IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos.294 to 296/Bang/2023
Assessment Years: 2018-19 to 2020-21

Nandi Hospitality Services Private Limited No.45, 2nd Floor, 1st Cross Opp. Indian Oil Petrol Bunk 80 Feet Road, Chandra Layout Bangalore 560 072 **PAN NO : AACCN8275D**	**Vs.**	Deputy Commissioner of Income-tax Circle-3(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Sandeep Chalapathy, A.R.
Respondent by	:	Shri Sankar Ganesh K., D.R.

Date of Hearing	:	01.06.2023
Date of Pronouncement	:	01.06.2023

O R D E R

PER BENCH:

These appeals by the assessee in ITA Nos.294 to 296/Bang/2023 are directed against the order of NFAC, Delhi dated 12.1.2023 for the AYs 2018-19 to 2020-21 passed u/s 250 of the Income-tax Act,1961 ['the Act' for short]. The issue in all these appeals are common in nature except figures, hence, these are clubbed together heard together and disposed of by this common order for the sake of convenience. The grounds of appeal raised by the assessee in ITA No.294/Bang/2023 are reproduced as under:

1. *That the order of the learned Commissioner of Income-tax (Appeals) in so far it is prejudicial to the interests of the appellant is bad and erroneous in law and against the facts and circumstances of the case.*

2. *That the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in making addition of employee's contribution of Rs. 14,78,835/- u/s 36(1)(va) of the Act even though the same is paid before the due date specified u/s 139(1) of the Act.*

3. *That the learned Commissioner of Income tax (Appeals) erred in law and on facts in making addition of Rs. 14,78,835/- u/s 36(1)(va) or 43B of the Act as such addition does not fall under the purview of section 143(1)(a)(iv) of the Act.*

4. *That the learned Commisssioner of Income-Tax (Appeals) erred in law and on facts in not considering the amendment brought vide Finance Act, 2021 in Explanation 2 to section 36(1)(va) of the Act and Explanation 5 to section 43B of the Act which are prospective in nature and CBDT has clarified in the Explanatory Memorandum to Finance Bill, 2021 that the amendment is applicable from AY 2021-22.*

2. The assessee has raised additional grounds of appeal in ITA Nos.294 & 295/Bang/2023, which are common in nature except figures. Hence, we reproduced here the additional grounds raised in ITA No.294/Bang/2023 as follows:

1. *That the learned Commissioner of Income tax (Appeals) erred in law and on facts in making addition of Rs. 14,78,835/- u/s 36(1)(va) or 43B of the Act as such addition does not fall under the purview of section 143(1)(a)(iv) of the Act.*

2. *That the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in not considering the amendment brought vide Finance Act, 2021 in Explanation 2 to section 36(1)(va) of the Act and Explanation 5 to section 43B of the Act which are prospective in nature and CBDT has clarified in the Explanatory Memorandum to Finance Bill, 2021 that the amendment is applicable from AY 2021-22.*

3. We have heard the both the parties on admission of additional grounds. In our opinion, all the facts are already on record and there is no necessity of investigation of any fresh facts

for the purpose of adjudication of above ground. Accordingly, by placing reliance on the judgement of Hon'ble Supreme Court in the case of NTPC Vs. CIT 229 ITR 383 (SC) we inclined to admit the additional ground for the purpose of adjudication as there was no investigation of any fresh facts otherwise on record and the action of the assessee is bonafide.

ITA No.294/Bang/2023:

4. Facts of the case are that the assessee, Nandi Hospitality Services Private Limited, is a private limited company and is assessed to tax under PAN: AACCN8275D. It is carrying on its business of providing Hospitality services such as Housekeeping, Catering & other hospitality services. Its Registered address is No.45, 1st Floor, 1st Cross, 80 Feet Road, Opp. Indian Oil Petrol Bunk, Chandra Layout Bangalore - 560072. It is maintaining regular books of accounts and all the necessary details required for the purpose of statutory and tax audit. It is following the approved method of mercantile system of accounting. Its accounts are regularly audited under section 44AB of the Income Tax Act, 1961 and the audit reports are filed.

