

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 302/RPR/2023
निर्धारण वर्ष / Assessment Year : 2018-19

Pradeep Kumar Dhurve
Near Pawan Kirana Store,
Sangram Chowk, Prem Nagar,
Sikola Bhata, Durg (C.G.)-491 001
PAN : AANPD6067H

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-1(1), Bhilai (C.G.)

.....प्रत्यर्थी / Respondent

Assessee by : Shri R.B Doshi, CA
Revenue by : Shri Satya Prakash Sharma, Sr. DR

सुनवाई की तारीख / Date of Hearing : 21.11.2023

घोषणा की तारीख / Date of Pronouncement : 23.11.2023

आदेश / ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the assessee is directed against the order passed by the Commissioner of Income-Tax (Appeals), National Faceless Appeal Center (NFAC), Delhi, dated 08.08.2023, which in turn arises from the intimation issued by the Centralized Processing Center (CPC)/ A.O under Sec. 143(1) of the Income-tax Act, 1961 (in short 'the Act') dated 13.12.2019 for the assessment year 2018-19. The assessee has assailed the impugned order on the following grounds of appeal:

- “1. On facts and in the circumstances of the case, CIT(A) has erred in treating the assessee's case is covered by decision of the hon'ble Supreme Court in the case of "Checkmate Services Pt. Ltd. Vs. CIT (2022) 448 ITR 518 dt. 12.10.2022" and hence, in confirming the disallowances of Rs. 51,82,242/- made by CPC while processing return u/s 143(1) on 13.12.2019.
2. On facts and in the circumstances of the case, CIT(A) has erred in confirming action of CPC in making disallowances of Rs. 51,82,242/- while processing return u/s 143(1) on 13.12.2019 on the issues which are debatable one, i.e. on which there are difference of opinions of various judicial forums and/or favourable decisions of jurisdictional hon'ble Chhattisgarh High Court and jurisdictional hon'ble ITAT' Raipur Bench at the time of processing of return.
3. On facts and in the circumstances of the case, CIT(A) has erred in confirming action of CPC in making disallowances of Rs. 51,82,242/- while processing return u/s 143(1) on 13.12.2019 without appreciating the facts that the adjustments made by the CPC are not permissible u/s 143(1)(a) as the same are beyond the jurisdiction of the CPC.
4. The assessee reserves the right to add, amend, or alter/withdraw any ground/grounds of appeal at the time of hearing.”

2. Succinctly stated, the assessee had e-filed his return of income for A.Y.2018-19 on 24.10.2018 declaring an income of Rs.12,53,850/-. The return of income filed by the assessee was processed as such u/s. 143(1) of the Act, wherein its income was determined at Rs.51,82,242/- after, inter alia, making following additions/disallowances:

Particulars	Amount (Rs.)
Disallowance out of employees contribution to "Employee Provident Fund (EPF) paid after the due date specified in the "Employees' Provident Funds and Miscellaneous Provisions Act 1952" but before the due date of filing return specified as 139(1) of the Income-tax Act, 1961 by invoking provision of section 36(1)(va).	Rs.40,74,593/-
Disallowance out of employees contribution to "Employee State Insurance Corporation (ESIC) paid after the due date specified in the "Employment State Insurance Act 1948-but before the due date of filing return specified u/s 139(1) of the Income-tax Act, 1961 by invoking provision of section 36(1)(va).	Rs.3,41,636/-
Disallowance out of Service Tax payable before the due dates specified in the relevant Acts and before the due date of filing return specified u/s 139(1) of the Income-tax Act, 1961 by invoking provision of section 43B(a)	Rs.7,66,013/-

3. Aggrieved the assessee carried the matter in appeal before the CIT(Appeals) but without success. The CIT(Appeals) drawing support from the judgment of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. Vs. CIT (SC) 143 taxmann.com 178 (SC) approved the view taken by the A.O and upheld the disallowances by observing, as under:

"1. The appellant has not filed reply to hearing-notice. I have gone through the facts of the case and the legal position in this regard. The contention of the appellant is that since employees' contribution was deposited before filing of return, the addition should not have been made. The appellant has nowhere taken a plea that employees' contribution was deposited by the due dates, mentioned in the acts, relevant for EPF and ESI. Brief facts of the case, as emanating from records, are that an adjustment of Rs.51,82,042/- was made during the processing u/s 143(1) (a) of the Act.

The AO, ADIT, CPC has made addition of Rs. 51,82,042/- to the total income towards adjustment u/s 143(1)(a)(iv) for disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return, for 'any sum received from employees as contribution to any provident fund or superannuation fund or any fund set up under ESI Act or any other fund for the welfare of employees to the extent not credited to the employees account on or before the due date [36(1)(va)."

Section 36(1)(va) of the Act reads 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 on or before the due date.

[Explanation 1] 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 At, employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.]

[Explanation 2.- For the removal of doubts, it is hereby clarified that the provisions of section 438 shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;]"

Further, sub-clause (x) of clause (24) of section 2 reads as under;

"2. In this Act, unless the context otherwise requires,-

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.]"

5.4. A plain reading of above sections makes it clear that when employee's contribution inter-alia to PF or ESIC is not paid within the limitation-dates, prescribed in those Acts, it will be treated as income of the assessee for that year. Further, explanation 2 to section 36(1)(va) of the Act, inserted by the Finance Act, 2021 with effect from 01.04.2021 removes any doubts with respect to 'due date' regarding applicability of provisions of section 43B of the Act. However, the assessee has cited various judgments of Hon'ble Tribunals wherein it has been held that explanation will apply to assessment year 2021-22 and subsequent assessment years. In para 6 of the decision of the Hon'ble ITAT, Jaipur bench, in the case of Dhabriya Polywood Vs. ADIT, CPC Bengaluru 192 ITD 298 dated 15.09.2021, it has been held that;

"6. In the instant case, admittedly and undisputedly, the employees' contribution to ESI and PF collected by the assessee from its employees' contribution to ESI and PF collected by the assessee from its employees have been deposited well before the due date of filing of return of income u/s 139(1) of the Act. Further, it is noted that the Ld CIT(A) has referred to the explanation to section 36(1)(va) and section 438 introduced by the Finance Act, 2021 and has also referred to the rationale of the amendment as explained by the Memorandum in the Finance bill, 2021, however, he has simply failed to consider the express wordings in the said memorandum which says "these amendments will take effect from 1st April, 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years". The impugned assessment year is assessment year 2019-20 and therefore, the said amendment cannot be applied in the instant case."

5.5. Further prior to insertion of this explanation 2 to section 36(1)(va) of the Act, there have been various decisions on this issue and high courts had different views on this issue. While some of them were in favour of the revenue, some were favouring the assessee. The appellant has also cited a number of decisions in its favour. The decisions in the favour of the assessee mainly held that the proviso to section 43B of the Act will apply to the amount covered in section 36(1)(va) of the Act also and, therefore, the employee's contribution towards ESI and PF through not paid due dates as per PF or ESI Acts but paid before date of filing of return of income u/s 139(1) of Income tax Act, 1961 will be allowable.

6. However, Hon'ble Supreme court has put this controversy to an end in its decision in Civil Appeal no. 2833 of 2016 in the case of Checkmate Services Pvt Ltd. Hon'ble SC in this order has considered entire conspectus of the matter (-related history of sec 2(24)(x); sec 36(1)(va) (employee contribution) versus (employer contribution) vide sec 36(1) (iv) / sec 43B (b) / second proviso etc.) with specific reference to explanatory CBDT circulars No. 372 dated 08-12-1983. & Circular no. 495 dated 22.09.1987 etc.).

Para 51 to para 55 of this order of Hon'ble Supreme Court are cited below:

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“51. The analysis of the various judgments cited on behalf of the assessee i.e., CIT v. Aimil LTD. [2010] 188 Taxman 265/321 ITR 508 (Delhi); CIT v. Sabari Enterprises [2008] 298 ITR 141 (Kar.); CIT v. Pamwi Tissues Ltd [2009] 313 ITR 137 {BOM.}; CIT v. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. [2013] 35 taxmann.com 616/217 taxman 64 (Mag.) [2014] 366 ITR 163 and Nipso Polyfabriks (supra) would reveal that in all these cases, the high courts principally relied upon omission of second proviso to Section 43B (b). No doubt many of these decisions also dealt with section 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 Extrusions did not consider the fact of the introduction of section 2(24)(x) or in fact the other provisions of the Act.

52. When Parliament introduced section 43B, what was on the statute book, was only employer's contribution (Section 34(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 section 36(1)(va) and simultaneously inserting the second proviso of section 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 section 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. Section 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 section 36(1)(va). The other important feature is that the distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (section 36(1)(va)) was maintained — and continues to be maintained. On the other hand, section 43B covers all deductions that are permissible as expenditures, or out goings forming part of the assessee's 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 section 43B is to ensure that if assessee 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 deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing expenditure.

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 (section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the latter retains its character as an income (albeit deemed), by virtue of section 2(24)(x) — unless the conditions spelt by Explanation to section 36(1)(va) are satisfied i.e. depositing such amount received or deducted from the employee 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 market distinction has to be borne while interpreting the obligation of every assessee under section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non- obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assesses 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 as income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

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

7. In view of the judgment of Hon'ble Supreme Court, it is clear that as per provisions of section 2(24)(x) read with section 36(1)(va) of the Act, the employees' contribution to PF and Superannuation Fund is allowable as deduction only if the payment has been made within the due 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 by rule, order or notification issued there under or under any Standing order, award, contract of service or otherwise. Further, it is also pertinent to mention that the decision of Hon'ble Supreme Court cited above is for assessment years prior to 2021-22 and, therefore, is applicable to the case of the appellant and there remains no need to going to the debate whether the explanation (2) inserted below section 36(1)(va) of the income tax act, 1961 is applicable in this case or not. In the present case the appellant has not deposited amount of Rs. 51,82,042/- in the PF and ES! Fund within due date. With regard to the ground no.1 - which challenges the AO's power to make adjustment in a debatable issue in view of divergent decisions of Courts- it is misconceived as the controversy has been settled in view of decision of Hon'ble Supreme Court in the case of in Civil Appeal no. 2833 of 2016 in the case of Checkmate Services Pvt Ltd. The claim made by the appellant in its return of income for deduction u/s 36(1)(va) of the Act is an incorrect claim and it can be adjusted in view of provisions of section 143(1)(a)(ii) of the Act. The addition made by the AO is, therefore, justified and in view of these facts, the grounds of appeal are dismissed.

8. In the result, the appeal is dismissed.”

4. The assessee being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us.

5. We have heard the Id. Authorized Representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Ld. AR to drive home his contentions.

6. Shri R.B Doshi, Ld. Authorized Representative (for short 'AR') at the threshold of hearing of the appeal submitted that the CIT(Appeals) had based on misconceived facts, had approved the view taken by the A.O. Elaborating on his aforesaid contention, it was averred by the Ld. AR that though the A.O had made impugned disallowance/addition of Rs.51.82 lacs (approx.) on two fold counts, viz. (i) delayed deposit of the employees share of contributions towards EPF/ESIC u/s. 36(1)(va) of the Act : Rs.44,16,229/-; and (ii) disallowance u/s. 43B(a) of the Act towards service tax paid beyond the "due date" specified for filing of return of income u/s. 139(1) of the Act : Rs.7,66,013/-, but the CIT(Appeals) had approved the said order by wrongly attributing the entire disallowance as having been made u/s.36(1)(va) r.w.s. 2(24)(x) of the Act on account of delayed deposit of employees share of contribution towards ESIC/EPF by pressing into service the judgment of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd. Vs. CIT (supra). The Ld. AR in order to drive home his aforesaid contention had taken us through the relevant extract of the order of the CIT(Appeals).

7. Apropos the disallowance of the delayed deposit of the employees share of contributions towards ESIC/EPF of Rs.44,16,229/-, the Ld. AR submitted that the A.O had traversed beyond the scope of his jurisdiction in carrying out the same u/s. 143(1) of the Act. It was averred by the Ld. AR that as on the date of issuance of intimation u/s.143(1) of the Act dated 13.12.2019 there were divergent views as regards the said issue, i.e. as to whether the deposit of the employee's share of contribution towards labour welfare funds upto the "due date" of filing of return of

income by the assessee was allowable as a deduction u/s.43B of the Act; or the same was liable to be disallowed as per mandate of Section 36(1)(va) r.w.s. 2(24)(x) of the Act, therefore, the same could not have been summarily disallowed by the CPC, Bengaluru while processing the return of income of the assessee u/s.143(1) of the Act. In support of his aforesaid contention, the Ld. AR had relied on the order of the ITAT, SMC Bench, Raipur in the case of Satpal Singh Sandhu Vs. DCIT, Circle-1(1), Raipur, ITA No.04/RPR/2023 dated 11.05.2023 and also that of "Division Bench" in the case of Gurmeet Singh Hora Vs. ACIT, CPC, Bengaluru, ITA No.45/RPR/2023 dated 03.08.2023.

8. As regards the disallowance u/s. 43B(a) of the Act on account of delayed deposit of service tax of Rs.7,66,013/- by the assessee, i.e., beyond the "due date" applicable in his case for furnishing of return of income under sub-section (1) of Section 139 of the Act for the year under consideration, the Ld. AR submitted that the same comprises of opening balance of Rs.7,06,473/-, while for, only an amount of Rs.59,540/- pertained to the year in question i.e. A.Y.2018-19. Carrying his contention further, the Ld. AR submitted that as the assessee was consistently following exclusive method for accounting his receipts (i.e. net of service tax) and had not claimed deduction of amount of service tax, therefore, failure on his part to pay/deposit the same upto the "due date" of filing of return of income as contemplated u/s. 139(1) of the Act would not entail any disallowance in his hands. In sum and substance, the Ld. AR submitted that now when the assessee has not claimed deduction of amount of unpaid service tax in question, the same thus could

not have been disallowed by triggering the provisions of Section 43B of the Act. The Ld. AR in order to buttress his aforesaid claim had relied on the judgment of the Hon'ble High Court of Chhattisgarh in the case of ACIT-1, Bhilai, Dist. Durg Vs. M/s. Ganapati Motors, Tax Case (Income Tax Appeal) No. 30 of 2016 dated 25.04.2017 and order of the ITAT, "SMC" Bench, Raipur in the case of Ganeshan Puroshothaman Achari Vs. DCIT, CPC, Bengaluru, ITA Nos. 146 to 148/RPR/2022 dated 27.03.2023.

9. Based on the aforesaid facts, the Ld. AR submitted that no part of the disallowance/addition made by the A.O u/s. 36(1)(va) r.w.s. 2(24)(x); AND u/s. 43B(b) of the Act could be sustained.

10. Per contra, the Ld. Departmental Representative (for short 'DR') relied on the orders of the lower authorities.

11. We have thoughtfully considered the contentions of the Ld. authorized representatives of both the parties in the backdrop of the observations of the lower authorities. At the threshold, we may herein observe that there is substance in the claim of the Ld. AR that the CIT(Appeals) had proceeded with and approved the view taken by the A.O on the basis of misconceived facts. We, say so, for the reason that though the A.O had made disallowance on two counts, viz. (i) delayed deposit of the employees share of contributions towards EPF/ESIC u/s. 36(1)(va) of the Act : Rs.44,16,229/-; and (ii) disallowance u/s. 43B(a) of the Act towards service tax paid beyond the "due date" specified for filing of return of income u/s.

139(1) of the Act : Rs.7,66,013/-, but the CIT(Appeals) had proceeded with on the premises that the entire disallowance pertained to the delayed deposit of the employees share of contributions by the assessee towards ESIC/EPF.

12. Be that as it may, we shall now deal with two-fold disallowances/additions that have been made by the A.O, as under:

(A) Delayed deposit of the employees share of contributions towards EPF/ESIC u/s. 36(1)(va) of the Act : Rs.44,16,229/-

13. Controversy involved in the present appeal lies in a narrow compass, i.e., as to whether or not the delayed deposit by the assessee of the employee's share of contributions towards ESI/EPF could have been summarily disallowed by the AO prior to the judgment of the Hon'ble Apex Court in the case of Checkmate Services P. Ltd. Vs. CIT (SC) 143 taxmann.com 178 (SC) while processing his return of income vide an intimation u/s.143(1)(a) of the Act dated 13.12.2019. As stated by the Ld. AR and, rightly so, the aforesaid issue had been looked into by the ITAT, SMC, Raipur in the case of Satpal Singh Sandhu Vs. DCIT, Circle-1(1), Raipur, ITA No.04/RPR/2023 dated 11.05.2023 and that of "Division Bench" in the case of Gurmeet Singh Hora Vs. ACIT, CPC, Bengaluru, ITA No.45/RPR/2023 dated 03.08.2023. The Tribunal while deliberating at length on the aforesaid issue had after drawing support from the orders of the ITAT, Mumbai in the case of Kalpesh Synthetics (P) Ltd. Vs. DCIT (2022) 137 taxmann.com 475 (Mumbai) and P.R. Packaging Service Vs. ACIT (2023) 148 taxmann.com 153 (Mumbai), had held that no such disallowance of the delayed deposit of the employee's share of

contribution towards labour welfare fund could have been made in the hands of the assessee company while processing its return of income u/s. 143(1)(a) of the Act.

The Tribunal while concluding as hereinabove had observed as under:

“6. I have heard the Ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions.

7. Controversy involved in the present appeal lies in a narrow compass, i.e as to whether or not the delayed deposit of the employee's share of contributions towards ESI & EPF by the assessee-employer, could have summarily been held by the A.O, as the assessee's income under Section 36(1)(va) r.w.s 2(24)(x) of the Act while processing his return of income u/s.143(1) of the Act,.

8. As is discernable from the records, it transpires that the assessee's chartered accountant in his audit report filed in “Form 3CD” r.w.r 6G(2) of the Income Tax Rules, 1962, had at Sr.No.20(b) of the said report furnished details of the delayed deposits by the assessee-employer of the employees share of contributions towards ESI & EPF, which reads as under:

Description		Amount		
20 b	Details of contributions received from employees for various funds as referred to in section 36(1)(va):			
	Nature of fund	Sum received from employees	Due date for payment	The actual amount paid The actual date of payment to the authorities concerned
	Provident Fund	127808	15/05/2018	127808 13/06/2018
	Provident Fund	131172	15/06/2018	131172 03/07/2018
	Provident Fund	139760	15/07/2018	139760 02/08/2018
	Provident Fund	163140	15/08/2018	163140 06/09/2018
	Provident Fund	152631	15/09/2018	152631 03/10/2018
	Provident Fund	161641	15/10/2018	161641 03/11/2018
	Provident Fund	157574	15/11/2018	157574 28/11/2018
	Provident Fund	143465	15/12/2018	143465 12/01/2019
	Provident Fund	165475	15/01/2019	165475 04/02/2019
	Provident Fund	125441	15/02/2019	125441 02/03/2019
	Provident Fund	103116	15/03/2019	103116 30/03/2019
	Provident Fund	75998	15/04/2019	75998 09/05/2019
	Any Fund set up under the provisions of ESI Act,1948	29815	15/05/2018	29815 04/06/2018
	Any Fund set up under the provisions of ESI Act,1948	26668	15/06/2018	26668 02/07/2018
	Any Fund set up under the provisions of ESI Act,1948	26283	15/07/2018	26283 02/08/2018
	Any Fund set up under the provisions of ESI Act,1948	29663	15/08/2018	29663 06/09/2018
	Any Fund set up under the provisions of ESI Act,1948	26918	15/09/2018	26918 25/10/2018
	Any Fund set up under the provisions of ESI Act,1948	28998	15/10/2018	28998 03/11/2018
	Any Fund set up under the provisions of ESI Act,1948	27980	15/11/2018	27980 11/12/2018
	Any Fund set up under the provisions of ESI Act,1948	26993	15/12/2018	26993 12/01/2019
	Any Fund set up under the provisions of ESI Act,1948	29950	15/01/2019	29950 11/02/2019
	Any Fund set up under the provisions of ESI Act,1948	36626	15/02/2019	36626 18/03/2019
	Any Fund set up under the provisions of ESI Act,1948	30089	15/03/2019	30089 18/04/2019
	Any Fund set up under the provisions of ESI Act,1948	24114	15/04/2019	24114 24/05/2019

Ostensibly, as the aforementioned amounts received by the assessee-employer as employees share of contribution towards ESI & EPF were deposited by him beyond the stipulated time period prescribed under the said relevant Acts, therefore, the A.O while processing his return of income u/s.143(1) of the Act, had held the same as the income of the assessee u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act.

9. It is the claim of the Ld. A.R that the aforementioned addition could not have been made by the A.O in the garb of a *prima facie* adjustment u/s.143(1)(a) of the Act. Elaborating on his aforesaid contention, it was the claim of the Ld. AR that the assessee's chartered accountant as per the mandate of law had at Sr. No. 20(b) of his audit report only furnished details of the employees shares of contribution as referred to in Section 36(1)(va), i.e the respective amounts a/w. dates of deposit. It was submitted by the ld. A.R that the A.O merely on the basis of the aforesaid details provided by the auditor could not have made an addition of the same to the assessee's returned income u/s.143(1)(a) of the Act. Our attention was drawn by the Ld. AR to Sr. No.20(b) of the audit report in Form 3CD. Carrying his argument further, it was submitted by the Ld. AR, that, even otherwise, on the date when the return of income of the assessee was processed u/s. 143(1) of the Act, i.e. on 21.02.2020, the issue as to whether or not the delayed deposits of the employee's share of contributions towards labour welfare funds, which were though deposited by the assessee-employer beyond the due date prescribed under the relevant Acts but before the "due date" of filing of the return of income under sub-section (1) of Section 139 of the Act, could be held as the income of the assessee u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act, was highly debatable, therefore, the same clearly fell beyond the realm of a *prima-facie* adjustment under section 143(1) of the Act. The ld. A.R in order to buttress his aforesaid contention had drawn support from the following judicial pronouncements:

- (i) CIT Vs. M/s. Alom Extrusions Ltd. (2009) 185 Taxman 416 (SC)
- (ii) CIT Vs. Vinay Cement Ltd. (2007) 213 CTR 268(SC)
- (iii) Pr. CIT, Jaipur Vs. Rajasthan State Beverages Corporation Ltd. (2017) 84 taxmann.com 185(SC)
- (iv) CIT Vs. State Bank of Bikaner & Jaipur (2014) 43 taxmann.com 411 (Rajasthan)
- (v) Sagun Foundry Pvt. Ltd. Vs. CIT (Kanpur) (2017) 78 taxmann.com 47 (Allahabad)

(vi) CIT Vs. Aimil Limited (2010) 188 TaXMAN 265 (Delhi)

It was submitted by the Ld. AR, that now when the department on the one hand was of the view that the delayed deposit of the employee's share of contributions towards ESI & EPF were to be disallowed u/s. 36(1)(va) r.w.s. 2(24)(x); while for the courts on the other hand had accepted the assessee's claim that such delayed deposits which were made by the assessee not later than the "due date" of filing of its return of income under sub section (1) of Section 139 of the Act were saved by the provisions of Section 43B of the Act, therefore, the said delayed deposits could not have been summarily held by the A.O as the income of the assessee u/s.143(1) of the Act. Ld. A.R in support of his aforesaid contention had relied on the orders of the ITAT, Mumbai in the case of Kalpesh Synthetics (P) Ltd. Vs. DCIT (2022) 137 taxmann.com 475 (Mumbai) and that of P.R Packaging Service Vs. ACIT (2023) 148 taxmann.com 153 (Mumbai). It was averred by the Ld. AR, that the addition of the delayed deposit of employee's share of contribution of Rs. 19,91,318/- made u/s. 36(1)(va) of the Act by the A.O, vide his intimation issued u/s.143(1) of the Act could not be sustained and was liable to be vacated.

10. Per contra, the Ld. Departmental Representative (for short 'DR') relied on the orders of the lower authorities. It was submitted by the Ld. DR that as the assessee's auditor had categorically qualified his audit report and furnished details of the delayed deposit of employees share of contributions towards ESI and EPF as referred in Section 36(1)(va) of the Act, therefore, no infirmity did emerge from the order of the A.O, who while processing the return of income u/s.143(1) of the Act had rightly held the said amount as the income of the assessee.

11. We have given a thoughtful consideration to the aforesaid contentions of the Ld. Authorized Representatives of both the parties in the backdrop of the orders of the lower authorities, and have also considered the judicial pronouncements that have been pressed into service by them.

12. Admittedly, the issue as to whether or not, the delayed deposits of employees share of contribution towards labour welfare funds, i.e. ESI and EPF by the assessee-employer were liable to be held as the income of the assessee u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act, as was the view of the department; or the same were saved by the provisions of Section 43B of the Act, i.e to the extent such deposits were made not later than the "due date" of filing of the return of income of the assessee as prescribed under sub-section (1) of Section 139 of the Act, was a highly debatable and had finally

only recently been settled by the judgment of the Hon'ble Apex Court in the case of Checkmate Services (P) Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC). On the date on which the return of income of the assessee was processed by the A.O u/s.143(1) of the Act, i.e. on 21.02.2020, the aforesaid issue, as observed by us hereinabove, was highly debatable. Apart from that, we find substance in the claim of the Ld. AR that the assessee's auditor in his audit report in Form 3CD r.w.s. 6G(2), as per the statutorily required, had only furnished the details of the contributions towards employee's share of contributions towards various funds as referred to in Section 36(1)(va) of the Act, and at no stage had offered the same as the income of the assessee.

13. On a conjoint perusal of the aforesaid facts, viz. (i). the issue as to whether the delayed deposit of employees share of contribution towards labour welfare funds, i.e. ESI and EPF by the assessee-employer were liable to be held as the income of the assessee u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act, as was the view of the department; or the same were saved by the provisions of Section 43B of the Act, i.e to the extent such deposits were made not later than the "due date" of filing of the return of income of the assessee as prescribed under sub-section (1) of Section 139 of the Act, was a highly debatable; AND (ii). that the assessee's chartered account had only furnished the details of such delayed deposits in column 20(b) of his audit report in Form 3CD and had not offered the same as disallowance; I am of the considered view, that there could have been no justification for the A.O at the time of processing the return of income of the assessee u/s.143(1) of the Act on 21.02.2020 to have summarily held such delayed deposit of the employees share of contributions towards labour welfare funds i.e ESI & EPF by the assessee-employer, as the income of the assessee. My said view is supported by the judgment of the Hon'ble High Court of Bombay in the case of Khatau Junkar Ltd. vs. K.S Pathania (1992) 196 ITR 157 (Bom). It was observed by the Hon'ble High Court that where a claim has been made which requires further inquiry, it cannot be disallowed without hearing the parties and/or giving the party an opportunity to submit proof of its claim. It was further observed that in absence of Sec. 143(1)(a) being read in the above manner, i.e debatable issues cannot be adjusted by way of intimation under section 143(1)(a), would lead to arbitrary and unreasonable intimations being issued, leading to chaos. In fact, I find that the aforesaid issue in hand had been deliberated at length by the ITAT, Mumbai in the case of Kalpesh Synthetics (P) Ltd. Vs. DCIT (supra). The Tribunal while dealing with the various facets of the aforesaid issue, had held, that no such addition of the delayed deposits of the employee's share of contribution towards labour welfare funds could have been made in the hands of the assessee while summarily

processing its return of income u/s.143(1)(a) of the Act, observing as under:

“4. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

5. In our considered view, it is quite evident, from a careful look at the related statutory provisions, that there is a material difference in the scheme of processing the income tax return under section 143(1)(a) as it stands now vis-à-vis as it stood at the point of time when Khatau Junkar judgment (supra) by Hon’ble jurisdictional High Court was delivered. That was the time when incorrect claims could be disallowed only when such a deduction was “on the basis of information available in such return, accounts or documents is prima facie inadmissible” [see Section 143(1)(a)(iii) as it then stood] and it was in this context that the connotations of the expression “prima facie inadmissible” came up for consideration before Hon’ble Courts above. While the expression used in section 143(1)(a)(i) is materially similar inasmuch as its wordings are “an incorrect claim, if such incorrect claim is apparent from any information in the return”, there are two important things that one must bear in mind- (a) firstly, the expression “an incorrect claim, if such incorrect claim is apparent from any information in the return” is well defined in Explanation to Section 143(1), and; (b) secondly, and perhaps much more importantly, that is just one of the permissible types of adjustments, denying a deduction, under section 143(1)(a) which goes well beyond such adjustments and includes the cases such as “(iii) disallowance of loss claimed, if the 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”. So far as the first point is concerned, it must be noted that the expression “incorrect claim apparent from any information in the return”, for the purpose of Section 143(1)(a), is further defined, under Explanation to Section 143(1), and it means that 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. On the second point, it is useful to bear in mind the fact that the scheme of Section 143(1)(a) thus permits the processing of the income tax return in the manner that the total income or loss of the assessee is computed after making the adjustments for (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". The adjustments under clause (vi) above are no longer permissible after 1st April 2018. Clearly, thus, there is a significant paradigm shift in the processing of income tax returns under section 143(1), and the decisions rendered in the context of old Section 143(1)(a) cease to be relevant. Learned counsel thus derives no advantage from the judgments rendered in the context of old Section 143(1)(a)- such as Hon'ble jurisdictional High Court's judgment in the case of Khatau Junkar (supra). To that extent, we must uphold the plea of the learned Departmental Representative.

6. Coming to the mechanism of application of Section 143(1), we find that the first proviso to Section 143 (1) mandates 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" and, under the second proviso to Section 143(1), "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". The scope of permissible adjustments under section 143(1)(a) now is thus much broader, and, as long as an adjustment fits the description under section 143(1)(a) (i) to (v), read with Explanation to Section 143(1), such an adjustment, subject to compliance with first and second proviso to Section 143(1), is indeed permissible. It is, however, important to take note of the fact that unlike the old scheme of 'prima facie adjustments' under section 143(1)(a), the scheme of present section 143(1) does not involve a unilateral exercise. The very fact that an opportunity of the assessee being provided with an intimation of 'such adjustments' [as proposed under section 143(1)], in writing or by electronic mode, and "the response received from the assessee, if any" to be "considered before making any adjustment" makes the process of making adjustments under section 143(1), under the present legal position, an interactive and cerebral process. When an assessee raises objections to proposed adjustments under section 143(1), the Assessing Officer CPC has to dispose of such objections before proceeding further in the matter- one way or the other, and such disposal of objections is a quasi-judicial function. Clearly, the Assessing Officer CPC has the discretion to go ahead with the proposed adjustment or to drop the same. The call that the Assessing Officer CPC has to take on such objections has to be essentially a judicious call, appropriate to facts and circumstances and in accordance with the law, and the Assessing Officer CPC has to set out the reasons for the same. Whether there is a provision for further hearing or not, once objections are raised before the Assessing Officer CPC and the Assessing Officer CPC has to dispose of the

objections before proceeding further in the matter, this is inherently a quasi-judicial function that he is performing, and, in performing a quasi-judicial function, he has to set out his specific reasons for doing so. Disposal of objections cannot be such an empty formality or meaningless ritual that he can do so without application of mind and without setting out specific reasons for rejecting the same. Let us, in this light, set out the reasons for rejecting the objections. The Assessing Officer- CPC has used a standard reason to the effect that "As there has been no response/the response given is not acceptable, the adjustment(s) as mentioned below are being made to the total income as per provisions of Section 143(1)(a)", and has not even struck off the portion inapplicable. To put a question to ourselves, can such casually assigned reasons, which are purely on a standard template, can be said to be sufficient justifications for a quasi-judicial decision that the disposal of objections inherently is? The answer must be emphatically in negative. It is important to bear in mind the fact that intimation under section 143(1) is an appealable order, and when consideration of objections raised by the assessee is an integral part of the process of finalizing the intimation under section 143(1) unless the reasons for such rejection are known, a meaningful appellate exercise can hardly be carried out. When the first appellate authority has no clue about the reasons which prevailed with the Assessing Officer- CPC, in rejecting the submissions of the assessee, because no such reasons are indicated by the Assessing Officer CPC anyway, it is difficult to understand on what basis the first appellate authority sits in judgment over correctness or otherwise of such a rejection of submissions. Whether the statute specifically provides for it or not, in our considered view, the need for disposal of objections by way of a speaking order has to be read into it as the Assessing Officer CPC, while disposing of the objections raised by the assessee, is performing a quasi-judicial function, and the soul of a quasijudicial decision making is in the reasoning for coming to the decision taken by the quasi-judicial officer. While on this aspect of the matter, we may usefully refer to the observations made by the Hon'ble Supreme Court, in the case of Union Public Service Commission v. Bibhu Prasad Sarangi and Ors., [2021] 4 SCC 516. While these observations are in the context of the judicial officers, these observations will be equally applicable to the decisions by the quasi-judicial officers like us as indeed the Assessing Officer CPC. In the inimitable words of Hon'ble Justice Chandrachud, Hon'ble Supreme Court has made the following observations:

.....Reasons constitute the soul of a judicial decision. Without them, one is left with a shell. The shell provides neither solace nor satisfaction to the litigant. We are constrained to make these observations since what we have encountered in this case is no longer an isolated aberration. This has become a recurring phenomenon.How judges communicate in their judgments is a defining characteristic of the judicial process. While it is important to keep an eye on the statistics on disposal, there is a higher value involved. The quality of justice brings legitimacy to the judiciary.

7. These observations of Their Lordships apply equally, and in fact with much greater vigour, to the quasi-judicial functionaries as well. Viewed thus, reasons in a quasi-judicial order constitute the soul of the quasi-judicial decision. A quasi-judicial order, without giving reasons for arriving at such a decision, is contrary to the way the functioning of the quasi-judicial authorities is envisaged. A quasi-judicial order, as a rejection of the objections against the proposed adjustments under section 143(1) inherently is, can hardly meet any judicial approval when it is devoid of the cogent and specific reasons, and when it is in a standard template text format with clear indications that there has not been any application of mind as even the inapplicable portion of the template text, i.e whether there was no response or whether the response is unacceptable, has not been removed from the reasons assigned for going ahead with the proposed adjustment under section 143(1). In any event, there is no dispute that the precise and proximate reasons for disallowance in all these cases admittedly are the inputs based on the tax audit report. The question then arises about the status and significance of the tax audit report. Can the observations in a tax audit report, by themselves, be justifications enough for any disallowance of expenditure under the Act? As we deal with this question, we are alive to the fact section 143(1)(a)(iv) specifically an adjustment in respect of "disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return". It does proceed on the basis that when a tax auditor indicates a disallowance in the tax audit report, for this indication alone, the expense must be disallowed while processing under section 143(1) by the CPC. It is nevertheless important to bear in mind the fact that a tax audit report is prepared by an independent professional. The fact that the tax auditor is appointed by the assessee himself does not dilute the independence of the tax auditor. The fact remains that the tax auditor is a third party, and his opinions cannot bind the auditee in any manner. As a matter of fact, no matter how highly placed an auditor is, and even within the Government mechanism and with respect to CAG audits, the audit observations are seldom taken an accepted position by the auditee- even when the auditor is appointed by the auditee himself. These are mere opinions and at best these opinions flag the issues which are required to be considered by the stakeholders. On such fine point of law, as the nuances about the manner in which Hon'ble Courts have interpreted the legal provisions of the Income Tax Act in one way or the other, these audit reports are inherently even less relevant- more so when the related audit report requires reporting of a factual position rather than express an opinion about legal implication of that position. In the light of this ground reality, an auditee being presumed to have accepted, and concurred with, the audit observations, just because the appointment of auditor is done by the assessee himself, is too unrealistic and incompatible with the very conceptual foundation of independence of an auditor. On the one hand, the position of the auditor is treated so subservient to the assessee that the views expressed by the auditor are treated as a reflection of the stand of the assessee, and, on the other hand, the views of the auditor are treated as so sacrosanct that these views, by themselves, are taken as justification enough for a disallowance under the scheme of the Act. There is no

meeting ground in this inherently contradictory approach. Elevating the status of a tax auditor to such a level that when he gives an opinion which is not in harmony with the law laid down by the Hon'ble Courts above- as indeed in this case, the law, on the face of it, requires such audit opinion to be implemented by forcing the disallowance under section 143(1), does seem incongruous. Learned Departmental Representative's contentions in this regard that the observations made in the tax audit report, in the light of the specific provisions of Section 143(1)(a)(iv), must prevail- more so when the tax auditor is appointed by the assessee himself, is clearly unsustainable in law. While Section 143(1)(a)(iv) does provide for a disallowance based purely on the "indication" in the tax audit report, inasmuch as it permits "disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return", and it is for the Hon'ble Constitutional Courts above to take a call on the vires of this provision, we are nevertheless required to interpret this provision in a manner to give it a sensible and workable interpretation. When the opinion expressed by the tax auditor is contrary to the correct legal position, the tax audit report has to make way for the correct legal position. The reason is simple. Under Article 141 of the Constitution of India, the law laid down by the Hon'ble Supreme Court unquestionably binds all of us, and the Hon'ble Supreme Court has, in numerous cases- including, for example, in the case of East India Commercial Co. Ltd. v. Collector of Customs 1962 taxmann.com 5, speaking through Hon'ble Justice Subba Rao observed, inter alia, as follows:

.....Under article 215, every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. Under article 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under article 227 it has jurisdiction over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that Court and start proceedings in direct violation of it. If a Tribunal can do so, all the subordinate Courts can equally do so, for there is no specific provision, just like in the case of the Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer

8. When the law enacted by the legislature has been construed in a particular manner by the Hon'ble jurisdictional High Court, it cannot be open to anyone in the jurisdiction of that Hon'ble High Court to read it in any other manner than as read by the Hon'ble jurisdictional High Court. The views expressed by the tax

auditor, in such a situation, cannot be reason enough to disregard the binding views of the Hon'ble jurisdictional High Court. To that extent, the provisions of Section 143(1)(a)(iv) must be read down. What essentially follows is that the adjustments under section 143(1)(a) in respect of "disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return" is to be read as, for example, subject to the rider "except in a situation in which the audit report has taken a stand contrary to the law laid down by Hon'ble Courts above". That is where the quasi-judicial exercise of dealing with the objections of the assessee, against proposed adjustments under section 143(1), assumes critical importance in the processing of returns. It is also important to bear in mind the fact that what constitutes jurisdictional High Court will essentially depend upon the location of the jurisdictional Assessing Officer. While dealing with jurisdiction for the appeals, Rule 11(i) of the Central Processing of Returns Scheme 2011 states that "Where a return is processed at the Centre, the appeal proceedings relating to the processing of the return shall lie with Commissioner of Income-tax (Appeals) [CIT(A)] having jurisdiction over the jurisdictional Assessing Officer". Then situs of the CPC or the Assessing Office CPC is thus irrelevant for the purpose of ascertaining the jurisdictional High Court. Therefore, in the present case, whether the CPC is within the jurisdiction of Hon'ble Bombay High Court or not, as long as the regular Assessing Officer of the assessee and the assessee are located in the jurisdiction of Hon'ble Bombay High Court, the jurisdictional High Court, for all matters pertaining to the assessee, will be Hon'ble Bombay High Court. In our considered view, it cannot be open to the Assessing Officer CPC to take a view contrary to the view taken by the Hon'ble jurisdictional High Court- more so when his attention was specifically invited to the binding judicial precedents in this regard. For this reason also, the inputs in question in the tax audit report can not be reason enough to make the impugned disallowance. The assessee must succeed for this reason as well.

9. What a tax auditor states in his report are his opinion and his opinion cannot bind the auditee at all. In this 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 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", 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 the 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 this due date in the tax audit report constituted "disallowance of expenditure indicated in the audit report but not 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 not 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 due 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 the 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 is 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 an 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 the assessment years 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.”

14. Also, I find that a similar view had been taken by the ITAT, Mumbai in the case of P.R Packaging Service Vs. ACIT (supra). In the aforesaid case, the Tribunal after drawing support from its earlier order in the case of Kalpesh Synthetics (P) Ltd. Vs. DCIT (supra), had, further observed, that as in the subsequent judgment of the Hon’ble Supreme Court in the case of Checkmate Services (P) Ltd. Vs. CIT (supra) assessment was framed u/s.143(3) of the Act and not u/s. 143(1)(a) of the Act, therefore, the same would not assist the case of the department before them, wherein the assessee had assailed the validity of the addition of the delayed deposit of the

employee's share of contributions towards labour welfare funds, i.e. ESI & EPF that were made by the A.O u/s. 143(1)(a) of the Act. Further, I find that similar view had been taken by the ITAT, Jaipur in the case of Paris Elysees India Private Limited Vs. DCIT, ITA No.357/JPR/2022 dated 20.02.2023; and ITAT, Delhi in the case of M/s. 360 Realtors LLP Vs. ADIT, CPC in ITA No.303/Del/2022 and Garg Heart Centre & Nursing Home Private Limited, ITA No.1700/Del/2022.

15. On the basis of my aforesaid observations, I am of the considered view that as the issue involved in the present appeal is squarely covered by the order of the ITAT Mumbai in the case of Kalpesh Synthetics (P) Ltd. Vs. DCIT (supra), therefore, I respectfully follow the same and vacate the addition of Rs.19,91,318/- that was summarily made by the A.O, CPC u/s.143(1)(a) of the Act. Accordingly, I set-aside the order of the CIT(Appeals) and vacate the addition of Rs.19,91,318/- made by the A.O u/s.143(1)(a) of the Act.”

14. As the facts and issues involved in the present appeal remains the same as were there before the ITAT, SMC Bench, Raipur in the aforesaid case i.e. Satpal Singh Sandhu Vs. DCIT, Circle-1(1), Raipur (supra) and before the “Division Bench” in the case of Gurmeet Singh Hora Vs. ACIT, CPC, Bengaluru, ITA No.45/RPR/2023 dated 03.08.2023, therefore, we respectfully follow the same. Accordingly, we set-aside the order of the CIT(Appeals) and vacate the addition of Rs.44,16,229/- made by the A.O.

(B) Disallowance u/s. 43B(a) of the Act of the amount of service tax paid beyond the “due date” prescribed for filing of return of income u/s. 139(1) of the Act : Rs.7,66,013/-

15. Controversy involved in the present appeal has two facets, viz. (i) that as to whether or not the lower authorities were justified in law and the facts of the case in making/sustaining the addition towards service tax liability of Rs.7,66,013/- which

was not paid by the assessee on or before “due date” for furnishing of his return of income for the year under consideration u/s.139(1) of the Act, despite the fact that the assessee who was accounting for his sales/turnover by following an “exclusive method” and had not claimed deduction of the said amount in the profit and loss account for the year under consideration; and (ii) that even otherwise as to whether or not addition/disallowance u/s.43B of the assessee’s service tax liability could have justifiably been done u/s.143(1) of the Act.

16. We have given a thoughtful consideration to the issue in hand in the backdrop of the contentions advanced by the Ld. authorized representatives of both the parties. We may herein observe that the **Hon’ble High Court of Chhattisgarh** in the case of **Assistant Commissioner of Income Tax-1, Bhilai, Dist. Durg (C.G.) Vs. M/s. Ganapati Motors, Tax Case (Income Tax Appeal) No.30 of 2016 dated 25.04.2017** had held that in a case where the assessee had not charged VAT to its profit and loss account, then, despite the fact that the liability may still be unpaid it could not have been added u/s.43B of the Act as the same was not claimed as a deduction in the books of accounts. For the sake of clarity the relevant observations of the Hon’ble High Court are culled out as under:

“2. Heard learned Counsel for the revenue and learned Counsel for the respondent-assessee. The fundamental issue that arises for decision is, as to whether a particular amount which is subject matter of the appeal is to be treated as relatable to Value Added Tax (VAT) payable by the assessee and, if so, whether it has to be actually paid by him before filing of the return under the Income Tax Act. This question is relevant, having regard to the manner in which the question of law has been framed. The issue as to whether Section 43-B of the Income Tax is attracted even when the

assessee does not claim any deduction on the strength of that provision may also be relevant.

3. The Assessing Authority, on the instant issue, noticed that the assessee's claim regarding the treatment of VAT in the Books of Accounts has been verified from the Books and that has been found to be in order. The Assessing Authority also found that VAT has been found separately accounted for in the Books of Accounts. The only ground on which the Assessing Authority refused to exclude the VAT collected by the dealer from the profit of business is on the basis that the VAT component was not paid off on or before the due date for furnishing the return in relation to the previous year under Section 139(1) of the Income Tax Act. The First Appellate Authority also noticed that it is an undisputed fact that the Appellant did not charge VAT to the Profit and Loss account. It was therefore noted by the First Appellate Authority that in such circumstances, the liability may still be unpaid, but it cannot be disallowed being not claimed as deduction in the Books of Accounts.

4. With the aforesaid fact situation, we are unable to hold that the Tribunal was in error in law in dismissing the revenue's appeal making a reference to the decisions referred to by it.

5. The decision of the Apex Court in *Chowringhee Sales Bureau (P) Ltd. Vs. CIT*, AIR 1973 SC 376 = (1973) 87 ITR 542, dealt with a case where the contents of the Profit and Loss account apparently showed that though the assessee had attempted to show that there is a separate account for tax collected, the collection would have been only of a composite amount. The transaction dealt with in Chowringhee's case (*supra*) related to auction and the nature of the income derived by an auctioneer in the process of auction. In contradistinction thereto, are the decisions of the High Court of Delhi in *Commissioner of Income Tax v. Noble & Hewitt (India) (P) Ltd.*, 2008 305 ITR 0324, which make a nice distinction between Chowringhee's case and instances where Profit and Loss accounts and Service Tax accounts are maintained separately following mercantile system of accounting. As rightly noticed therein, it is not for the Income Tax department to make out a case relating to the correctness or otherwise of the mercantile system of accounting, resorted to and maintained by an assessee. The acceptability or otherwise of the accounts in a mercantile system would obviously be a matter of concern for other taxation authorities.

6. In the case in hand, as already noted, the fact situation that the Assessing Authority and the First Appellate Authority did not doubt the modality of the accounting system adopted by the assessee is an outstanding phenomenon which goes in favour of the assessee. Under such circumstances, it is not necessary for the authorities to

consider, whether Section 43-B of the Income Tax is to be relied on by the assessee to claim any deduction.

7. For the aforesaid reasons, on the facts and circumstances of the case in hand, we answer to the question formulated in these appeals in the negative, that is to say, against the revenue and in favour of the assessee.”

17. Considering the aforesaid judgment of the Hon'ble Jurisdictional High Court as per which, no addition can be made of an assessee's unpaid VAT tax liability that was not charged to the profit and loss account, there is substance in the claim of the Ld. AR that based on the same analogy there was no justification for the A.O to have made an addition u/s.43B of the amount of service tax payable of Rs.7,66,013/- as the same was not charged to the latter's profit and loss account. Also, we may herein observe that as the aforesaid claim of the assessee was in conformity with the *ratio decidendi* of the judgment of the Hon'ble Jurisdictional High Court in the case of M/s. Ganapati Motors (supra), therefore, the same by no means could have been dubbed as an incorrect claim and brought within the realm of the adjustments contemplated in clause (a) of Section 143(1) of the Act. Accordingly, the order of the CIT(Appeals) is set-aside and the addition made by the A.O of service tax payable of Rs.7,66,013/- is vacated.

18. In the result, appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in open court on 23rd day of November, 2023.

Sd/-
ARUN KHODPIA
(ACCOUNTANT MEMBER)

Sd/-
RAVISH SOOD
(JUDICIAL MEMBER)

रायपुर/ RAIPUR ; दिनांक / Dated : 23rd November, 2023

SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G.)
4. The Pr. CIT, Raipur-1 (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.