आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा॰ एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 426/JPR/2023
निर्धारण वर्ष/Assessment Years : 2020-21

SM Workforce Private Limited Shop No. G-19, Big Bazar, Near Central Market, Nanglia, Tehsil- Tijara, Bhiwadi	बनाम Vs.	ITO, Ward, Bhiwadi
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AAUCS 0570 N		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओरसे/Assessee by : None
राजस्व की ओरसे/Revenue by: Sh. A. S. Nehra (Addl.CIT)

सुनवाई की तारीख/Date of Hearing :19/10/2023
उदघोषणा की तारीख/Date of Pronouncement: 18/12/2023

आदेश/ORDER

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

This appeal is filed by the assessee against the order of the National Faceless Appeal Centre, Delhi [herein after referred to as "NFAC/ld. CIT(A)"] dated 09.05.2023 for the assessment years 2020-21.

2. None appeared on behalf of the assessee, the assessee has raised the following grounds of appeal:-

1. Regarding the disallowance of Rs. 6,98,230/- made by the Id. ADIT, CPC, Bangaluru, while processing the return under section 139(1), on the basis of column 20(b) of the Audit Report under section 44AB in Form No. 3CB. The Id. ADIT has made the addition disallowing the amounts treating them as late payments made by the assesse beyond the due date of deposit in fund set up under provisions of the ESI Act, 1948 account.

It is submitted that in the last column of the above table "The actual amount paid", the Auditor has shown the total amount of payment through a single challan for the month of January, 20 amounting Rs. 52,568/-dated 17-02-2020. However, the amount was paid through 2 separate challans dated 11-02-2020 and 17-02-2020 amounting Rs.47,254/- and Rs.5,314/- respectively as Employees' Contribution. It is submitted that one challan paid on 11-02-2020 amounting Rs. 47,254/- is paid before the due date of the ESI Act, 1948 i.e., 15-02-2020. The copy of challans is enclosed herewith. It is requested to kindly allow the amount of Rs.47,254/- as the same has been paid in compliance with the provisions of The Income Tax Act, 1961 and ESI Act, 1948.

2. The ADIT, CPC has grossly erred in law in disallowing the amount of Rs 6,98,230/- under section 143 sub-section 1. It is trite that under section 143 sub-section 1 clause a, prima facie adjustments are permissible only in respect of claims, the incorrectness of which is apparent from information in the return. Debatable claims are not liable to such prima facie adjustments, which are permissible only u.s. 143 sub-section 3, after issuing notice under section 143 sub-section 2.

3. Even otherwise, the claim of the assesse is allowable u.s. 36 sub-section 1 clause va read with section 43B of the I.T. Act 1961, in view of binding decision of the jurisdictional honorable Rajasthan High Court in the cases of CIT Vs. State Bank Of Bikaner and Jaipur reported in 2014 363 ITR 70 Rajasthan, CIT Vs. Jaipur Vidhyut Vitran Nigam Limited reported in 2014 363 ITR 307 Rajasthan and CIT Vs. Udaipur Dugdh Utpadak Sahkari Sangh Limited reported in 2014 366 ITR 163 Rajasthan, which may kindly be allowed.

4. The Assessee craves right to add, alter or amend any of the grounds of appeal."

3. Apropos Ground No. 1 and 2 of the assessee, the facts as emerges from the order of the ld. CIT(A) are as under:-

7. Grounds of appeal are against the order dated 25.11.2022 passed u/s 154 of the IT Act, 1961 by the CPC for A.Y. 2020-21 regarding addition of Rs.6,98,230/- which was made u/s 154 by invoking the provisions of Section 36(1)(va) of the Income Tax.

7.1 In this regard, it is pertinent to mention here that to provide clarity and certainty on non-applicability of section 43B on employees' contribution to specified funds, the Budget, 2021 has proposed to amend the provisions of section 36(1)(va) and section 43B as under:

> *"(a) amend section 36(1)(va) of the Act by inserting another explanation 2 to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the due date under this clause; and*
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> *amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub- clause (x) of clause (24) of section 2 applies."*

The language of newly proposed explanation 2 to section 36(1) (va) and explanation 5 to section 43B makes it clear that the amendment is retrospective.

