आयकर अपीलीय अधिकरण, कोलकाता पीठ 'बी', कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष

Before Shri Sanjay Garg, Judicial Member and Dr. Manish Borad, Accountant Member

I.T.A Nos.488 & 489/Kol/2023
Assessment years: 2017-18 & 2018-19

Vishnu Cotton Mills Ltd…….....……Appellant
Narayanpur, P.O-Rajarhat,
Gopalpur, W.B-700136.
[PAN: AABCV0405G]

vs.

AO, Circle-11, Kolkata.....…….....……..…..…..Respondent

Appearances by:
Shri Chirajit Goswami, FCA, appeared on behalf of the appellant.
Shri P.P. Barman, Addl. CIT- Sr. DR, appeared on behalf of the Respondent.

Date of concluding the hearing : July 03, 2023
Date of pronouncing the order : September 26, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The captioned appeals has been preferred by the assessee against the separate orders both dated 29.03.2023 of the National Faceless Appeal Centre (hereinafter referred to as the 'CIT(A)') passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The sole issue involved in these appeals is relating to the disallowance made by the Assessing Officer/Central Processing Centre (CPC) u/s 36(1)(va) r.w.s. 2(24)(x) of the Act on account of delayed deposit of employees' contribution to PF/ESI i.e. after the due date as provided under the respective welfare enactments.

3. The issue raised by the assessee has come to rest by the recent verdict of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. Vs.

CIT (2022) 143 taxmann.com 178 (SC) dated 12.10.2022 wherein it has been held that "deduction u/s 36(1)(va) in respect of delayed deposit of amount collected towards employees' contribution to PF cannot be claimed even though deposited within the due date of filing of return even when read with Section 43B of the Income-tax Act,1961.

4. Further, the issue herein is covered by the Coordinate Kolkata Bench of the Tribunal in the case of Siddhi Vinayaka Graphics Pvt. Ltd. vs. ACIT in ITA No.61/Kol/2023 vide order dated 16.05.2023 (authored by one of us i.e. Judicial Member herein)**,** wherein, the decision of the Hon'ble Supreme Court in the case of **'**Checkmate Services Pvt. Ltd vs. CIT' (supra) has been duly considered and other contentions relating to the validity of the adjustments made on account of disallowance of delayed deposit of employees' contribution to PF/ESI while processing the return u/s 143(1) of the Act, have also been duly discussed. The relevant part of the order of the Coordinate Bench is reproduced as under:

> *"5.* ***Contention -1:***
>
> *The prima facie adjustment u/s. 143(1)(a) of the Income tax Act, 1961 (Act) in respect of an issue is allowable with reference to the interpretation of law which was prevailing as on the date of filing of subject Income tax Return (ITR) and any subsequent pronouncement of law or retrospective amendment on the concerned issue is not to be considered for such purpose. Accordingly, the subsequent pronouncement of law by Hon'ble Supreme Court judgement in Checkmate Services (P) Ltd. Vs. CIT (2022) 448 ITR 518 (SC) is not to be considered for prima facie adjustment u/s. 143(1)(a) for asst. yr. 2020-21 for disallowing payment of employees' contribution to PF/ESI beyond the due date prescribed in respective statute because on the date of filing of ITR by appellant on 30.03.2021, Hon'ble Calcutta High Court (Jurisdictional High Court) judgement in the case of CIT Vs. Vijay Shree Ltd. (2014) 43 taxmann.Com 396 (Calcutta High Court) was holding field which held that such employees' contribution, if deposited within due date of filing ITR (which in the instant case of appellant was 15.02.2021) is not to be disallowed u/s. 36(1)(va) of the Act.*

a) CIT Vs. Hindustan Electrographite Ltd. (2000) 243 ITR 48 (SC) (2000) 109 Taxman 342 (SC)
b) Modern Fibotex India Ltd. Vs. DCIT (1995) 212 ITR 496 (Cal)
c) Samtel Color Ltd. Vs. UOI (2002) 258 ITR 1 (Del) (2002) 125 Taxman 1002 (Delhi)
d) ITO Vs. Gujarat Power Corpn. Ltd. (2002) 254 ITR 217 (Gujarat) (2002) 122 Taxman 367 (Gujarat)
e) CIT Vs. Vijayshree Ltd. (2014) 43 taxmann.com 396 (Calcutta High Court)

6. Admittedly, the issue on merits has been set at rest by the recent decision of the Hon'ble Supreme Court in bunch of appeals with the lead case in 'Checkmate Services Pvt. Ltd vs. CIT' in Civil Appeal No.2833 of 2016 dated 12.10.2022. Earlier, there were divergent opinions of various High Courts. The High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi were of the view that if the employer's as well as employee's contribution to PF/ESI is deposited before the due date of filing of Income Tax Return, the same was an allowable expenditure u/s 36(1)(va) of the Act taking the due date as per the provisions of section 43B of the Act, whereas, the High Courts of Kerala and Gujarat ruled in favour of the Revenue holding that the due date of filing of return u/s 43B would be applicable in respect of employer's contribution only and not in respect of failure of the employer to deposit the funds deducted/collected from the employees, to say it in other words, the benefit of extended date i.e. last date of filing of return, would not be available in respect of employees' contribution and the same will not be allowed as deduction of expenditure if deposited after due date as prescribed by the relevant statutes irrespective of the fact that the same was deposited by the employer before the due date of filing of return of income u/s 139(1) of the Income Tax Act. The Hon'ble High Courts which ruled in favour of the assessee held that the provisions of section 43B(b) prescribing the due date as the last date for furnishing of return of income will not only apply to employers' contribution towards ESI/PF of employee but also to the employees' contribution which have been deducted by the employer and deposited by the employer as prescribed u/s 36(1)(va) of the Act. However, the Hon'ble Supreme Court in the case of 'Checkmate Services Pvt. Ltd vs. CIT' (supra) has held that by virtue of section 2(24)(x) of the Act, the amounts received or deducted by an employer u/s 36(1)(va), it retains its character as an income (albeit deemed) by virtue of section 2(24)(x), unless the condition stipulated 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. The Hon'ble Supreme Court held that 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 employee's income and held in trust by the employer. The Hon'ble Supreme Court thus held that the conditions of section 43B prescribing the due date as the date of filing of return of income in case the employers' contribution towards ESI/PF would not be applicable in case the

employees' contribution as provided u/s 36(1)(va) of the Act and that the due date in respect of deposit of employees' contribution would be such as prescribed u/s 36(1)(va) of the Act.

7. Now the contention raised by the ld. counsel for the assessee is that before the decision of the Hon'ble Supreme Court in the case of 'Checkmate Services (P) Ltd. vs. CIT' (supra), the judgement of the jurisdictional Calcutta High Court in CIT vs. Vijayshree Ltd. (supra) was holding field which held that employees' contribution if deposited within the due date of filing of ITR is not to be disallowed u/s 36(1)(va) of the Act. Therefore, the Assessing Officer was not justified in making adjustment u/s 143(1)(a) of the Act. Before proceeding further, it will be relevant to mention here that under section 43B(b) of the Income Tax Act, the following amount is allowable as deduction if paid by the assessee before due date of furnishing of return u/s 139(1) of the Act.

> ***"43B**(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees"*

It has to be noted here that under the statutory provisions of section 43B(b) of the Income Tax Act, the due date being the last date of filing of ITR was applicable only in respect of employer's contribution towards ESI/PF etc. There is no mention in the aforesaid statutory provision of section 43B regarding the due date of deposit of employees' contribution to ESI/PF, which is prescribed in the provisions of section 36(1)(va) only.

It will be also relevant to reproduce here the relevant part of the judgment of the Hon'ble Calcutta High Court in the case of CIT vs. Vijayshree Ltd. (supra):

> *"2. The only issue involved in this appeal is as to whether the deletion of the addition by the Assessing Officer on account of Employees ' Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not.*
>
> *3. It appears that the Tribunal below, in view of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.*
>
> *4. Being dissatisfied, the Revenue has come up with the present appeal.*
>
> *5. After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988.*

6. Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

7. We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal."

A perusal of the above observations of the hon'ble Calcutta High Court would reveal that in the case of 'CIT vs. Vijayshree Ltd.' (supra), though the issues before the Hon'ble Calcutta High Court was relating to the disallowance on account of delayed deposit of employees' contribution to ESI and PF, however, the aforesaid decision would show that the Hon'ble Calcutta High Court referred to the provisions of section 43B of the Act to hold that the said section 43B introduced by Finance Act 2003, was curative in nature and was required to be applied retrospectively w.e.f. 01.04.1988. It was not brought to knowledge of the Hon'ble High Court that the provisions of section 43B do not prescribe the due date of deposit of employees' contribution, rather, the same refers to only the employer's contribution. There is no discussion in the said decision of the Hon'ble Calcutta High Court that the provisions of section 43B would also include employees' contribution along with employer's contribution. However, since the hon'ble High Court in the concluding para mentioned Employees' contribution, while holding about the retrospective application of section 43B of the Act, therefore, it was taken that the aforesaid decision of Calcutta High Court in the case of CIT vs. Vijayshree Ltd. (supra) was applicable on Employees' contribution also.

8. However, as observed above, the issue has been settled by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. (supra) wherein the Hon'ble Supreme Court has dealt with the law/provisions as applicable prior to the amendment brought by Finance Act 2021 w.e.f. 01.04.21.

9. It has been held time and again that law declared by a court will have retrospective effect, if not otherwise stated to be so specifically. It is also well settled proposition that whenever, a previous decision is overruled by a larger bench of the Supreme Court, the previous decision is completely wiped out and Article 141 will have no application to the decision which has already been overruled and the court would have to decide the cases according to the law laid down by the latest decision of the Hon'ble Supreme Court and not by the decision which has been expressly overruled. The above reasoning stems from the principle that when a court decides a matter, it is not as if it is making any new law but it is as if it is only restating what the law has always been. The reliance in this respect can be placed on the decision of the Hon'ble Supreme Court in the case of "Ramdas Bhikaji and Choudhary vs. Sadananda" (1980) 1 SCC 550 and on the recent decision of the Hon'ble Supreme Court in the case of "Manoj Parihar and Ors. Vs. State of Jammu & Kashmir and Ors"

SLP(C) No.11039 of 2022 vide order dated 27.06.2022; "PV Goerge vs. State of Kerala" (2007) 3 SCC 557; Assistant Commissioner vs. Saurashtra Kutch Stock Exchange Ltd. (2008) 14 SCC 171, wherein, the Hon'ble Supreme Court has held that judges do not make law, they only discover and find the correct law. Even, that where an earlier decision of the court operate for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which were earlier not correctly understood.

In view of the above stated legal position, the law declared by the Hon'ble Supreme Court will be retrospectively applicable and it will be treated that earlier decisions of different High Court favouring the assessee would be of no benefit of assessee at this stage as the said decisions of the High Courts are treated to be never existed or to say are wiped out by the aforesaid decision of the Hon'ble Supreme Court. Therefore, I do not find any merit in the first contention raised by the assessee. Even otherwise, it was not a case of amendment of provisions, the assessee was banking upon the interpretation given by the hon'ble High Court on the already existing provisions, which were subject to appeal to hon'ble Supreme Court. If the assessee has chosen to reap the fruits of the interpretation given by the hon'ble High Court, the assessee is also liable to face the consequences, if such an interpretation given by the hon'ble High Court is reversed or modified by the Apex Court of the country.

So far as the reliance of the ld. counsel on the decision of the Hon'ble Supreme Court in the case of 'CIT vs. Hindustan Electrographite Ltd.' (supra) is concerned, I find that the said decision is not applicable to the facts and circumstances of the present case. The said decision deals with the retrospective amendment of the statutory provision, and not relating to the interpretation of the provisions already existing in the Statute. The facts of the said case were that the assessee had received during the prevision year relevant to assessment year 1988-89 certain amount by way of cash compensatory support. It did not include this income in its return which was filed on 29.12.1989. the Assessing Officer treated cash compensatory support receipt as additional income u/s 143(1A) in view of insertion of clause (iiib) to section 28 by the Finance Act, 1990 with retrospective effect from 1.4.1967 and levied tax at higher rate and also charged interest u/s 234. The Hon'ble Supreme Court in the aforesaid facts and circumstances held that in view of the law on the date of filing of the return, there was neither a bona fide mistake on the part of the assessee nor there was any mistaken belief. That, though, the amendment to section 28 was made with retrospective effect but the said amendment could not have been known to the assessee before the Finance Act came into force. The Hon'ble Supreme Court further observed that levy of additional tax bears all the characteristic of penalty and when the additional tax was imprint of penalty and that it would be punishing the assessee for no fault of it. However, the facts and circumstances of the

present case as observed are quite distinguishable. In the present case as observed there is no change of law. the statutory provisions have not been amended retrospectively, rather, it was a question only of interpretation of statutory provisions. Moreover, as noted above, provision in the decision of the Hon'ble Calcutta High Court in the case of 'CIT vs. Vijayshree Ltd.' (supra), the sole issue raised before the Hon'ble Calcutta High Court was as to whether the provisions of section 43B will have to be applied retrospectively or prospectively without any discussion on the issue whether the employer's contribution mentioned in section 43 would also include employees' contribution. It was not the case that the assessee was not aware that the decision of the hon'ble High Court was subject to appeal before the hon'ble Supreme Court and that the decision of the Hon'ble High Court could be reversed by the Hon'ble Supreme Court. Similarly, the case law cited by the ld. counsel in the case of Modern Fibotex India Ltd. vs. DCIT (supra), the other case laws of different High Courts relied by the ld. counsel, are not applicable in view of the settled proposition of law by the Hon'ble Supreme Court in the various case laws as discussed above.

10. ***Contention -2*** *–*

Upto asst. yr. 2020-21, despite Hon'ble Supreme Court judgement in Checkmate Services (P) Ltd. Vs. CIT (2022) 448 ITR 518 (SC), prima facie adjustment u/s. 143(1)(a) of the Act cannot be made to disallow u/s. 36(1)(va) the employees' contribution to PF/ESI deposited belatedly after due date prescribed under relevant statute if deposited within due date of filing ITR which in the instant case of appellant was 15.02.2021.

a) M/S P.R. Packaging Service Vs. ACIT (2022) 66 CCH 0378 Mum. Trib

b) A Infrastructure Ltd. Vs. DCIT (2023) 37 NYPTTJ 165 (Jd)

c) Paris Elysees India Private Limited Vs. DCIT Order dated 20.02.2023 in ITA No. 357/JPR/2022

11. The contention as canvassed by the ld. counsel is that the Assessing Officer could have disallowed the aforesaid employees' contribution to ESI/PF being deposited after the due date under the relevant statute, only in an assessment carried out u/s 143(3) of the Act. That the Assessing Officer did not have any power or jurisdiction to disallow the aforesaid amount while processing the return u/s 143(1)(a) of the Act. The ld. Counsel for the assessee, in this respect, has relied upon the recent decision of the Coordinate Mumbai Bench of the Tribunal in the case of 'M/s P R Packaging Service vs. ACIT' in ITA No.2376/Mum/2022 order dated 07.12.2022, wherein, the Coordinate Bench of the Tribunal has held that as per the provisions of section 143(1)(a)(iv) of the Act, the Assessing Officer while processing the return u/s 143(1) of the Act could have made the disallowance of expenditure if, the same was indicated in

the audit report but not taken into account in computing the total income in the return. The Coordinate Bench of the Tribunal has been of the view that the tax auditor in the audit report 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. That the tax audit had not contemplated to disallow the employees' contribution to PF, wherever, it is remitted beyond the due date prescribed in the Provident Fund Act. That it was merely recording of facts and a mere statement made by the tax auditor in his tax audit. That the provisions of section 143(1)(a)(iv) of the Act would come into operation when the tax auditor had suggested for a disallowance of expenses or increase in income, but the same has not been carried out by the assessee while filing the return of income. The Coordinate Bench thus observed that the tax auditor in the said case had not said to disallow the employees' contribution to PF, wherever, it is remitted beyond the due date under the respective Act. The Coordinate Mumbai Bench of the Tribunal in the case of M/s P R Packaging Service (supra), therefore, held that the said action of the ld. CPC, Bangalore/Assessing Officer in disallowing the employees' contribution to PF while processing the return u/s 143(1) of the Act was against the provisions of the Act as it did not fall within the ambit of prima facie adjustment. The Coordinate Bench of the Tribunal to fortify its view has further relied upon the another decision of the Coordinate Mumbai Bench of the Tribunal in the case of 'Kalpesh Synthetics Pvt. Ltd. vs. DCIT' reported in 195 ITD 142(Mum). The relevant part of the order of the Coordinate Mumbai Bench in the case of M/s P R Packaging Service (supra), for the sake of ready reference, is reproduced 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 section 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 Ld.AR 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 Ld.CPC Bangalore had taken up this data from tax audit report and sought to disallow the same while processing the return under section 143(1) of the Act, apparently by applying the provisions of section 143(1)(a)(iv) of the Act. For the sake of convenience, the relevant provisions is reproduced hereunder:-*

"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:-

(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 clause (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 Ld.CPC Bangalore in disallowing the employees' contribution to Provident Fund while processing the return under section 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)."

