IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

Before: Smt. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member

ITA No: 310/Ahd/2022 for Asst. Year: 2020-21 &
ITA Nos: 311 & 312/Ahd/2021 for Asst. Years: 2018-19 & 2019-20

Jai Prakash Choudhary S-5, Dev Commercial Centre, Near Nathubhai Circle Gotri Road, Vadodara Gotri Road, Vadodara-390007 **PAN: ACZPC4345F** **(Appellant)**	Vs	The ADIT, CPC, Bengaluru **(Respondent)**

Assessee Represented: Shri Rohan Sogani, A.R.
Revenue Represented: Shri Santosh Kumar, Sr.D.R.

Date of hearing : 28-02-2024
Date of pronouncement : 29-02-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

These three appeals are filed by the Assessee as against three separate appellate orders dated 16.06.2022 & 01.10.2021 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, (in short referred to as "CIT(A)"), arising out of the Intimation passed under section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Years (A.Ys) 2020-21, 2018-19 & 2019-20. Since

common issue of disallowance u/s. 36(1)(va) of the Act is involved in all these appeals, the same are disposed of by this common order.

2. **ITA No. 312/Ahd/2021** is taken as the lead case. The brief facts of the case is that the assessee is an individual and deriving income from business and other sources. For the Assessment Year 2019-20, the assessee filed his Return of Income on 22.10.2019 declaring total income of Rs.25,72,090/-. The return was processed u/s. 143(1) dated 01.05.2020 wherein the CPC made disallowance of Rs.20,37,680/- being the late payment of Employees' Provident Fund and ESI Fund to the concerned authorities resulting in a tax demand of Rs.7,59,150/-.

3. Aggrieved against the same, the assessee filed an appeal before Ld. NFAC which was dismissed by a detailed order and following Jurisdictional High Court Judgment held as follows:

> *"4.3 I have considered the matter. The assessee had pointed out a number of judicial decisions wherein it is held that employees' contribution of PF and ESI shall be allowed if the same is deposited before the due date of filing income-tax return u/s 139(1) of the Act. But none of them pertained to decision of Hon'ble Jurisdictional ITAT or Hon'ble Gujarat High Court. The Hon'ble Jurisdictional Gujarat High Court, in the case of Commissioner of Income tax-II vs. Gujarat State Road Transport Corporation (2014) 44 taxmann.com 100 (Gujarat) had held that employees' share of PF/ESI not deposited within the date prescribed in explanation to section 36(1)(va) cannot be allowed. Concluding paras of the Hon'ble Court's judgment are extracted as under:*
>
> > *8. In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it is held that with respect to the 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 assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or*

> *funds on or before the "due date" mentioned in explanation to section 36(1)(va). Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account/ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation to section 36(1)(va) of the Act ie. date by which the concerned assessee was required as an employer to credit employees' contribution to the employees' account in the Provident Fund under the Provident Fund Act and/or in the ESI Fund under the ESI Act.*
>
> *9. Consequently, all these appeals are allowed and the impugned judgment and orders passed by the tribunal in deleting the disallowances made by the AO are hereby quashed and set aside and the disallowances of the respective sums with respect to the Provident Fund/ESI Fund made by the AO is hereby restored. The questions raised in present appeal are answered in favour of the revenue. With this, all these appeals are allowed"*

The decision of Hon'ble Jurisdictional High Court is squarely binding on me. It has to be given precedence over decisions of other High Courts and Tribunals and the same has to be followed only.

3.1. The assessee's second limb of argument namely the disallowance being a debatable issue, the same could have been made in the Intimation u/s. 143(1)(a)(iv) of the Act. The Ld. CIT(A) considered the above submissions of the assessee and held as follows:

> *".....The list of disallowances possible u/s 143(1) can be seen from extract of relevant parts of the said section*
>
> *143. [(1) Where a retum has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:-*
>
> *(a) the total income or loss shall be computed after making the following adjustments, namely:-*
>
> *(i) any arithmetical error in the return; 22[]*
>
> *(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return,*

23 [(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 23a[or increase in income] indicated in the audit report but not taken into account in computing the total income in the return,

……

Therefore, in processing the return, the Assessing Officer can several types of adjustments which includes, amongst others, incorrect claim apparent from information in the return and disallowances indicated in the audit report but not taken into account in computation of income. In this regard, it will be in the fitness of things to refer to the provision of section 36(1)(va) again. The same is extracted below

[(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

71a [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 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.]

71b [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:]

A bare reading of the provision shows that employees' contribution is to be allowed only if the same is credited to their accounts within the due date. The due date is prescribed in the PF/ESI Act itself. In view of this clear cut provision of the Act, the tax auditor is obliged to give details of PF/ESI deducted from employees and to mention the due date of deposit and actual date of deposit. The purpose of the auditor in furnishing the due date of deposit and actual date of deposit can easily be inferred and that is to help the Assessing Officer in disallowing the sum deposited after due date when the return comes up for assessment u/s 143(1) of the Act. The audit report clearly indicated the sum paid by assessee belatedly. Per statute, those sums cannot be allowed. The claim of such expenses can be treated as incorrect claim even u/s 143(1)(a)(ii) of the Act also. It is seen that the assessee is advancing a hyper technical argument in trying to avail of deduction

which is not in accordance with decision taken by Hon'ble Jurisdictional High Court. The claim deserves to be rejected.

4. Aggrieved against the appellate order, the assessee is in appeal before us raising the following Grounds of Appeal:

1. In the facts and circumstances of the case and in law, Ld. CIT (A) has erred in confirming the action of the ld. AO, in making adjustments in the intimation under Section 143(1) which are outside the purview of Section 143(1)(a). The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the entire disallowance of Rs.20,37,680/-.

2. In the facts and circumstances of the case and in law, ld. CIT (A), has erred in confirming the action of the ld. AO, in making disallowance of Rs.20,37,680/- in respect of ESIC and PF u/s 36(1)(va) of Income Tax Act, 1961. The action of the ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the disallowance of Rs.20,37,680/-.

3. The assessee craves its rights to add, amend or alter any of the grounds on or before the hearing.

5. Ld. Counsel for the assessee reiterated the same submissions made before First Appellate Authority and also stated that the adjustment made u/s. 143(1) are not correct in law, since the CPC is not empowered to make such disallowance and therefore requested to quash the Intimations passed by the CPC and prayed to allow assessee's appeal.

6. Per contra Ld. D.R. appearing for the Revenue supported the order passed by the Lower Authorities and further stated that this issue is now settled by Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. Vs. CIT reported in [2022] 143 taxmann.com 178 vide judgment dated 12.10.2022. Thus the disallowance made by the CPC u/s. 143(1) is well within the provisions of law which does not require any interference and the appeals filed by the assessee are liable to be dismissed.

7. We have given our thoughtful consideration and perused the materials available on record. We note that identical issue is dealt by Co-ordinate Bench of this Tribunal and decided against the assessee in ITA No. 342/IND/2022 after taking into account the latest judgment of the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. and the legal provisions of section 143(1)(a) of the Act as follows:

> *"… 5. The assessee is in appeal before us against the order passed by Ld. CIT(Appeals). Before us, the counsel for the assessee submitted that firstly, in the audit report, the auditor has not made any specific observation regarding inadmissibility of the claim u/s 36(1)(va) of the Act which was required to be made by the auditors in the Tax Audit Report and the Auditors have only mentioned the "actual dates" and "due dates" of remittance. Accordingly, in view of the Mumbai ITAT decisions in the case of PR Packaging in ITA number 2376/Mum/2022 and Kalpesh Synthetics 137 Taxmann.com 475 (Mumbai), this claim of deduction u/s 36(1)(va) of the Act cannot be disallowed u/s 143(1) of the Act (more specifically under sub-clause (d) to 143(1) of the Act). Secondly, the counsel argued that the issue at the time when the disallowance was made, issue was debatable and accordingly could not be the subject matter of disallowance under section 143(1) of the Act. In response, DR relied upon the observations made by the Ld. CIT(Appeals) in the appellate order.*
>
> *6. We have heard the rival contentions and perused the material on record. Regarding the argument that the auditors did not specifically mention in the audit report regarding inadmissibility of claim with respect to contributions received from the employees for various funds as referred to in section 36(1)(va) of the Act, it would be useful to reproduce section 143(1) of the Act, which reads as under:*
>
> *Assessment.*
>
> *143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—*
> *(a) the total income or loss shall be computed after making the following adjustments, namely:—*
>
> *i) any arithmetical error in the return;*
>
> *(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;*
>
> *(iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;*
>
> *(iv) disallowance of expenditure [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 69[section 10AA or under any of the provisions of Chapter VI-A under the heading "C.—Deductions in respect of certain incomes", if] the return is furnished beyond the due date specified under sub-section (1) of section 139; or

(vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:

*A perusal of section 143(1) of the Act shows that the words used are "(iv) disallowance of expenditure …**indicated in the audit report**"*

*6.1 Therefore, there is no specific requirement under section 143(1) of the Act that the auditor has to make a specific observation regarding " admissibility/inadmissibility" with regard to any claim of expenditure and all that is required under section 143(1) of the Act is that disallowance of such expenditure should be "**indicated in the audit report**". Now, on going through the specific clauses of the Tax Auditors Report in Form Number 3CD issued under section 44AB of the Act, we observe that serial number 20(b) of Form Number 3CD, which is specific to allowability of claim of deduction u/s 36(1)(va) of the Act, does not require the auditor to make any specific observation regarding admissibility of the amount under section 36(1)(va) of the Act. At the same time, when we observe several other parts of the tax audit report viz. serial number 21(b)-**amounts inadmissible** under section 40(a), serial number 21(c)-**amounts inadmissible** under section 40(b)/40(a)(ia) of the Act (ba), serial number 21(e)- the provision for payment of gratuity **not allowable** under section 40A(7), serial number 21(f)- any sum paid by the assessee as an employer **not allowable** under section 40A(9), serial number 21(h) amount of **deduction inadmissible** in terms of section 14A etc, there is a specific requirement that the auditor has to mention whether the expenditure is admissible/allowable or not. However, so far as section 36(1)(va) of the Act, the audit report does not require the auditor to make a specific observation regarding "admissibility/inadmissibility" of the above expenditure.*

*6.2 Therefore, once the auditor has mentioned the "actual" dates of ESI/PF remittance and the "due" dates of ESI/PF remittance by the assessee u/s 36(1)(va) of the Act at serial number 20(b) of the audit report, then, in our considered view, the requirement of section 143(1) of the Act viz. "disallowance of expenditure ….**indicated** in the tax audit report" stands satisfied and the Department is permitted to make disallowance in terms of section 143(1) of the Act.*

*6.3 With regards to the second argument of the counsel for the assessee that at the time when the disallowance was made, the issue was debatable, we observe that the position on this issue has now been unambiguously clarified by the Hon'ble Supreme Court with respect to all assessment years prior to AY 2021-22 in the case of **Checkmate Services (P.) Ltd. [2022] 143 taxmann.com 178 (SC)** wherein the Supreme Court held that for assessment years prior to AY 2021-22, non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was held in trust by assessee-employer as per section 2(24)(x), 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. The Supreme Court observed that there is a marked difference between nature and character of assessee-employer's contribution and amounts retained*

by assessee from out of employee's income by way of deduction wherein one is liability to be paid by employer and second is deemed income as per section 2(24)(x) which is held in trust by assessee-employer, thus, said marked difference was to be borne while interpreting obligation of assessee-employer under section 43B of the Act. The Hon'ble Supreme held that the non obstante clause under section 43B could not apply in case of amounts which were held in trust as was case of employee's contribution which were deducted from their income and was not part of assessee-employer's income, 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. Again the Supreme Court in the case of ***Harrisons Malayalam Ltd. [2022] 145 taxmann.com 608 (SC)****, dismissed the SLP of the Assessee against order of High Court that where assessee-company failed to pay employees' contribution towards EPF and ESI within due date prescribed in respective Acts, deduction under section 36(1)(va) was not allowable. Recently in the case of* ***Ms. Nalina Dyave Gowda [2023] 146 taxmann.com 420 (Bangalore - Trib.)*** *the assessee during, financial year 2018-19 (assessment year 2019-20) made payment of employees' contribution to ESI and PF beyond due date specified under relevant Act and claimed deduction of same under section 36(1)(va). The Assessing Officer made disallowance of employees' contribution to ESI and PF* ***while electronically processing return of income under section 143(1)(a) of the Act****. The ITAT held that disallowance under section 143(1)(a) was valid in view of Supreme Court's decision in case of Checkmate Services (P.) Ltd. v. CIT [2022] 143 taxmann.com 178 and the assessee will not be entitled to deduction of belated payment of ESI and PF of employees' share of contribution as per provisions of section 36(1)(va) of the Act. Again, recently Pune ITAT in the case of* ***Cemetile Industries v. ITO [2022] 145 taxmann.com 209 (Pune-Trib.)*** *held that where assessee-employer deposited amount of employees contribution towards employees' provident fund and employees' state insurance corporation beyond due date stipulated in respective Acts, disallowance made under section 36(1)(va) was justified. The ITAT further held that adjustment under section 143(1)(a) by means of disallowance made for late deposit of employees' share to relevant funds beyond date prescribed under respective Acts was proper.*

6.4 In view of the above observations respectfully following the decision of the Honourable Supreme Court in the case of Checkmate Services Private Ltd supra and Harrisons Malayalam Ltd supra and in the light of our observations, we hereby dismiss the assessee's appeal.

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

7.1. Further the Hon'ble Supreme Court judgment is being followed by the Apex Court in the case of PCIT vs. Strides Arcolab Ltd. reported in [2023] 147 taxmann.com 202 (SC) and Harrisons Malayalam Ltd. Vs. CIT reported in [2022] 145 taxmann.com 608 following Checkmate Services (P.) Ltd. 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.

8. The next contention of the assessee CPC should not have made the disallowance u/s. 36(1)(va) in 143(1) proceedings which is a debatable and controversial issue by different High Courts. In this connection, the provisions of Section 143(1)(a) deals with the total income or loss shall be computed after making the following adjustments namely "(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return", being an incorrect claim made by the assessee, which is apparent from the information filed in the Return of Income and Audit Report, thus the CPC rightly made the disallowance, which is well within the provisions of law.

8.1. Further the Co-ordinate Bench of the Delhi Tribunal in the case of Savleen Kaur vs. ITO in ITA No. 2249/DEL/2022 dated 09-01-2023 considered the Checkmate Services (P.) Ltd. Supreme Court Judgment and the provisions of Section 143(1)(a) held as follows:

> *".... 12. 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. Meaning thereby, that exercise of power under sub-section (2) of section 143 of the Act leading to the passing of an order under subsection (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 allowed."

9. Respectfully following the above decisions of the Hon'ble Supreme Court and other Co-ordinate Benches of the Tribunal, we are of the considered view, the disallowance of late payment of PF & ESIC made u/s. 143(1) is valid in law. Thus the grounds of appeal raised by the assessee are devoid of merits. The case laws relied by the assessee are prior to the judgment passed by the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. Thus the grounds raised by the assessee are hereby dismissed.

10. In the result, the appeal filed by the Assessee is hereby dismissed.

11. **ITA Nos. 310/Ahd/2022 & ITA 311/Ahd/2021** are also on the same disallowance made u/s. 36(1)(va) in the 143(1) proceedings of the Act. For the detailed reasons stated in ITA No. 312/Ahd/2021, respectfully following the same the present appeals filed by the Assessee are also hereby dismissed.

12. In the combined result, all the appeals filed by the Assessee are hereby dismissed.

Order pronounced in the open court on 29-02-2024

Sd/- **Sd/-**
(ANNAPURNA GUPTA) **(T.R. SENTHIL KUMAR)**
ACCOUNTANT MEMBER True Copy JUDICIAL MEMBER
Ahmedabad : Dated 29/02/2024

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद