

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

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No.749/JPR/2023
निर्धारण वर्ष/Assessment Years : 2014-15

Shri Madhopur Kraya Vikraya Sahkari Samiti Limited. 3, Near Railway Station, Shrimadhapur.	बनाम Vs.	Income Tax Officer Ward Neem Ka Thana.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAJAS 8075 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Vedant Agrawal (C.A.)
राजस्व की ओर से / Revenue by : Shri Anup Singh (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 29/02/2024
उदघोषणा की तारीख / Date of Pronouncement : 27/05/2024

आदेश / ORDER

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

This appeal is filed by the assessee aggrieved from the order of the Learned Commissioner of Income Tax (Appeals), ADDL/JCIT(A)-2, Coimbatore 12.10.2023 [Here in after referred as "CIT(A)"] for the assessment year 2014-15, which in turn arise from the order dated 30.11.2016 passed under section 143(3) of the Income Tax Act, [Here in after referred as "Act"] by the AO.

2. The assessee has marched this appeal on the following grounds:-

“1. On the facts and circumstances of the case and in law also Ld. CIT(A)-2, Coimbatore grossly erred in remanding back the matter for reconsideration & fresh assessment to income tax Officer without having any power for remanding back the issue.

2. On the facts and circumstances of the case and in law also ld. A.O. grossly erred in disallowing deduction of Rs. 4,71,247/- under section 80P(2)(a)(iv) of the Income Tax Act.

3. On the facts and circumstances of the case and in law also ld. Lower authorities grossly erred in making and confirming addition of Rs. 22,398/- under section 36(i)(va) of the Income Tax Act.

4. That the appellant craves his indulgence to add, amend, alter or delete the grounds of appeal.”

3. Brief facts of the case are that the assessee filed his return of income for the assessment year 2014-15 declaring total income of Rs. 9,13,200/- on 29.11.2014. The case of the assessee was selected for scrutiny through CASS, notice u/s 143(2) of the I.T. Act dated 31.08.2015 was issued by the ITO, Ward-1, Sikar and was duly served upon the assessee on 04.09.2015. In response to the notice issued the assessee furnished details/ information as required which were examined and whatever felt necessary, were placed on record by the ld. AO. Books of account were also produced which were test checked. The assessee is engaged in marketing of agriculture products, seeds for its members. During the year under consideration, the assessee has declared gross and

net profit of Rs. 60,55,315/- and Rs. 53,85,677/- respectively on turnover of Rs. 26,47,97,282/-to yield GP @ 2.29% and NP @ 2.03%.

3.1 During assessment proceedings, it was noticed that the assessee had claimed deduction u/s 80P(2)(d) of the Income Tax Act, 1961 amounting to Rs. 33,33,246/- being gross interest/ dividend received on its investment with other cooperative societies/ bank. On perusal of the details, it was found that the assessee paid interest to the cooperative bank amounting to Rs. 2,26,139/- but it was not reduced while working out the deduction claimed under said section. Further, the interest expenses were also claimed while working out the deduction u/s 80P(2)(a)(iv) allowable on profit earned on sale of the specified items purchased by the assessee for supply to its members Looking to these facts, net interest income received from the cooperative bank is liable to be allowed as deduction and the same was appraised to the assessee vide note sheet entry dated 16.11.2016. However, the assessee did not respond to it. In view of above discussion, The ld. AO restrict the deduction claimed u/s 80P(2)(d) of the Income Tax Act, 1961 at Rs 31,07,007/- as against claimed at Rs. 33,33,246/- by the assessee. This will result in addition of Rs. 2,26,139/- to the total income of the assessee.

3.2 The assessee claimed deduction u/s 80P(2)(a)(iv) amounting to Rs. 16,72,092/-. On perusal of the calculation done to work out the deduction, it was noticed that the assessee had included the medicine also in the specified items intended for supply to its members. During assessment proceedings, it emerged that the medicines were not sold to its members but to the general customers/ public through medical outlets outside the Govt hospitals. The same was admitted by the assessee as well and accordingly, on being asked revised working for claiming deduction was furnished.

3.3 On perusal of the working, the ld. AO noticed that the assessee bifurcated the sale and gross profits earned on sale of specified items and non specified items and the proportionate net profit earned on sale of specified items was worked out on the basis of ratio of sale of specified items to the total sales while it should have been worked out in the ratio of GP rate earned on sale of specified items to the total gross profit. The sale of specified items constituted 74.18% of the total sale while sale of non specified items was 25.82%. Further, the gross profit on sale of specified and non specified items was Rs. 29,33,280/- and Rs. 31,22,234/- out of total gross profit of Rs. 60,55,515/- to give ratio of 48.44% and 51.56% to the total gross profit. Hence, the net profit on

specified and non specified items should also be worked out in the ratio of GP rate is 48.44% and 51.56% and not in the ratio of sale of specified items to total sales ie 74.18%, as has been done by the assessee, to qualify for deduction u/s 80P(a)(iv) of the Income Tax Act, 1961. The assessee was apprised with the same vide note sheet entry dated 16.11.2016 and 23.11.2016. However, the assessee did not furnish any reply on the issue. Thereafter, ld. AO proceeded to allow the deduction u/s 80P(a)(iv) to the tune of Rs. 12,00,845/- as against claimed at Rs. 16,72,092/- by the assessee which would result consequential addition to the total income of the assessee.

4. Aggrieved from the above order of the Assessing Officer, an appeal before the ld. CIT(A) was preferred by the assessee. Apropos to the grounds so raised the relevant finding of the ld. CIT(A) is reiterated here in below:-

“8. The Disallowance out of deduction claimed u/s.80P(2)(a)(iv): Rs.4,71,247/-.: The assessing officer has observed that sum of the medicine were not sold to the member of the society but to the general consumer/public through medical outlets outside government hospitals. Therefore he applied GP on specified and non specified items and reworked the deduction to be allowed u/s.80P(2)(a)(iv) of the Act and disallowed Rs.4,71,247/-.

8.1 It is the contention of the appellant that Agricultural medicines were sold to members only and not to general public. It was submitted that the appellant society can make sales only to the members.

8.2. This contention of the appellant requires verification and a factual finding as to whether sales were made to non-members. The AO has not brought out any factual finding in his assessment order. The AO is directed to verify

whether any actual sales have been made to non members and if any sales have been made to non-members, the proportionate profit on such sales may be disallowed from the deduction claimed.

9. The last ground pertains to belated payment of employee's contribution to ESI and PF: Rs.22,398/-. The appellant has submitted that section 43B overrides section 36(i)(v)(a) and since the payments have been made before the due date for filing return of income, the disallowance of Rs.22,398/- is unlawful. The appellant relied on CIT vs State Bank of Bikaner and Jaipur (2014) 363 ITR 10 (Raj.) (HC) and Jaipur Vidyut Vitran Nigam Ltd. (2014) 363 ITR 307(Raj.).

9.1. The appellant's submissions duly considered. The case laws relied on by it are respectfully noted.

9.2. Explanation 2 to sec 36 1(va) was inserted from 01.04.21 as under.

For the removal of doubts, it is clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the due date under this clause.

9.3 The above amendment is clarificatory and therefore retrospective in application. The words "Shall deemed never to have been applied" connotes that section 43B has no application with respect to employee's contribution to various welfare funds

9.4 The Hon'ble Madras High Court in Unifac Management Services (India) (P.) Ltd. vs DCIT in 409 ITR 225 stated that "The scope of section 438 and section 36(1)(va) are different and thus, there is no question of reading both provisions together to consider as to whether the assessee is entitled to deduction in respect of the sum belatedly paid towards such contribution, especially when such sum is, admittedly, a sum received by the assessee/employer from his employee. Therefore, for considering such question, application of section 36(1)(va) read with section 2(24)(x) alone is the proper course and any other interpretation would only defeat the object and scope of both the provisions viz., 438 and 36(1)(va)

9.5. Further in the case of Checkmate services pvt. ltd, the Hon. Supreme court has held as under:-

Checkmate Services Pvt ltd Vs CIT-I (Supreme Court) 448 ITR 518 Date-12th October 2022 Sub-Deduction u/s 36(1)(va) in respect of delayed deposit of amount collected towards employees' contribution to PF cannot be claimed when deposited within the due date of filing of return even when read with Section 43B of the Income-tax Act, 1961.

9.6 This important decision was decided in favour of the department on 12th October, 2022 when the Supreme Court was seized of a situation where Kerala and Gujarat high court were in favour of the department whereas other high court including Calcutta high court decided in favour of the assessee. The court noted that it is apparent that the scheme of the Act is such that Sections 28 to 38 deal with different kinds of deductions, whereas Sections 40 to 43B spell out special provisions, laying out the mechanism for assessments and expressly prescribing conditions for disallowances. 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.

Finally it was noted that the essential character of an employees' contribution, i.e., that it is part of the employees'

before the due date. The court pointed out to the clear distinction between Section 438 and the non-obstante clause in that section by observing that the said clause could not be applied to the deemed income under 35(1)(a) which was basically a money held in trust.

8.7. The law with regard to deduction of employee's contribution to various funds is therefore settled by the Hon'ble Supreme court of India. Hence it is imperative to see whether the appellant satisfies the condition laid out in section 36(1)(va) of the IT Act. It is seen that as mentioned in assessment order in few instances the sum received from employees are remitted beyond the due date. The failure of the appellant to comply with conditions satisfying section 36(1)(va) has made their claim vulnerable to rejection. The disallowance of Rs.22,398/- with respect to the sums remitted beyond the due date is confirmed.

10. Appeal is partly allowed.”

5. During the course of hearing, the ld. AR for the assessee submitted that Agricultural medicines were sold to members only and not to general public and submitted that the assessee society can make sales only to the

members. The Id. Assessing Officer has observed that sum of the medicine were not sold to the member of the society but to the general consumer/public through medical outlets outside government hospitals and therefore, he applied GP on specified items and non specified items and reworked the deduction to be allowed u/s 80P(2)(a)(iv) of the Act. The Id. AR for the assessee submitted that even Id. CIT(A) observed in its finding that it requires verification whether sales were made to non-members and if any sales have been made to non-members what is the proportionate profit on such sales may be disallowed from the deduction claimed. Therefore he submitted that considering these facts the matter may be remanded back to the Id. AO for verification of whether any actual sales have been made to non-members as the Id. AO has not verified the factual findings in his order. The Id. AR of the assessee prayed that ground Nos. 1 & 2 of the assessee may be kindly restore to the file of the Id. AO for afresh consideration and decision thereupon.

6. On the other hand, the Id. DR relied on the order of the lower authorities but at the same he has no objection to remand back the matter to the Id. AO. Thus ground Nos. 1 & 2 of the assessee is allowed for statistical purpose.

7. We have heard the parties and perused the material available on record based the discussion so recorded and in the light of the submission of the ld. AR for the assessee we deem it fit to remand the issue raised in ground No. 1 and 2.

8. As regards, ground No. 3, the Ld. CIT(A) has confirmed the action of the ld. AO for the disallowance of employees contribution towards PF/ESI amounting to Rs. 22,398/- in terms of Section 43B r.w.s. 36(1)(va) of the Act.

9. Briefly the facts of the case are that the ld. AO noticed that the assessee failed to deposit the PF contribution/ESI within the prescribed time limit as per provisions of the relevant Act and thus, he made disallowance of Rs. 22,398/- towards employee's contribution towards ESI and PF. On appeal, the ld. CIT(A) has confirmed the disallowance.

10. The ld. AR for the assessee submitted that the assessee has deposited PF/ESI before due date of filing of ITR and therefore, the same is allowable.

11. On the other hand, the ld. DR supported the order of the ld. CIT(A).

12. We have heard the parties and perused the materials available on record. In this case, it is noted that the AO disallowed an amount of Rs.22,398/- u/s 36(1)(va) of the Act on the ground that payments of employees contribution towards ESI and PF had not been made on or before the due date by the employer as per respective Acts which has been confirmed by the Id. 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](#).

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.

2. As per the Office record, Service is complete on the sole respondent but none has entered appearance on behalf of the Respondent 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

4. In view of the above, the impugned 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 dated 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 relevant Fund Act.

5. Though the quarrel is no more res integra, as it has been settled by 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 of the co-ordinate bench at Mumbai has been placed in the case of PR Packaging Service in ITA No. 2376/MUM/2022 and it has been seriously argued that the co-ordinate bench has considered the decision of the Hon'ble Supreme Court and yet decided the quarrel in favour of the assessee and against the Revenue.

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 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 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 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 jurisdictional High 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” The 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 for 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-

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 assessee must 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 up under 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 funds of employee(s) on the other. This is one more reason why we 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 effect from 1st April, 1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 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 Excise 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 on account 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 framed 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 Section 143, 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 allowed.

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 the ground of the assessee is dismissed. Thus Ground No. 3 of the assessee is dismissed.

In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 27/05/2024.

Sd/-

(राठौड कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य / Accountant Member

Sd/-

(डॉ.एस.सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 27/05/2024

*Santosh/ Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Shri Madhopur Kraya Vikraya Sahkari Samiti Ltd. Shrimadhopur.
2. प्रत्यर्थी / The Respondent- ITO, Neem Ka Thana.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File { ITA No. 749/JPR/2023 }

आदेशानुसार/ By order

सहायक पंजीकार/ Asst. Registrar