7.1.1 The rational of the amendment was explained by the Memorandum to the Finance Bill, 2021 as below:

> *"There is a distinct ion between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-sect ion (1) of Sect ion 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions."*

7.2 It is also relevant to mention here that the Hon'ble Supreme Court judgment in the case of Checkmate Services Pvt. Ltd. vs Commissioner of Income Tax-I (C.A. No. 2383 of 2016-SC), while superseded the judgment in the case of CIT vs. Alom Extrusion Ltd. [2009] 185 Taxman 416 (SC), the prolonged ambiguity about whether employees' contribution can be deposited before the due date of filing of return or it has to be deposited on or before the due date mentioned in such acts, has been settled. The relevant extract of the judgment of the Apex Court is as under:

> *"In the opinion of this Court, the reasoning in the impugned judgment that the nonobstante 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 nonobstante 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 assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non- obstante clause under 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".*

7.3 In view of the facts of the case and also in view of retrospective amendments made by the Finance Act, 2021 to section 36(1) (va) and section 43B, and the judgment of Hon'ble supreme court in the case of Checkmate Services Pvt. Ltd. vs Commissioner of Income Tax-I (C.A. No. 2383 of 2016 - SC , the contentions made in the submissions are not found acceptable and the disallowance of Rs. 6,98,230/- made by AO, CPC, for not depositing of employee's contribution to the PF and ESIC covered under section 36(1)(va) r.w.s. 2(24)(x) of "the Act" but paid to the respective funds after the due dates as specified by rules of relevant funds are correctly held as deemed income and, therefore, the disallowance is hereby confirmed as the said late payments are not covered under 43B of the Act. Accordingly, this appeal against the disallowance for deduction claimed amounting to Rs. 6,98,230/- which was delayed as per the respective Act is dismissed.

8. In the result the appeal of the appellant is dismissed."

4. The ld. DR supported the order of the ld. CIT(A).

5. The Bench heard the Ld DR and perused the materials available on record including the submissions of the assessee and case laws cited by both the parties. In this case, it is noted that the appeal against the disallowance for deduction claimed the amount of Rs 6,98,230 /- on the ground that the assessee failed to deposit the same on or before the due date as specified under Employees State Insurance Act, 1948 and Employees Provident Funds & Insurance Act, 1952 which has been confirmed by the ld. CIT(A). It is not imperative to repeat the facts of the case and the case laws cited by both the parties. The Bench has observed that the recently the Hon'ble Supreme Court has opined in the case of Checkmate Services

Pvt. Ltd. vs CIT-1, 143 Taxmann.com 178 (SC)/Civil Appeal No. 2833 of 2016 held that the provision of Section 43B of the Act shall not apply to employee's contribution to PF/ESI and the due date specified u/s 36(1)(va) of the Act shall apply for determination of deductibility of employee's contribution to PF/ESI. The relevant portion of the Judgement of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs CIT-1 (supra) is reproduced as under:-

> ''53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.
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> 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 assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under 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 interfere with the impugned judgment. The appeals are accordingly dismissed.''

Similar issue has also been decided by the Hon'ble Supreme Court in the case of PCIT vs Strides Arcolab Ltd. vide its order dated 29-11-2022 (Civil Appeal No.9009 of 2021 [2023] 147 taxmann.com 202 SC)]. The relevant head note is reproduced as under:-

