IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH 'DB', JODHPUR

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. BRR KUMAR, ACCOUNTANT MEMBER

ITA Nos. 108 & 109/Jodh/2023
Assessment Years: 2018-19 & 2019-20
(Through Virtual Mode)

M/s. Tarun Construction Co., Ward No. 24, Near Bhagat Singh Chowk, Suratgarh. **PAN: AAIFT5316J** (Appellant)	Versus	Income-tax Officer, Ward-1(1), Sriganganagar. (Respondent)

Assessee by : Sh. P.C. Parwal, C.A.
Revenue by : Sh. Rajeev Mohan, JCIT-DR

Date of hearing : 18.09.2023
Date of pronouncement: 21.09.2023

ORDER

These appeals are by the assessee against two separate orders, passed by National Faceless Appeal Centre (NFAC), Delhi for the assessment years 2018-19 and 2019-20.

2. The only common dispute arising in these appeals relates to disallowance of deduction claimed on account of delayed payment of employees' contribution towards Provident Fund(PF) and Employees

State Insurance (ESI), while processing the returns of income under section 143(1) of the Income-tax Act, 1961.

3. Briefly, the facts are, the assessee is a partnership firm. In the assessment years under dispute, the assessee filed its returns of income in regular course under section 139 of the Act. It also requires mention that the assessee maintains regular books of account and its accounts were under statutory audit. In fact, for the impugned assessment years, the assessee furnished tax audit reports in form-3CD. Be that as it may, while processing the returns filed by the assessee, the Centralized Processing Centre (CPC), having noticed that employees' contribution to PF and ESI were not deposited within the due date as prescribed under the PF and ESI Act, disallowed the deduction claimed by the assessee under section 36(1)(va) of the Act. The disallowances made in respective assessment years are to the tune of Rs.10,97,693/- and Rs.33,54,760/-. Contesting the disallowances, the assessee preferred appeals before the first appellate authority. However, relying upon the decision of Hon'ble Supreme Court in case of Checkmate Services (P) Ltd. vs. CIT

(2022) 143 taxmann.com 178, the first appellate authority upheld the disallowances. Being aggrieved, the assessee is before us.

4. At the time of hearing, in addition to the submissions made orally, learned counsel appearing for the assessee has also furnished submissions in writing, which are as under :

> ***"Submission:-***
>
> *Adjustment cannot be made under section 143(1)(a)(iv) – as held by the CIT(A)*
>
> 1. *At the outset it is submitted that the adjustmentsthat can be made under section 143(1)(a) of the Act while processing the ROIhas been specifically provided, which are 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 142, 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 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; 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
….

***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"
(emphasis supplied)

2. *It is submitted that under sub-clause (iv), the adjustment can only be made in respect of disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the ROI. However, by Finance Act, 2021 w.e.f. 01.04.2021, apart from disallowance of expenditure, the word 'or increase in income' is also brought into the statute. Thus, so far as AY under consideration is concerned, what can be adjusted under sub-clause (iv) is only disallowance of expenditure indicated in the audit report.*

3. *The employees contribution to PF/ ESI/ other welfare fund received by the employer is income of the employer by virtue of section 2(24)(x) of the Act which provides that income includes:*

"(24) "income" includes—
….

"any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees"
(emphasis supplied)

4. *The deduction of the said income is provided in '**Section 36 – Other deductions**' wherein section 36(1)(va)of the Act provides as under:-*

*"36. (1) **The deductions provided for in the following clauses shall be allowed** in respect of the matters dealt with therein, in computing the income referred to in section 28—*

*(va) **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.*

Explanation.—For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise;"
(emphasis supplied)

Thus, the deduction of the said income/ sum is allowed if such sum is credited to the employees account maintained in the relevant fund on or before the due date. As mentioned above, section 143(1)(a)(iv) provides for adjustment by way of disallowance of expenditure indicated in the audit report but not considered while computing the total income.

5. *In the audit report, the tax auditor at clause 20(b) is required to furnish the following information only:*

20	b	Details of contributions received from employees for various funds as reerred to in section 36(1)(va)					
		S.No.	Nature of fund	Sum received from employee	Due date for payment	The actual amount paid	The actual date of payment to the concerned authorities

On perusal of the above, it can be noted that the heading itself states 'details of contributions received from employees for various funds as referred to in section 36(1)(va) of the Act'. Thus,

information on contribution received by the employer from its employees, due date of payment, actual amount paid and actual date of payment is required to be reported in the said clause by the tax auditor. The tax auditor in the said clause not where indicates any disallowance of expenditure so as to attract adjustment under section 143(1)(a)(iv) of the Act.Reliance in this regard is placed on the following decisions of the coordinate bench:-

PR Packaging Service Vs. ACIT (2023) 221 DTR 1(Mum)
The Hon'ble Mumbai Bench of *the ITATin the said caseafter distinguishing the decision of Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd (supra), at paras 3 to 6 of the order held as under:-*

"3. We have heard the rival submissions and perused the materials available on record. It is not in dispute that assessee had remitted the employees, contribution to provident fund beyond the due date prescribed under the Provident Fund Act, but had duly remitted the same before the due date of filing the return of income under s. 139(1) of the Act. This fact of remittance made by the assessee with delay had been reported by the tax auditor in the tax audit report. The copy of the tax audit report is placed on record by the learned Authorised Representative before us together with its annexures. On perusal of the same, we find that the tax auditor had merely mentioned the due date for remittance of provident fund as per the Provident Fund Act and the actual date of payment made by the assessee. The tax auditor had not even contemplated to disallow the employees' contribution to provident fund wherever it is remitted beyond the due date prescribed under the Provident Fund Act. Hence, it is merely recording of facts and a mere statement made by the tax auditor in his audit report. The learned CPC Bangalore had taken up this data from tax audit report and sought to disallow the same while processing the return under s. 143(1) of the Act, apparently by applying the provision of s. 143(1)(a)(iv) of the Act. For the sake of convenience, the relevant provision is reproduced hereunder:

"143(1) Where a return has been made under s. 139, or in response to a notice under sub-s. (1) of s. 142, 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:

(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."

4. From the aforesaid provisions, it is very clear that the said cl. (iv) would come into operation when the tax auditor had suggested for a disallowance of expense or increase in income, but the same had not been carried out by the assessee while filing the return of income. As stated supra, the tax auditor had not stated in the instant case to disallow Employees' Contribution to Provident Fund wherever it is remitted beyond the due date under the respective Act. Hence, in our considered opinion, the said action of the learned CPC Bangalore in disallowing the employees' contribution to provident fund while processing the return under s. 143(1) of the Act is against the provisions of the Act as it would not fall within the ambit of prima facie adjustments. Our view is further fortified by the co-ordinate bench decision of this Tribunal in the case of Kalpesh Synthetics Pvt Ltd vs DCIT reported in 195 ITD 142 (Mum). The relevant portion of the decision is reproduced below:-
…..

5. We are conscious of the fact that the issue on merits is decided against the assessee by the recent decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd vs CIT reported in 143 taxmann.com 178 (SC) dated 12/10/2022. This decision was rendered in the context where assessment was framed under section 143(3) of the Act and not under section 143(1)(a).

6. Hence we direct the Ld. Assessing Officer to delete the addition made in respect of employees' contribution to Provident Fund, in the facts and circumstances of the instant case. Accordingly, grounds 1 to 3 raised by the assessee are allowed."

Kalpesh Synthetics Pvt Ltd Vs DCIT 195 ITD 142 (Mum)
The Hon'ble Mumbai Bench of ITAT held as under:-

9. What a tax auditor states in his report are his opinion and his opinion cannot bind the auditee at all. In 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 (now Explanation 1) to section 36(1)(va) provides that "For purposes 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 the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of 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 allowability 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 to be decisive in the light of the law laid down by Hon'ble Courts above, and it cannot, therefore, be said that the reporting of payment beyond due date in the tax audit report constituted "disallowance of expenditure indicated in the audit report but taking into account in the computation of total income in the return" as is sine qua non for disallowance of section 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 the payments having been made after this due date is "indicative" of the disallowance of expenditure in question. While preparing the 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 that information ceases to be relevant because, in terms of the law laid down by Hon'ble Courts, which binds all of us as much as the enacted legislation does, the said disallowance does not come into play when the payment is made well before the date of filing the income tax return under section 139(1). Viewed thus also, the impugned adjustment is vitiated in law, and we must delete the same for this short reason as well.

10. In view of the detailed discussions above, we are of the considered view that the impugned adjustment in course of processing of return under section 143(1) is vitiated in law, and we delete the same. As we hold so, we make it clear that our observations remain confined to the peculiar facts before us, that our adjudication confined to the limited scope of adjustments which can be carried out under section 143(1) and that we see no need to deal with the question, which is rather academic in the present context, as to whether if such adjustment was to be permissible in the scheme of section 143(1), whether the insertion of Explanation 2 to section 36(1)(va), with effect from 1st April 2021, must mean that so far as the assessment years prior to this assessment year

2021-22 are concerned, the provisions of section 43B cannot be applied for determining the due date under Explanation (now Explanation 1) to section 36(1)(va). That question, in our humble understanding can be relevant, for example, when a call is required to be taken on merits in respect of an assessment under section 143(3) or under section 143(3) r.w.s. *147 of the Act, or when no findings were to be given on the scope of permissible adjustments under section 143(1)(a)(iv). That is not the situation before us. We, therefore, see no need to deal with that aspect of the matter at this stage.*

11. In a result, this appeal is allowed"

In the following cases as well, the Mumbai Bench of ITAT relying on the above decisions held that adjustment on account of employees contribution to PF cannot be made under section 143(1)(a)(iv) of the Act:-

DCIT Vs Maharashtra State Security Corporation reported in (2022) 196 ITD 653 (Mum)
Coronation Cigar Co. AndOrs. Vs. DCIT and Ors (2022) 196 ITD 498 (Mum)
Mehra Eyetech Private Ltd. Vs. ACIT (2022) 197 ITD 124(Mum)
Mehra Eyetech Private Ltd. Vs. ACIT (2022) 65 CCH 722 (Mum)
KA Hospitality Private Ltd. Vs. ITO (2022) 65 CCH 724 (Mum)
Jasbir Singh Kaberwal Vs. Assistant Director of Income Tax (2022) 197 ITD 299 (Mum)
Della Adventure and Resorts Pvt. Ltd. Vs. National Faceless Appeal Centre (NFAC) (Mum)
Ernst & Young Merchant Banking Services LLP Vs. ADIT, CPC ITA No. 2333/Mum/2022 dated 20 March 2023

Paris Elysees India Private Limited [TS-77-ITAT-2023(JPR)]- The Jaipur Bench of the ITAT held that adjustment on account of employees contribution to PF cannot be made under section 143(1) of the Act. Further, it also held that addition by way of adjustment and intimation under section 143(1) of the Act on debatable and controversial issues is beyond the scope of section 143(1) of the Act. Revenue was clearly in error in making the aforesaid adjustments.

Garg Heart Centre & Nursing Home Private Limited ITA No.1700/Del/2022: The Delhi Bench of the ITAT held as under:

"(C.2) In view of foregoing discussion, we come to the following conclusions:

(a) The fact that payments by way of employees' contribution to provident fund and ESI were made by the respective assessees after stipulated date prescribed under the relevant laws governing provident fund and ESI, but before the due date of filing of return of income prescribed u/s 139(1) of Income Tax Act; is not in dispute;

(b) Whether the aforesaid amendments to Income Tax Act by way of Finance Act, 2021 are retrospective or prospective, is debatable and controversial.

(c) Adjustments made by Revenue u/s 143(1) of Income Tax Act, whereby aforesaid additions were made to the income of the respective assessee, were unfair, unjust and bad in law.

(d) Addition by way of adjustment and 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.

(e) Addition by way of adjustment and intimation u/s 143(1) of Income Tax Act, on the basis of retrospective amendment to Income Tax Act is beyond the scope of Section 143(1) of Income Tax Act.

(f) In the present appeals before us, additions of aforesaid amount have been made by way of adjustments and intimation u/s 143(1) of Income Tax Act, on a debatable and controversial issue.

(C.2.1) In the light of the foregoing conclusions in paragraph (C. 2) of this order and the preceding discussion, we are of the view that the aforesaid additions by way of adjustment and intimation u/s 143(1) of Income Tax Act, were beyond the scope of Section 143(1) of Income Tax Act.

6. It is further submitted that the ROI was filed by the assessee on 01.10.2018. The law prevailing on the said date allowed the assessee to claim a deduction of employees' contribution to PF/ ESI and did not authorized CPC to take a different view that too by way of adjustment by processing the ROI under section 143(1) of the Act. Thus, the adjustment made by the CPC is beyond its scope and ambit of the provisions of the Act.

7. The Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT (2022) 218 DTR 401 at para 50 of the order, relying on the decision of Commissioner. of Customs v. Dilip Kumar & Co2018 (9) SCC 1, has held that *(iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly."* The Pune Bench of ITAT in the case of CemetileIndustries vs ITO (supra) has taken a view that adjustment of employees' contribution to PF/ ESI can be made under section 143(1)(a)(iv) of the Act. However, plethora of decision by the jurisdictional Mumbai ITAT, Delhi ITAT and Jaipur ITAT has held that adjustment of employees' contribution cannot be made under section 143(1)(a)(iv) of the Act. Basis the decision of the Hon'ble Supreme Court of India, it is submitted that in case of divergent views, the view that favours the assessee should be followed. Accordingly, the view held by jurisdictional Mumbai ITAT, Delhi ITAT and Jaipur ITAT be kindly be followed and addition made by the CPC under section 143(1)(a)(iv) of the Act be deleted.

   In view of the above detailed factual and legal submission, it is humbly submitted that the order of the CIT(A) upholding the adjustment made by the CPC in the ROI u/s 143(1) of the Act, which is debatable and controversial, be directed to be deleted.

   Amendment in section 36(1)(va) of the Act is prospective in nature

8. The Finance Act, 2021 had introduced the following amendment by bringing in Explanation 2 to section 36(1)(va) of the Act:

   "[Explanation 2.—For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;]"

   The memorandum explaining the Finance Bill, 2021 provided as under in relation to the aforesaid amendment:

   "Accordingly, in order to provide certainty, it is proposed to –

   (i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have

been applied for the purposes of determining the —due date under this clause; and

(ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years."

As evident above, the Finance Bill, 2021 in unequivocal terms provided that the amendment in section 36(1)(va) and section 43B of the Act is applicable from 1 April 2021 and will accordingly apply to AY 2021-22 and onwards. The subject case of the assessee is of AY 2018-19 and therefore the said amendment cannot be said to be operative for AY 2018-19. Reliance in this regard is placed on the following cases as well:

Dhabriya Polywood Limited vs. ADIT (2022) 192 ITD 0298 (Jaipur-Trib)
Indian Geotechnical Services vs. ACIT (2021) 62 CCH 468 (Del-Trib)
NCC Limited vs ACIT (2021) 63 CCH 60 (Hyd-Trib)

Thus, the said amendment is prospective in nature and cannot be read for the subject AY.

Amount is allowable as a deduction as it is paid within the 'due date' under 'any Act' or 'otherwise'

9. *It* is *also submitted that section 36(1) of the Act which provides for 'other deduction', states that deduction provided for in the specified clauses shall be allowed in respect of matters dealt with therein, in computing the income referred to in section 28. Clause (va) of said section reads as under:-*

"(va) 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.

Explanation.—For the purposes of this clause, ***"due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act****, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise."*

From the plain reading of the section it can be noted that 'due date' has been defined in the Explanation to mean the date by which assessee is required to credit the employees contribution in the relevant fund under ***any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise****.* ***The section nowhere provides that the due date means the date by which the amount is to be deposited under the relevant Statue****. For this reason* ***Hon'ble Karnataka High Court in case of CIT Vs. Sabari Enterprises (2008) 298 ITR 141*** *at para 12 & 13 of its order held as under:-*

"12. After hearing learned counsel for the parties, we have carefully examined the above statutory provisions of the Act including the definition of sections 2(24)(x) and s. 36(1)(va) and 43B(b), which read thus :

2.(24) 'income' includes,— . . .
(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees."

43(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity or any other fund for the welfare of employees, or"."36.(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in s. 28—. .

(va) any sum received by the assessee from any of his employees to which the provisions sub-clause (x) of clause (24) of s. 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.

Explanation.—Fur the purposes of this clause, 'due date' means the date by which the assessee is required as an employer to credit an

employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise."

13. This clause is inserted by the Finance Act with effect from 1st April, 1988. The Explanation to this clause is read very carefully. "Due date" has been explained stating that : means the date by which the assessee is required as an employer to credit contribution to the employees' account in the relevant fund under any Act, rule or order or notification issued thereunder or under any standing order, award, contract of service or otherwise." Prior to the above clause was inserted to s. 36 giving statutory deductions of payment of tax under the provisions of the Act, s. 43B(b) was inserted by the Finance Act, 1983, which came into force with effect from 1st April, 1984. Therefore, again the provision of s. 43B(b) clearly provides that notwithstanding anything contained in the other provisions of the Act including s. 36(1) clause (va) of the Act, even prior to the insertion of that clause the assessee is entitled to get statutory benefit of deduction of payment of tax from the Revenue. If that provision is read along with the first proviso of the said section which was inserted by the Finance Act, 1987, which came into effect from 1st April, 1988, the letters numbered as clause (a), or cl. (c) or cl. (d) or cl. (e) or cl. (f) are omitted from the above proviso and therefore deduction towards the employees contribution paid can be claimed by the assessee. The Explanation to clause (va) of s. 36(1) of the Income-tax Act further makes it very clear that the amount actually paid by the assessee on or before the due date applicable in this case at the time of submitting returns of income under s. 139 of the Act to the Revenue in respect of the previous year can be claimed by the assessees for deduction out of their gross income. The above said statutory provisions of the Income-tax Act abundantly makes it clear that, the contention urged on behalf of the Revenue that deduction from out of gross income for payment of tax at the time of submission of returns under s. 139 is permissible only if the statutory liability of payment of provident fund or other contribution funds referred to in cl. (b) are paid within the due date under the respective statutory enactments by the assessees as contended by learned counsel for the Revenue is not tenable in law and therefore the same cannot be accepted by us.

However, Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. Vs. CIT (2022) 218 DTR 401 while deciding this issue has observed at Para 51 to 54 held as under:-

"51. The analysis of the various judgments cited on behalf of the assessee i.e., CIT vs. AIMIL Ltd. &Ors. (2010) 229 CTR (Del) 418 : (2010) 35 DTR (Del) 68 : (2010) 321 ITR 508 (Del) , (Delhi High Court); CIT vs. Sabari Enterprises (2007) 213 CTR (Kar) 269 : (2008) 2 DTR (Kar) 394 : (2008) 298 ITR 141 (Kar) (Karnataka High Court).; CIT vs. Pamwi Tissues Ltd. (2008) 215 CTR (Bom) 150 : (2008) 3 DTR (Bom) 66 : (2009) 313 ITR 137 (Bom) (Bombay High Court); CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. (2014) 265 CTR (Raj) 59 : (2014) 98 DTR (Raj) 109 : (2013) 35 taxmann.com 616 (Raj) [Rajasthan High Court] and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to s. 43B(b). No doubt, many of these decisions also dealt with s. 36(va) with its Explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrutions did not consider the fact of the introduction of s. 2(24)(x) or in fact the other provisions of the Act.

52. When Parliament introduced s. 43B, what was on the statute book, was only employer's contribution [s. 36(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 s. 36(1)(va) and simultaneously inserting the second proviso of s. 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions–especially second proviso to s. 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. Sec. 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 [s. 36(1)(va)]. The other important feature is that this distinction between the employers' contribution [s. 36(1)(iv)] and employees' contribution required to be deposited by the employer [s. 36(1)(va)] was maintained - and continues to be maintained. On the other hand, s. 43B covers all deductions that are permissible as expenditures, or outgoings 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 entitle an assessee to the benefit of deduction from the total income. The essential objective of s. 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 precondition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law–in terms of s. 36(1)(iv), and its liability to deposit amounts received by it or deducted by it [s. 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 s. 2(24)(x) - unless the conditions spelt by Explanation to s. 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 s. 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 s. 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 s. 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.

With utmost regard to the decision of Hon'ble Supreme Court, it is submitted that it did not take into consideration that Explanation to section 36(1)(va) nowhere provides that due date means the date by which employees contribution to be deposited in the relevant fund under relevant statute but only provides that the amount is to be deposited under the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise. Thus, even if the amount is deposited with delay as per the time limit provided under the relevant fund/law but deposited within the permissible time as provided under the Act, it should be allowed as a deduction to the assessee. Hence, this decision of Hon'ble Supreme Court vis-à-vis the amendment made in section 36(1)(va) by introducing Explanation 2 by Finance Act, 2021 is applicable from AY 2021-22 and not for earlier AYs.

<u>Amount is allowable as an expenditure under section 37 of the Act</u>

10. *Without prejudice to above, it is submitted that the amount of employees contribution paid by the assessee should be treated as an expenditure allowable as deduction under section 37 of the Actdue to the reason that the employees contribution is treated as income of the assessee under section 2(24)(x) of the Act. Further*

*the said amount is allowable as a '**deduction**' under section 36 of the Act wherein section 36(1) provides 'The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28'.*

11. *Section 37(1) of the Act being a 'General' section provides that Any expenditure (not being expenditure of the nature **described in sections 30 to 36 and not** being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".* It is submitted that after treating the employees' contribution as income of the assessee, once it is paid or a liability is accrued for payment being an ascertained liability, the same is allowable as an expenditure under section 37 of the Act.

12. While section 37 provides that the expenditure should not be an expenditure of the nature described in section 30 to 36 of the Act, it is submitted that section 36 of the Act does not provide details on nature of expenditure, rather provides specific cases of deductions in computing the total income of the assessee. Further, section 36(1)(va) of the Act starts with the words "*any sum received by the assessee*" hence the restrictionon the expenditures covered under section 30 to 36 of the Act, which is provided in section 37 of the Act is not applicable to section 36(1)(va) of the Act which deals with employees contribution to PF and ESI. In other words, allowance of an expenditure is provided in section 37 of the Act and in section 36 of the Act, few deductions are provided. The other conditions of section 37 of the Act i.e. not being personal or capital in nature and being expended wholly and exclusively and for the business of the assessee are fulfilled and therefore the amount contributed by the assessee being employees' contribution to PF/ ESI is allowable as a deduction 37 of the Act. *Reliance in this regard is placed on the following cases as well:-*

***M/s BBG Metal Syndicate Pvt. Ltd. Vs. DCIT in ITA No.112/CTK/2022 order dated 17.11.2022** (**Cuttack) (Trib.):** The Hon'ble ITAT after considering the decision of Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. Vs. CIT 218 DTR 401, at Para 6 & 7 of the order held as under:-*

"6. In the case of Nirakar Security & Consultancy Services Pvt Ltd vs ITO in ITA No.98/CTK/2022 for Assessment Year 2016-17, order dated 17.10.2022, the Co-ordinate Bench of this Tribunal after considering the arguments of ld AR, has restored the issue to the file of the Assessing officer with the following directions:

"6. Liberty is granted to the ld AR to make all submissions in respect of allowability of disallowed contribution of the employees to PF and ESI under other relevant provisions in the interest of justice. This direction is being given because ld AR has submitted that as the amount is not allowable under section 36(1)(va) of the Act and same is also not covered under section 43B of the Act, the amount of delayed contribution to PF and ESI in respect of employees contribution would be treated as income in the hands of the assessee u/s 2(24)(x) and on subsequent payment of the same, it would be a business expenditure, which can be claimed u/s.37(1) of the Act. We are not expressing any opinion in regard to his arguments as it has not been examined by the lower authorities. Liberty is also granted to the assessee to raise all arguments as are found necessary by him before the lower authorities."

7. As the issue in the present appeal is also identical to the issue in the case of Nirakar Security & Consultancy Services Pvt Ltd.,(supra), on identical findings the issue in this appeal is restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity of being heard."

***ACIT*Vs. SunilaSahu MA No.23/CTK/2022 (Arising out of ITA No.07/CTK/2022) order dt.13.01.2023 (Cuttack) (Trib.)**
The Hon'ble ITAT by following the decision of Nirakar Security & Consultancy Services Pvt Ltd vs ITO in ITA No.98/CTK/2022 for AY 2016-17 order dated 17.10.2022, restored the issue to the file of AO to consider the allowability under section 37(1) of the Act on the payment of employees contribution to PF & ESI.

In view of above, even if addition is confirmed under section 36(1)(va) in view of the decision of Hon'ble Supreme Court, amount paid by the assessee during the relevant AYs be directed to be allowed under section 37(1) of the Act."

5. We have given a thoughtful consideration to rival submissions and perused materials on record. We have also applied our mind to various decisions cited before us.

6. In so far as factual aspect of the issue is concerned, there is no dispute between the parties that the employees' contribution to PF and ESI were not deposited within the due date prescribed under the PF and ESI Acts in terms of Explanation-1 to section 36(1)(va) of the Act. The said provision makes it clear that if employees' contribution to PF and ESI is not paid within due date provided under the respective statutes, it has to be treated as income of the concerned assessee under section 2(24)(x) of the Act. In accordance with the statutory provision, the departmental authorities have made the disallowances.

7. The assessee has contested the disallowance broadly on the following grounds:

- In the tax audit report, the auditor has only mentioned the details of contribution received from employees for various

funds and has not indicated these disallowances expressly so as to attract adjustment under section 143(1)(a)(iv) of the Act.

- The disallowances made are beyond the scope and ambit of adjustment provided under section 143(1)(a) while processing the returns of income.
- At the time of filing of returns of income by the assessee for the respective assessment years, the law prevailing on the said date allowed the assessee to claim deduction of employees' contribution to PF and ESI, if deposited on or before due date of filing of income-tax return. In that scenario, the CPC could not have made adjustment under section 143(1)(a)(iv) of the Act.
- Amendment to section 36(1)(va) introducing Explanation-2, which clarifies that the provisions of section 43B shall not apply for the purpose of determining the due date, vis a vis, section 36(1)(va), will apply prospectively.
- Without prejudice, even if it is not allowable under section 36(1)(va), alternatively, it has to be allowed under section 37 of the Act in the year of actual payment.

8. In our considered opinion, none of these submissions of the assessee are acceptable for the reasons to be discussed by us in ensuing paragraphs.

9. Section 36 is a deduction provision under the Act. A reading of section 36(1)(va) makes it clear that in respect of any sum received by an assessee from his employees, to which section 2(24)(x) applies, the assessee can get deduction only if such sum is credited to the employees' accounts in the relevant fund or funds on or before due date. Explanation-1 to section 36(1)(va) clarifies the meaning of expression "due date" by stating that it means the date, by which the assessee is required as an employer to credit employees' contribution to the employees' account in the relevant funds under any Act, Rule or Order or Notification issued thereunder. Section 2(24)(x) provides that any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of the Employees State Insurance Act, or any other fund for the welfare of such employees, has to be treated as income of the assessee. It is relevant to observe,

both section 36(1)(va) and section 2(24)(x) co-exist in the statute w.e.f. 01.04.1988.

10. Thus, from the very inception of the provisions in the statute, the intention of the legislature, as could be gathered from the language used in the provisions, is quite clear that unless employees' contribution to certain funds such as PF or ESI are not remitted to the accounts of the concerned employees within the due date provided under the relevant Acts and Rules, such contribution has to be treated as the income of the assessee in terms of section 2(24)(x) of the Act. Thus, to that extent, there is no ambiguity in the statutory provisions. While interpreting the true meaning and import of the provisions contained under section 36(1)(va) and 2(24)(x) of the Act, the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. (supra) has held 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 fulfilment 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."

** ** **

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) for employers' 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".

** ** **

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 2004 Supp (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."

** ** **

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."

11. The aforesaid observations of Hon'ble Supreme Court would leave no room for doubt or ambiguity regarding the real intent and purport of section 36(1)(va) read with section 2(24)(x) of the Act. Thus, as per the clear language of the aforesaid provisions, unless employees' contribution to PF and ESI are deposited within the due date prescribed under the PF and ESI Acts, not only the assessee would get no deduction under section 36(1)(va), but the amount in question has to be treated as assessee's income under section 2(24)(x) of the Act. To that extent, the issue stands squarely settled by the ratio laid down by Hon'ble Supreme Court in case of Checkmate Services (P) Ltd. (supra).

12. Now reverting back to the contention of the assessee that the adjustment made is not within the scope and ambit of section 143(1)(a)(iv) of the Act, it is necessary to look into the said provision, which reads 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 142, 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*) ……
>
> (*ii*) ……
>
> (*iii*) ……..
>
> (*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"

13. As could be seen from the provision reproduced herein above, in its earlier form, the provision was little different from the present one, as the words "or increase in income" appearing in the provision was inserted by Finance Act, 2021 w.e.f. 01.04.2021. However, without taking note of the said amendment, the provision states that disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return, can be the subject matter of adjustment under section 143(1)(a) of the Act. In this regard, assessee's contention is that in the tax audit report, the

auditor has not indicated about any disallowance, but has merely furnished the details of contribution received from employees for various funds as contemplated under section 36(1)(va) of the Act.

14. On an examination of column 20b of the tax audit report, it is quite clear that it provides for furnishing details relating to nature of fund, sum received from employees, due date for payment, the actual amount paid and the actual date of payment. If we keep the format in column 20b in juxtaposition to the provisions contained in section 36(1)(va) of the Act, it will be quite evident that there is a clear indication by the auditor that the employees' contribution to various funds were not paid within due date, but were paid beyond the due date. Thus, such clear indication by the auditor in the audit report calls for *suo motu* disallowance of such amount paid beyond the due date, as it is in contravention of section 36(1)(va) of the Act, while computing the total income in the return of income. Instead of doing that, the assessee has claimed deduction of the amount under section 36(1)(va) of the Act. Thus, in our considered opinion, the adjustment clearly falls within the ambit of section 143(1)(a)(iv) read

with Explanation (a). Therefore, we reject assessee's contention in this regard.

15. Further, in our view, the concept of *prima facie* adjustment under section 143(1)(a) has long been obliterated, as, after the amendment of section 143(1), first and second proviso to section 143(1)(a) provide for complying with the requirements of rule of natural justice in case of any adjustment. Thus, we do not find any merit in the submissions of the assessee contesting the adjustment made under section 143(1)(a) of the Act.

16. Another contention of the assessee is to the effect that the amendment to section 36(1)(va) by introducing Explanation-2 will apply prospectively. Even, accepting assessee's aforesaid contention, as we have already discussed earlier in the order, section 36(1)(va) in its original form, sans the amendment, had no ambiguity, as it clearly provided that no deduction in respect of employees' contribution to PF and ESI can be granted unless such contribution is remitted within the due date prescribed under the relevant Acts. Therefore, retrospective or prospective application of the amendment to section 36(1)(va) would be of no help to the assessee.

17. Lastly, the assessee has made an alternative claim that the deduction can be allowed under section 37 of the Act. In this regard, we do not find any convincing reason to allow assessee's claim. The decisions cited by the assessee, in no way, advance its case. It is relevant to observe, though the assessee has cited a number of decisions to canvass its claim of deduction under section 36(1)(va) of the Act and has also made an attempt to persuade us to deviate from the decision of Hon'ble Supreme Court in case of Checkmate Services (P) Ltd. (supra), however, we are not impressed. Though, after the decision of Hon'ble Supreme Court in case of Checkmate Services (P) Ltd. (supra), there are plethora of judicial precedents not only by different Benches of Tribunal but Hon'ble High Courts following the ratio laid down by the Hon'ble Supreme Court in case of Checkmate Services (P) Ltd. (supra), surprisingly, learned counsel for the assessee has not referred to even a single contrary decision in his submissions.

18. Be that as it may, in our view, the issues arising in the present appeal are no more *res integra* in view of clear ratio laid down by Hon'ble Supreme Court in case of Checkmate Services (P) Ltd.

(supra), which is declaratory in nature and is the law of the land in terms of Article 141 of the Constitution of India. Therefore, it is binding not only on us, but all other courts, tribunals and authorities. In our view, the various submissions made by learned counsel for the assessee in support of its claim are mere subterfuges to circumvent the ratio laid down by the Hon'ble Supreme Court in case of Checkmate Services (P) Ltd. (supra), hence, not acceptable. Accordingly, we uphold the decision of the first appellate authority in sustaining the disputed disallowances. Grounds are dismissed.

19. In the result, appeals are dismissed.

Order pronounced in the open court on 21/09/2023.

Sd/-	Sd/-
(DR. BRR KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 21.09.2023
*aks/-