance of show cause notice, no reply was filed by the assessee. The AO thus observed that as the mistake was apparent from record, and the same was rectified by the AO u/s 154 of the Act on 08-02-2018 by adding the amount of Rs.75,100/- to the income of the assessee.

2.2 Aggrieved by the orders of the AO, the assessee carried the matter before the ld. CIT(A) who has confirmed the action of the AO by giving his finding on the issues raised by the assessee in his grounds of appeal (supra).

'' 4. Ground No. 1 of appeal relates to the issuance of notice u/s 154 of the I.T. Act and passing of the order u/s 154 of the I.T. Act.

4.1……..

''4.2 I have considered the facts of the case and written submissions of the appellant as against the observations / findings of the AO in the assessment order for the year under consideration. The contentions/ submissions of the appellant are being discussed and decided as under:-

The appellant argued that in the order u/s 154 debatable issues cannot be decided. In this regard, it is submitted that this issue is no more debatable. After the decision of Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1 (2022) 143 taxmann.com 178 (SC), the issue is now settled and the law declared by Supreme Court is law of land which is binding on all authorities. Since the issue is not debatable, the decisions relied upon by the appellant are not applicable on the facts of the case. Therefore, the action of AO in passing order under section 154 is held to be valid.

The assessee has relied upon some case laws which were rendered without considering the decision of Apex Court, hence no found to be applicable

The ground raised by the appellant is dismissed.''

5. Ground No. 2 of appeal relates to doing the ex-parte order.

5.1…….

5.2 I have considered the facts of the case and written submissions of the appellant as against the observations/ findings of the AO in the assessment order for the year under consideration. The appellant has submitted that order was passed u/s 154 vide dated 08-02-2018 of the Income Tax Act, 1961 as ex-parte order whereas the authorized representative of the appellant appeared

before the Assessing Officer on 08-02-2018. The schedule date of hearing in this case was 07-02-2018 as mentioned in rectification notice. The reply was furnished by the authorized representative of the appellant after passing of rectification order by the AO. Therefore, it was impossible to consider the reply by the AO. Hence, rectification order passed by the AO is found to be correct as per provision of Income Tax Act. This Ground of appeal of the appellant is against the appellant.

6. Ground No. 3 of appeal relates to in making the addtiin of Rs.75,100/- on account of ESI/PF though paid in time as per Section 43B of the Income Tax Act.

6.1……

6.2 I have considered the facts of the case and written submissions of the appellant as against the observations / findings of the AO in the assessment order for the year under consideration. The contentions / submissions of the appellant are being discussed and decided as under:-

In this regard the decision rendered by Hon'ble Supreme Court is relevant in the cases of Checkmate Services (P) Ltd. vs CIT-1[2022] 143 taxmann.com 178 (SC). The court held as under:-
''.. the significance of this is that Parliament treated contributions…….

The Hon'ble Court held that for assessment years prior to 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 employees contribution on or before due date as a condition for deduction.

The position of law is made clear by the Hon'ble Supreme Court even for assessment years prior to 2021-22. Accordingly as per law the amount of PF and ESI which is deducted from employees is not deposited in respective accounts within due date of the respective Acts is deemed income of the assessee as per Section 2(24(x). Therefore, claiming this amount as expenditure by the assessee is an incorrect claim as per law. The action of the Assessing Officer found to be justified accordingly. Since there was no

mistake apparent from te record, the order passed by the Assessing Officer u/s 154 is found to be correct.

The assessee has relied upon some case laws which were rendered without considering the decision of Apex Court, hence, not found to be applicable. This ground of the appeal is decided against the appellant.

2.3 During the course of hearing, the ld. AR of the assessee has repeated the same grounds of appeal as made before the ld. CIT(A) praying therein that ld. CIT(A) summarily dismissed the appeal of the assessee and did not consider the submissions as made before him appropriately.

2.4 On the other hand, the ld. DR supported the order of the ld. CIT(A).

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.Rs.75,100/- - u/s 36(1)(va) of the Act on the ground that payments of employees contribution towards EPF and PF had not been made on or before the due date by the employer as per respective Acts 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:-

> 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.

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

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) by dismissing the Ground No. 1 to 3 of the assessee.

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

Order pronounced in the open court on 10 /05/2023

Sd/-	Sd/-
(संदीप गोसाई)	(राठोडकमलेशजयन्तभाई)
(Sandeep Gosain)	(Rathod Kamlesh Jayantbhai)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 10 /05/2023
*Mishra

आदेश की प्रतिलिपिअग्रेशित / Copy of the order forwarded to:

1. The Appellant- M/s. Dhruv Buildcon Pvt Ltd. Kota
2. प्रत्यर्थी / The Respondent- The DCIT, Central Circle, Kota
3. आयकरआयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No.86/JP/2023)

आदेशानुसार / By order,

Asstt. Registrar