

**IN THE INCOME TAX APPELLATE TRIBUNAL
Visakhapatnam DB Bench, Visakhapatnam**

**Before Shri Vijay Pal Rao, Vice-President
A N D
Shri Manjunatha, G. Accountant Member**

आ.अपी.सं / **ITA No.226/Viz/2024**
(निर्धारण वर्ष / Assessment Year: 2017-18)

Shree Society Visakhapatnam PAN:AANAS1911Q (Appellant)	Vs.	Income Tax Officer Ward 1(5) Visakhapatnam (Respondent)
निर्धारिती द्वारा / Assessee by: Shri I Rama Sastry, CA		
राजस्व द्वारा / Revenue by: Dr. Satyasai Rath, CIT(DR)		
सुनवाई की तारीख / Date of hearing: 29/07/2025		
घोषणा की तारीख / Pronouncement: 31/07/2025		

आदेश / ORDER

Per Vijay Pal Rao, Vice President

This appeal by the assessee is directed against the order dated 30/03/2024 of the learned Pr.CIT passed u/s 263 r.w.s. 254 of the Act for the A.Y 2017-18.

2. The assessee has raised the following grounds of appeal:

- 1 1. The order under section 263 dated 30.03.2024 passed by the Principal Commissioner of Income-tax, Visakhapatnam is bad in law not justified and beyond the scope of revision in the facts and circumstances of the case as the Income-tax Officer, Ward-1 (5), Visakhapatnam has passed the order in accordance with the law existing on the date of passing of the order as per the decision of the Jurisdictional Visakhapatnam Bench of the Honourable Tribunal.Ground
- 2 2. In the facts and circumstances of the case, the assessment order dated 02.12.2019 is null and void as the same is in violation of CBDT Circular No.19/2019 requiring mandatory DIN consequently the same cannot be revised under section 263 (Additional Ground).
- 3 3. Principal Commissioner of Income-tax, Visakhapatnam is not justified in directing the Income-tax Officer, Ward-1(5), Visakhapatnam to treat the total amount of PF and ESI contributions (both employer's and employees') aggregating to Rs.27,20,319/- as income under section 2(24)(x) r.w.s. 36(1)(va).
- 4 4. All the above grounds of appeal are mutually exclusive and without prejudice to one another
- 5 5. The appellant craves leave to add to; alter; modify; delete all are any of the above grounds of appeal

3. This is 2nd round of appeal as this Tribunal vide order dated 20/02/2024 in ITA No.271/Viz/2023 has remanded the matter to the record of the Principal CIT for fresh consideration after giving an opportunity of hearing to the assessee in Para No.7 as under:

“7. We have heard both the parties and perused the material available on record. It is undisputed fact that the Ld.PCIT treated the assessment order passed by the AO (ITO, Ward-1(5), Visakhapatnam) u/s 143(3) dated 02.12.2019 as erroneous and prejudicial to the interest of the revenue and accordingly set aside the assessment to the file of the AO(Income Tax Officer), Ward-1(1) to pass consequential order after affording reasonable opportunity to the assessee. The contention of the Ld.AR is that the assessee was not served with the show cause notice due to the reasons mentioned in the condonation petition filed, to controvert the findings of the AO as well as the Ld.PCIT. He, therefore, pleaded for affording another opportunity of being heard to the assessee before the Ld.PCIT to substantiate its case, keeping in view the principles of natural justice or else, the assessee would be at great financial loss. The assessee filed an affidavit before us, elaborating the reasons for non-compliance to the notices issued by the Ld.PCIT. We find that there is a reasonable cause for the assessee for such non-compliance. Hence, keeping in view the principles of natural justice, we are inclined to remit the matter back to the file of the PCIT and direct the Ld.PCIT to afford the assessee, another opportunity of being heard. The assessee is also directed to adhere to the notices issued by the Ld.PCIT promptly and furnish relevant material evidences to substantiate its case.”

4. Thus, it is clear that earlier, the learned Principal CIT passed the order dated 23/03/2022 as ex-parte when there was no participation of the assessee in the proceedings initiated u/s 263 of the Act and consequently, this Tribunal remanded the matter to the record of the learned Principal CIT for deciding the matter after giving an opportunity of hearing to the assessee.

5. The learned AR of the assessee has submitted that the assessment was completed u/s 143(3) vide order dated 2/2/2019 and thereafter, the learned Principal CIT initiated the proceedings u/s 263 of the Act on the issue of disallowance of belated

payment of employee's contribution towards PF & ESI. The learned AR has submitted that at the relevant point of time when the assessment order was passed, the issue of belated payment of employee's contribution towards PF & ESI but before the due date of filing the return of income u/s 139(1) of the Act was decided in favour of the assessee by various High Courts as well as jurisdictional Tribunal by holding that if the payment of employees contribution towards PDF and ESI has been made before the due date of filing the return, then the same is allowable. Thus, the learned AR has submitted that the Assessing Officer has allowed the claim of the assessee by taking a view which is in consonance of the view taken by the Hon'ble High Courts as well as this Tribunal. In support of his contention, he has relied upon the judgment of the Hon'ble Calcutta High Court in the case of Principal CIT vs. M/s. Special Property Management dated 31/03/2023 in ITA No.49/2023 and submitted that on an identical issue, the Hon'ble High Court has upheld the order of the Tribunal by holding that on the date when the Assessing Officer completed the assessment, the law on the subject as laid down by the jurisdictional High Court was binding on the Assessing Officer and the Assessing Officer had followed the said decision of the High Court and completed the assessment, Thus, the Assessing Officer having followed the decision of the Hon'ble jurisdictional High Court which held the field on the subject at that relevant point of time, the assessment cannot be held to be prejudice to the interest of the Revenue. He has further submitted

that though there was no judgment of the jurisdictional High Court on this point, however, there are various decisions of the Tribunal on this issue decided in favour of the assessee and therefore, in view of the judgment of the Hon'ble High Court in the case of Principal CIT vs. M/s. Deccan Jewellera P Ltd reported in 438 ITR 131 the order of the Tribunal is binding on the Assessing Officer and therefore, the claim of the assessee allowed by the Assessing Officer as per law as held by the jurisdictional Tribunal cannot be held as erroneous as well as prejudice to the interest of the Revenue. The learned AR has referred to the assessment order and submitted that the case was selected for scrutiny and the Assessing Officer issued notice u/s 143(2) as well as notice u/s 142(1) which were duly replied by the assessee. Therefore, it is not a case of lack of inquiry on the part of the Assessing Officer. Thus, he has submitted that the impugned order of the learned Principal CIT is not sustain able in law and liable to be set aside.

6. On the other hand, the learned DR has submitted that the Assessing Officer has not conducted any inquiry on this issue of disallowance u/s 36(1)(va) r.w.s. 2(24)(x) of the I.T. Act. Further, this issue is now covered by the judgment of the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd vs. CIT reported in [2022] 143 taxmann.com 178 (SC). He has relied upon the impugned order of the learned Principal CIT.

7. We have considered the rival contentions as well as the relevant material available on record. The assessment was completed u/s 143(3) on 2/12/2019 as under:



**GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
WARD 1(5),VISAKHAPATNAM**

To, SHREE SOCIETY 26-9-28,WOOD YARD STREET,NEAR READING ROOM VISAKHAPATNAM VISAKHAPATNAM 530001,Andhra Pradesh India	
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PAN: AAAS1911Q	AY: 2017-18	Order No: ITBA/AST/S/143(3)/2019-20/1021470358(1)	Dated: 02/12/2019
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Name of the assessee	SHREE SOCIETY
Address of the assessee	26-9-28, WOOD YARD STREET,NEAR READING ROOM VISAKHAPATNAM, VISAKHAPATNAM 530001, Andhra Pradesh, India
Status	AOP(ASSOCIATION OF PERSONS)
Range/Circle/Ward	WARD 1(5),VISAKHAPATNAM
Resident/Resident but not Ordinary resident/ Non-resident	Resident
Date of Hearing	04/09/2018, 10/09/2018, 24/09/2018, 20/09/2019, 20/09/2019
Section/Sub-section under which assessment is made	143(3)
Date of Order	02/12/2019

ASSESSMENT ORDER

The assessee AOP is engaged in the business of labour manpower supply. For the Asst.year 17-18, the assessee filed return of income admitting total income of Rs.5,05,655 on gross receipts of Rs.1,22,41,304. The case was selected for scrutiny under CASS and notices u/s.143(2) and 142(1) issued through ITBA. The reasons listed under CASS is 1. receipts as per 26AS more than return filed 2. excess contribution to PF as per rule 87- statutory limit of 27% of salaries.

In response to the notices issued u/s.143(2) and 142(1), the assessee has responded and submitted information called for.

It is seen that assessee has claimed interest on Service Tax of Rs.6250 which

Note: If digitally signed, the date of digital signature may be taken as date of document.
PRATYAKSHAKAR BHAVAN, MVP DOUBLE ROAD, VISAKHAPATNAM, Andhra Pradesh, 530020
Email: VIZAG.ITO1.5@INCOMETAX.GOV.IN,

The Notice/Letter/Order No. mentioned above may be treated as DIN for the purpose of procedure for issuance of Income Tax Notice prescribed by Circular No.19/2019 dt. 14 August 2019.

cannot be allowed. Hence, the same is added to the income returned.

After examination of the same, the assessment is completed as under.

Income returned	5,05,655
Add: As discussed above	<u>6,250</u>
Revised total income	5,11,905

LALITH KUMAR KALWANI
WARD 1(5),VISAKHAPATNAM

Copy to:

Assessee

8. Thus, the case was selected for scrutiny under CASS and initially two issues were taken up for examination namely (i) receipts as per 26AS more than return filed and (ii) excess contribution to PF as per rule 87 – statutory limit of 27% of salaries. The Assessing Officer issued notices u/s 143(2) and 142(1). The Assessing Officer has not even raised the issue of belated payment of employees contribution towards PF and ESI but the notice u/s 142(1) was issued only regarding the excess claim of ESI and PF in contravention of Rule 87 of the I.T. Rules which restricts the claim only 27% of the salaries. The assessee in the reply accepted the erroneous reporting of the employees contribution to PF & ESI in Form 3CED. Thus, it is manifest from the record that neither the Assessing Officer raised any query, nor the assessee filed any details on the issue of allowability of the

claim u/s 36(1)(va) r.w.s. 2(24)(x) of the I.T. Act. The learned Principal CIT has also stated this fact in para No.5 & 6 as under:

5. Considering the submissions of the assessee and based on the information available on record, the revision proceedings are finalized as under:

5.1 The assessee submitted that invoking provisions of 263 is beyond the scope of the issue as it was selected for scrutiny. In this regard, it is pertinent to mention that one of the issues was the assessing officer was required to examine excess contribution to PF as per Rule 87 – statutory limit of 27% of salaries. Being complete scrutiny, the assessing officer was required to examine on the claim of the assessee with regard to contribution to provident fund.

5.2 Therefore the issue of contribution of PF was very much within the scope of examination of assessing officer and the time of payment of employee contribution of PF within statutory due date is inextricably linked to this issue. Hence the assessing officer was required to examine whether the contribution of employee was paid within the statutory due date. Since the assessing officer failed to make any enquiry/ verification during the assessment proceedings and the assessee also did not submit any evidence that the assessing made enquiry. Hence, the assessee's argument of the case that invoking of provisions under section 263 was beyond scope is not tenable. Therefore, the assessment order u/s.143(3) dt. 02.02.2019 is erroneous and prejudicial to the interest of revenue.

5.3 Within the meaning of Explanation-2 of the section 263 of I-T Act, 1961 the terms "erroneous" and "prejudicial" to the interest to the revenue have not been confined rather given wider amplification by giving the meaning to the scope of inquiry and verification while completing an assessment by the assessing officer during scrutiny proceedings. In the light of the same it would be noteworthy to reproduce the Explanation -2 to the section 263(1) of the I-T Act, 1961.

Explanation 2.-For the purposes of this section, it is hereby declared that an order passed by the assessing officer [or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if in the opinion of the Principal [Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner –

1. the order is passed without making inquiries or verification which should have been made,
2. the order is passed allowing any relief without inquiring into the claim;
3. the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119 or
4. the order has not been made in accordance with any decision which is prejudicial to

the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

5.4 It is clear from the above that the assessing officer did not conduct any enquiry in respect of this issue. Therefore, the assessment order u/s.143(3) dt.02.02.2019 is held erroneous and prejudicial to the interest of the revenue. Reliance placed on the following case laws for this proposition.

Hon'ble Supreme Court of India in the case of M/s **Malabar Industrial Co. Ltd. Vs CIT** [2000] 109 Taxman 66 (SC)/[2000] 243 ITR 83 (SC)/[2000] 159 CTR 1 (SC) held as under:

"Where Assessing officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified."

ITAT Delhi in the case of Surya Financial Services Ltd Vs PCIT [2000] 109 2018-TIOL-74-ITAT-DEL held as under:

"When assessing officer fails to carry out adequate enquiry about alleged accommodation entries in the name of the assessee, the Pr. CIT rightly invoked provisions of section 263 of the Act to reopen the assessment"

5.5 The second plank of argument taken by the assessee is that on the date of which the order was passed by the assessing officer, the law declared by the jurisdictional Visakhapatnam Bench of the Hon'ble Tribunal was in favour of the assessee. Therefore, the order passed by the jurisdictional assessing officer cannot be said to be a prejudicial to the Revenue as the jurisdictional AO followed a binding decision.

5.6 However it is noticed that when assessing officer did not at all make any enquiry or omitted to make enquiry regarding the non-remittance of employee's contribution of PF, ESI within statutory dates, the question of assessing officer following the jurisdictional Tribunal Bench order and therefore not making addition does not arise since assessing officer has not examined issue at all.

5.7 In fact it is pertinent to note that, the assessee itself in the previous plank of argument mentioned that according to him the issue is beyond the scope of limited scrutiny and the assessing officer himself could not have made any adjustment. This tantamount to admitting that this issue was never examined at all during the course of scrutiny proceedings, therefore when the issue itself was never examined, therefore the issue of assessing officer following the jurisdictional tribunal decision on the point does not arise.

5.8 Further, the Hon'ble Supreme Court in the case of Checkmate Services Private Limited held as under.

"...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 assesseees 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 34 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."

5.9. From the above decision, it is clear that it is categorical that the payments to ESI & PF made from the contributions by employees beyond the statutory dates as specified in the respective act of the Act, falls within the purview of the income tax laws 2(24)(x) r.w.s. 36(1)(va) Of IT Act.

6 In this regard, reliance is placed in the case of *M/s.Sri Seetaramanjaneya Sortex, Kakinada versus Pr. Commissioner of Income tax, Visakhapatnam in I.T.A.No.147/Viz/2023 for AY 2018-19 of Hon'ble ITAT, Visakhapatnam* (jurisdictional bench). In this case, the assessee in its appeal against order u/s.263 of I.T.Act has raised the following ground in respect of this issue as under:

"6. With regard to late deposition of ESI and PF employee contribution to the Govt Account after the due dates prescribed in the respective Acts, it is humbly submitted that the EPF employee contribution of INR 1,26,591/- and ESI employee contribution of INR 26,684/- only has been deposited late to the Government account under the relevant Acts. It is to be noted that the same has been paid before due date of return under Section 139(1) of the Income Tax Act. There are judicial pronouncements of various High Courts which 7 I.T.A. No.147/Viz/2023, A.Y.2018-19 Sri Seetaramanjaneya Sortex, Kakinada have allowed that deduction of EPF and ESI employee contribution is allowed, if the same is paid to the Government account before due date of return under the Income Tax Act. The Assessee has relied upon those judgements since they were law of the land at the time of filing return by the assessee, So, in the assessment proceeding Id.AO has not taken any cognizance of

the matter in view of various judgements, So, the order of AO was not prejudicial in the interest of revenue”

Hon'ble ITAT, Visakhapatnam vide its order dt.29.11.2023 dismissed the above ground and held as under:

“5. With regard to Ground No.6, now the law is settled after a view had been taken by Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd., in Civil Appeal No.2833 of 2016, order dated 12.10.2022. In the case on hand also, the assessee made remittances before filing the return of income u/s 139(1), but not within the due date specified by the respective PF / ESI Acts. For the sake of clarity and convenience, relevant part of the order of the Checkmate Services Pvt. Ltd.(supra) is extracted as under :

“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 deduction that such amounts are deposited on or before the due date.” Since the decision of the Hon'ble Supreme Court pronounced the correct legal position of the allowability of belated payment of PF and ESI under the provisions of the Act, we have no hesitation to come to a conclusion that the disallowance made by the AO as well as the Ld.CIT(A) needs no interference, in view of the decision of the Hon'ble Supreme Court mentioned supra. Accordingly, ground No.6 is dismissed.”

9. Finally, the learned Pr. CIT set aside the assessment order for conducting necessary inquiry on disallowability of claim u/s 2(24)(x) r.w.s. 36(1)(va) of the Act in para 7 & 8 as under:

7. Therefore it is held that the belated payments made by the assessee in remitting the employee's contribution fund PF & ESI ought to have been added back in the assessment order u/s 2(24)(x) r.w.s 36(1)(va) of IT Act, but the assessing officer has omitted to do so.

8. For the foregoing reasons, the assessment completed order 143(3) dt.02.02.2019 for the A.Y. 2017-18 is held to be not only erroneous but also prejudicial to the interest of revenue. Consequently, as discussed above, the assessment order 143(3) dt.02.02.2019 for the A.Y. 2017-18 vide Order No.ITBA/AST/S/143(3)/2019-20/1021470358(1) for the A.Y.2017-18 is set aside to the assessing officer for limited purpose of verification in the issue of remittance of payments made in respect of employees contribution towards PF and ESI, with a direction to obtain the receipts indicating the date of remittances of the employers' contribution to the respective statutory funds, and to treat the belated payments made beyond the due dates prescribed under respective acts, as the income of the assessee u/s.2(24)(x) rws 36(1)(va) of the Income tax Act, 1961 for the AY 2017-18 by disallowing the deduction claimed. The assessing officer shall afford reasonable opportunity of being heard to the assessee before passing the consequential order.

10. The decision of the Hon'ble Calcutta High Court relied upon by the learned AR of the assessee will not help the case of the assessee when the Assessing Officer has neither conducted any inquiry nor taken a view on this point. Further, we find from the notice issued u/s 143(2) of the Act that the Assessing Officer has nowhere stated that the case was selected for limited scrutiny and therefore, the 2 issues initially taken up for the examination does not restrict the jurisdiction of the Assessing Officer to verify and examine the other issues arising from the return of income of the assessee. Accordingly, when the Assessing Officer has not conducted any inquiry on the issue of belated payment of Employee's contribution to PF and ESI u/s 2(24)(x) r.w.s. 36(1)(va) of the Act, then it is a clear case of lack of inquiry on the part of the Assessing Officer which renders the order of the Assessing Officer erroneous so far as it is prejudicial to the interest of the

Revenue. Accordingly, we do not find any reasons to interfere with the order of the learned Principal CIT on this issue.

11. In the result, appeal filed by the assessee is dismissed.

Order pronounced in the Open Court on 31st July, 2025.

Sd/-

Sd/-

(MANJUNATHA, G.) ACCOUNTANT MEMBER	(VIJAY PAL RAO) VICE-PRESIDENT
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Visakhapatnam, dated 31st July, 2025

Vinodan/sps

Copy to:

S.No	Addresses
1	Shree Society, 26-9-28 Woodyard Street, Near Reading Room Visakhapatnam 530001 A.P
2	Income Tax Officer WARD 1(5) Pratyaksha Kar Bhavan, MVP Double Road, Visakhapatnam A.P
3	Pr. CIT – Visakhapatnam
4	DR, ITAT Visakhapatnam Bench
5	Guard File

By Order