4.1. For the assessment year 2018 - 2019, based on the audited statement of accounts, the assessee has computed its total income, as per the provisions of the Income Tax Act, 1961 after effecting several adjustments to the net profit, arrived at in the audited accounts, in respect of various inadmissible(s) and has filed its return of income, on 31st October 2018, declaring a total income of Rs. 54,68,020/- and tax liability of Rs.14,08,015/- was paid and there was refund of Rs. 42,340/- .

4.2. The Learned Deputy Commissioner of Income Tax, CPC has sent communication under section 143(1)(a) of the Act. Since the Authorized Representative does not regularly check the email and Income tax portal, the Company could not file its response within time.

4.3 Return of income was processed u/s 143(1) on 12th November 2019, where the assessee's total income has been recomputed at Rs. 86,05,060/-. The following item of addition has been made by the Learned Deputy Commissioner of Income Tax, CPC:

a) Addition of Rs. 14,78,835/- Disallowance of expenditure indicated in the audit report but not taken into account in computing file total income (Section 36(1)(va) towards disallowance of PF and ESI Contribution of Employees')
b) Addition of Rs. 16,58,207/- Disallowance of statutory payment indicated in the audit report but not taken into account in computing the total income (Section 43B towards disallowance of Service Tax not paid within due date)

4.4 Regarding the first item of addition, it is mentioned in the Audit report as below under Observations / Comments / Qualifications of to Form 3CD: There has been delay in remitting Employees Contribution to PF & ESI for certain months. However, the same has been paid within the due date of filing the return of income. The delayed payments have been considered allowable as deduction on the basis of the decision of the Supreme Court held in the case of Principal Commissioner of Income Tax-II Jaipur Vs. Rajasthan State Beverages Corporation Ltd. and other cases. (Supreme Court CIT Vs. Alom Extructions Ltd (2009) 319 ITR 306 (SC))

4.5 Records clearly show that employees' contribution towards EPF and ESI has been paid and deposited to the fund concerned before filing of return of income u/s 139(1). However, due to cash flow problems and resulting financial hardship there was delay of a few days in crediting the same to respective funds. It is a settled provision of law that the benefits under section 43B of the Act. can be extended towards employee's contribution as well if the same is remitted within the due date i.e. the due date prescribed under section 139(1), as upheld in the judgement passed by Hon'ble High Court of Karnataka during Writ Appeal No. 4077 of 2013 (T-IT) in the case of The Commissioner of Income Tax vs. M/s Spectrum Consultants Private Limited and ITA No. 480/2013 in case of M/S. Essae Teraoka Pvt. Ltd vs DCIT dated 04.02.2014. In the said case, clause (b) of section 43B was deeply examined by the Hon'ble High Court of Karnataka by referring to the provisions of the Employee's Provident Funds Scheme, 1952, especially section 29 and 30, wherein "contribution" is defined to include both employer and employee's portion. Further, reliance was placed upon various judicial decision of Hon'ble Supreme Court in case of CIT vs. Vinay Cement Ltd., 213 GTR 268 (SC) and CIT v. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC) besides the decisions in CIT vs Sabari Enterprises.

5. The ld. A.R. submitted that the ld. AO has totally and bluntly ignored the fact that the benefit of Section 43B of the Act can be extended to employee's portion of contribution and has totally ignored certain factual position available on records that major portion of the sum referred above was remitted to the concerned funds within the financial year and the balance was remitted within the due date of filing of return of income u/s 139(1). The ld. Deputy Commissioner of Income Tax, CPC

made an addition of Rs. 44,78,835/-. The Total demand raised was Rs.9,93,740/-

5.1 He submitted that the assessee does not have any objection towards the second item of addition of Rs. 16.58.207/-. But the assessee is aggrieved with the decision of the ld. AO and hence the assessee went in appeal before the NFAC who has dismissed the appeal of the assessee. Aggrieved, the assessee is in appeal before us.