12. At this stage, it will be relevant to reproduce the relevant provisions of section 143(1) of the Act which is 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 sections 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, 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:

> ***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:]*
>
> ***...***
>
> *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;"*

A perusal of clause (iv) to section 143(1)(a) of the Act would show that it provides for disallowance of expenditure indicated in the audit report, but not taken into account in computing the total income in the return.

13. As per the prescribed form 3CD, the following information is required to be given by the auditor:

> *"20.(b) Details of contributions received from employees for various funds as referred to in section 36(1)(va):*

Sl. No.	*Nature of fund*	*Sum received from employees*	*Due date for payment*	*The actual amount paid*	*The actual date of payment to the concerned authorities*

14. The contention raised on behalf of the assessee is that in the audit report, the auditor is required to report only the facts of due date of payment and the actual date of payment. That nowhere the auditor is required to indicate the amount of disallowance of expenditure on the above accounts. It has, therefore, been pleaded that when the CPC makes

the adjustment by disallowing the late payment then it can be said that the revenue was not justified in invoking the provisions of section 143(1)(a)(iv) of the Act on the fallacy of presumption that the auditor has disallowed employees' contribution to ESI/PF.

15. Before proceeding further, it can be noted that the relevant word is 'indicated in the audit report'. Now, what does the word 'indicate/indicated' means? As per Collins dictionary, the word 'indicate' has been explained as 'if one thing indicates another, the first thing shows that the second is true or exists. Synonyms of word 'indicate' have been mentioned as: show, suggest, reveal, display, imply, hint etc. As per the Oxford Advance Learners dictionary, 'indicate' means to show that something is true or exists, viz. Record profits in the retail market indicate in a boom in the economy. Synonyms have been mentioned as: suggest – to be a sign of something; to show that something is possible or likely; mention - to mention something especially in an indirect way; point to - to make somebody notice somebody/something especially by pointing or moving your head; give information - to represent information without using words viz. The results are indicated in Table. Further, the word 'indication' has been explained as remark or sign that shows something happening or what somebody is thinking or feeling. Further the 'indicative' has been explained as showing or suggesting something.

16. In the light of the above meaning or expression of the word 'indicate', when I look into the facts of the case, I note that there is a prescribed form for furnishing of audit report and the auditor is supposed to furnish the information as per the prescribed columns of the Form 3CD. Under section 44AB of the Act, if the sales/turnover or the gross receipts, as the case may be, of an assessee carrying on business exceeds the prescribed threshold, it has been made mandatory for him to get his books of account audited. The object is to get a clear picture of the assessee's accounts so as to enable the Income Tax authorities to assess true and correct income of the assessee. The information furnished by the auditor in the prescribed form enable the Assessing Officer/CPC to make the required adjustments into the returned income of the assessee.

I note that under clause 20B of the prescribed form, the auditor is supposed to furnish the information in respect of nature of fund, sum receipts from employee, due date for payment, the actual amount paid and the actual date of payment to the concerned authorities. This information is available to the CPC/Assessing Officer for processing the return of the assessee and this information itself indicates the allowance or disallowance which is required to be made while processing the return of the assessee. The auditor is not required in the prescribed form to specifically mention as to the what disallowance or to say as to what amount of disallowance is required to be made u/s 36(1)(va) of the Act, rather, the auditor is required to furnish the information and the said

information is when correlated with the statutory provisions applicable, it may indicate for certain adjustment of disallowance which may be attracted in the case of the assessee.

The information in the return of income/audit report is also required to be uploaded on line. The said online information of return of income/audit report is automatically compared with the prefeeded data relating to statutory provisions/compliances etc. as provided u/s 143(1) of the Act, and wherever the return/audit report data suggests of non-compliance etc., the software automatically picks the said default and report accordingly. However, before making such disallowance as is indicative from the tax audit report, the proviso to section 143(1) provides that no such adjustment shall be made unless an intimation is given to the assessee of such adjustment either in writing or electronic mode and it has been further provided that the response received from the assessee, if any, shall be considered before the making any adjustment. Therefore, the adjustment u/s 143(1) of the Act may be made only after giving opportunity to the assessee to file response/objection to such adjustment and before making such adjustment such response/objection of the assessee is required to be considered by the Assessing Officer/CPC. Hence there is no violation of the principles of natural justice while making adjustments u/s 143(1) of the Act.

17. In view of the above facts, "as indicated in the audit report", in my humble view, would mean that where the information in the audit report is suggestive of some disallowance but not taken into account by the assessee in computing the total income in the return, the Assessing Officer/CPC would give intimation to the assessee of such proposed adjustments and whereupon the assessee has the right to file response/objection to such adjustment and the Assessing Officer/CPC is required to consider such response/objection before making the adjustments. Therefore, the word 'indicate' does not mean that the auditor is required to specifically mention that such and such disallowance is required to be made in the case of the assessee, rather, correct view would be that the auditor is required to furnish the information and that information can be compared and considered by the Assessing Officer/CPC in the light of the relevant statutory provisions as well as relevant laws and if such information is suggestive of any adjustment of disallowance, the Assessing Officer will make such disallowance after giving opportunity to the assessee to rebut the same.

18. Identical view has been taken by the Coordinate Ranchi Bench of the Tribunal in the case of Nepal Chandra Dey vs. ACIT in ITA No.63/Ran/2022 order dated 15.05.23 (The said decision also authored by the undersigned Judicial Member).

19. I have come across of the another decision of the Coordinate 'Chennai Bench' of the Tribunal passed in bunch of appeals with the title case of "M/s Electrical India vs. ADIT, CPC" in ITA No.789/Chny/2022 and Ors vide order dated 04.11.2022, wherein, on the identical issue as to the jurisdiction of the Assessing Officer/CPC to make adjustment while processing the return u/s 143(1) of the Act in respect of late deposit of employees' contribution by the employer to the ESI/PF fund, the Coordinate bench after deliberating in length upon the respective contentions of the ld. representatives of the parties has upheld the adjustment made by the Assessing Officer/CPC u/s 36(1)(va) of the Act on account of late deposit of employees' contribution to ESI/PF. The Coordinate Chennai Bench has observed that the purpose of the audit is to enable the revenue to make correct computation of assessee's income. That a proper audit would, inter alia, ensure that the claims for deduction are correctly made. That the report is required to be furnished by the assessee along with return of income to enable revenue to make correct computation of income. That the reporting made therein could certainly be available to CPC to make the adjustment of defaults reported therein since the same would be apparent from information contained in the return. The relevant part of the order of the Coordinate Bench of the Tribunal in the case of M/s Electrical India (supra) is as under:

> *"We find that the provisions of Section 2(24) enumerate different components of income. The income as defined therein 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. It is thus clear that as soon as the Employer receives any contribution from its employees towards provident fund or ESI by way of deduction or otherwise, then the same is treated as income of the assessee. If the assessee deposit the same as per the mandate of Sec. 36(1)(va), the deduction of the same is allowed to the assessee otherwise the right to claim the deduction is lost forever. In other words, the contribution is first treated as deemed income of the assessee and thereafter, the deduction of the same is allowed to the assessee if the conditions of Sec.36(1)(va) are met. The CPC, as is evident, has denied this deduction to the assessee since the assessee did not fulfil the mandate of Sec.36(1)(va). It could also be seen that this is not an increase in income but disallowance of expenditure, the adjustment of which is covered u/s 143(1)(a)(iv) which provide that the disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return could be made while processing the return of income. The amendment made w.e.f. 01.04.2021 by insertion of words 'increase in income' would have no impact on such disallowance since it is only a disallowance of expenditure and the revenue is very well entitled to make such an adjustment u/s 143(1)(a)(iv).*
>
> *8. The impugned adjustment, in our opinion, would also fall u/s 143(1)(a)(ii) since it is an incorrect claim which is apparent from any information in the*

return. The adjustment made by CPC flows from reporting made by Tax Auditor in Tax Audit Report in Form 3CD. As per statutory mandate, the assessee is required by law to get its accounts audited u/s 44AB if its turnover crosses threshold turnover. The purpose of the audit is to enable the revenue to make correct computation of assessee's income. A proper audit would, inter-alia, ensure that the claims for deduction are correctly made. The report is required to be furnished by the assessee along with return of income to enable revenue to make correct computation of income. The reporting made therein could certainly be available to CPC to make the adjustment of defaults reported therein since the same would be apparent from information contained in the return. As noted earlier, the contribution is first treated as income of the assessee and thereafter, the deduction of the same has to be claimed by the assessee. Therefore, the columns in the Profit & Loss Account in the return of income has to be filled in this manner only i.e., the contribution is to be first added to the income of the assessee and thereafter, the deduction of the same would be claimed by the assessee. In other words, the assessee would first add the same to its income and thereafter, it would claim deduction after crossing the hurdle of Sec.36(1)(va). Since the claim made by the assessee is inconsistent with the reporting made by Tax Auditor, it was an incorrect claim which CPC has rightly disallowed.

9. Another argument is that the debatable issues could not be subject matter of adjustment u/s 143(1). However, so far as the revenue is concerned, this issue is not debatable for the revenue. The revenue has always maintained a position that the claim is allowable to assessee only when the contribution is deposited as per the mandate of Sec.36(1)(va) otherwise not. Therefore, it is incorrect to say that the issue is debatable one. The Hon'ble Supreme Court has upheld the stand of the revenue.

10. The Hon'ble High Court of Madras in Southern Industrial Corporation vs. CIT (258 ITR 481) held that when a statutory provision is interpreted by the Apex Court in a manner different from the interpretation made in the earlier decisions by a smaller Bench, the order which does not conform to the law laid down by the larger Bench in the later decision which decision would constitute the law of the land and is to be regarded as the law as it always was, unless declared by the court itself to be prospective in operation, would clearly suffer from a mistake which would be apparent from the record. Therefore, in the present case, the law laid down by Hon'ble court is to be regarded as law of land and it was to be presumed that the law was always like that.

11. The case law of Hon'ble Supreme Court in Kvaverner John Brown Engg. (India) P. Ltd. V/s ACIT (305 ITR 103), as referred on behalf of assessee, deal with deduction u/s 80-O for which two interpretations were possible viz. the deduction could be computed at gross value or the same could be computed on net value. The same is not the case here. The action of revenue is in accordance with the law laid down by Hon'ble Supreme Court in the cited decision. In fact, Hon'ble High Court of Madras in Tamilnadu Magnesite Ltd. vs DCIT (303 ITR 71) held that where the amount was inadmissible in view of Sec.43B which

overrides section 36(1) of the Act, the revenue was well within its power to make a prima facie adjustment in the computation of taxable total income while processing return of income under Section 143(1)(a) of the Act. The aforesaid decision supports our view.

12. The decision of Hon'ble High Court of Bombay in Bajaj Auto Finance Ltd. vs. CIT (93 Taxmann.com 63) as referred before us deals with case of debatable issue and hence distinguishable. The case law of Chandigarh Tribunal in Lanjani Co-operative Agri Service Society Ltd. vs DCIT (ITA No.332/Chd/2021 dated 30.08.2022) relates with adjustment u/s 143(1)(a)(v) which is not the case here. The case law of Visakhapatnam Tribunal in S.V.Engineering Constructions India (P.) Ltd. vs DCIT (ITA No.130/Viz/2021 dated 23.09.2021) relies on another decision of Tribunal in Andhra Trade Development Corp. Ltd. (ITA No.434/Viz/2019 dated 05.05.2021) which deal with set-off of losses. In this decision, the bench also dealt with the merits of the case by following earlier view which has now been reversed by Hon'ble Supreme Court. The decision of Delhi Tribunal in SVS Guarding Services Pvt. Ltd. vs ITO (ITA No.231/Del/2022 dated 24.05.2022) held that the issue whether the amendment made by Finance Act, 2021 was retrospective or prospective was debatable and controversial and consequently, the adjustment was beyond the scope of Sec.143(1). Further the bench did not specifically examine the applicability of clauses (ii) and (iv) of Sec.143(1)(a) in that decision. The subsequent decision of the bench in 360 Realtors LLP vs. ADIT (ITA No.303/Del/2022 dated 26.09.2022) is substantially on same lines. All these case laws have been rendered before the recent decision of Hon'ble Supreme Court which has settled the law since its inception. Therefore, all these case laws do not render any assistance to the case of the assessee.

20. It is further noted that the aforesaid order of the Chennai Bench of the Tribunal in the case of M/s Electrical India has been further followed by the Hyderabad 'SMC' Bench of the Tribunal in the case of Sudhakar Rao Dondapati vs ITO in ITA No.129/Hyd/2023 vide order dated 21.03.2023.

21. So far as the reliance of the Mumbai Bench of the Tribunal in the case of 'Kalpesh Synthetics Pvt. Ltd. vs. DCIT' (supra) is concerned, I find that the observations made by the Coordinate Mumbai Bench are not relevant in any manner for the purpose of adjudication of the issue under consideration. In the case of 'Kalpesh Synthetics Pvt. Ltd. vs. DCIT' (supra), the Tribunal has held that before making adjustments u/s 143(1) of the Act, the CPC/Assessing Officer should give opportunity to the assessee to file objections against such adjustments and the Assessing Officer/CPC has to depose of such objections before proceeding further in the matter. Thereafter, the Tribunal goes on to hold that the views expressed by the tax auditor may not be binding on the auditee; that the tax audit reports are mere opinions and these opinions flag the issues which are required to be considered by the stakeholders; that these audit

reports are inherently even less relevant, more so, when the reports require reporting of a factual position rather than express an opinion about legal implication of that position. The Coordinate Mumbai Bench further goes on to hold that when the law enacted by the legislature has been construed in a particular manner by the Hon'ble Jurisdictional High Court, it cannot be open to anyone in the jurisdiction of that Hon'ble High Court to read it in any other manner than as read by the Hon'ble Jurisdictional High Court. That, hence, the views expressed by the tax auditor in such a situation, cannot be the reason enough to disregard the binding views of the Jurisdictional High Court. The Coordinate bench, therefore, goes on to read down provisions to section 143(1)(a)(iv) and to hold that "what essentially follows is the adjustments under section 143(1)(a) in respect of "disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return" is to be read as, for example, subject to the rider "except in a situation in which the audit report has taken a stand contrary to the law laid down by Hon'ble Courts above".

22. The crux of the entire decision of the Tribunal in the case of 'Kalpesh Synthetics Pvt. Ltd. vs. DCIT' (supra) is that even when the factual information given in the audit report indicates the disallowance u/s 36(1)(va), however, that is subject to the law laid down by the courts and if the Jurisdictional High Court has interpreted the provisions in any other manner then the decision of the Hon'ble High Court would prevail over the indication given in the tax audit report. The above views of the Coordinate bench of the Tribunal in 'Kalpesh Synthetics Pvt. Ltd. vs. DCIT' (supra) in no manner is suggestive that the adjustment u/s 36(1)(va) cannot be made while processing the return u/s 143(1) of the Act, rather, the above view is limited to the proposition that if the law laid down by the High Court/Supreme Court is otherwise as compared to the factual information given in the audit report, then the law laid down by the Hon'ble High Court/Supreme Court would prevail over the tax audit report. Therefore, the Coordinate Mumbai Bench in the said case of "Kalpesh Synthetics Pvt. Ltd. vs. DCIT" (supra) has also mentioned time and again that in the audit report factual information is given, whereupon the Assessing Officer has to apply the prevailing law. As observed above, the law has been settled by the Hon'ble Supreme Court on the issue in the case of Checkmate Services Pvt. Ltd. (supra). The law declared by the Hon'ble Supreme Court is to be treated as if the same was the right interpretation since the date of the inception of the relevant provision and, therefore, even as per the decision of the Coordinate Bench of the Tribunal in 'Kalpesh Synthetics Pvt. Ltd. vs. DCIT' (supra), the issue is required to be decided in favour of the Revenue and against the assessee.

5. The identical view has been taken by the Coordinate Ranchi Bench of the Tribunal in the case of Nepal Chandra Dey vs. ACIT in ITA

No.63/Ran/2022 order dated 15.05.23 (one of us i.e. Judicial Member herein being part of the said Bench).

6. We are in agreement with the aforesaid decisions of the Coordinate Benches of the Tribunal as referred to above, therefore, following the same we do not find merit in the captioned appeals of the assessee and the same are accordingly dismissed.

7. In the result, both the appeals of the assessee stand dismissed.

Kolkata, the 26th September, 2023.

Sd/-	Sd/-
[डॉक्टर मनीष बोरड /Dr. Manish Borad]	**[संजय गर्ग /Sanjay Garg]**
लेखा सदस्य /Accountant Member	**न्यायिक सदस्य /Judicial Member**

Dated: 26.09.2023.
RS

Copy of the order forwarded to:
1. Vishnu Cotton Mills Ltd
2. AO, Circle-11, Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches