आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए" , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

HEARING THROUGH: PHYSICAL MODE

श्री विक्रम सिंह यादव, लेखा सदस्य एवं श्री परेश म. जोशी, न्यायिक सदस्य
BEFORE: SHRI. VIKRAM SINGH YADAV, AM & SHRI. PARESH M. JOSHI, JM

आयकर अपील सं. / ITA NO. 274/Chd/2022
निर्धारण वर्ष / Assessment Year : 2018-19

M/s Barnala Builders and Consultant, C/o Parikshit Aggarwal, Chartered Accountant, H.No. 3035, Sector 27D, Chandigarh	बनाम	The DCIT, CPC Bengaluru
स्थायी लेखा सं. /PAN NO: AAHFB0806E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Parikshit Aggarwal, C.A
राजस्व की ओर से/ Revenue by : Smt. Amanpreet Kaur, Sr. DR

सुनवाई की तारीख/Date of Hearing : 30/04/2024
उदघोषणा की तारीख/Date of Pronouncement : 07/05/2024

आदेश/Order

PER PARESH M. JOSHI, J.M. :

This is an appeal filed by the Assessee against the order of the Ld. CIT(A)-3, Gurgaon dt. 27/12/2021 wherein the limited issue relates to sustenance of disallowance of employees contribution towards PF / ESI under section 36(1)(va) of the Act pertaining to A.Y. 2018-19. Be it noted that this Hon'ble Tribunal vide their order dt. 18/09/2023 had allowed the application of Department for recall in M.A. No. 9/Chd/2023 in ITA No. 274/Chd/2022 for the A.Y. 2018-19.

2. Briefly the facts of the case are that the assessee filed its return of income declaring total income of Rs. 79,00,220/- on 06/10/2018. The return was processed by the CPC and order under section 143(1) dt. 19/11/2019 was passed wherein the disallowance Rs. 2,46,952/- invoking the provisions of Section 143(1)(a)(iv) was made for fault of the assessee to pay the employees contribution to PF/ESI before the prescribed due date under the relevant statue. Against the said intimation and the disallowance so made under section

36(1)(va) r.w. s 143(1)(a)(iv) of the Act, the assessee filed an appeal before the Ld. CIT(A)-3 Gurgaon. As per the Ld. CIT(A), the employees contribution can be allowed as deduction only where it had been paid within prescribed due date under the relevant welfare funds and this is the position of law and has always been the case as apparent from the clarification brought in by the amendment to the provision which apply retrospectively. It was accordingly held that the disallowance of Rs. 2,46,952/- made under section 143(1) by the CPC on account of assessee's failure to pay the employees contribution of PF / ESI within the prescribed due date as per the Section 36(1)(va) of the Act is strictly in accordance with law and clearly comes under the prima facie adjustment as envisaged under section 143(1)(a)(iv) of the Act and therefore the order passed under section 143(1) by the CPC was confirmed.

3. Against the said findings and the direction of the Ld. CIT(A)-3, Gurgaon, the assessee is in appeal before us.

4. During the course of hearing, the Ld. AR submitted that the assessee deposited the contribution of Rs. 2,46,952/- towards PF/ESI belatedly, however, the said deposits were made prior to filing of return of income under section 139(1) of the Act.

4.1 It was further submitted that the assessee appreciates that the legal position has changed now after the decision of Hon'ble Supreme Court in case of Checkmate Services P. Ltd. & Ors. Vs. CIT & Ors. (2022) 448 ITR 518 (SC) and the assessee bows before the decision of Hon'ble Supreme Court. It was submitted that the assessee appreciates that the Parliament in its wisdom has treated the contribution of employers and employees under different provisions of Income Tax Act, and which has been upheld by the Hon'ble Supreme Court. It was submitted that the idea behind introduction of Section 36(1)(va) was that the employees contribution is held in trust by the employer and to prevent its

misuse, it has to be allowed as deduction only where the payment is made by due date under the relevant statue. It was submitted that the assessee appreciates the concern of legislature and despite financial constraints, wants to pay at least employees contribution by due date under the relevant statue, as this is the amount held by him under trust. However despite his best efforts, the assessee was not able to deposit the same, as no corresponding enabling mechanism has been made in the EPF Scheme and ESI Regulation by the executive as also reproduced in the order of the Hon'ble Supreme Court at para 6 and 7 in case of Checkmate Services P. Ltd. & Ors. Vs. CIT & Ors.(supra) which provide for payment of employee's contribution and employer contribution together and do not allow separate and independent payment of employer and employee contribution. It was submitted that this aspect of the lack of enabling mechanism for making separate payment of employer and employees contribution has not been considered in the decision of the Hon'ble Supreme Court in case of Checkmate Services P. Ltd. & Ors. Vs. CIT & Ors.(supra).

4.2 It was submitted that the Hon'ble Karnataka High Court in case of Essae Teraoka (P.) Ltd. Vs. DCIT reported in 366 ITR 408(Kar.) has held as under:

> *"20. Paragraph-38 of the PF Scheme provides for Mode of payment of contributions. As provided in sub para (1), the employer shall, before paying the member, his wages, deduct his contribution from his wages and deposit the same together with his own contribution and other charges as stipulated therein with the provident fund or the fund under the ESI Act within fifteen days of the closure of every month pay. It is clear that the word "contribution" used in Clause (b) of Section 43B of the IT Act means the contribution of the employer and the employee. That being so, if the contribution is made on or before the due date for furnishing the return of income under subsection (1) of Section 139 of the IT Act is made, the employer is entitled for deduction. "*

4.3 It was submitted that it is a settled law that in case the Government fails to make rules for implementation of a constitutional provision, the Constitution mechanism fails and no action can be taken by the Government against any

person in that regard. It was accordingly submitted that making disallowance under section 36(1)(va) will amount to punishing the assessee for no fault on his part. Rather, the assessee is made to incur not only additional tax liability on genuine expenditure incurred but has to also pay heavy interest and other penal charges under PF/ESI Act. It was submitted that this is against all canons of justice and of course against the concept of ease of doing business. It was accordingly submitted that the appeal of the assessee may kindly be allowed and Karnataka High Court decision should prevail till such time amended rules are notified under relevant statutes.

5. Per contra, the Ld. DR has relied on the order of the Ld. CIT(A)-3, Gurgaon and submitted that the Ld. CIT(A) has passed a very detailed and speaking order upholding the disallowance under section 36(1)(va) of the Act. It was further submitted that the matter is now squarely covered against the assessee by the decision of Hon'ble Supreme Court in case of Checkmate Services P. Ltd. & Ors. Vs. CIT & Ors.(supra) which has set-aside the decision of the Hon'ble Karnataka High Court Essae Teraoka (P.) Ltd and various other High Courts where the employees contribution were equated with employer contribution and benefit of section 43B were provided to the assessee. He accordingly submitted that the appeal so filed by the assessee deserves to be dismissed and the order of the Ld. CIT(A), NFAC be confirmed.

6. We have considered the rival submissions and perused the material available on the record. We find that the matter is squarely covered by the decision of Hon'ble Supreme Court in case of **Checkmate Services P. Ltd.** & Ors. Vs. CIT & Ors.(supra) wherein after taking into consideration the relevant provisions of the Act as well as the provisions of relevant welfare ESI/PF schemes, it was held that the contribution by the employees to the relevant funds is the employer's income under section 2(24)(x), but the deduction for the same can be allowed under section 36(1)(va) only if such sum is deposited in the

employee's account in the relevant fund before the date stipulated under the respective Act and as rightly pointed out by the DR that the ratio laid down by the Hon'ble Karnataka High Court stand overruled by the decision of the Hon'ble Supreme Court and the same doesn't support the case of the assessee.

6.1. Further, in the context of disallowance made by CPC while processing the return of income and specially in the context of 143(1)(a)(iv) as relevant in the instant case, we find that the matter is squarely covered by the decision of Coordinate Pune Bench in case of **Cemetile Industries** & Ors. Vs. ITO & Ors *(in ITA No. 693/PUN/2022 dt. 23/11/2022)* and the relevant findings read as under:

> *5. Adverting to the facts of the case, it is seen that the assessee claimed the deduction for the employees' share for depositing the same in the relevant funds beyond the due date as given in Explanation 1 to section 36(1)(va) on the strength of section 43B. The latter section opens with a non-obstante clause and provides that a deduction otherwise allowable in respect of: `(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees' shall be allowed only in that previous year in which such sum is actually paid. The first proviso to section 43B states that: `nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.' The main provision of section 43B, providing for the deduction only on actual payment basis, has been relaxed by the proviso so as to enable the deduction even if the payment is made before the due date of furnishing the return u/s 139(1) of the Act for that year. The claim of the assessee is that the deduction becomes available in the light of section 36(1)(va) read with section 43B on depositing the employees' share in the relevant funds before the due date u/s 139(1) of the Act. This position was earlier accepted by some of the Hon'ble High Courts holding that the deduction is allowed even if the assessee deposits the employees' share in the relevant funds before the date of filing of return u/s.139(1) of the Act. This was on the analogy of treating the employee's share as having the same character as that of the employer's share, becoming deductible u/s 36(1)(iv) read in the hue of section 43B(b). Recently, the Hon'ble Supreme Court in Checkmate Services P. Ltd. & Ors. VS. CIT & Ors. (2022) 448 ITR 518 (SC) has threadbare considered this issue and drawn a distinction between the parameters for allowing deduction of employer's share and employees' share in the relevant funds. It has been held that the contribution by the employees to the relevant funds is the employer's income u/s.2(24)(x), but the deduction for the same can be allowed only if such amount is deposited in the employee's account in the relevant fund before the date stipulated under the respective*

Acts. The hitherto view taken by some of the Hon'ble High Courts in allowing deduction even where the amount was deposited in the employee's account before the time allowed u/s.139(1), ergo, got overturned. The net effect of this Apex Court judgment is that the deduction u/s.36(1)(va) can be allowed only if the employees' share in the relevant funds is deposited by the employer before the due date stipulated in respective Acts and further that the due date u/s.139(1) of the Act is alien for this purpose.

6. There is no quarrel that the enunciation of law by the Hon'ble Supreme Court is always declaratory having the effect and application ab initio, being, the date of insertion of the provision, unless a judgment is categorically made prospectively applicable. The ld. AR candidly admitted that this judgment will equally apply to the disallowance u/s.36(1)(va) anent to all earlier years as well for the assessments completed u/s.143(3) of the Act. He, however, accentuated the fact that the instant batch of appeals involves the disallowance made u/s.143(1) of the Act. It was argued that no prima facie adjustment can be made in the Intimation issued u/s 143(1) of the Act unless a case is covered within the specific four corners of the provision. It was stressed that the action of the AO in making the extant disallowance does not fall in any of the clauses of section 143(1).

7. We fully agree with the proposition bolstered by the ld. AR that adjustment to the total income or loss can be made only in the terms indicated specifically u/s.143(1) of the Act. Now, we proceed to examine if the case falls under any of the clauses. The rival parties are consensus ad idem that the case can be considered as falling either under clause (ii) or (iv) of section 143(1). For ready reference, we are extracting the relevant provision as under:

'143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—

(a) the total income or loss shall be computed after making the following adjustments, namely:—

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(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'

8. Sub-section (1) of section 143 states that a return shall be processed to compute total income by making six types of `adjustments' as set out in sub-clauses (i) to (vi). As noted supra, we are concerned only with the examination of two sub-clauses, viz., (ii) and (iv). Sub-clause (ii) talks of 'an incorrect claim, if such incorrect claim is apparent from any information in the return". The expression "an incorrect claim apparent from any information in the return" has not been generally used in the provision. Rather, it has been specifically defined in Explanation (a) to section 143(1) as under:

`Explanation.—For the purposes of this sub-section,—

(a) "an incorrect claim apparent from any information in the return" shall mean a claim, on the basis of an entry, in the return,—

(i) of an item, which is inconsistent with another entry of the same or some other item in such return; (ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or

(iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction;'

9. Clause (i) of Explanation (a) refers to a situation in which there is a claim of income or expenditure at two places in the return of income and there is inconsistency in them. For example, if deduction is claimed under a specific section for a sum of Rs.100/- in the Profit and loss account accompanying the return, but in the computation of income, the amount has been taken as Rs.110/-, leading to inconsistency, requiring an adjustment. Clause (ii) of Explanation (a) covers a situation in which claim is made, say, for a deduction u/s.80IA for which audit report is required to be furnished, but such report has not been furnished along with the return. Clause (iii) contemplates a situation in which deduction exceeds specified statutory limit. For example, section 24(a) provides for a standard deduction for a sum equal to 30% of the annual value, but the assessee has claimed deduction at 40%. These situations warrant an adjustment. It is obvious that none of the three clauses of Explanation (a), defining an incorrect claim apparent from any information in the return, gets magnetized to the facts of the present case.

10. Now we turn to clause (iv) of section 143(1)(a) which provides for `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'. The words "or increase in income" in the above provision were inserted by the Finance Act, 2021 w.e.f. 01-04-2021. As such, this part of the provision cannot be considered for application during the years under consideration, which are anterior to the amendment. We are left with ascertaining if the disallowance made u/s 36(1)(va) in the Intimation under section 143(1)(a) can be construed as a `disallowance of expenditure indicated in the audit report not taken into account in computing the total income in the return'. Point 20(b) of the audit report in Form 3CA has columns – Serial number; Nature of fund; Sum received from employees; Due date for payment; The actual amount paid; and The actual date of payment to the concerned authorities. A copy of audit report in one of the cases under consideration, namely, S.M. Auto Stamping Pvt. Ltd. (ITA No.521/PUN/2022) has been placed on record. Point 20(b) of the audit report gives the `Sum received from employees' at Rs.21,800/-. `Due date for payment' has been reported as 15-07-2017 and `The actual date of payment to the concerned authorities' has been given as 20-07-2017. Similar is the position regarding other items disallowed u/s.36(1)(va) having `The actual date of payment' after the `Due date for payment'. Thus, it is manifest that the audit report clearly points out that as against the due date of payment of the employees' share in the relevant fund on 15.7.2017 for deduction u/s 36(1)(va), the actual payment is delayed and deposited on 20.7.2017. The legislature, for the disallowance under sub-clause (iv) of section 143(1)(a), has used the expression `indicated in the audit report'. The word `indicated' is wider in amplitude than the word `reported', which envelopes both the direct and indirect reporting. Even if there is some indication of disallowance in the audit report, which is short of direct reporting of the disallowance, the case gets

covered within the purview of the provision warranting the disallowance. However, the indication must be clear and not vague. If the indication in the audit report gives a clear picture of the violation of a provision, there can be no escape from disallowance. Turning to the facts of the case, it is clear from the mandate of section 36(1)(va) that the employees' share in the relevant funds must be deposited before the due date under the respective Acts. If the audit report mentions the due date of payment and also the actual date of payment with specific reference in column no. 20(b) having heading: `Details of contributions received from employees for various funds as referred to in section 36(1)(va)', it is an apparent indication of the disallowance of expenditure u/s 36(1)(va) in the audit report in a case where the actual date of payment is beyond the due date. Though the audit report clearly indicated that there was a delay in the deposit of the employees' share in the relevant funds, which was in contravention of the prescription of u/s.36(1)(va), the assessee chose not to offer the disallowance in computing the total income in the return, which rightly called for the disallowance in terms of section 143(1)(a) of the Act.

11. The ld. AR vehemently argued that it was a case of "increase in income" which has been enshrined in clause (iv) of section 143(1)(a) w.e.f. 01-04-2021 and hence cannot be take note of for the year under consideration. In our considered opinion, the contention is ill-founded. We have noted above that clause (iv) of section 143(1)(a) talks of two different limbs, namely, `disallowance of expenditure' and `increase in income' by means of indication in the audit report. Both the limbs are independent of each other. The indication in the audit report for `Increase of income' should be qua some item of income and not increase of income because of the `disallowance of expenditure'. Every disallowance of expenditure leads to increase of income. If the contention of the ld. AR is taken to a logical conclusion, then the second expression `or increase in income' inserted by the Finance Act, 2021 would be rendered a redundant piece of legislation. It is trite interpretation has to be given to the statutory provisions in such a manner that no part of the Act is rendered nugatory. Distinction in the scope of the two aspects can be understood with the help of the present context only. We have noted that point no. 20(b) of the audit report, dealing with section 36(1)(va), has columns, inter alia, (i) `Sum received from employees'; (ii) `Due date for payment'; and (iii) `The actual date of payment to the concerned authorities'. The column (i) having details of the amounts received from employees indicates about the `increase in income' as per sub-clause (iv) of section 143(1)(a) if the assessee does not take this sum in computing total income. The columns (ii) and (iii) having details of due date for payment and the actual date of payment indicate about `disallowance of expenditure' if the assessee does not make suo motu disallowance in computing total income. Right now, there is no case of `increase in income' because the AO did not make adjustment for non-offering of income of the `Sums received from employees', but made the adjustment for `disallowance of expenditure' with the remarks that `Amounts debited to the profit and loss account, to the extent disallowance under section 36 due to non-fulfillment of conditions specified in relevant clauses'. Thus, it is evident that it is a case of `disallowance of expenditure' and not `increase of income'. Further, the entire challenge by the assessee throughout has been to the disallowance of expenditure made by the AO. It set up a case before the authorities below, including the ld. CIT(A), taking shelter of section 43B of the Act by arguing that the disallowance cannot be made because such

payment was made before the due date u/s.139(1) of the Act. As such, the contention of adjustment u/s 143(1)(a)(iv) due to `increase in income' is jettisoned.

12. Another argument point was put forth on behalf of the assessee that the assessee did not claim any deduction in the Profit and loss account of the amount under consideration and hence no disallowance should have been made. This argument is again bereft of force. The assessee claimed deduction for salary on gross basis, inclusive of the employees' share to the relevant funds. To put it simply, if gross salary is of Rs.100, out of which a sum of Rs.10 has been deducted as contribution to relevant fund, then the debit of Rs.100 in the Profit and loss account means deduction has been claimed for Rs.10 as well. Ex consequenti, if deduction of Rs.10 is not allowed u/s 36(1)(va) for late deposit of the amount before the due date under the respective Act, it would mean that the claim of Rs.10 included in Rs.100 is not allowed deduction.

13. The ld. AR referred to section 5 of the Payment of Wages Act, 1936, to contend that deduction made from an employee's salary for the month of October should suffer disallowance only if it is not paid by 15th December. This argument was premised on the language of section 5, which says that the wages of every person employed upon or in any railway, factory or industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before expiry of the seventh day, after the last day of the wage-period in respect of which the wages are payable. It was contended that salary for the month of October, 2022 will be paid before the 7th of November, which will result into income of the employer only at the time of payment, making the due date of payment into relevant fund as on or before 15th December and not 15th November.

14. There is no merit in the contention of linking the date of deposit of the employees' share in the relevant funds with the date of payment of wages. Section 5 of the Payment of Wages Act simply deals with the 'Time of payment of wages'. It does not stipulate any time limit for deposit of the employees share in the relevant funds. For that purpose, the relevant Acts give a window for depositing the contribution within 15 days of the last month's salary. Thus, contribution to the relevant fund towards the salary for the month of October-ending should be deposited before 15th November.

15. In view of the foregoing discussion, we are satisfied that the ld. CIT(A) was justified in sustaining the adjustment u/s 143(1)(a) by means of disallowance made in these cases for late deposit of employees' share to the relevant funds beyond the date prescribed under the respective Acts."

6.2. In light of aforesaid discussions and in the entirety of facts and circumstances of the case, and respectfully following the decisions referred supra, we are of the considered opinion that the ld. CIT(A) was justified in sustaining the adjustment u/s 143(1)(a) by means of disallowance made for late

deposit of employees' share of PF/ESI contribution to the relevant funds beyond the date prescribed under the respective Acts.

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

Order pronounced in the open Court on 07/05/2024.

Sd/-	**Sd/-**
विक्रम सिंह यादव	**परेश म. जोशी**
(VIKRAM SINGH YADAV)	**(PARESH M. JOSHI)**
लेखा सदस्य/ ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

AG

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar