

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. 97/JP/2023  
निर्धारणवर्ष/AssessmentYear :2020-21

M/s. Beckhaul Digital Technologies (P)Ltd.B- 21, Shakti Bhawan, Shivaji Colony, Khatipura Road, Jhotwara, Jaipur	बनाम Vs.	The ITO Ward 1(1) Jaipur
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AAKCP 1256 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rajeev Sogani, CA &  
Shri Rohan Sogani, CA

राजस्व की ओर से / Revenue by: Mrs. Runi Pal, Addl. CIT-DR

सुनवाई की तारीख / Date of Hearing : 29/03/2023

उदघोषणा की तारीख / Date of Pronouncement: 08/06/2023

आदेश / ORDER

PER: SANDEEP GOSAIN, JM

This appeal filed by the assessee is directed against order of the ld. CIT(A) dated 16-01-2023, National Faceless Appeal Centre, Delhi [ hereinafter referred to as (NFAC) ] for the assessment year 2020-21 wherein the assessee has raised the following grounds of appeal.

“1. In the facts and circumstances of the case and in law the AO (CPC) has erred in passing order u/s 143(1) of the Income Tax Act, 1961 without following the procedure as laid down under such section. The action of the AO is illegal, unjustified arbitrary and again

the facts of the case. Relief may please be granted by quashing the entire such order being illegal and void ab inito.

2. In the facts and circumstances of the case in law, Id. CIT(A) erred in confirming the action of the AO in disallowing the employees contribution of Rs.5,99,073/- u/s 36(1)(va) w.r.t. PF/ESI when the same was deposited by the assessee firm before the due date of filing the return of income. The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the entire addition made by the AO and confirmed by the Id. CIT(A).”

2.1 Brief facts of the case are that the assessee company is registered under the provisions of Companies Act 1956. The assessee company is engaged in telecom infrastructure service. During the relevant previous year, the assessee company filed its return of income on 11-02-2021 declaring total income of Rs.3,86,66,100/- . Thereafter the assessee company received intimation u/s 143(1) dated 23-12-2021 wherein the AO made various disallowances totaling to Rs.8,01,330/- thereby raising demand of Rs.2,81,990/-. In this appeal, it is noted that the Id. CIT(A) has confirmed the addition of Rs.5,99,073/- as made by the AO in respect of belated payment of employee’s contribution towards EPF and ESI and thus dismissed the Ground No. 1 of the assessee for which relevant para of the Id. CIT(A) dismissing the Ground No. 1 of the assessee is reproduced as under:-

“6.26. From the above judicial decision of Hon’ble Apex Court of the country and also the unambiguous wording of the amended provisions of Section 36(1) and 43B, it is clear that the employee’s contribution can be allowed as a deduction only if it had been paid within the prescribed due dates under the

relevant welfare funds and this position of law is and has always been the case and the clarifications brought about by the amendment clearly apply retrospectively. The case laws relied upon by the appellant were rendered prior to the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs CIT-1, therefore, are not applicable to the present case.

6.27 With respect to the alternate ground that the phrase increase income has been added to the Section 143(1)(a)(iv) vide Finance Act, 2021 w.e.f. 1-04-2021 i.e. A.Y. 2021-22, hence right to increase in come u/s 143(1)(a)(iv) has been conferred only w.e.f. A.Y. 2021-22. In this regard, it is held that the AO has disallowed expenditure and the provisions to that effect were applicable for A.Y. 2021-21. Hence, the alternate ground of the assessee is rejected.

6.28 In view of the above, the addition of Rs.5,99,073/- made by the AO in respect of belated payment of employee's contribution towards EPF and ESI is confirmed. The Grounds of Appeal No.1 is dismissed.''

2.2 During the course of hearing, the ld.AR of the assessee has filed the detailed written submission alongwith various case laws praying mainly therein that AO has grossly erred in deciding the disallowance made u/s 36(1)(va) of the Act in Section 143(1)(a). To this effect, the detailed written submission of the ld. AR of the assessee is reproduced as under:-

GROUND NO. 1A: ADDITION MADE WITHOUT AFFORDING ANY OPPORTUNITY AS MANDATED IN PROVISIO TO SECTION 143(1)(a).

1. SUBMISSION

1.1. The adjustment made while processing the return of income is illegal because adjustment of Rs. 8,01,330 was made without giving intimation to the assessee in writing or in electronic mode mandated under proviso to section 143(1)(a) of the Income Tax Act, 1961.

1.2. The Provisions of Section 143(1)(a) are as under: Assessment

\*143(1) Where.....

Provided that no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode:

Provided further that the response received from the assessee, if any, shall be considered before making any adjustment, and in a case where no response is received within thirty days of the issue of such intimation, such adjustments shall be made:

Provided also that no adjustment shall be made under sub-clause (vi) in relation to a return furnished for the assessment year commencing on or after the 1st day of April, 2018,"

1.3. The act mandates, before making an adjustment, intimation has to be given to the assessee of such adjustment in writing or electronic mode. Failure to adhere to the mandatory procedure prescribed in statute lead to intimation u/s 143(1) being illegal.

1.4. In the instant case, no such intimation proposing such adjustment was made. Screenshot of the portal of the assessee company for the relevant year where it is clearly mentioned that the return of income of the assessee company was filed on 11.02.2021 and is ultimately processed u/s 143(1) on 23.12 2021 is as under evidencing the same:

A. Y. 2020-21 e-Filing

Filing Type – Original	ITR-6 Acknowledgement No.250605361110221	Filing Date Feb. 11, 2021 Filing Section : 139(1)
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Processed with demand due  
Dec. 23, 2021

Date of Order: Thu Dec. 23, ...2021

Date of SMS: Thu Dec. 23...2021

Date of Email: Thu Dec 23...2021

Email id.....gmail.com

Details of speed post:

Pay Now ...

Under processing Jun 24, 2021

Under Processing Jun 20, 2021

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1.5. Reliance is placed on the judgement of Hon'ble Chennai Tribunal in the matter of The Ceylon Pentecostal Mission [ITA no. 320/Chny/2021, Assessment Year 2015-16 dated 08.10.2021] wherein it was held that 8. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. It is an admitted fact that 143(1) intimation is not an assessment. Time and again, various Courts have categorically held that 143(1) intimation cannot be considered as a regular assessment. Therefore, once there is no regular assessment, then question that needs to be considered is whether the Assessing Officer can make adjustments towards capital gains and accumulation of income u/s 11(2) of the Income Tax Act, 1961, while processing return u/s 143(1) of the Act. The provisions of section 143(1) deals with summary adjustment, as per which, where a return has been filed u/s 139, such return shall be processed in the following manner. As per said section, except as provided under Explanation, no adjustment can be made towards total income reported by the assessee. Further, adjustments provided under Explanation to section 143(1) are that only prima-facie adjustments which can be made on the basis of return filed by the assessee, without going into examine any other evidences. The proviso further specifies that no such adjustment shall be made unless an intimation is given to the assessee of such adjustments either in writing or electronic mode. In this case, admittedly no such intimation was given to the assessee before making adjustment towards capital gain and accumulation of income u/s.11(2) of the Income Tax Act, 1961. Therefore, on this count itself adjustment made by the Assessing Officer towards capital gain and accumulation of income u/s 11(2) of the Income Tax Act, 1961 deserves to be deleted. (Emphasis Supplied]

1.6. Further, attention is also drawn towards the judgement of Hon'ble Delhi ITAT in matter of Vinod Malik [ITA no. 1635/Del/2021: Assessment Year 2019-20 dated 25.11.2022] wherein it was held that 7. Failure to adhere to the mandatory procedure prescribed in statute has domino effect on the order passed u/s 143(1)(a) culminating in treating the order legally unsustainable.

1.7. The order for processing of return passed u/s 143(1) suffers from the fundamental defect of not providing any opportunity to the assessee company. The specific legal requirement contained in first and second provisos to section 143(1)

not complied with. The order passed is in gross violation of principles of natural justice,

1.8. Provisions of 1 and 2nd proviso to section 143(1) violated and Principles of Natural Justice breached

1.9. The order passed in Blatant Violation of Principles of Natural Justice is void ab initio.

1.10. Principles of Natural Justice are firmly rooted and guaranteed under the Article 14 & 21 of the Constitution. The major objective of these principles are that they aid to avert miscarriage of justice by safeguarding rights of an individual. They further ensure that a judgment by the appropriate authority is just, fair and reasonable.

1.11 Principles of Natural Justice are mainly based on the following two principles-

1.11. Nemo Judex in causa sua - no one should be made a judge in his own cause

1.11. Audi alteram partem no one should be condemned unheard.

1.12 Audi Alteram Partem It means "hear the other side" or "let the other side be heard as well" This is the second most fundamental rule of natural justice that says no one should be condemned unheard. In circumstances where a person, against whom any action is sought to be taken and his right or interest is being affected, shall be given an equal opportunity of being heard and defend himself.

It gives right to the party to respond to the evidence against them and to choose legal representative of their own choice. The principles of natural justice form a fundamental fair procedure among the parties during a dispute. It is the duty of every person or body exercising judicial or quasi- judicial functions to act in good faith and to listen fairly both the sides before passing any order.

In case if the Legislature specifically authorizes an administrative authority to proceed without giving an opportunity of heard, then except in case of recognized exceptions, the law would be violative of the principles of fair hearing as provided by Articles 14 and 21 of the Constitution

Any decision which violate the principle of Audi Alteram partem such can be quashed by court.

1.13. The rule that no decision should be given against a party without giving an opportunity to be heard is reasonably embodied in different sections of the Income

Tax Act. Moreover, Article 265 declares that no tax shall be levied or collected, except by the authority of law. Therefore, Article 265 read with Article 14 of the Constitution of India guaranteeing the right to equality. In this scenario, it is important that orders and decisions of the Income Tax Authorities are taken not only in compliance with the provisions of the law but also following the principle of natural justice.

1.14. Cumulative reading of both the provisos to section 143(1)(a) reproduced in Para 2 makes it clear that assessee should not only be intimated about the proposed adjustment but should also be provided the opportunity to explain as to why adjustment should not be made. In the case the reply of assessee is not received within 30 days then adjustment may be made. The legislature, in its wisdom, considered a period of 30 days to be reasonable period for seeking reply from assessee.

1.15. In the present case, NO OPPORTUNITY was granted to the assessee company. The fact is clearly evident from the screenshot of the e-filing portal attached hereinbefore.

1.16. In view of above, it is submitted that the powers as available u/s 143(1) have been misused. The assessee company was not provided any opportunity to give reply either in writing or electronic mode as indicated from the screenshot above.

1.17. The Principles of Natural Justice were blatantly violated. Hence, the order is non-est.

1.18 Reliance is placed on the following judicial pronouncements wherein it has been held that the orders passed in violation of principles of natural justice have no legal force and stands null and void:

1.18.i In *Maneka Gandhi vs Union of India* [1978 AIR 597] 1978 SCR (2) 621/ 1978 SCC (1) 248 dated 25 January, 1978 the passport of the petitioner was impounded by the Government of India in public interest. No opportunity was afforded to the petitioner before taking the impugned action. The Supreme Court held that the order was violative of principles of Natural justice.

1.18.ii Hon'ble Supreme Court in the case of *Nawabkhan Abbaskhan vs The State Of Gujarat* [1974 AIR 1471] on 19 February, 1974 held that a Tribunal by failing to hear the party. may commit an illegality. But where he is charged with the duty of complying with natural justice in the exercise of power, the order is void ab initio and of no legal efficacy. The Court further held that where the Authorities

have the obligation to hear, expressly or impliedly, an order which infringes the audi alteram partem rule is a nullity. The subtle difference between "illegality" and "nullity" is discernible from this judgment. The relevant extract of the order is as follows:

"HELD: that an order which infringed a fundamental freedom passed in violation of the audi alteram partem rule was a 'nullity'. A determination is no determination if it is contrary to the constitutional mandate of Art. 19. On this footing the externment order was of no effect and its violation was no offence. Any order made without hearing the party affected is void and ineffectual to bind parties from the beginning if the injury is to a constitutionally guaranteed right. May be that in ordinary legislation or at common law a Tribunal having Jurisdiction and failing to hear the parties may commit an illegality which may render the proceedings voidable when a direct attack was made thereon by way of appeal revision or review, but nullity is the consequence of unconstitutionality and so the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void ab initio and of no legal efficacy. The duty to hear menaces his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid down in regard to hearing.

An order which is void may be directly and collaterally challenged in legal proceedings. An order is null and void if the statute clothing the administrative tribunal with power conditions it with the obligation to hear, expressly or by implication. Beyond doubt an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity. When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, that is, the impugned act or order was never valid."

