

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

डॉ. एस.सीतालक्ष्मी, न्यायिकसदस्य एवंश्रीराठोडकमलेशजयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकरअपील सं./ ITA. No. 96/JPR/2023  
निर्धारणवर्ष / Assessment Years : 2017-18

M/s. Vaibhav Global Ltd. K-6B, Fateh Tiba, Adarash Nagar Jaipur- 302004	बनाम Vs.	DCIT, Circle-4, Jaipur.
स्थायीलेखा सं./ जीआईआर सं./ PAN/GIR No.: AAACV 4679 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rajeev Sogani, CA &  
Shri Rohan Sogani, CA  
राजस्व की ओर से / Revenue by : Shri A.S. Nehra, Addl.CIT

सुनवाई की तारीख / Date of Hearing 19/04/2023  
उदघोषणा की तारीख / Date of Pronouncement : 14 /07/2023

आदेश / ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This appeal is filed by the assessee against the order of the Id. CIT(A),  
Udaipur-2 dated 07-02-2023 for the assessment year 2017-18 wherein the assessee  
has raised the following grounds of appeal.

“1. In the facts and circumstances of the case and in law the Id. CIT(A) has erred in confirming the action of the AO (CPC) in declining to rectify u/s 154, the apparent error in order passed u/s 143(1). The action of the Id. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the said order passed by Id. CIT(A)

2. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the AO (CPC) in disallowing the Employees Contribution to PF of Rs.86,97,076 u/s 143(1) r.w.s. 36(1)(va) without giving intimation u/s 143(1)(a). The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the entire addition made by the AO (CPC) and confirmed by ld. CIT(A)

3. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the AO (CPC) in disallowing the Employees Contribution to PF of Rs.86,97,076/- u/s 143(1) r.w.s. 36(1)(va) which is beyond the scope of Section 143(1). The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the entire addition made by the AO (CPC) and confirmed by ld. CIT(A)''

2.1 Brief facts of the case are that the assessee is a company registered under the provisions of Companies Act, 1956 and it deals in the business of manufacturing . of fashion jewelry and lifestyle accessories. During the relevant previous year, assessee company filed its return of income on 27.11.2017, declaring total income of Rs. 19,49,76,120/-. The Return of the assessee company was processed u/s 143(1), *vide* order dated 6.03.2019, wherein ld. AO (CPC) made various disallowances amounting to Rs. 96,13,158. Such disallowances made by the ld. AO(CPC) were mistake apparent on record. Resultantly, assessee company filed

rectification u/s 154 on 8.05.2019, against such adjustments. The AO (CPC) passed rectification order on 10.05.2019, without any rectification in Income Tax Computation.

2.2 Against the rectification order, passed by Id. AO(CPC), assessee company, preferred an appeal, before the Id. CIT(A)-Udaipur, 2, wherein the Id. CIT(A) had dismissed both the grounds raised (supra) by observing as under:-

“6.2 I have considered the assessment order and the written submission of the appellant. There is no evidence furnished by the appellant that rectification rights with regard to order passed by the CPC were transferred to the jurisdictional AO. Therefore, this argument is found to be not acceptable. With regard to argument about opportunity of being heard, if no opportunity was provided the AO shall provide the appellant opportunity of being heard before passing the appeal effect order.

7. The second ground of appeal related to making an addition of Rs.86,97,076 to the income of the appellant on account of payment of employees contribution to PF and ESI after due dates specified in the respective Acts.

7.1 In this regard, the A/R of the appellant submitted as under:-

Adjustment was made without giving intimation u/s 143(1)(a).....

7.2 The appellant has claimed that the action of CPC is beyond the scope of section 143(1) on the issue of disallowance made u/s 36(1)(va) of the Act. The claim of the assessee is misplaced in view of

the fact that section 143(1)(a)(ii) mandates that adjustment shall be made with regard to an incorrect claim, if such incorrect claim is apparent from any information in the return. In this regard the decision rendered by Hon'ble Supreme Court is relevant in the case of Checkmate Services (P.) Ltd. vs. Commissioner of Income-tax-1 [2022] 143 taxmann.com 178 (SC). The Hon'ble Court held as under-

"...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, ie, 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....."

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

Further, the Hon'ble court discussed Finance Act, 2021 by which explanation 5 which was introduced w.e.f. 01.04.2021:

"Explanation 5.-For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies."

The Hon'ble court held that for assessment years prior to 2021-22, non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction.

The position of law is made clear by the Hon'ble Supreme Court even for Assessment Years prior to 2021-22. Accordingly as per law the amount of PF and ESI which is deducted from employees and is not deposited in respective accounts within due date of the respective acts is deemed income of the assessee as per section 2(24)(x). Therefore claiming this amount as expenditure by the assessee is an incorrect claim as per law. As per provisions of 143(1)(a) adjustment shall be made with regard to an incorrect claim. The action of the CPC found to be justified accordingly.

The assessee has relied upon some case laws which were rendered without considering the decision of Apex Court, hence, not found to be applicable.

A five-day grace period was allowed to employer's in terms of the Manual of Accounting Procedure (Part-1 General). However, the grace period was discontinued by circular bearing No.

WSU/9(1)(2013)/Settlement/35631 dated 08.01.2016, made applicable to contributions for January 2016 onwards.

In view of the above discussion the action of the AO was found to be as per law while passing order u/s 143(1) of the Act. Since, there was no mistake apparent from record, the AO was justified in rejecting the claim of the appellant in the order passed u/s 154.

This ground of the appeal is decided against the appellant and this ground is treated as dismissed.”

2.3 During the course of hearing, the ld. AR of the assessee prayed that adjustment made while processing the return of income is illegal because adjustment of Rs.86,97,076/- was made without giving intimation to the assessee company in writing or in electric mode mandated under proviso to Section 143(1)(a) of the Income Tax Act, 1961 for which the ld. AR of the assessee filed a detailed written submission concerning the issue in question (supra).

**“GROUNDS OF APPEAL**

**GROUND NO. 1-2                      ADDITION MADE WITHOUT AFFORDING ANY OPPORTUNITY AS MANDATED IN *PROVISO* TO SECTION 143(1)(a).**

**1. SUBMISSION**

1. Adjustment made while processing the return of income is illegal because adjustment of Rs. 86,97,076 was made without giving intimation to the assessee company in writing or in electronic mode mandated under *proviso* to Section 143(1)(a) of the Income Tax Act, 1961.

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

**Assessment**

*“143(1) Where.....*

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

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

3. The act mandates, before making an adjustment, intimation has to be given to the assessee company of such adjustment in writing or electronic mode. Failure to adhere to the mandatory procedure prescribed in statute lead to intimation u/s 143(1) being illegal. Accordingly, any adjustment made without such mandatory procedure is a **“mistake apparent on record”, being no in accordance with law.**

4. It is submitted that the disallowance made by the Id. AO(CPC) was not in accordance with provisions of Section 143(1). In the intimation issued by the CPC dated 31.05.2018 **[Copy Enclosed]** proposing adjustments, the adjustment for disallowance u/s 36(1)(va), amounting to Rs. 86,97,076 was not proposed. Screenshot of the same is as under:

Dear Sir/Madam,

Subject: Communication from CPC for the PAN AAACV4679F and AY 2017-18.

(ii) Incorrect Claim u/s 143(1)(a)(ii)					
Sl.No	Schedule	Error Description	Amount in Income Tax Return	Amount as computed	Variance
1	Schedule BP	In Schedule BP, Row no A3c "Income/receipt credited to profit and loss account considered under other heads of Income" – Other Source value is more than the SUM of row no. 1(a),1(b),1(c),1(d) and 3(a) in Other source Schedule	4157353	3596386	560967
2	Schedule BP	In Schedule BP, Sl.No.15. "Amounts debited to the profit and loss account, to the extent disallowable under section 37(7k of Part-OI)" Is not consistent with amount shown in Sl.No.7.k. "Total amount disallowable under section 37 (total of 7a to 7j)".	15224649	15579764	355115

5. Adjustments proposed by Id. AO (CPC) were in relation to other adjustments [other than on account of Employee's Contribution to Provident Fund]. The details as regards the adjustment proposed are as under:-

S.No.	Schedule	Error Description	Remarks
1	Schedule BP	In Schedule BP, Row no. A3c "Income/receipt credited to profit and loss account considered under other heads of income"-Other Source value is more than the SUM of row no. 1(a),1(b),1(c) ,1(d) and 3(a) in Other source Schedule.	Any income, forming part of Profit and Loss Account, which is to be offered for tax under as <b>Income from Other sources</b> , not under <b>Income from Business and Profession</b> is to be adjusted in the schedule.
2	Schedule BP	In Schedule BP, SI.No.15 "Amounts debited to the profit and loss account, to the extent disallowable under section 37(7k of Part-OI)" is not consistent with amount shown in SI.No.7.k "Total amount disallowable under section 37 (total of 7a to 7j)".	This is in relation to <i>Suo motu</i> disallowance made by the assessee under Section 37

6. Therefore, the intimation issued u/s 143(1) dated 06.03.2019 and order u/s 154 dated 10.05.2019, wherein the said apparent error was not rectified, are illegal.

7. Reliance is placed on the judgement of **Hon'ble Chennai Tribunal** in the matter of **The Ceylon Pentecostal Mission [ITA no. 320/Chny/2021, Assessment Year 2015-16 dated 08.10.2021] [PB : 15]** wherein it was held that:

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

8. **Hon'ble ITAT, Delhi Bench**, in matter of **Vinod Malik [ITA no. 1635/Del/2021 : Assessment Year 2019-20 dated 25.11.2022]** held that [PB : 3]:

7. *Failure to adhere to the mandatory procedure prescribed in statute has domino effect on the order passed u/s 143(1)(a) culminating in treating the order legally unsustainable.*

9. **Hon'ble ITAT, Ahmedabad Bench**, in the case of **Arham Pumps [2022] 140 taxmann.com 204 (Ahmedabad - Trib.) [PB : 5]** laid down the ratio that where addition was made to income of assessee, being late payment of employees contribution of PF and ESI which was disallowed under section 36(1)(va), however, **no intimation had been given to assessee for making any adjustment or disallowance either in writing or in electronic mode, therefore, entire section 143(1) proceedings being invalid in law, intimation issued by CPC was to be quashed and set aside.**

10. The order for processing of return passed u/s 143(1) suffers from the fundamental defect of not providing any opportunity to the assessee company. The specific legal requirement contained in first and second *provisos* to Section 143(1) is not complied with. The order passed is in gross violation of **principles of natural justice.**

**11. Provisions of 1<sup>st</sup> and 2<sup>nd</sup> proviso to Section 143(1) violated and Principles of Natural Justice breached**

- i. The order passed in **Blatant Violation** of Principles of Natural Justice is ***void ab initio***.
- ii. Principles of Natural Justice are firmly rooted and guaranteed under the Article 14 & 21 of the Constitution. The major objective of these principles are that they aid to avert miscarriage of justice by safeguarding rights of an individual. They further ensure that a judgment by the appropriate authority is just, fair and reasonable.
- iii. Principles of Natural Justice are mainly based on the following two principles: -
  - **Nemo Judex in causa sua – no one should be made a judge in his own cause**
  - **Audi alteram partem – no one should be condemned unheard.**

iv. Audi Alteram Partem

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

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

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

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

- v. The rule that no decision should be given against a party without giving an opportunity to be heard is reasonably embodied in different sections of the Income Tax Act. Moreover, Article 265 declares that no tax shall be levied or collected, except by the authority of law. Therefore, Article 265 read with Article 14 of the Constitution of India guaranteeing the right to equality. In this scenario, it is important that orders and decisions of the Income Tax Authorities are taken not only in compliance with the provisions of the law but also following the principle of natural justice.
- vi. Cumulative reading of both the *provisos* to section 143(1)(a) reproduced hereinbefore makes it clear that assessee should not only be intimated about the proposed adjustment but should also be provided the opportunity to explain as to why adjustment should not be made. In the case the reply of assessee is not received within 30 days then adjustment may be made.

The legislature, in its wisdom, considered a period of 30 days to be reasonable period for seeking reply from assessee.

- vii. In the present case, **NO OPPORTUNITY** was granted to the assessee company. The fact is clearly evident from the screenshot as set out hereinbefore.
- viii. In view of above, it is submitted that the powers as available u/s 143(1) have been misused. The assessee company was not provided any opportunity to give reply either in writing or electronic mode as indicated from the screenshot above.
- ix. The Principles of Natural Justice were blatantly violated. Hence, the order is ***non-est***.
12. Reliance is placed on the following judicial pronouncements wherein it has been held that the orders passed in violation of principles of natural justice have no legal force and stands null and void:
- i. In **Maneka Gandhi vs Union of India [1978 AIR 597]/ 1978 SCR (2) 621/ 1978 SCC (1) 248** dated 25 January, 1978 the passport of the petitioner was impounded by the Government of India in public interest. No opportunity was afforded to the petitioner before taking the impugned action. The Supreme Court held that the order was violative of principles of Natural justice.
- ii. **Hon'ble Supreme Court** in the case of **NawabkhanAbbaskhan vs The State Of Gujarat [1974 AIR 1471]** on 19 February, 1974 held that a Tribunal by failing to hear the party, may commit an illegality. But where he is charged with the duty of complying with natural justice in the exercise of power, the order is void *ab initio* and of no legal efficacy. The Court further held that where the Authorities have the obligation to hear, expressly or impliedly, an order which infringes the audi alteram partem rule is a nullity. The subtle difference between "illegality" and "nullity" is discernible from this judgment. The relevant extract of the order is as follows:  
*"HELD : that an order which infringed a fundamental freedom passed in violation of the audi alteram partem rule was a 'nullity'. A*

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

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

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

- iii. Reliance is also placed on the judgment of the Hon'ble Allahabad High court in the case of **Jagannath Prasad Bhargava vs Lala NathimalAndOrs. [AIR 1943 All 17]** on 31 July, 1942 wherein it held as under:  
*"We consider we are bound to follow the very obvious legal principle that there should be no decision against a person who has not had an opportunity of being heard upon the point which is to be decided."*
- iv. **Hon'ble ITAT Cuttack Bench in M/S. Jaydurga Minerals, Cuttack vs. CIT Cuttack** on 10 August, 2020 **ITA No. 276/CTK/2015** relied upon the Allahabad High Court judgment (*Supra*) to hold as under:  
*"After hearing the submissions of both the sides and perusing the order of Pr. CIT at last para of page No.2, we find that the Pr. CIT has issued show cause notice u/s.263 of the Act on 20.03.2015 requiring the assessee to furnish the clarification by 27.03.2015 and thereafter the Pr. CIT passed the order on 30.03.2015 stating that he was constrained to dispose off the revision proceedings on or before the end of the relevant financial year. It is clear that the Pr. CIT has provided opportunity to the assessee on 27.03.2015 for appearing before him, which, in our opinion, causes denial of opportunity under the principles of natural justice. Before us, Id. AR submitted that the assessee stays in Joda which is near about 275 kms from Cuttack and the notice received on 23.03.2015, therefore, the assessee had no sufficient time to contact his local lawyer, who is staying at Barbil and the Counsel to appear before the Pr. CIT, Cuttack is staying at Cuttack. When the authorized representative of the assessee appeared before the Pr.CIT, the order u/s.263 of the Act was already passed. It is trite that right to fair hearing is a guaranteed right of an assessee and granting of effective opportunity is a sin qua non in [Section 263](#) of the Act for unsetting a statutory order. It was the duty of the Pr. CIT to provide the assessee an effective opportunity to enable it to substantiate its claim. In any case, it is one of the fundamental principles of natural justice that no person can be condemned unheard i.e.audi alteram partem, and the impugned revision order was thus passed in violation of the principles of natural justice in absence of any effective/reasonable opportunity of hearing provided to the assessee. To support our view, reliance can be placed on the decision of the Division Bench judgment of the Hon'ble Allahabad High Court in the case of [Jagannath Prasad Bhargava V. Lala Nathimal](#), AIR 1943 All. 17, wherein the Hon'ble High Court Court has held as under:-*

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

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

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

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

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

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

13. The aforementioned factual position of the no opportunity being granted to the assessee company, was brought to the notice of the Id. CIT(A), in the first appellate proceedings. However, those were ignored by the Id. CIT(A).

Therefore, in view of the above, Id. AO(CPC) had not followed the mandatory mechanism to process the return prescribed in the law as well as violated the principles of natural justice. Hence, the order passed u/s 143(1), is illegal.

Accordingly, passing of the order under Section 143(1), making the adjustment of Rs. 86,97,076, is a mistake apparent on record and deserves to be rectified.

**GROUND NO. 2            ADJUSTMENT FOR DISALLOWANCE U/S 36(1)(va) OUTSIDE THE PURVIEW OF SECTION 143(1)**

#### 1. SUBMISSION

1. The *proviso* to Section 143(1)(a) states that no adjustments shall be made to the total income of the assessee unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode.
2. It is pertinent to note that in the intimation received, it was not specifically provided that under which **sub-clause (i) to (iv) of clause (a) of Section 143(1)** the case of the assessee company was covered, in relation to adjustment on account of Employees Contribution to PF. Accordingly, assessee company was not aware in this regard when the addition was finally made under Section 143(1), in Employees' Contribution of PF.
3. Adjustment made while processing the return of income is illegal because the case of the assessee company does not fall in any of the below clauses of Section 143(1).
4. Section 143(1)(a)(i)
  - i. It is submitted that u/s 143(1)(a)(i) only an arithmetical error in the return of income can be adjusted to the total income of the assessee company, which is not present in the said case.
5. Section 143(1)(a)(ii)

- i. It is submitted that u/s 143(1)(a)(ii) only an incorrect claim which is apparent from any information in the return of income can be adjusted.
- ii. Incorrect claim has been defined in the Explanation to section 143(1) as under:  
*“Explanation. — For the purposes of this sub-section—  
(a) “an incorrect claim apparent from any information in the return” shall mean a claim, on the basis of an entry, in the return—  
(i) of an item, which is inconsistent with another entry of the same or some other item in such return;  
(ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or  
(iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction;”*
- iii. It is submitted that case of the assessee company has not claimed any such amount in the return of income and the case of the assessee company does not fall under the said sub-clause.

6. Section 143(1)(a)(iii)

- i. It is submitted that u/s 143(1)(a)(iii), only disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under Sub-Section (1) of Section 139 can be made.

7. Section 143(1)(a)(iv)

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

- ii. Attention is drawn towards the fact in Section 143(1)(a)(iv), 'increase in income' has been added *vide* Finance Act, 2021 w.e.f. 1.4.2021. It is submitted that the present processing was done for AY 2017-18. The present addition amounts to increase in income in view of Section 2(24)(x). The right to increase in income u/s 143(1)(a)(iv) has been conferred only w.e.f. 1.4.2021. Thus, invoking this clause for making adjustment in the returned income is without jurisdiction.
- iii. In the case of assessee company the Auditor in Clause 20(b) provided details of contribution received from Employees for various funds as referred to in Section 36(1)(va). Thus, **only factual reporting, which was mandated**, was done and **no opinion was expressed** regarding the disallowance. Otherwise also no disallowance can be made on the basis of mere reporting in Audit Report. The disallowance can be made only on the basis of relevant law and taking into account judicial view in that regard.
- iv. It is further submitted that in the Clause 20(b), the auditor is required to **report the details of the contribution** not the amount of disallowance or any late payments made to the respective funds. Screenshot evidencing the same is as under:
- (b) Details of contributions received from employees for various funds as referred to in section 36(1)(va):
- | Serial number | Nature of fund | Sum received from employees | Due date for payment | The actual amount paid | The actual date of payment to the concerned authorities |
|---------------|----------------|-----------------------------|----------------------|------------------------|---|
|               |                |                             |                      |                        |   |
- v. It is evident from the above screenshot that no disallowance has been made but only the dates of payments of Employee's contribution have been reported. Ld. AO(CPC) simply matched the due dates of payment and actual date of payment while processing the return of income and any difference between the said dates **has been assumed to be disallowance**. But in actual scenario there is no disallowance but only difference in due date and actual date of payment.
- vi. Hence, when there is no disallowance, provisions of section 143(1)(iv) cannot be invoked.
- vii. It is further submitted that provisions of section 143(1)(a)(iv) can be invoked **with reference to other clauses** like, for example, the following

wherein the auditor is required to express his opinion with reference to disallowance:

- Clause 21(b)-Amounts inadmissible under section 40(a),
- Clause 21(d)-Disallowance/deemed income under section 40A(3),
- Clause 21(f)-Any sum paid by the assessee as an employer not allowable under section 40A(9) etc.

viii. Reliance is placed on the recent judgement of **Hon'ble ITAT, Delhi Bench** in the case of **Garg Heart Centre & Nursing Home Private Limited ITA No.1700/Del/2022** wherein it has been held that *“At the very least, Revenue should have given due consideration to the fact that the issue was highly debatable and controversial. As already discussed earlier, adjustments u/s 143(1) of Income Tax Act by way of intimation u/s 143(1) of Income Tax Act, on debatable and controversial issues, is beyond the scope of section 143(1) of Income Tax Act. Revenue was clearly in error, in making the aforesaid adjustments u/s 143(1) of Income Tax Act on a debatable and controversial issue”*

ix. Reliance is placed on the judgement of **Hon'ble ITAT, Mumbai Bench** in the case of **Kalpesh Synthetics (P.) Ltd. Vs. DCIT, CPC Bengaluru [2022] 137 taxmann.com 475**

*“In the light of this ground reality, an auditee being presumed to have accepted, and concurred with, the audit observations, just because the appointment of auditor is done by the assessee himself, is too unrealistic and incompatible with the very conceptual foundation of independence of an auditor. On the one hand, the position of the auditor is treated so subservient to the assessee that the views expressed by the auditor are treated as a reflection of the stand of the assessee, and, on the other hand, the views of the auditor are treated as so sacrosanct that these views, by themselves, are taken as justification enough for a disallowance under the scheme of the Act. There is no meeting ground in this inherently contradictory approach. Elevating the status of a tax auditor to such a level that when he gives an opinion which is not in harmony with the law laid down by the Hon'ble Courts above- as indeed in this case, the law, on the face of it, requires such audit opinion to be implemented by forcing the disallowance under section 143(1), does seem incongruous.”*

- x. Same ratio has been laid down by **Hon'ble ITAT, Mumbai Bench** in the case of **P.R. Packaging Service vs. ACIT-25(3), Mumbai ITA No. 2376/Mum/2022**, wherein under identical set of facts, as in the case of the assessee company, additions made w.r.t Section 36(1)(va), under Section 143(1) were deleted by Hon'ble ITAT, Mumbai Bench, holding such adjustment in the processing to be outside the scope of Section 143(1)(a)(iv). The said decision has been rendered by Hon'ble ITAT, Mumbai Bench subsequent to the decision of Hon'ble Supreme Court in Checkmate Services Private Limited (*Supra*).
- xi. **Attention is also drawn towards the recent decision of Hon'ble ITAT, Jaipur Bench, in the case of Paris Elysees India Private Limited, ITA No. 357/JPR/2022, in which the aforementioned legal position was accepted by the Hon'ble ITAT, Jaipur Bench.**

8. Section 143(1)(a)(v)

i. It is submitted that only 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 can be made.

ii. The above clause is also not applicable in the present case.

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

**In view of above the adjustment made by Id. AO (CPC) is illegal and beyond the scope of Section 143(1) and thus is a mistake apparent on record. "**

2.4 On the other hand, the Id. DR supported the orders of the lower authorities and further submitted that the adjustment made in intimation is in relation to compulsory disallowance on account of late payment of PF &ESI under the

respective Acts and the said information is duly reflected in the audit report filed by the assessee. He submitted that after the recent decision of Hon'ble Supreme Court in the case of Checmkate Services (P) Ltd. vs CIT-1 [2022] 143 taxmann.com 178, there is no need to give separate intimation or notice to make adjustment.

2.5 In the rejoinder, the ld. AR of the assessee submitted that the Hon'ble Apex Court in the case of Checkmate Services (P) Ltd. vs CIT-1 (supra) has clarified the controversy of allowance or disallowance of the claim of the assessee which was held by the different Hon'ble High Courts on different decisions but there is no change in the law that intimation issued u/s 143(1)(a) of the Act has to make adjustment for which opportunity as provided in the Act has to be granted to the assessee. He further submitted that the decision of Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1 relates to proceedings u/s 143(3) of the Act and not in the proceedings u/s 143(1)(a) of the Act. He further submitted that even on the date of intimation the decision of Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1 was not there and thus considering the decision of Jurisdictional High Court the claim of the assessee was allowable and at that point of time for making adjustment notice as per provisions of Section

143(1)(a) of the Act is compulsorily required to be given to the assessee which is not in the present case for making adjustment.

2.6 We have heard both the parties and perused the materials available on record including the case laws cited by the respective parties. The crux of the issue in this appeal is that for making adjustment notice as per provisions of Section 143(1)(a) of the Act is compulsorily required to be given to the assessee which is not in the present case for making adjustment. It is also noteworthy to mention the summary of the additions made by the AO (CPC) and sustained by the Id. CIT(A) against which the present appeal has been filed by the assessee before us.

				(Amt. in Rs.)
Particulars		Adjustment made in 143(1) Order by Id. AO(CPC) and rectification application rejected	Adjustment sustained by Id. CIT(A)	Remarks
Disallowance for late deposit of Employees' Contribution of PF u/s 36(1)(va)		86,97,076	86,97,076	Issue under Appeal before Hon'ble ITAT
Addition for income credited to Profit & Loss Account,				
(a) Profit on sale of Mutual Fund, which was offered under the head 'Capital Gain'	5,13,147	5,60,967	-	Submission accepted by Id. CIT(A). Additions directed to be deleted
(b) Profit on sale of Fixed Assets	47,820			
Disallowance u/s 37 on account of amortization of land cost.		3,55,115		Not Pressed by assessee company before Id. CIT(A)
<b>Total</b>		<b>96,13,158</b>	<b>86,97,076</b>	

It is not imperative to repeat the facts of the case as the ld. CIT(A) has elaborately discussed the issues in question (supra) and confirmed the action of the AO. From the entire conspectus of the case, it is noted that the assessee was not provided opportunity to contest the case which fact is clearly evident from the screen short mentioned hereinabove. It is worthwhile to mention that proviso to Section 143(1)(a) states that **no adjustment shall be made** to the total income of the assessee **unless an intimation is given to the assessee of such adjustment either in writing or in electronic modes**. It is also noted that u/s 143(1)(a) only an arithmetic error in the return of income can be adjusted to the total income of the assessee which does not appear in the present case. It is found from the entire scenario of the case that the assessee company does not fall under any of the sub-clauses of Section 143(1) and no adjustment can be made to the total income under said section. We also draw strength from the decision of the Coordinate Bench ITAT Delhi in ITA No. 1635/Del/2021 (A.Y. 2019-20 dated 25-11-2022) wherein the Bench on the similar issue has held as under:-

“6. From the above, we find that the disallowance made by the CPC was in accordance with provisions of Section 143(1)(iv). The Act mandates, before making adjustment, an intimation has to be given to the assess of such adjustment in writing or in electronic mode. The Revenue could not produce

evidence of sending the intimation to the assessee with regard to the proposed adjustment.

7. Failure to adhere to the mandatory procedure prescribed in statute has domino effect on the order passed u/s 143(1)(a) culminating in treating the order legally unsustainable.

8. In the result, the appeal of the assessee is allowed.”

We also draw strength from the decision of ITAT Ahmedabad Bench in the case of Arham Pumps vs DCIT [2022]140 taxmann.com 204 (Ahd. Trib) wherein the Bench observed in favour of the assessee as under:-

“Section 36(1)(va) read with section 143(1) of the Income Tax Act, 1961 – Employee’s contribution (intimation for making adjustment) – Assessment Year 2018-19 – Whether where addition was made to income of assessee being late payment of employees contribution to PF and ESI which was disallowed u/s 36(1)(va), however, no intimation had been given to assessee for making any adjustment or disallowance either in writing or in electronic mode, thus CPC center had erred in issuing intimation u/s 143(1) as it had not followed first proviso to Section 143(1)(a) – Held, Yes – Whether therefore entire section 143(1) proceedings being invalid in law, intimation issued by CPC was to be quashed and set aside – Held yes (Paras 7 to 9) [in favour of assessee]

In view of the above deliberation and facts of the case, we do not concur with the findings of the Id. CIT(A) and thus the appeal of the assessee is allowed.

3.0 In the result, the appeal of the assessee is allowed

Order pronounced in the open Court on 14 /07/2023.

Sd/-

( राठोडकमलेशजयन्तभाई )  
(RATHOD KAMLESH JAYANTBHAI)  
लेखा सदस्य / Accountant Member

Sd/-

( डॉ.एस.सीतालक्ष्मी )  
(Dr. S. Seethalakshmi)  
न्यायिकसदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 14/07/2023.

**\*Mishra**

आदेश की प्रतिलिपिअग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s. Vaibhav Global Limited, Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT, Circle-4, Jaipur.
3. आयकरआयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
5. गार्डफाईल / Guard File {ITA No. 96/JPR/2023 }

आदेशानुसार / By order,

सहायकपंजीकार / Asst. Registrar