> Section 36(1)(va), read with section 2(24) and 43B of the Income Tax Act – Employee's contributions (PF/ESI) – High Court by impugned order held that Tribunal was correct in deleting disallowance made under section 36(1)(va) being employee's contribution to Provident Fund and ESI even though same were not deposited in respective fund within stipulated time – Apex Court in case of Checkmate Services (P) Ltd. vs CIT [2022] 143 taxmann.com 178/ [2023] 290 Taxman 19/[2022] 448 ITR 518/2022 SCC Online Sc 1423, held that non obstante clause under section 43B could not apply in case of employee's contribution which were deducted from their income and was not part of assessee-employer's income and, thus, said clause would not absolve assessee-employer from its liability to deposit employee's contribution on or before due date as a condition for deduction. – Whether in view of the said judgement of Supreme Court, impugned order of High Court was to be set aside – Held , yes [Para 4) [In favour of Revenue]

For the sake of convenience and brevity of the case, the order passed by the Supreme Court in the case of PCIT vs Strides Arcolab Ltd. (supra) is also reproduced as under:-

> ''1.Leave granted.
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> 2. As per the Office record, Service is complete on the sole respondent but none has entered appearance on behalf of the Respondnet Assessee.

> 3. Mr. Balbir Sharma, learned Additional Solicitor General appearing for the appellant submits that the issue involved in this appeal is squarely answered in favour of the Revenue by a Three-Judge Bench of this Court vide judgement dated 12-10-2022 in Checkmate Services (P) Ltd. vs CIT [2022] 143 taxmann.com 178/[2023] 290 Taxman 19/[2022] 448 ITR 518/2022 SCC Online SC 1423
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> 4. In view of the above, the impunged judgement dated 22-03-2019 passed by the High Court of Judicature at Bombay is set aside and the appeal is allowed in terms of the cited decision.''

It may be mentioned that similar issue has also been decided by the ITAT Delhi Bench in favour of the Revenue in the case of Salveen Kaur Vs Income Tax Office vide its order darted 9th January 2023 (in IT Appeal Nos. 2197,2249, 2250 and 2293 (Delhi) of 2022 – A.Y. 2017-18 to 2019-20 [2023] 147 taxmann.co. 402 (Delhi-Trib) by observing as under:-

> ''4. The undisputed fact in the captioned appeals is that there was a delay in depositing the employees' contribution and the contribution has been deposited beyond the date stipulated under the relevantFund Act.
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> 5. Though the quarrel is no more res integra, as it has been settledby the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd 143 Taxmann.com 178. But, before us, the decision ofthe co-ordinate bench at Mumbai has been placed in the case of PRPackaging Service in ITA No. 2376/MUM/2022 and it has been seriouslyargued that the co-ordinate bench has considered the decision of theHon'ble Supreme Court and yet decided the quarrel in favour of theassessee and against the Revenue.
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> 6. Another argument taken before us is that the disallowance made by the CPC Bengaluru while processing the return u/s 143(1) of the Act is beyond the scope of provisions of section 143(1(a) of the Act and,therefore, cannot be sustained.

7. We have carefully perused the decision of the co-ordinate bench in the case of M/s P R Packaging Services [supra]. We find that the co-ordinate bench has not given any independent finding but has simply relied upon another decision of the co-ordinate bench in the case of Kalpesh Synthetics Pvt Ltd 195 ITD 142 wherein the co-ordinate bench has based its decision on the interpretation and binding decision of the Hon'ble Jurisdictional High Court. In the case of Kalpesh Synthetics Pvt Ltd [supra], the Tribunal has held that the CPC Bengaluru cannot override the binding decision of the Hon'ble Bombay High Court while making the impugned disallowance on account of delay in the deposit of employees' contribution to PF/ESI.