"Where hearing is obligated by a statute which affects the fundamental right of a citizen, the duty to give the hearing sounds in constitutional requirement and failure to comply with such a duty is fatal. May be that in ordinary legislation or at common law a Tribunal, having jurisdiction and falling to hear the parties, may commit an illegality which may render the proceedings voidable when a direct attack is made thereon by way of appeal, revision or review, but nullity is the consequence of unconstitutionality and so without going into the larger issue and its plural divisions, we may roundly conclude that the order of an administrative authority charged with the, duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void and ab initio of no legal efficacy. The duty to hear manacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions

laid down in regard to hearing. May be, this is a radical approach, but the alterative is a travesty of constitutional guarantees."

1.18 Reliance is also placed on the judgment of the Hon'ble Allahabad High court in the case of Jagannath Prasad Bhargava vs Lala Nathimal And Ors. [AIR 1943 All 17] on 31 July, 1942 wherein it held as under:-

"We consider we are bound to follow the very obvious legal principle that there should be no decision against a person who has not had an opportunity of being heard upon the point which is to be decided."

1.18 iv Hon'ble ITAT Cuttack Bench in M/S. Jaydurga Minerals, Cuttack vs. CIT Cuttack on 10 August, 2020 ITA No. 276/CTK/2015 relied upon the Allahabad High Court judgment (Supra) to hold as under.

"After hearing the submissions of both the sides and perusing the order of Pr. CIT at last para of page No. 2. we find that the Pr. CIT has issued show cause notice ws 263 of the Act on 20.03.2015 requiring the assessee to furnish the clarification by 27.03.2015 and thereafter the Pr. CIT passed the order on 30.03 2015 stating that he was constrained to dispose off the revision proceedings on or before the end of the relevant financial year. It is clear that the Pr. CIT has provided opportunity to the assessee on 27.03.2015 for appearing before him, which, in our opinion, causes denial of opportunity under the principles of natural justice. Before us, Id. AR submitted that the assessee stays in Joda which is near about 275 kms from Cuttack and the notice received on 23.03.2015, therefore, the assessee had no sufficient time to contact his local lawyer, who is staying at Barbil and the Counsel to appear before the Pr. CIT, Cuttack is staying at Cuttack When the authorized representative of the assessee appeared before the Pr.CIT, the order u/s 263 of the Act was already passed. It is trite that right to fair hearing is a guaranteed right of an assessee and granting of effective opportunity is a sin qua non in Section 263 of the Act for unsetting a statutory order. It was the duty of the Pr. CIT to provide the assessee an effective opportunity to enable it to substantiate its claim. In any case, it is one of the fundamental principles of natural justice that no person can be condemned unheard ie. audi alteram partem, and the impugned revision order was thus passed in violation of the principles of natural justice in absence of any effective/reasonable opportunity of hearing provided to the assessee. To support our view, reliance can be placed on the decision of the Division Bench judgment of the Hon'ble Allahabad High Court in the case of Jagannath Prasad Bhamava V. Lala Nathimal, AIR 1943 All. 17, wherein the Hon'ble High Court Court has held as under-

“It is very obvious legal principle that there should be no decision against a person who has not had an opportunity of being heard upon the point which is to be decided."

It is mandatory to apply the principles irrespective of the fact as to whether there is any statutory provision or not. In the present case, we find that the assessee was not afforded opportunity, much less the ITA No.276/CTK/2015 sufficient opportunity to give reply to the show cause notice. Therefore, it is clear that the Pr CIT in a hurriedly manner without affording opportunity of hearing to assessee had passed impugned order by violating principle of audi alteram partem In view of above factual position as well as the judicial pronouncements cited supra, we are of the opinion that the Pr. CIT has committed a gross error in not providing any effective/reasonable opportunity of being heard to the assessee before passing the order. Accordingly, we quash the revisional proceedings framed w/s 263 of the Act by the Pr. CIT and allow grounds No. 2, 3 & 4 of the appeal of the assessee

1.18v Hon'ble Madhya Pradesh High Court in the case of Raju @ Pushpendra Bhadoriya v. Collector/ District Magistrate Indore & Ors. In W.P. No. 21686 of 2021 dated 24 November, 2021

"12. In view of the aforesaid discussion, it is apparent that by not providing the petitioner sufficient time to produce the orders of acquittal in the cases in which he was already acquitted, the principles of natural justice have been clearly violated and in such peculiar circumstances, even if the petitioner has not availed the remedy of appeal, this Court is of the considered opinion that this petition under Article 226 of the Constitution of India is maintainable. In the considered opinion of this court, had an opportunity to produce the copies of acquittal orders passed in favour of the petitioner been given to him by the District Magistrate, the result of the outcome could have been different

13. So far as the contention that the order of externment cannot be passed in respect of other adjoining district is concerned, this court is not required to dwell upon the same as the impugned order is liable to be quashed on the ground of violation of principles of natural justice.

14. In such circumstances, the petition stands allowed and the impugned order dated 17.09.2021 is hereby quashed."

1.18.vi Hon'ble ITAT, Chennai Bench in the case of The Ceylon Pentecostal Mission vs. ACIT, Bangalore [ITA No. 320/Chhny/2021] AO having given no intimation to the assessee before making adjustments u/s 143(1) towards

disallowance of exemption u/s 11(1A) and accumulation of income u/s 11(2), said adjustments are to be deleted on this count itself.

1.19. The aforementioned factual position of the no opportunity being granted to the assessee company, was brought to the notice of the NFAC, in the first appellate proceedings. However, those were ignored by the NFAC INFAC Order Page 4]

Hence, the order passed in gross violation of Principles of Natural Justice is "void on its face" and "transparently invalid". Such an order, as a matter of ordinary common sense, is a still born child which had died at Birth. Such an order will amount to never have legally existed. Beyond doubt, an order which infringes a fundamental freedom passed in violation of the Audi Alteram partem rule is a nullity. The order is a nullity from its very inception and a "non-est order".

Therefore, in view of the above, Id. AO(CPC) had not followed the mandatory mechanism to process the return prescribed in the law as well as violated the principles of natural justice. Hence, the intimation issued u/s 143(1), are illegal and should be quashed.

GROUND NO. 1B: ADJUSTMENT FOR DISALLOWANCE U/S 36(1)(va) OF RS. 5,99,073 OUTSIDE THE PURVIEW OF SECTION 143(1)

1. SUBMISSION

1.1. The proviso to section 143(1)(a) states that no adjustments shall be made to the total income of the assessee unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode.

1.2 It is pertinent to note that in the intimation received it was not specifically provided that under which sub-clause (1) to (iv) of clause (a) of Section 143(1) the case of the assessee company was covered. Accordingly, the assessee company was not aware in this regard when the addition were finally made under Section 143(1).

1.3. It is submitted that no such opportunity was provided to the assessee firm either in electronic mode or writing

1.4. The adjustment made while processing the return of income is illegal because the case of the assessee company does not fall in any of the below clauses of section 143(1)

15. Section 143(1)(a)(i)

1.5.1 It is submitted that u/s 143(1)(a)(i) only an arithmetical error in the return of income can be adjusted to the total income of the assessee firm, which is not present in the said case.

#### 1.6. Section 143(1)(a)(i)

1.6.i. It is submitted that u/s 143(1)(a)(ii) only an incorrect claim which is apparent from any information in the return of income can be adjusted.

1.6.ii Incorrect claim has been defined in the Explanation 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;"

1.6. It is submitted that case of the assessee company has not claimed any such amount in the return of income and the case of the assessee firm does not fall under the said sub-clause.

#### 1.7. Section 143(1)(a)(ii)

1.7.i It is submitted that u/s 143(1)(a)(ii), only 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 can be made.

#### 1.8 Section 143(1)(a)(iv)

1.8.i. It is submitted that u/s 143(1)(a)(iv) only a claim/expenditure whose disallowance has been indicated in the audit report but the same not been taken into account in computing the total income in the return can be adjusted while processing the return of income.

1.8.ii Attention is drawn towards the fact in Section 143(1)(a)(iv), 'increase in income has been added vide Finance Act, 2021 w.e.f 1.4.2021. It is submitted that the present processing was done on for AY 2020-21. The present addition amounts

to increase in income in view of Section 2(24)(x). The right to increase in income u/s 143(1)(a)(iv) has been conferred only w.e.f 14.2021. Thus, invoking this clause for making adjustment in the returned income is without jurisdiction.

1.8.iii In the case of assessee company the Auditor in Clause 20(b) provided details of contribution received from employees for various funds as referred to in section 36(1)(va). Thus, only factual reporting, which was mandated, was done and no opinion was expressed regarding the disallowance. Otherwise also no disallowance can be made on the basis of mere reporting in Audit Report. The disallowance can be made only on the basis of relevant law and taking into account judicial view in that regard.

1.8.iv It is further submitted that in the Clause 20(b), the auditor is required to report the details of the contribution not the amount of disallowance or any late payments made to the respective funds. Screenshot evidencing the same is as under.

(8) Details of contributions received from employees for various funds as referred to a section

Serial Number	Nature of fund	Sum received	Due date for payment	The actual amount paid	The actual date of payment to the concerned authorities

1.8.v It is evident from the above screenshot that no disallowance has been made but only the dates of payments of employee's contribution have been reported. Ld. AO(CPC) simply matched the due dates of payment and actual date of payment while processing the return of income and any difference between the said dates has been assumed to be disallowance. But in actual scenario there is no disallowance but only difference in due date and actual date of payment.

1.8.vi Hence, when there is no disallowance, provisions of section 143(1)(iv) cannot be invoked.

1.8.vii It is further submitted that provisions of section 143(1)(a)(iv) can be invoked with reference to other clauses like, for example, the following wherein the auditor is required to express his opinion with reference to disallowance

- Clause 21(b)-Amounts inadmissible under section 40(a),
- Clause 21(d)-Disallowance/deemed income under section 40A(3).

● Clause 21(0)-Any sum paid by the assessee as an employer not allowable under section 40A(9) etc.

1.8.vii Reliance is placed on the 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 that "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"

18.ix Reliance is placed on 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

"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."

1.8.x Same ratio has been laid down by Hon'ble ITAT, Mumbai Bench in the case of P.R. Packaging Service vs. ACIT-25(3), Mumbai ITA No. 2376/Mum/2022, wherein under identical set of facts, as in the case of the assessee company, additions made w.r.t Section 36(1)(va), under Section 143(1) were deleted by Hon'ble ITAT, Mumbai Bench, holding such adjustment in the processing to be outside the scope of Section 143(1)(a)(iv). The said decision has been rendered by Hon'ble ITAT, Mumbai Bench subsequent to the decision of Hon'ble Supreme Court in Checkmate Services Private Limited (Supra)

1.8.xi. Attention is also drawn towards the recent decision of Hon'ble ITAT, Jaipur Bench, in the case of Paris Elysees India Private Limited, ITA No. 367/JPR/2022, in which the aforementioned legal position was accepted by the Hon'ble ITAT, Jaipur Bench.

#### 19. Section 143(1)(a)(v)

1.9.i It is submitted that only disallowance of deduction claimed under 83 [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 can be made.

1.9.ii During the relevant year, the assessee company has not claimed any deduction specified above which makes it clear that the case of the assessee company does not fall under the said sub clause

1.10. It is evident from the above clauses that the case of the assessee form does not fall under any of the sub-clauses of section 143(1) and no adjustment can be made to the total income under the said section.

In view of above the adjustment made by Id. AO (CPC) and confirmed by NFAC, is baseless and without jurisdiction. Relief may please be granted by quashing such adjustment.”

2.3 On the other hand, the Id. DR supported the order of the Id.CIT(A) and also relied upon the judgement of Hon’ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT (Civil Appeal No. 2833 of 2016 dated 12 Oct. 2022.

2.4 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.5,99,073/- 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 as the ld. CIT(A) passed the speaking order by taking into consideration the ground no. 1 and 2 of the assessee in his order concerning the issue of ESI/PF. 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 latter retains its character as an income (albeit deemed), by virtue of [Section 2\(24\)\(x\)](#) - unless the conditions spelt by Explanation to [Section 36\(1\)\(va\)](#) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under [Section 43B](#).

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of [Section 43B](#) which is to ensure timely payment before the returns are filed, of certain liabilities

which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessee is given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they 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 Respondent 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 impugned 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 dated 9<sup>th</sup> 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 framed 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 Section 143, 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 Id. CIT(A) by dismissing the appeal of the assessee.

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

Order pronounced in the open court on 08/06/2023.

Sd/-

(राठोडकमलेशजयन्तभाई )  
(Rathod Kamlesh Jayantbhai)  
लेखासदस्य / Accountant Member

Sd/-

(संदीप गोसाई)  
(Sandeep Gosain)  
न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 08 /06/2023

\*Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- M/s. Beckhaul Digital Technologies (P) Ltd. , Jaipur
2. प्रत्यर्थी / The Respondent- The ITO, Ward 1(1), Jaipur
3. आयकरआयुक्त / The Id CIT
5. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्डफाईल / Guard File (ITA No. 97/JP/2023)

आदेशानुसार / By order,

सहायकपंजीकार / Asstt. Registrar