6. The ld. A.R. submitted that the AO cannot make disallowance towards Employees Contribution to Provident Fund/ESI with regard to employees share paid after the due date of respective Act though it was paid within the due date of filing return of income u/s 139(1) of the Act. According to disallowing the employees contribution to provident fund or ESI while processing return of income u/s 143(1) of the Act is against the provisions of the Act as it would fall within the ambit of prima-facie adjustments stipulated in that section. For this purpose, he relied on the judgement of order of the Tribunal Mumbai Bench in the case of P.R. Packaging Services in ITA No.2376/Mum/2022 dated 7.12.2022, wherein held as under:

3. We have heard the rival submissions and perused the materials available on record. It is not in dispute that assessee had remitted the employees contribution to Provident Fund beyond the due date prescribed under the Provident Fund Act, but had duly remitted the same before the due date of filing the return of income under section 139(1) of the Act. This fact of remittance made by the assessee with delay had been reported by the Tax Auditor in the Tax Audit Report. The copy of the Tax Audit Report is placed on record by the Ld.AR before us together with its annexures. On perusal of the same, we find that the Tax Auditor had merely mentioned the due date for remittance of Provident Fund as per the Provident Fund Act and the actual date of payment made by the assessee. The Tax Auditor had not even contemplated to disallow the employees' contribution to Provident Fund wherever it is remitted beyond the due date prescribed under the Provident Fund Act. Hence, it is merely recording of facts and a mere statement made by the Tax Auditor in his audit report. The Ld.CPC Bangalore had taken up this data from tax audit report and sought to disallow the

same while processing the return under section 143(1) of the Act, apparently by applying the provisions of section 143(1)(a)(iv) of the Act. For the sake of convenience, the relevant provisions is reproduced hereunder:-

> *"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:-*
> *(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."*

4. From the aforesaid provisions, it is very clear that the said clause (iv) would come into operation when the Tax Auditor had suggested for a disallowance of expense or increase in income, but the same had not been carried out by the assessee while filing the return of income. As stated supra, the tax auditor had not stated in the instant case to disallow Employees Contribution to Provident Fund wherever it is remitted beyond the due date under the respective Act. Hence, in our considered opinion, the said action of the Ld.CPC Bangalore in disallowing the employees' contribution to Provident Fund while processing the return under section 143(1) of the Act is against the provisions of the Act as it would not fall within the ambit of prima facie adjustments. Our view is further fortified by the co-ordinate bench decision of this Tribunal in the case of Kalpesh Synthetics Pvt Ltd vs DCIT reported in 195 ITD 142 (Mum). The relevant portion of the decision is reproduced below:-

> *"6. Coming to the mechanism of application of section 143(1), we find that the first proviso to section 143(1) mandates that "no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode" and, under the second proviso to section 143(1), "the response received from the assessee, if any, shall be considered before making any adjustment, and in a case where no response is received within thirty days of the issue of such intimation, such adjustments shall be made". The scope of permissible adjustments under section 143 (1)(a) now is thus much broader, and, as long as an adjustment fits the description under section 143(l)(a) (i) to (v), read with Explanation to section 143(1), such an adjustment, subject to compliance with first and second proviso to section 143(1), is indeed permissible. I however, important to take note of the fact that unlike the old scheme of 'prima facie adjustments' under sec 143(l)(a), the scheme of present section 143(1) does not involve a unilateral exercise. The very fact that an opportunity of the assessee being provided with an intimation of 'such adjustments' [as opposed under sec 143(1)], in writing or by electronic mode, and "the response*

received from the assessee, if any" to be "considered before making any adjustment" makes the process of making adjustments under section 143(1), under the pre legal position, an interactive and cerebral process. When an assessee raises objections to proposed adjustment under section 143(1), the Assessing Officer CPC has to dispose of such objections before proceeding further in the matter - one way or the other, and such disposal of objections is a quasi judicial function. Clearly, Assessing Officer CPC has the discretion to go ahead with the proposed adjustment or to drop the same. The call that the Assessing Officer CPC has to take on such objections has to be essentially a judicious call, appropriate to facts and circumstances and in accordance with the law, and the Assessing Officer CPC has to set out the reasons for the same. Whether there is a provision for further hearing or not, once objections are raised before Assessing Officer CPC and the Assessing Officer CPC has to dispose of the objections before proceeding further in the matter, this is inherently a quasi judicial function that he is performing, and, in performing a quasi judicial function, he has to set out his specific reasons for doing so. Disposal of objections cannot be such an empty formality or meaningless ritual that he can do so without application of mind and without setting out his specific reasons for rejecting the same. Let us, in this light, set out the reasons for rejecting the objections. The Assessing Officer-CPC has used a standard reason to the effect that "As there has been no response/the response given is not acceptable, the adjustment(s) as mentioned below are being made to the total income as per provisions of section 143(l)(a)", and has not even struck off the portion inapplicable. To put a question to ourselves, can casually assigned reasons, which are purely on a standard template, can be said to be sufficient justifications quasi judicial decision that the disposal of objections inherently is? The answer must be emphatically in negative. It is important to bear in mind the fact that intimation under section 143(1) is an appealable order when consideration of objections raised by the assessee is an integral part of the process of finalizing intimation under section 143(1) unless the reasons for such rejection are known, a meaningful appellate exercise can hardly be carried out. When the first appellate authority has no clue about the reasons which prevailed the Assessing Officer- CPC, in rejecting the submissions of the assessee, because no such reasons are indicated by the Assessing Officer CPC anyway, it is difficult to understand on what basis the first appellate authority in judgment over correctness or otherwise of such a rejection of submissions. Whether the statute specifically provides for it or not, in our considered view, the need for disposal of objections by way of a speaking order to be read into it as the Assessing Officer CPC, while disposing of the objections raised by the assessee is performing a quasi judicial function, and the soul of a quasi judicial decision making is in the reasoning for coming to the decision taken by the quasi judicial officer. While on this aspect of the matter, we may usefully refer to the observations made by the Hon'ble Supreme Court, in the case of Union Public Service Commission v. Bibhu Prasad Sarangi [2021] 4

SCC 516. While these observations are in the context of the judicial officers, these observations will be equally applicable to the decisions by the quasi judicial officers like us as indeed the Assessing Officer CPC. In the inimitable words of Hon'ble Justice Chandrachud, Hon'ble Supreme Court has made the following observations:
Reasons constitute the soul of a judicial decision. Without them, one is left with a shell. The shell provides neither solace nor satisfaction to the litigant. We are constrained to make these observations what we have encountered in this case is no longer an isolated aberration. This has become a recurring henomenon.....How judges communicate in their judgments is a defining characteristic of the judicial process. While it is important to keep an eye on the statistics on disposal, there is a higher value involved. The quality of justice brings legitimacy to the judiciary

7. These observations of Their Lordships apply equally, and in fact with much greater vigour, to the judicial functionaries as well. Viewed thus, reasons in a quasi judicial order constitute the soul of the judicial decision. A quasi judicial order, without giving reasons for arriving at such a decision, is contrary to the way the functioning of the quasi judicial authorities is envisaged. A quasi judicial order, as a rejection of the objections against the proposed adjustments under section 143(1) inherently is, can hardly meet any judicial approval when it is devoid of the cogent and specific reasons, and when it is in a standard template text format with clear indications that there has not been any application of mind as even the inapplicable portion template text, i.e. whether there was no response or whether the response is unacceptable, has not been removed from the reasons assigned for going ahead with the proposed adjustment under section 143(1). In any event, there is no dispute that the precise and proximate reasons for disallowance in all these cases admittedly are the inputs based on the tax audit report. The question then arises about the status and significance of the tax audit report. Can the observations in a tax audit report, by themselves, be justifications enough for any disallowance of expenditure under the Act? As we deal with this question, we are alive to the fact section 143(l)(a)(iv) specifically an adjustment in respect of "disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return". It does proceed on the basis that when a tax auditor indicates a disallowance in the tax audit report, for this indication alone, the expense must be disallowed while processing under section 143(1) by the CPC. It is nevertheless important to bear in mind the fact that a tax audit report is prepared by an independent professional. The fact that the tax auditor is appointed by the assessee himself does not dilute the independence of the tax auditor. The fact remains that the tax auditor is a third party, and his opinions cannot bind the auditee in any manner. As a matter of fact, no matter how highly placed an auditor is, and even within the Government mechanism and with respect to CAG audits, the audit observations are seldom taken an accepted position by the auditee - even when the auditor is appointed by the auditee himself. These are mere opinions and at best these opinions

flag the issues which are required to be considered by the stakeholders. On such fine point of law, as the nuances about the manner in which Hon'ble Courts have interpreted the legal provisions of the Income Tax Act in one way or the other, these audit reports are inherently even less relevant - more so when the related audit report requires reporting of a factual position rather than express an opinion about legal implication of that position. In the light of this ground reality, an auditee being presumed to have accepted, and concurred with, the audit observations, just because the appointment of auditor is done by the assessee himself, is too unrealistic and incompatible with the very conceptual foundation of independence of an auditor. On the one hand, the position of the auditor is treated so subservient to the assessee that the views expressed by the auditor are treated as a reflection of the stand of the assessee, and, on the other hand, the views of the auditor are treated as so sacrosanct that these views, by themselves, are taken as justification enough for a disallowance under the scheme of the Act, There is no meeting ground in this inherently contradictory approach. Elevating the status of a tax auditor to such a level that when he gives an opinion which is not in harmony with the law laid down by the Hon'ble Courts above- as indeed in this case, the law, on the face of it, requires such audit opinion to be implemented by forcing the disallowance under section 143(1), does seem incongruous. Learned Departmental Representative's contentions in this regard that the observations made in the tax audit report, in the light of the specific provisions of section 143(l)(a)(iv), must prevail- more so when the tax auditor is appointed by the assessee himself, is clearly unsustainable in law. While section 143(l)(a)(iv) does provide for a disallowance based purely on the "indication" in the tax audit report inasmuch as it permits "disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return", and it is for the Hon'ble Constitutional Courts above to take a call on the vires of this provision, we are nevertheless required to interpret this provision in a manner to give it a sensible and workable interpretation. When the opinion expressed by the tax auditor is contrary to the correct legal position, the tax audit report has to make way for the correct legal position. The reason is simple. Under Article 141 of the Constitution of India, the law laid down by the Hon'ble Supreme Court unquestionably binds all of us and the Hon'ble Supreme Court has, in numerous cases- including, for example, in the case of East India Commercial Co. Ltd. v. Collector of Customs 1962 taxmann.com 5. speaking through Hon'ble Justice Subba Ra observed, inter alia, as follows:

> *.....Under article 215, every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself. Under article 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its*

territorial jurisdiction. Under article 227 it has jurisdiction over all Courts and Tribunals throughout the territories in relation to which exercises jurisdiction. It would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that Court and start proceedings in direct violation of it. If Tribunal can do so, all the subordinate Courts can equally do so, for there is no specific provision, just like in the case of the Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise, there would be confusion in the administration of law and respect for law irretrievably suffer"

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(l)(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". Then 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- more so when his attention was specifically invited to binding judicial precedents in this regard. For this reason also, the inputs in question in the tax audit report can not be reason enough to make the impugned disallowance. The assessee must succeed for this reason as well.

9. What a tax auditor states in his report are his opinion and his opinion cannot bind the auditee at all. In light, when one considers what has been reported to be 'due date' in column 20(b) in respect of contributions received from employees for various funds as referred to in section 36(l)(va) and the fact that the expression 'due date' has been defined under Explanation (now Explanation 1) to section 36(1)(va) provides that "For purposes of this clause, 'due date' means the date by which the assessee is required as an employer to credit employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise", one cannot find fault in what has been reported in the tax audit report. It is not even an expression of opinion about the allowability of deduction or otherwise; it is just a factual report about the fact of payments and the fact of the due date as per Explanation to section 36(l)(va). This due date, however, has not been found to be decisive in the light of the law laid down by Hon'ble Courts above, and it cannot, therefore, be said that the reporting of payment beyond due date in the tax audit report constituted "disallowance of expenditure indicated in the audit report but taking into account in the computation of total income in the return" as is sine qua non for disallowance of section 143(l)(a)(iv). When the due date under Explanation to section 36(l)(va) is judicially held to be decisive for determining the disallowance in the computation of total income, there is no good reason to proceed on the basis that the payments having been made after this due date is "indicative" of the disallowance of expenditure in question. While preparing the tax audit report, the auditor is expected to report the information as per the provisions of the Act, and the tax auditor has done that, but that information ceases to be relevant because, in terms of the law laid down by Hon'ble Courts, which binds all of us as much as the enacted legislation does, the said disallowance does not come into play when the payment is made well before the date of filing the income tax return under section 139(1). Viewed thus also, the impugned adjustment is vitiated in law, and we must delete the same for this short reason as well.

10. In view of the detailed discussions above, we are of the considered view that the impugned adjustment in course of processing of return under section 143(1) is vitiated in law, and we delete the same. As we hold so, we make it clear that our observations remain confined to the peculiar facts before us, that our adjudication confined to the limited scope of adjustments which can be carried out under section 143(1) and that we see no need to deal with the question, which is rather academic in the present context, as to whether if such adjustment was to be permissible in the scheme of section 143(1), whether the insertion of Explanation 2 to section 36(l)(va), with effect from 1st April 2021, must mean that so far as the assessment years prior to this assessment year 2021-22 are concerned, the provisions of section 43B cannot be applied for determining the due date under Explanation (now Explanation 1) to section 36(l)(va). That question, in our humble understanding can be relevant, for example, when a call is required to be taken on merits in respect of an assessment under section 143(3) or under section 143(3) r.w.s. 147 of the Act, or when no findings were to be given on the scope of permissible adjustments

under section 143(l)(a)(iv). That is not the situation before us. We, therefore, see no need to deal with that aspect of the matter at this stage.

11. In a result, this appeal is allowed"

5. We are conscious of the fact that the issue on merits is decided against the assessee by the recent decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd vs CIT reported in 143 taxmann.com 178 (SC) dated 12/10/2022. This decision was rendered in the context where assessment was framed under section 143(3) of the Act and not under section 143(1)(a).

6. Hence we direct the Ld. Assessing Officer to delete the addition made in respect of employees' contribution to Provident Fund, in the facts and circumstances of the instant case. Accordingly, grounds 1 to 3 raised by the assessee are allowed."

7. On the contrary, ld. D.R. submitted that this issue is squarely covered by the order of the Tribunal in the case of Cemetile Industries Vs. ITO (14)1, Pune in ITA No.693/Pun/2022 dated 23.11.2022. Further, he relied on the order of coordinate bench of Bangalore in MP No.127/Bang/2022 dated 19.12.2022 in the case of M/s. Automac Diesels wherein held as under:-

6. After considering the rival submissions I notice that the Hon·ble Supreme Court in the case of Checimote Services (supra) has considered the issue of whether the employees' contribution paid before due date for filing the return of income u/s.139(1) of the Act otherwise allowable u/s.43 B of the Act and putting to rest the contradicting decisions of various High Courts. The relevant extract of the decision is as under:-

> *"52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-R9, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions - especially second proviso to Section 438 - was introduced tc ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and, avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, isevident from the use of*

different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) os income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time - by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 438 covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not he given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

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 43P 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, isr 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."

8. Keeping in view of the decision of the Hon'ble Supreme Court, I uphold that the addition can be made in respect of the employees' contribution in regard to PF/ESI, which has not been deposited within the stipulated date as per the respective Act, since in the case on hand, the assessee has not deposited the employees, contribution within the due date as per the respective Act. Therefore, the disallowance can be made as per section 36(1)(va) r.w.s. 2(24)(x) of the Act. Hence, respectfully following the judgment of Hon'ble Supreme court cited (supra), the arguments of the assessee is not acceptable.

8.1 The Ld. A.R. has also raised on the issue that the disallowance/addition

cannot be made u/s 14-3(1(a) of the Act. A similar issue has been decided by the coordinate bench of the Tribunal in ITA No.188/Coch/2021 for the AY 2016- 17 vide order dated 28.07.2022 and also following the judgment of the Hon'ble Madras High Court, in which it has been held that the addition can be made u/s 143(1)(a) of the Act, the relevant para is as under:

> *_ In this case the assessee filed his return of income belatedly and return was processed under Section 143(1)(a) of the Act by observing that "in schedule Chapter VI-A, under Part-C deduction in respect of certain incomes, in SL.No. 2.1 deduction is claimed under Section 80P however return is not filed within due date". Against this observation the assessee filed writ petition before the Hon'ble Madras High Court and the writ petition has been dismissed by observing as under: -*
>
> > *"7. The scope of an 'intimation' under section 143(1)(a) of the Act, extends to the making of adjustments based upon errors apparent from the return of income and patent from the record, Thus to say that the scope of 'incorrect claim' should be circumscribed and restricted by the Explanation which employs the term 'entry' would, in my view, not be correct and the provision must be given full and unfettered play. The explanation cannot curtail or restrict the main thrust or scope of the provision and due weightage as well as meaning has to be attributed to the purposes of section 143(1)(a) of the Act.*

