IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI ABY T. VARKEY, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 775/MUM/2023 (A.Y: 2020-21)

Rishabh Metals and Chemicals Private Limited 4th Floor, Eross Theatre BLDG JT Road, Churchgate Mumbai - 400020 **PAN: AAACR2214E**	*v.*	DCIT-Circle -1(3)(1) Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**None**
Department Represented by	**:**	**Shri P.D. Chougule**
Date of Conclusion of Hearing	**:**	**25.05.2023**
Date of Pronouncement	**:**	**20.06.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 20.01.2023 for the A.Y.2020-21.

2. The Assessee has challenged the disallowance of ₹.4,00,168/- being payment of Provident Fund and ESI, u/s.36(1)(va) of Income-tax Act, 1961 (in short "Act").

3. The Assessee in the return of income filed on 09.02.2021 had declared total income of ₹.2,04,98,240/-. The said return was processed online by CPC Bangalore and accordingly, adjustment of ₹.4,00,168/- was made in the intimation u/s.143(1) on account of late payment of employee contribution towards PF & ESI. The contention of the Assessee has been that payments have not been made within the due date of 15 day of next months as per the respective Act but made much before the due date of filling of return income.

4. Before the Ld. CIT(A) various submissions and judgments were cited by the Assessee in favor of the proposition that if the payment of PF & ESI has been made before the due date of filling of the return of income u/s 139(1) the same should not be disallowed.

5. The Ld.CIT (A), after discussing the various issues relating to employees contribution and finally justified the disallowance made as per provisions of section 143(1)(a)(iv) of the Act. After detail discussion and

relying on various judicial pronouncements, Ld.CIT(A) dismissed the appeal filed by the assessee.

6. Aggrieved, assessee is in appeal before us raising following grounds of appeal: -

> *"1. The learned CIT (A) erred in law in confirming the action of CPC in making adjustments in the returned income which are not permissible under section 143(1), of the Act and thereby determined the total income- 21426060 as against the returned income at ₹.20498240, in the intimation dated 18.12.2021 issued under section 143(1) of the ACT, without appreciating the facts and circumstances of the case.*
>
> *2. The CIT(A) erred in upholding the disallowance of ₹.400168/- made by CPC, under section 36(1)(va) of the Act on account of delayed payment on account of employees contribution towards provident fund and ESIC of employees, without appreciating that the same is not permissible adjustment under section 143(1) of the Act.*
>
> *3. The CIT(A) failed to appreciate that the assesse has paid the amount on account of Employee contribution before the due date of filing return U/S 139(1) of the Act.*
>
> *The amendment made in finance Act, 2021 is prospective in nature and thus the same will not apply for the assessment under consideration. Thus, the disallowance made under section 36(1)(va) is not justified and the same may be deleted.*
>
> *4. The learned AO erred in levying interest under section 234A, 234B, and 234C, without appreciating the facts that the appellant denies his liability to the same.*
>
> *5. The Appellant craves leave to add, alter, rescind or amend any of the Grounds."*

7. Inspite of issue of notice none appeared on behalf of the assessee nor any adjournment was sought by the assessee. However, assessee has filed written submissions, for the sake of clarity, it is reproduced below

and we proceed to dispose off this appeal on hearing the Ld. DR on merits:-

"In continuation of our grounds of appeal, statement of facts we hereby submit as under for kind considerate of the bench.

The return of income of the appellant was processed U/S 143(1) of the ACT by CPC center, and the intimation under section 143(1) dated 18.12.21, by disallowing & addition to income of RS 400168/- , for funds deducted from employees as contribution to employees provident fund, or any other fund set under ESIC Act, paid beyond stipulated due date under respective Act, but paid before due date of submission of return U/S 139(1), of the Act. In response to appeal against intimation the learned CIT (A), confirmed the action of CPC in making adjustment to returned income, against the law as making adjustment in the returned income are not permissible under the Act.

The amount of EPF contribution & ESIC of employees are paid before the due date of filling of return of income. The amendment made in finance Act, 2021 is prospective in nature and thus same will not apply for assessment year under consideration, thus the disallowance made under section 36(1)(va).

The details of payments made beyond due date for employees contribution to provident fund & ESIC are as below:

Provident Fund	**Date of Actual Payment for Provident Fund beyond 15th of the month**	**ESIC**	**Date of Actual Payment for ESIC beyond 15th of the month**
34282	20/05/2019	928	16/05/2019
37858	18/06/2019	928	17/06/2019
38167	20/07/2019	928	20/07/2019
55124	19/08/2019	398	19/08/2019
59683	18/09/2019	456	18/09/2019
58011	19/12/2019	398	16/12/2019
55581	16/02/2020	518	16/03/2020
56908	17/03/2020		
395614		4554	Total Rs. 400168

From the above statement it may be observed in most of the cases delays are only for 5 days or less than 5 days.

Nowadays these payments are to be made electronically and cannot be made over the counter by cheque and while making the payment

electronically it may be possible that on that particular date there could be a public holiday or the banks or our company's computer system may have developed glitches or problems which might have delayed the payments within the due dates. These are the possibilities which cannot be denied. In other words the assessee was willing to pay in time but somehow it did not happen for the reasons beyond its control.

In view of the above it cannot be said definitely that the company has defaulted in making the payments on due date.

The learned CIT(A), relying on decision of SUPREME COURT in case of CHECKMATE SERVICES PVT LTD VS COMMISSIONER OF ITA-1, CIVIL APPEAL NO 2833 OF 2016 DATED 12.10.2022.

Relying on the decision of Apex court CIT(A) has concluded that addition/ disallowance U/S 36(1) shall apply retrospectively, hence sustained the disallowance/addition.

Post the judgment of CHECKMATE by the APEX court SMC ITAT bench MUMBAI. in appeal no ITA no 2376-MUMBAI/2022, assessment year 2019-20 dated 7.12.2022, in the matter of PR PACKAGING SERVICES VS ASSISTANT COMMISSIONER OF I TAX, 25(3), MUMBAI, in which the learned bench had considered the judgment of APEX COURT "CHECKMATE SERVICES PVT LTD has allowed the appeal of appellant and had deleted the addition/ disallowance and had distinguished the decision of CHECKMATE SERVICES PVT LTD" (COPY OF JUDGMENT ATTACHED).

While deciding the appeal in favor of appellant had up held as under:

1. Without expressing any opinion of allow ability or disallowance. CPC center while processing the return of income U/S.143(1) of the Act had taken up date from the tax audit report and had disallowed the same, apparently applying the provisions of section 143(1)(a)(iv). of the Act.

2. On perusal of the provisions of section 143(1)(a)(iv) of the Act it is understood that clause (iv), would come in operation when the TAX auditor had suggested for disallowance of expenses or increase in income, which has not been carried out by the assessee while submitting the return of income, contrary to the fact that tax auditor had not expressed opinion about allow ability or disallow ability, for payment beyond due date under respective Act.

3. The view expressed in case of KALPESH SYNTHETICS LTD VS DCIT, reported in 195 ITD 142, (MUM), is that the action of the CPC, in disallowing the amount of EPF & ESIC would not fall within the ambit of prima facie adjustment.

4. The proceedings conducted by CPC center is a quasi- judicial function and while performing the quasi-judicial function the AO has to set out the specific reason for doing so.

5. Disposal of objection cannot be such an empty formality or meaning less ritual which can be done without applying mind and without setting out his specific reason for rejecting the objections.

6. The AO CPC uses standard reasons like There has no response/ response is not capable, the adjustment are being made to total income per provision of section 143(1)(a), and has not even stuck off the inapplicable portion.

7. By any stretch of imagination, casually assigned reasons, which are Not purely on a standard template, cannot be said to be sufficient justifications for disposal of objections, more so in quasi-judicial decisions.

8. The intimation under section 143(1)(a) is a appealable order and so is the consideration of objections raised by appellant is an integral part of the process finalizing intimation U/S 143(1)(a), unless the reasons for rejection of are known a meaningful appellate exercise can hardly be carried out.

9. CPC while disposing the objection of appellant is exercising the quasi- judicial jurisdiction and therefore the disposal of objection raised by appellant has to be a speaking order. Soul of quasi-judicial decision is in the reasoning for arriving to a particular decision. The honorable SUPREME COURT in the matter of UNION PUBLC SERVICE COMMISSION VS BIBHU PRASAD SARANGI". (2021) 4 SCC 516, has observed the same views, though these observations are in context of judicial officers, these observations will be equally applicable to the decisions by quasi-judicial officers like assessing officer CPC.

> *"In the inimitable words of HONORABLE JUSTICE CHADRACHUD, HONORABLE SUPREME COURT has observed" ---Reasons constitute the soul of a judicial decision, without them, one is left with a shell. The shell provides neither solace nor satisfaction to the litigant."*

10. Under quasi-judicial order, rejection of objection raised against the adjustment U/S 143(1), devoid of any cogent and specific reasons, when it is in a standard template text format, indicates that there has not been any application of mind as even the in applicable portion of template i.e. whether there was a response or whether the response is unacceptable has not been removed from reasons assigned. In such situation any adjustment made can hardly meet any judicial approval.

In the above situation proximate reason for disallowance/addition is based on the inputs of the TAX AUDIT REPORT, and by themselves it cannot be a reason for disallowance/addition and cannot be justified.

11. Section 143(1)(a)(iv), is specifically for an adjustment in respect of disallowance of expenses indicated in the TAX AUDIT REPORT but not taken in account in computing the total income in the return, means that when an auditor indicates a disallowance in the tax audit report, ad if not carried by the appellant then the same can be considered for addition/ disallowance while processing return under section 143(1)(a) by CPC

12. the tax auditor is appointed by the assessee, but it does not dilute the independence of tax auditor, the tax auditor remains the third party and his opinion cannot bind the assessee in any manner The tax auditor reports by tax audit is opinion and at best these opinion flag the issues which are required to be considered by various stake holders Audit report requires reporting of a factual position and is not an expression of any opinion about its legal implications These audit reports are less relevant specially at the time of application of law, specially more so when point of law has been interpreted by various Honorable courts have interpreted the legal provisions of the I TAX Act.

13. Auditors are performing dual responsibilities, in capacity of a neutral independent identity The view expressed by auditor are treated as reflection of the stand of the assessee, and on the other hand auditors views are treated as sacrosanct, that these views by themselves are taken as justification for disallowance under the scheme of the Act.

This action in itself is a contradictory approach, as the opinion which is not in harmony with the law laid down by Honorable courts, and enforcement of disallowance u/s 143(1) does seem incongruous.

Section 143(1)(a)(iv) does provide for disallowance based on the indications in the tax audit report in as much as it permits, "disallowance of expenditure indicated in audit report but ot taken in account in computing the total income in the return", and it is for the honorable constitutional courts above to take a call on the provisions We are nevertheless required to interpret this provision in a manner to give it a sensible interpretation. When the law enacted by a legislature has been construed in a particular manner by the Honorable jurisdictional high court it cannot be open to anyone in the jurisdiction of that Honorable high court to read any other manner than as read by Honorable high court.

Under article 141 of the constitution of India, the Honorable Apex court unquestionably binds all of us and Honorable Apex court has in numerous cases including for example in case of EAST INDIA COMMERCIAL CO LTD VS COLLECTOR OF CUSTOMS, 1962 Taxmancom 5. is observed under article 215, every High court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt i self Under article 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purposes to any person or authority, including n appropriate cases any Government, within its territorial jurisdiction.

Under article 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which exercises jurisdiction.

It would be anomalous to suggest that a tribunal over which the high court has superintendence can ignore the law declared by that court and start proceedings direct violation of it If tribunal can do so, all subordinate courts can equally do so, for there is no specific provision, just like in case of Supreme court, making the law declared by the high court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it Such obedience would also be conducive to their smooth working otherwise there would be confusion in the administration of law and respect for law irretrievably suffer When the law was enacted by the legislature has been construed in a particular manner by the Honorable jurisdictional high court, and therefore it cannot be open to anyone in the jurisdiction of that Honorable court to read any other manner than as read by Honorable High court.

The views expressed by the tax auditor in such a situation, cannot be reason enough to disregard the binding views of honorable jurisdictional court. To that extent, the provisions of section 143(1)(1)(a)(iv) must be read down. What essentially follows is the adjustments under section 143(1)(a) in respect of disallowances of expenditure indicated in the audit report but not taken in to account in computing the total income 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 law laid down by Honorable Courts above. That is where 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 jurisdictional High court will essentially depend up on the location of the jurisdictional assessing officer. While dealing with the jurisdiction for 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 returns shall lie with Commissioner of income Tax (Appeals) (CIT(A)) having jurisdiction over the jurisdictional assessing officer." The situs of the CPC or the assessing officer CPC is thus irrelevant for the purpose of ascertaining the jurisdictional High Court Therefore, in the preset case, whether the CPC is within the jurisdiction of Honorable BOMBAY HIGH COURT or not, as the regular assessing officer of the assessee and the assessee is located in the jurisdiction of the Honorable Bombay High court, the jurisdictional High court, for all matters pertaining to the assessee, will be Honorable Bombay high court. In our considerate view, It cannot be open to Assessing officer CPC to take a view contrary to the view taken by the Honorable jurisdictional High court- more so when his attention was specifically invited to binding judicial 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.

What tax auditor states in his report are his opinion cannot bind the audited at all. In the light, when one considers what has been reported to be 'due date in column 20(b) in respect of contributions received from employees for various funds as referred to in section 36(1)(va) and the fact that the expression: due date has been defined under explanation (no explanation 1) to section 36(1)(va) provides that" for the purpose of this clause, 'due date means the date by which the assessee is required as an employer to credit employee's contribution to the employee's account in relevant fund under the Act, rule, order or notification issued there under or understanding order, award, contract service or otherwise, one cannot find fault in what has been reported in the tax audit report. It is not even an expression of opinion about the allow ability of deduction or otherwise; it is just a factual report about the fact of payments and the fact of the due date as per explanation to section 36(1)(va), This due date, however has not been found decisive in the light of law laid down by Honorable courts above, and cannot, therefore be said that the reporting of payments beyond due date in the tax audit report constituted disallowance of expenditure indicated in the audit report but taking in to account In the computation of total income in the return, as is sine qua none for disallowance U/S 143(1)(a)(iv). When the due date under explanation to section 36(1)(va) is judicially held to be decisive for determining the disallowance in the computation of total income, there is no good reason to proceed on the basis that payment having been made after this due date is indicative of the disallowance of expenditure in question. While preparing tax audit report, the auditor is expected to report the information as per the provisions of the Act,

and the tax auditor has done that, but the information ceases to be relevant because in terms of the law laid down by Honorable Court, which binds all of us as much as the enacted legislation does, the said disallowance does not come in to play when the payment is made well before the due date of filling the income tax return under section 139(1), viewed thus also, the impugned adjustment is vitiated in law, and the adjustment made must be deleted for this reason also."

8. Ld. DR brought to our notice relevant facts of the case and relied orders of the Ld.CIT(A).

9. Considered the submissions of Ld.DR and material placed on record, on perusal of the material placed on record, we find that, it is undisputed fact that payment of PF & ESI amounting to ₹.4,00,168/- was not made within the due date prescribed under the PF & ESI Act, but payment has been made much before the due date of filing the return of income. However, Hon'ble Supreme Court in the case of "**Checkmate Services Private Limited vs. CIT in Civil Appeal No. 2833 of 2016 dated 12.10.2022**" has decided this issue against the Assessee. The relevant observation and finding given by the Hon'ble Supreme Court in Para No. 31-37 and Para No. 52-54 of the judgement are summarized as under: -

