

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

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

आयकरअपील सं./ITA No. 101/JP/2023
निर्धारणवर्ष/AssessmentYear : 2020-21

Shri Chandra Shekhar Tiwari Flat No. B-9, D-224, Tanwar Residency, Tulsi Marg, Bani Park, Jaipur	बनाम Vs.	The ITO Ward 1(2) Jaipur
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: ACNPT 8254A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओरसे / Assesseeby : Shri S.L. Poddar, Advocate
राजस्व की ओरसे / Revenue by: Shri A.S. Nehra, Addl. CIT-DR

सुनवाई की तारीख / Date of Hearing : 21/06/2023
उदघोषणा की तारीख / Date of Pronouncement: 28 /06/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by the assessee is directed against order of the ld. CIT(A) dated 24-02-2023, 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. Under the facts and circumstances of the case, the ld. CIT(A) has erred in confirming the addition of Rs.34,17,630/- as per the provisions of Section 2(24)(x) read with Section 36(1)(va) of the Income Tax Act, 1961 on account of delay in payment of ESI and PF made by CPC u/s 154 of the Income Tax Act, 1961.

2. Under the facts and circumstances of the case, CPC has no power to make adjustment u/s 143(1) of the Income Tax Act for disallowance of ESI/PF late deposit u/s 36(1)(va)/43B which are otherwise covered by the decision of various courts

2.1 Brief facts of the case are that the assessee filed his return of income for the A.Y. 2020-21 on 12-02-2021. The AO u/s 143(1) of the Act passed the order on 08-12-2021 in which deduction claimed in respect of contribution received from employees towards PF & ESI amounting to Rs.34,17,630/- was disallowed u/s 36(1)(va) of the Act on account of delay in deposit of employee share of ESI and EPF as per the provisions of ESI/PF Acts. The assessee filed rectification application before the CPC on 08-03-2022 which was disposed off by the ADIT, CPC (in short "the AO, CPC") vide order u/s 154 dated 17-03-2022 and addition made of Rs.34,17,630/- in intimation u/s 143(1) on account of delay in deposit of employee share of ESI/PF u/s 36(1)(va) of the Act as per the provisions of ESI/PF Act was not rectified.

2.2 In first appeal, the ld. CIT(A) after considering the amendment made by Finance Act, 2021 and the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs CIT (Civil Appeal No. 2833 of 2016 dated 12-10-2022) confirmed the addition made by the AO.

2.3 During the course of hearing, the Id. AR of the assessee prayed for deletion of addition confirmed by the Id.CIT(A) amounting to 34,17,630/- with regard to the deposition of employees contribution towards PF and ESI for which the Id. AR has filed the written submission mentioning therein that all the payments were deposited by the assessee before filing the return for the year under consideration as per provisions of Section 43B of the Act and the CPC has disallowed the payment of ESI/PF contribution of Rs.34,17,632/0 on the ground that the same was not paid within time allowed under the respective Act. The addition has been made u/s 36(1)(va) r.w.s. 2(24)(x) of the Income Tax Act, 1961. The Id. AR further submitted that it is settled position of law upto the stage of Apex Court that payment of ESI/PF etc. are governed by Section 43B which overrides Section 36(1)(va). He further submitted that as per the provisions of Section 43B, such payments are paid before filing of return of income and then these are allowable. In this case, the payment stood made much earlier than the date of filing of return of income and thus the same are allowable. To this effect, the Id.AR submitted the following case laws.

1. CIT Vs SBBJ and JVVNL , 363 ITR 70 (Raj)
2. CIT Vs. Udaipur DugdhuUtpadak Sahakari Sangh Ltd., Udaipur (2014), 366 ITR 163 (Raj)
3. CIT vs Ghatge Patil Transporters Ltd. (2014) 368 ITR 749 (Bom.)
4. CIT vs SBBJ (2014) 99 DTR 131(Raj)
5. CIT vs Alom Extrusions Ltd. 319 ITR 306 (SC)

6. CIT vs JVNNL 98 DTR 105 (Raj)
7. CIT Vs. Udaipur DugdhUtpadak Sahakari Sangh Ltd., Udaipur, 98 DTR 109 (Raj)
8. CIT Vs Vinay Cement Ltd. (2007) 213 CTR 268 (SC)
9. Mahadev Cold Storage vs Jurisdictional AO (ITA No. 41 & 42/Agr/2021 dated 14-06-2021)
10. Pr. CIT vs Pro Interactive Service (India) Pvt. Ltd (ITAT Delhi Bench order dated 10-09-2018 in ITA No. 983/2018)
11. DCIT vs Dee Development Engineers Ltd. (ITAT Delhi Bench order in ITA No. 4959/Del/2016)
12. Yogi Ji Technoequip Pvt. Ltd. vs DCIT (ITAT Delhi Bench in ITA No.1609/Del/2020 dated 30-07-2021)
13. Latest decision of ITAT Delhi Bench in the case of Garg Heart Centre & Nursing Home (P)Ltd. in ITA No. 1700/Del/2022 and ITAT Jaipur Bench in the case of Paris Elysees India (P) Ltd in ITA No. 357/JP/2022, considering the Supreme Court decision in case of Checkmate Services (P) Ltd and favoured the assessee.
14. Fingrowth Cooperative Bank Ltd. and others vs ADIT (ITa No.05/JP/2022, 304/JP/2021, 6/JP/2022 etc. dated 28-02-2022, ITAT Jaipur Bench)

2.4 On the other hand, the ld. DR supported the order of the ld. CIT(A) and prayed to sustain the addition based on the decision of Hon'ble Apex Court in the case of Checkmate Services (P)Ltd vs CIT-1 dated 12-10-2022.

2.5 We have heard both the parties and perused the materials available on record. In this case, it is noted that the AO disallowed the amount of Rs.34,17,632/- u/s 36(1)(va) of the Act on the ground that payments of employees contribution towards ESI and PF had not been made on or before the due date by the employer as per respective Acts which has been confirmed by the ld. CIT(A). It is not imperative to repeat the facts of the case and the case laws cited by both the

parties. The Bench has observed that the recently the Hon'ble Supreme Court has opined in the case of Checkmate Services Pvt. Ltd. vs CIT-1, 143 Taxmann.com 178 (SC)/Civil Appeal No. 2833 of 2016 that the provision of Section 43B of the Act shall not apply to employee's contribution to PF/ESI and the due date specified u/s 36(1)(va) of the Act shall apply for determination of deductibility of employee's contribution to PF/ESI. The relevant portion of the Judgement of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs CIT-1 (supra) is reproduced as under:-

“53. The distinction between an employer's contribution which is its primary liability under law – in terms of [Section 36\(1\)\(iv\)](#), and its liability to deposit amounts received by it or deducted by it ([Section 36\(1\)\(va\)](#)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of [Section 2\(24\)\(x\)](#) - unless the conditions spelt by Explanation to [Section 36\(1\)\(va\)](#) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under [Section 43B](#).

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of [Section 43B](#) which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of

statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under [Section 43B](#) or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.’’

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

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

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

“1. Leave granted.

2. As per the Office record, Service is complete on the sole respondent but none has entered appearance on behalf of the 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 9th January 2023 (in IT Appeal Nos. 2197,2249, 2250 and 2293 (Delhi) of 2022 – A.Y. 2017-18 to 2019-20 [2023] 147 taxmann.co. 402 (Delhi-Trib) by observing as under:-

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

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

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

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

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

“8. When the law enacted by the legislature has been construed in a particular manner by the Hon'ble jurisdictional High Court, it cannot be open to anyone in the jurisdiction of that Hon'ble High Court to read any other manner than as read by the Hon'ble jurisdictional High Court. The views expressed by the tax auditor in such a situation, cannot be reason enough to disregard the binding views of the Hon'ble jurisdictional Court. To that extent, the provisions of section 143(1)(a)(iv) must be read down. What essentially follows is the adjustments under section 143(1)(a) in respect of” disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return” is to be read as, for example, subject to the rider “except in a situation in which the audit report has taken a stand contrary to

the law laid down by Hon'ble Courts above". That is where the quasi judicial exercise of dealing with the objections of the assessee against proposed adjustments under section 143(1), assumes critical importance in the processing of returns, also important to bear in mind the fact that what constitutes jurisdictional High Court will essentially depend upon the location of the jurisdictional Assessing Officer. While dealing with jurisdiction for the appeals, rule 11(1) of the Central Processing of Returns Scheme, 2011 states that "Where a return is processed at the Centre, the appeal proceedings relating to the processing of the return shall lie with Commissioner of Income Tax (Appeals) [CIT(A)] having jurisdiction over the jurisdictional Assessing Officer" The situs of the CPC or the Assessing Office CPC is thus irrelevant for the purpose of ascertaining the jurisdictional High Court. Therefore, in the present case, whether the CPC is within the jurisdiction of Hon'ble Bombay High Court or not, as for the regular Assessing Officer of the assessee and the assessee are located in the jurisdiction of Hon'ble Bombay High Court, the jurisdictional High Court, for all matters pertaining to the assessee, will be Hon'ble Bombay High Court. In our considered view, it cannot be open to the Assessing Officer CPC to take a view contrary to the view taken by the Hon'ble 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. The assessee must succeed for this reason as well."

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

"32. The scheme of the provisions relating to deductions, such as Sections 32 - 37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfillment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection.

In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of Section 36 (iv). It is noteworthy, that this provision was

part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of “income” – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee’s income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression “due date” was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer’s contribution (i.e., Section 36(1)(iv)).

33. The significance of this is that Parliament treated contributions under Section 36(1)(va) differently from those under Section 36(1)(iv). The latter (hereinafter, “employers’ contribution”) is described as “sum paid by the assessee as an employer by way of contribution towards a recognized provident fund”. However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that “any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee’s account in the relevant fund or funds on or before the due date.” The essential character of an employees’ contribution, i.e., that it is part of the employees’ income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

34. It is therefore, manifest that the definition of contribution in Section 2 (c) is used in entirely different senses, in the relevant deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification under the IT Act, between the two.

35. It is instructive in this context to note that the Finance Act, 1987, introduced to Section 2(24), the definition clause (x), with effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill, 1987, presented to the Parliament, is extracted below:

“Measures of penalising employers mis-utilising contributions to the provident fund or any funds set up under the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees

12.1. The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section

43B). The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. "Due date" means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise.

(Explanation to Section 36 (1) of the Finance Act)

12.2. In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due date. Where such income is not chargeable to tax under the head "profits and gains of business or profession" it will be assessed under the head "income from other sources."

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44. There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available.

45. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) foremployers' contribution and employees' contribution, too went unnoticed. The court observed inter alia, that:

"15. ...It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in Allied Motors (P)Limited (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003 will operate retrospectively with effect from 1st April, 1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year] but before filing of the Returns under the Income Tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under Section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of

deduction under Section 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003”.

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48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. Eagle Flask Industries Ltd Vs. Commissioner of Central Exercise 2004Supp (4) SCR 35. This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations.

49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in State of Jharkhand v Ambay Cements as follows:

“23.... In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein.”

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53. The distinction between an employer’s contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers’ income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer’s liability is to be paid out of its income

whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer.

54. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions-which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date."

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

11. The Hon'ble Supreme Court has categorically held that the employees' contribution deposited after respective due date cannot be allowed as deduction, and, therefore, it would be incorrect to say that the decision of the Hon'ble Supreme Court is applicable only in the case of an assessment 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 allowed.

17. In the result, all the three appeals of the assessee in ITA No. 249/DEL/2022, 2250/DEL/2022 and 2197/DEL/2022 are dismissed whereas the appeal of the Revenue in ITA No. 2293/DEL/2022 is allowed.”

In view of the above deliberations and the decision taken by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1(supra), PCIT vs Strides Arcolab Ltd. and also the decision of ITAT Delhi Bench in the case of Savleen Kaur (supra), the Bench sustains the addition confirmed by the ld. CIT(A) by dismissing the Ground No. 1 & 2 of the assessee.

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

Order pronounced in the open court on 28 -06-2023.

Sd/-

(संदीप गोसाई)

(Sandeep Gosain)

न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:-

28 /06/2023

*Mishra

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. The Appellant- Shri Chandra Shekhar Tiwari, Jaipur
2. प्रत्यर्थी / The Respondent-The ITO, Ward 1(2), Jaipur
3. आयकरआयुक्त / The Id CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File (ITA No.101/JP/2023)

आदेशानुसार / By order,

सहायकपंजीकार / Asstt. Registrar

Sd/-

(राठोडकमलेशजयन्तभाई)

(Rathod Kamlesh Jayantbhai)

लेखासदस्य / Accountant Member