8.2 Respectfully following the above judgments, we reject the content ion raised by the assessee.

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

8. We have heard the rival submissions and perused the materials available on record. The main contention of the ld. A.R. is that the AO cannot disallow employees contribution of ESI & PF in these assessment years u/s 36(1)(va) r.w.s. 143(1) of the Act as these amounts were deposited into Government account before the due date of filing the return of income in respect of assessment years though such payments were delayed in terms of respective Act. In our opinion this issue was considered by coordinate bench in the

case of Cemetile Industries Vs. ITO (14)1, Pune in ITA No.693/Pun/2022 dated 23.11.2022 wherein held as under:

3. We have heard Sh. Pramod Singte, Ms. Deepa Khare, Sh. Sanket Joshi, Sh. Sharad A. Vaze, Sh. Mahavir Jain, Sh. M.K. Kulkarni, Sh. S.N. Puranik and Sh. Burhanuddin Vora (hereinafter commonly referred to as `the ld. AR') and Sh. Suhas Kulkarni, the ld. Departmental Representative (DR). It is undisputed that the audit report filed by the assessee indicated the due dates of payment to the relevant funds under the respective Acts relating to employee's share and the said amounts were deposited by the assessee beyond such due dates but before the filing of the return u/s 139(1) of the Act. The case of the assessee before the authorities below has been that such payments before the due date as per section 139(1) of the Act amounts to sufficient compliance of the provisions in terms of section 43B of the Act, not calling for any disallowance. Per contra, the Department has set up a case that the disallowance is called for because of the per se late deposit of the employees' share beyond the due date under the respective Act and section 43B is of no assistance.

4. Before proceeding further, it would be apposite to take note of the relevant statutory provision in this regard. Section 2(24) provides that `income' includes: `(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees'. Thus, contribution by employees to the relevant funds becomes income of the employer. Instantly, there is no dispute as to the taxability of such income in the hands of the assessee. Once such an amount becomes income of the employer-assessee, then section 36(1)(va) comes into play for providing the deduction. This provision provides that: `(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.'. The term `due date' for the purposes of this clause has been defined in Explanation 1 to this provision to mean: `the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise.'

Thus, it is axiomatic that deposit of the employees' share of the relevant funds before the due date under the respective Acts is sine qua non for claiming the deduction. Au Contraire, if the contribution of the employees to the relevant funds is not deposited by the employer before the due date under the respective etc., then the deduction u/s.36(1)(va) is lost notwithstanding the fact that the share of the employees had already crystallized as income of the employer u/s.2(24)(x) of the Act.

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."

8.1 This issue was also decided by the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT reported in 440 ITR 518, wherein held that for assessment year prior to 2021-22, non-absentee clause u/s 43B of the Act could not apply in case of

amounts, which are held in Trust as was case of employees' contribution which are deducted from their income from the employees' income and was held in Trust by assessee employer as per section 2(24)(x) of the Act, thus, said clause will not absolve assessee employer from is liability to deposit employees' contribution on or before due date as required in respective Act. In view of the above, the employees' contribution towards ESI & PF made after due date mentioned in respective Act to be disallowed. On this count also, we do not find any merit in the argument of assessee's counsel.

8.2 Further, the Hon'ble Madras High Court in the case of AA 520 Veerappampalayam Primary Agricultural Cooperative Credit Society Ltd. Vs. Deputy Commissioner of Income-tax reported in (2022) 138 taxmann.com 571 wherein held as under:

> *_ In this case the assessee filed his return of income belatedly and return was processed under Section 143(1)(a) of the Act by observing that "in schedule Chapter VI-A, under Part-C deduction in respect of certain incomes, in SL.No. 2.1 deduction is claimed under Section 80P however return is not filed within due date". Against this observation the assessee filed writ petition before the Hon'ble Madras High Court and the writ petition has been dismissed by observing as under: -*
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> > *"7. The scope of an 'intimation' under section 143(1)(a) of the Act, extends to the making of adjustments based upon errors apparent from the return of income and patent from the record, Thus to say that the scope of 'incorrect claim' should be circumscribed and restricted by the Explanation which employs the term 'entry' would, in my view, not be correct and the provision must be given full and unfettered play. The explanation cannot curtail or restrict the main thrust or scope of the provision and due weightage as well as meaning has to be attributed to the purposes of section 143(1)(a) of the Act.*

8.3 Further, the coordinate bench of the Tribunal in MP No.117/Bang/2022 dated 30.11.2022 in the case of ACIT Vs. M/s. Sunrise Freight Movers Pvt. Ltd. wherein held as under:

"5.6 Coming to the merit of the issues raised by the revenue in its miscellaneous petition, we not that Hon'ble Supreme Court in the case of CIT Vs. Saurashtra Kutch Stock Exchange case 219 CTR (SC) 90 has held that non-consideration of the decision of the jurisdictional high court/Supreme Court constitutes mistake apparent from record and is rectifiable within the meaning of section 254(2) of the Act. In Honda Siel Power Products Ltd. v. CIT 295 ITR 466, the Hon'ble Supreme Court explained the scope of rectification powers u/s/254(2) of the Act, as follows:

"Scope of the Power of Rectification

12. As stated above, in this case we are concerned with the application under section 254(2) of the 1961 Act. As stated above, the expression "rectification of mistake from the record" occurs in section 154. It also finds place in section 254(2). The purpose behind enactment of section 254(2) is based on the fundamental principle that no party appearing before the Tribunal, be it an assessee or the Department, should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent powers of the Tribunal. In the present case, the Tribunal in its Order dated 10.9.2003 allowing the Rectification Application has given a finding that Samtel Color Ltd. (supra) was cited before it by the assessee but through oversight it had missed out the said judgment while dismissing the appeal filed by the assessee on the question of admissibility/allowability of the claim of the assessee for enhanced depreciation under section 43A. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record.

13. "Rule of precedent" is an important aspect of legal certainty in rule of law. That principle is not obliterated by section 254(2) of the Income-tax Act, 1961. When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. Atonement to the wronged party by the court or Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review. In the present case, the Tribunal was justified in exercising its powers under section 254(2) when it was pointed out to the Tribunal that the judgment of the coordinate bench was placed before the Tribunal when the original order came to be passed but it had committed a mistake in not considering the material which was already on record. The Tribunal has acknowledged its mistake, it has accordingly rectified its order. In our view, the High Court was not justified in interfering with the said order. We are not going by the doctrine or concept of inherent power. We are simply proceeding on the basis that if prejudice had

resulted to the party, which prejudice is attributable to the Tribunal's mistake, error or omission and which error is a manifest error then the Tribunal would be justified in rectifying its mistake, which had been done in the present case."

5.7. Article 141 of the Constitution of India provides that the law declared by Hon'ble Supreme Court shall be binding on all courts within the territory of India. ***The law laid down by Supreme Court operates retrospectively and is deemed to the law as it*** *has always been unless, the Supreme Court, says that its ruling will only operate prospectively.*

5.8 In the light of the law as explained above, there is a mistake apparent on record in view of the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt.Ltd. (supra) though rendered subsequent to the order passed by the Tribunal and has to be rectified by holding that the disallowance made by the revenue authorities u/s.36(1)(va) of the Act was justified. Consequently, the appeal by the Assessee will stand dismissed. The order of the Tribunal will stand modified /rectified accordingly."

8.4 Being so, in our opinion, the disallowance could be made u/s 143(1) of the Act, which has been shown in the audit report filed u/s 44 AB of the Act as this amount of employees' share of contribution of PF/ESI which is not paid within due date stipulated in the respective Act and there is no error committed by the AO in making such disallowance. Accordingly, we dismiss all the grounds of appeals taken by the assessee in all the assessment years.

9. In the result, all the three appeals filed by the assessee are dismissed.

Order pronounced in the open court on 1st June, 2023

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 1st June, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.