

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

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

आयकरअपील सं./ITA No. 56/JP/2023  
निर्धारणवर्ष/Assessment Year : 2018-19

Ms. Manju Singh 1-B-14, RHB Colony Kunhari Kota	बनाम Vs.	The ACIT Circle-1 Kota
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: ASFPS 2654 H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Nikhlesh Kataria, CA  
राजस्व की ओर से / Revenue by: Smt. Manisha Choudhary, Addl.CIT

सुनवाई की तारीख / Date of Hearing : 26/04/2023  
उदघोषणा की तारीख / Date of Pronouncement: 30 /05/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the assessee is directed against the order of the ld. CIT(A) dated 16-01-2022 , National Faceless Appeal Centre, Delhi [ hereinafter referred to as (NFAC) ] for the assessment years 2018-19 wherein the assessee has raised the following grounds of appeal.

“1 The order passed u/s 143(1) while making the addition is bad in law and on the facts of the present case and hence the same may please be quashed.

2. The AO erred in law as well as on the facts of the present case in making adjustment u/s 143(1) of the Act even though such adjustments is not covered under the

provisions of the section as neither there is any arithmetical error nor apparent incorrect claim.

3. Rs.17,66,540/-: The AO erred in law as well as on the facts of the present case in making disallowance of contribution towards PF/ESI.

4. The assessee prays your honour indulgence to add, amend, modify or delete all or any grounds of appeal on or before the date of hearing.

2.0 During the course of hearing, the ld. AR of the assessee has raised the Ground No 5 as an additional ground mentioned hereunder:-

“5. The AO erred in law as well as on the facts of the present case is not allowing the rectification of apparent mistake on record in making addition of PF/ESI while processing of return u/s 143(1) of the Act though such adjustment is beyond purview of Section 143(1) being a debatable and controvertial issue and hence the AO may be directed to rectify the addition so made.”

2.1 Apropos Ground Nos. 1 to 3 & 5 of the assessee, brief facts of the case are that the assessee is an individual and filed her return of income bearing e-filing by declaring total income of Rs.18,67,540/- for the assessment year 2018-19. The return of income was processed u/s 143(1) of the Act and total income of the assessee was assessed at Rs.36,40,080/- and after making an adjustment of Rs. 17,66,540/- due to the fact that contribution of EPF/ESI of employee's contribution was deposited beyond the due date of respective Acts. The assessee claimed that the same had been deposited in Govt. account before filing of the return of income u/s 139(1) of the Act. Thus, the AO made an addition of Rs.17,66,540/- on account of late deposit of employee's contribution towards EPF/ESI.

2.2 Aggrieved by the assessment order of the AO, the assessee carried the matter before the Id. CIT(A) who has confirmed the action of the AO taking the recent decision of Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1 vide Civil Appeal No. 2833 of 2016 dated 12-10-2022. For the sake of convenience, the operative para at page 7 of Id. CIT(A)'s order is reproduced as under:-

‘ In the instant case, the assessee has received Rs.17,66,540/- as contribution from its employees but failed to deposit such amount to respective authority within the given time frame. The assessee claims that such money has been, however paid before the due date of filing of its return and so entitled for such deduction.

1. It is relevant to mention here that the Department has consistently taken stands that such delayed payments are not allowable expenditure in view of the relevant provisions of the I.T. Act, 1961. However, different courts of law interpreted these provisions and came out with different opinions. Now, the Hon'ble Apex Court in its decision in the case of Checkmate Services Private Ltd. clarified the issue and interpreted the provisions of Income Tax Act, 1961 with reference to the intention behind it. Therefore, there arises no question to deviate from its effect as the Income Tax Department continued to disallow such expenses of delayed payments and stand of the Department remained consistent. So, the question of effect of the provisions coming with retrospective or prospective effect does not arise at all.

In view of the Apex Court's observation as discussed above, it is evident that the assessee has not paid the amount by the "due date" to the respective authority as mandated by the relevant provision of Law. So, the assessee's claim of allowing of deductions on payment made within the due date of filing of return is not tenable, and so, that claim is not acceptable. Therefore, addition made on this ground is upheld.”

3.3 During the course of hearing, the Id. AR of the assessee filed the written submission countering the decision of the Id.CIT(A) on the late deposit of employees Contribution towards ESI/PF. The relevant part of the written submission is as under:-

1. PF/ESI contribution duly deposited before the due date of filing of IT return: At the outset we may submit that the fact of depositing of PF/ESI before the due date of filing of IT return is not in dispute. The details of payment are also appearing in the tax audit report at PB 4-5. It can be seen from the details of payment provided by the tax auditor that all the deposit has been made till 05-05-2018 i.e. before the due date of filing of return which was 31-10-2018.

2. No disallowance was made by tax auditor: It is also notable that the tax auditor has not made any disallowance in tax audit report (PB 1-13) and the details relating to PF/ESI has been given only as information as required in prescribed format. In the form no. 3CB also as placed at PBI no qualification is made in relation to the computation of income. Therefore, making basis of tax audit report was unreasonable and uncalled for.

3. Discussion of Hon'ble Supreme Court in Checkmate Servicers Pvt Ltd. (Supra) is not relevant on the issue of adjustment u/s 143(1): The Id.CIT(A) has relied upon the decision of Hon'ble Supreme Court in Checkmate Servicers Pvt Ltd (Supra) for rejecting the appeal of the assessee. However, we may submit that the Hon'ble Supreme Court has not considered the issue whether such adjustment may be made u/s 143(1) of the Act or not. In the present case as the assessee has challenged the adjustment itself whether can be made u/s 143(1) or not and therefore to this extent the decision of Hon'ble Supreme Court is not relevant.

4. Debatable and controversial adjustment cannot be made u/s 143(1): It is submitted that the issue of disallowance of PF/ESI is highly debatable and there are judicial pronouncement on both sides in favour and against the assessee. It is a well settled law that the debatable issue cannot be dealt with while processing of return u/s 143(1) of the Act and therefore the adjustment was wrongly made u/s 143(1) of the Act and accordingly this was mistake apparent on record which was needed to be rectified u/s 154 of the act.

5. Issue directly covered by the decision of Hon'ble Jaipur Bench in the case of: We may submit that the issue in hand is directly covered by the decision of Hon'ble Jaipur Bench in the case of Paris Elysees India Private Limited Vs DCIT in ITA no.357/JPR/2022 dt.20/02/2023 which has held that disallowance of PF/ESI cannot be made while processing of return u/s 143(1) of the copy of decision is placed from PB 18-39.

Therefore, in view of the above submission the Id. AO (CPC) may please be directed to rectify the order u/s 143(1) deleting the adjustment made by making addition on account of PF/ESI.”

3.4 On the other hand, the Id. DR supported the order of the Id. CIT(A).

3.5 We have heard both the parties and perused the materials available on record including the case laws cited by both the parties. We have taken into consideration

the admission of additional ground raised (supra). In this case, it is noted that the AO disallowed the amount of Rs.17,66,540/- 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 Id. 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 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 Ground No. 1 to 3 & 5 of the assessee. The ground no. 4 being general in nature does not require any adjudication.

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

Order pronounced in the open court on 30/05/2023

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिकसदस्य / Judicial Member

Sd/-

(राठोडकमलेशजयन्तभाई )

(Rathod Kamlesh Jayantbhai)

लेखासदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 30 /05/2023

\*Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- Ms.Manju Singh, Kota
2. प्रत्यर्थी / The Respondent- The ACIT, Circle-1, Kota
3. आयकरआयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No.56/JP/2023)

आदेशानुसार / By order,

Asstt. Registrar