- *Section 43B falls in Part-V of the IT Act. What is apparent is that the scheme of the Act is such that sections 28 to 38 deal with different kinds of deductions, whereas sections 40 to 43B spell out special provisions, laying out the mechanism for assessments and expressly prescribing conditions for disallowances. In terms of this scheme, section 40 (which too start with a non obstante clause overriding sections 30-38), deals with what cannot be deducted in computing income under the head "Profits and Gains of Business and*

Profession". Likewise, section 40A(2) opens with a non obstante clause and spells out what expenses and payments are not deductible in certain circumstances. Section 41 elaborates conditions which apply with respect to certain deductions which are otherwise allowed in respect of loss, expenditure or trading liability etc. If this scheme is considered, sections 40-43B, are concerned with and enact different conditions, that the tax adjudicator has to enforce, and the assessee has to comply with, to secure a valid deduction. [Para 31].

- *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, with effect from 1-4-1988. 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)). [Para 32].*

- *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. [Para 33]

- *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 this contribution 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)(4), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two [Para 34]*

- *It is evident that the intent of the lawmakers was clear that sums referred to in clause (b) of section 438, ie.. "sum payable as an employer, by way of contribution" refers to the contribution by the employer The reference to "due date" in the second proviso to section 4311 was to have the same meaning as provided in the explanation to section 36(1)(va). Parliament therefore, through this amendment, sought to provide for identity in treatment of the two kinds of payments: those made as contributions, by the employers, and those amounts credited by the employers, into the provident fund account of employees, received from the latter, as their contribution. Both these contributions had to necessarily be made on or before the due date. [Para 37]*

- *When Parliament introduced section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting section 36(1)(va) and simultaneously inserting the second proviso of section 43B, its intention was not to treat the disparate nature of the amounts, similarly. The memorandum introducing the Finance Bill clearly stated that the provisions - especially second proviso to section 43B- was introduced to ensure timely payments were made by the*

employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time - by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained and continues to be maintained. On the other hand, section 43B covers all deductions that are permissible as expenditures, or out- goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitles an assessee to the benefit of deduction from the total income. The essential objective of section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure. [para 52]

- *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. [Para 53]*

- *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 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 employee's contributions which are deducted from their income. They are not part of the assessee employer's income nor are they head 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. [Para 54]"*

10. Thus, once the Hon'ble Supreme Court has held that if the payment has been made with respect employees contribution after the due date of the respective acts, the same has to be disallowed and cannot be allowed as deduction and therefore, adjustment has rightly been made. Section 143(1)(a) provides for following adjustment: -

"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 "for 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 incomes", if] the return is furnished beyond the due date specified under sub-section (1) of section 139."

11. Thus, if there is any incorrect claim apparent from any information in the return, then adjustment is permissible. Here in this case, once the claim of deduction as per the law is not allowable, same can be disallowed in the intimation u/s 143(1). The judgment of Hon'ble Supreme Court is a law, which has to be interpreted that this was the position of law from the date of enactment of provision. Further, clause (iv) states that, if any disallowance of expenditure has been indicated in the audit report, but not taken into account in computing the total income in the return, same also can be adjusted. The auditor in the audit report specifies the due date as prescribed u/s. 36(1)(va) of the Act and the date on which deposit has been made, then in the computation of income, the same cannot be

claimed as deduction, because the law envisages that such payment is disallowable, because it has not been made within the due date.

12. Accordingly, we hold that such an adjustment is permissible under the scope of section 143(1) of the Act. However, the adjustment has to be to the extent of employees' contribution. Therefore, Assessing Officer is directed to restrict the disallowance to the extent of employee contribution.

13. In the result, appeal of the Assesses is partly allowed**.**

Order pronounced in the open court on 20th June, 2023

Sd/-	Sd/-
(ABY T. VARKEY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 20/06/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum