IN THE INCOME TAX APPELLATE TRIBUNAL, 'SMC' BENCH MUMBAI

BEFORE: SHRI ABY T VARKEY, JUDICIAL MEMBER

&

SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.2376/Mum/2022
(**Assessment Year : 2019-20**)

M/s P R Packaging Service 1A, 1st Floor, Pushpam CHS Ltd, K.D. Road, Vile Parle (West), Mumbai-400 056	Vs.	Assistant Commissioner of Income Tax-25(3), Mumbai
PAN/GIR No.AAEEP6431E		
(Appellant)	..	**(Respondent)**

Assessee by	Shri K Gopal
Revenue by	Shri. Shambhu Yadav
Date of Hearing	**06/12/2022**
Date of Pronouncement	**07/12/2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.2376/Mum/2022 for A.Y.2019-20 is preferred by the assessee against the order of the Commissioner of Income Tax, National Faceless Appeal Centre, Delhi (NFAC) (Ld.CIT in short), dated 22/07/2022.

2. Though the assessee has raised several grounds of appeal before us, the only effective issue to be decided in this appeal is as to whether the Ld.CIT(A) was justified in upholding the action of the ADIT-CPC Bangalore in making disallowance of employees contribution to Provident

Fund based on the statement made in the Tax Audit Report while processing the return under section 143(1) of the Act.

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 adjustements 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. Grounds 4, 5 & 6 raised by the assessee are with regard to the chargeability of interest under section 234A, 234B & 234C of the Act which are consequential in nature. The Ld.Assessing Officer is directed to recomputed the same in accordance with law.

8. Ground 7 raised by the assessee is general in nature and does not requie any specific adjudication.

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

Order pronounced on 07/12 /2022 in the open court.

(ABY T. VARKEY)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 07/12/2022
Pavanan, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai