

**IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No.90/Jab/2022
(ASSESSMENT YEAR- 2020- 2021)**

M/s. Varsma Engineers Group, 656, Vijay Nagar, Damoh Road, Jabalpur (M.P.)	vs	Asst. Director of Income Tax, CPC, Bengaluru. ACIT, Circle-1(1), Jabalpur.
(Appellant)		(Respondent)
PAN No. AAEFV7885Q		

Assessee By	Shri H.S.Modh, Adv.
Revenue By	Shri Rajesh Kumar, Sr. DR
Date of hearing	11/09/2023
Date of Pronouncement	11/09/2023

ORDER

PER OM PRAKASH KANT, A.M.:

The appeal by the assessee is directed against the order dated 03.10.2022 of Ld. Commissioner of Income Tax(A)-National Faceless Appeal Centre, Delhi [“in short the Ld.CIT(A)”] for assessment year 2020-21, raising following grounds:-

1. *“That the CPC has grossly erred in facts and circumstances of the case for adjustment of Rs.4,56,690/- considering that the payment of Provident Fund and ESI has been made after due date but before filing of income tax return.*

2. *That the adjustment made for Rs.4,56,690/- on account of delayed payment of Provident Fund and ESI in intimation u/s 143(1) is arbitrary and bad in law.*
3. *That the assessee crave leaves to raise any other ground/s on or before the date of hearing to prove that the order is bad.”*

2. Briefly Stated facts of the case are that the assessee filed return of income on 31.03.2021, which was processed by Centralized Processing Center, Bengaluru [“CPC”] vide intimation order u/s 143(1) of the Income Tax Act, 1961 (“the Act”) dated 03.11.2021, wherein contribution to Employees State Insurance [“ESI”]/Provident Fund [“PF”] amounting to Rs. 4,56,690/- was disallowed and adjusted to the returned income. On further appeal, the Ld.CIT(A) referred the amendment made to section 36(1)(va) of the Act by way of Finance Act, 2021 , wherein the employee’s contribution to ESI/PF deposited after the due date prescribed under relevant Acts is not allowable as deduction. The Ld.CIT(A) also relied upon various decisions cited in the impugned order, to hold that said employee’s contribution to ESI/PF deposited after due date under relevant Acts is not allowable deduction. Aggrieved, the assessee is in appeal before this Tribunal by way of grounds reproduced herein above.

3. The Id Counsel of the assessee relied upon the decision of the 'SMC' bench of Tribunal in the case of Omega Hospital and Blood Bank, Jabalpur Vs DCIT in ITA No. 36/Jab/2021 for assessment year 2018-19.

4. On the contrary, the Ld. DR submitted that the issue of allowability of employee's contribution to ESI/PF u/s 36(1)(va) of the Act has been settled by the Hon'ble Supreme Court in the case of **Checkmate Services P.Ltd. vs CIT-1 in Civil Appeal No.2833 of 2016** dated **12.10.2022** and it is held that any contribution deposited after due date under relevant Acts is not allowable as deduction. He submitted that Hon'ble Supreme Court has explained the law from the date of introduction of relevant provision and therefore, decision of the Hon'ble Supreme Court is applicable from the date of inception of relevant provision under the Act.

5. We have heard Ld. Authorized Representatives of the parties on the issue in dispute and perused the relevant material available on record including Paper book containing pages 1-33 filed by the assessee. The issue in dispute before us is whether the employee's contribution to ESI/PF paid or deposited after due date under relevant Act is allowable as deduction under the provision of section 36(1)(va) of the Act read with section 43B of the Act. The Ld.

Counsel for the assessee relied on the decision of the SMC Bench in the case of ***Omega Hospital and Blood Bank, Jabalpur vs Dy CIT*** (supra), wherein it is held that in view of conflicting judicial opinion, the disallowance of employee's contribution to ESI/PF paid after due date under relevant Act is not permissible u/s 143(1) of the Act. The Tribunal (supra) also observed that the amendment brought to section 36(1)(va) of the Act by way of Finance Act, 2021 is prospective in nature and thus, amount of employee's contribution to ESI/PF deposited after due date, could not have been adjusted to the returned income in the intimation issued u/s 143(1) of the Act. However, before us the Ld DR has cited the decision of Hon'ble Supreme Court in the case of checkmate services p ltd (supra). We find that Hon'ble supreme Court has brought clear distinction in application of provisions of section 43B vis-a-vis section 36(1)(va) of the Act in relation to contribution to the ESI/PF. It is held that as far as employer's contribution to ESI/PF is concerned, same is governed by the section 43B of the Act, wherein amount deposited before the due date of return of income is allowed as deduction, but, as far as the employee's contribution is concerned, same is considered as income in the hands of the assessee as per section 2(24)(x) of the Act and on payment or deposit of same before due date under relevant Act,

make the assessee eligible for deduction u/s 36(1)(va) of the Act. The Hon'ble Supreme Court has explained the law from the date of inception of the provision of section 36(1)(va) of the Act and therefore, it is effective from said date of inception of the provision. The Hon'ble Supreme Court has not mentioned specifically that said decision should operate prospectively and thus unless mentioned specifically of prospective operation, the decision of Hon'ble Supreme Court operate retrospectively from the date of inception of the provision. Therefore, it is undisputed that any share of employee's contribution towards ESI/PF deposited after due date under the relevant Act is not allowable under the provision of section 36(1)(va) of the Act. Since in view of the decision of Hon'ble Supreme Court, such a claim has become incorrect claim and therefore, liable to be adjusted u/s 143(1)(a)(i) of the Act. The decision relied upon by the assessee in the case of Omega Hospital and blood bank (supra) is therefore not a valid law. Before us, Ld. Counsel for the assessee however, submitted that the amount disallowed also included employer contribution towards ESI/PF which is allowable under the provision of section 43B of the Act. In view of the submission of the Ld. Counsel for the assessee, we feel appropriate to restore this issue back to the file of the AO for examining the employer contribution towards ESI/PF under the

provision of section 43B of the Act and employees contribution towards ESI/PF under the provision of section 36(1)(va) of the Act as held by the Hon'ble Supreme Court in the case of *Checkmate Services P.Ltd. vs CIT-1* (supra). The grounds raised by the assessee are allowed partly for statistical purposes.

6. In the result, the appeal filed by the assessee is allowed partly for statistical purposes.

Order pronounced in the open Court on 11/09/2023.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Amit Kumar

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File

Asstt. Registrar
Jabalpur Bench