8. It would be apt to refer to the relevant part of the decision of the Tribunal in the case of Kalpesh Synthetics [supra] followed in P R Packaging Service [supra] wherein it has been held as under:-

> *"8. When the law enacted by the legislature has beenconstrued 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 any other manner than as read by the Hon'ble jurisdictional High Court. The views expressed by the tax auditor in sucha situation, cannot be reason enough to disregard the binding views of the Hon'ble jurisdictional Court. To that extent, the provisions of section 143(1)(a)(iv) must be read down. 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". 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, also important to bear in mind the fact that what constitutes jurisdictionalHigh Court will essentially depend upon the location of the jurisdictional Assessing Officer. While dealing with jurisdiction for the appeals, rule 11(1) 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" Thensitus 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 theCPC is within the jurisdiction of Hon'ble Bombay High Court or not, as for the regular Assessing Officer of the assesseeand the assessee are located in the jurisdiction of Hon'bleBombay 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 tothe Assessing Officer CPC to take a view contrary to the view taken by the Hon'ble jurisdictional High Court- moreso when his attention was specifically invited to bindingjudicial precedents in this regard. For this reason also, the inputs in question in the tax audit report cannot be reason enough to make the impugned disallowance. The assesseemust succeed for this reason as well."

9. With our utmost respect to the findings of the co-ordinate bench [supra], we are of the considered view that the co-ordinate bench has ignored the binding ratio decidendi of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd [supra]. It would be pertinent to refer to the most relevant observations of the Hon'ble Supreme Court on the impugned quarrel which read as under:-

"32. The scheme of the provisions relating to deductions, such as Sections 32 - 37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfillment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection.

In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of Section 36 (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act,1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of "income" – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions,or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e.,

depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

33. The significance of this is that Parliament treated contributions under Section 36(1)(va) differently from those under Section 36(1)(iv). The latter (hereinafter, "employers'contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

34. It is therefore, manifest that the definition of contribution in Section 2 (c) is used in entirely different senses, in the relevant deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification under the IT Act, between the two.

35. It is instructive in this context to note that the Finance Act,1987, introduced to Section 2(24), the definition clause (x), with effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill,1987, presented to the Parliament, is extracted below:

"Measures of penalising employers mis-utilising contributions to the provident fund or any funds set upunder the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees

12.1. The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section 43B).The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. "Due date"means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise.

(Explanation to Section 36 (1) of the Finance Act)

12.2. In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due date. Where such income is not chargeable to tax under the head "profits

and gains of business or profession" it will be assessed under the head "income from other sources."

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44. There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B,which mandated that unless the amount of employers'contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available.

45. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va).Furthermore, the separate provisions in Section 36(1) foremployers' contribution and employees' contribution, too went unnoticed. The court observed inter alia, that:

"15. …It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare fundsof employee(s) on the other. This is one more reason whywe hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in Allied Motors (P)Limited (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003 will operate retrospectively with effectfrom 1st April, 1988 [when the first proviso stoodinserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to theassessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year] but before filing of the Returns under the Income Tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act,they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under Section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April,2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under Section 43B of the Act. In our view, therefore, Finance Act, 2003,to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April,2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003".

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48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. Eagle Flask Industries Ltd Vs. Commissioner of Central Exercise 2004Supp (4) SCR

35. This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations.

49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in State of Jharkhand v Ambay Cements as follows:
"23…. In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed onaccount of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

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

54. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions-which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income,monies, only deemed to be income, with the

object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income,is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date."

10. In our understanding, the aforementioned binding observations of the Hon'ble Supreme Court cannot be brushed aside simply because the decision was rendered in the context where the assessment was framed u/s 143(3) and not u/s 143(1)(a) of the Act. In our considered opinion, the decision of the Hon'ble Supreme Court is in the context of allowability of deposit of PF/ESI after due date specified in the relevant Act.

11. The Hon'ble Supreme Court has categorically held that the employees' contribution deposited after respective due date cannot be allowed as deduction, and, therefore, it would be incorrect to say that the decision of the Hon'ble Supreme Court is applicable only in the case of an assessment farmed u/s 143(3) of the Act. In our considered view, the ratio decidendi is equally applicable for the intimation framed u/s 143(1) of the Act.

12. Now coming to the challenge that the impugned adjustment is beyond the powers of the CPC Bengaluru u/s 143(1) of the Act is also not correct. In light of the aforementioned decision of the Hon'ble Supreme Court [supra], as mentioned elsewhere, it cannot be stated that the impugned adjustment u/s 143(1) of the Act is beyond the powers of the CPC, Bengaluru.

13. The provisions of section 143(1)(a) read as under:-

"143(1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of Section143, 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 [or increase in income]indicated in the audit report but not taken into account in computing the total income in the return;

(v) Disallowance of deduction claimed under [section 10AA or under any of the provisions of Chapter VI-A under the heading "C.-Deductions in respect of certain income", 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;"

13.1 A perusal of the afore-stated provisions show that at every stage in sub-section (1) of the Act, the return submitted by the assessee forms the foundation, with respect to which, if any of the inconsistencies referred to in various sub-clauses are found,appropriate adjustments are to be made. It is an open secret that hardly 3 to 5% of the returns are selected for scrutiny assessment, out of which, more than 50% are because of AIR Information under CASS and the Assessing Officer cannot go beyond the reasons for scrutiny selection and such cases are called Limited Scrutiny cases and only the remaining returns are taken up for complete scrutiny u/s 143(3) of the Act.

13.2 Meaning thereby, that exercise of power under sub-section (2) of section 143 of the Act leading to the passing of an order under sub-section (3) thereof, is to be undertaken where it is considered necessary or expedient to ensure that the assessee has not understated income or has not computed excessive loss, or has not under paid the tax in any manner.

14. If any narrow interpretation is given to the decisions of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd [supra], it would not only defeat the very purpose of the enactment of the provisions of section 143(1) of the Act but also defeat the very purpose of the Legislators and the decision of the Hon'ble Supreme Court would be made redundant because there would be discrimination and chaos, in as much as, those returns which are processed by the CPC would go free even if the employees' contribution is deposited after the due date and in some cases the employer may not even deposit the employees' contribution and those whose returns have been scrutinized and assessed u/s 143(3) of the Act would have to face the disallowance.

15. This can neither be the intention of the Legislators nor the decision of the Hon'ble Supreme Court has to be interpreted in such a way

> so as to create such discrimination amongst the tax payers. Such interpretation amounts to creation of class [tax payer] within the class [tax payer] meaning thereby that those tax payers who are assessed u/s 143(3) of the Act would have to face disallowance because of the delay in deposit of contribution and those tax payers who have been processed and intimated u/s 143(1) of the Act would go scot- free even if there is delay in deposit of contribution and even if they do not deposit the contribution.
>
> 16. We are of the considered view that the ratio decidendi of the Hon'ble Supreme Court is equally applicable to the intimation u/s 143(1) of the Act and, therefore, the decision of the co-ordinate bench relied upon by the assessee is distinguishable. Therefore, respectfully following the binding decision of the Hon'ble Supreme Court [supra], all the three appeals of the assessee are dismissed and that of the revenue is allow
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> 17. In the result, all the three appeals of the assessee in ITA No. 249/DEL/2022, 2250/DEL/2022 and 2197/DEL/2022 are dismissed whereas the appeal of the Revenue in ITA No. 2293/DEL/2022 is allowed.''

In view of the above deliberations and the decision taken by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1(supra), PCIT vs Strides Arcolab Ltd. and also the decision of ITAT Delhi Bench in the case of Savleen Kaur (supra), the Bench sustains the addition confirmed by the ld. CIT(A) and ground No. 1 & 2 of appeal of the assessee are dismissed.

In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 18/12/2023.

Sd/-	Sd/-
(राठोड कमलेश जयन्तभाई)	(डॉ.एस.सीतालक्ष्मी)
(RATHOD KAMLESH JAYANTBHAI)	(Dr. S. Seethalakshmi)
लेखा सदस्य /Accountant Member	न्यायिक सदस्य/Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 18/12/2023
*Ganesh Kumar, PS
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. The Appellant- SM Workforce Private Limited, Bhiwadi
2. प्रत्यर्थी / The Respondent- ITO, Ward, Bhiwadi
3. आयकर आयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File ITA No. 426/JPR/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar