INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'H' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)]
and Sandeep S Karhail (Judicial Member)]

ITA No.1785/Mum/2021
Assessment Year: 2018-19

Kalpesh Synthetics Pvt Ltd., **…….. Appellant**
8, Kuntal, Modi Estate, L.B.S Marg, Ghatkopar (W),
Mumbai 400086 [PAN: AAACK6496P]

Vs.

Deputy Commissioner of Income Tax, CPC
Bengaluru **…….Respondent**

Appearances:
Bhupendra Shah *for the appellant*
Dinesh Chourasia *for the respondent*

Date of concluding the hearing : April 19, 2022
Date of pronouncement the order : April 27, 2022

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee-appellant has challenged the correctness of the order dated 31st March 2021, passed by the learned CIT(A) in the matter of the processing of income tax returns u/s. 143 (1) of the Income Tax Act, 1961*(hereinafter referred to as 'the Act')* for the assessment year 2018-19. Grievance of the assessee, as requiring our adjudication in this appeal, is that the learned CIT(A) was not justified in upholding the adjustment, made by the Centralized Processing Centre Bengaluru while processing income tax returns under section 143(1) based on certain inputs from the tax audit reports of the assessee in question, in respect of the disallowance of Rs 4,24,634 on account of delay in making the payment towards the employees' contribution for the provident fund, under section 36(1)(va) r.w.s. 2(24)(x) of the Act, particularly when there are judgments of Hon'ble jurisdictional High Court permitting such a deduction. Learned representatives fairly agree that this is the short issue requiring our adjudication and what is raised

as rather an elaborate set of grounds of appeal primarily consist of the arguments in support of this basic grievance.

2. The issue in appeal lies in a very narrow compass of common material facts. While processing the income tax return filed by the assessee, apparently, based on information contained in column 20(b) of the tax audit report under section 44AB(a), which was submitted online, there were certain delays in depositing the provident fund dues vis-à-vis 'the due date for *(such)* payments'. The sum total of such, as perceived by the tax auditor, delayed payments, aggregating to Rs 4,24,634 , were sought to be disallowed under section 143(1). When the assessee was put to notice, by the Dy Commissioner of Income Tax, CPC, Bangalore (hereinafter referred to as 'the Assessing Officer- CPC') in respect of the proposed adjustment under section 143(1) for this disallowance, the assessee objected to the adjustment so proposed. As evident from the uncontroverted facts set out in the Statement of Facts before the learned CIT(A), it was categorically pointed out by the assessee, through an online communication to the Assessing Officer CPC, that as held by the Hon'ble jurisdictional High Court, the payments made after the due date under the respective statute but before filing the income tax return are also deductible in the computation of business income, and the adjustment in question, therefore, was unsustainable in law. It was thus contended that *dehors* the observations made by the tax auditor, what was reported as delayed payment in column 20(b) were delayed payments of contributions received from the employees for various funds, as referred to in Section 36(1)(va) vis-à-vis the respective statute, but not vis-à-vis the provisions of the Income Tax Act. The judicial precedents in support of the said contention were pointed out. None of these arguments, however, impressed the Assessing Officer- CPC. The disposal of this objection, as per the standard template text embedded in the impugned intimation, was 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(1)(a)**". Leave aside giving reasons for not agreeing with the submissions of the assessee, no efforts were made even to strike out the inapplicable clause (i.e. whether the reply was not given or whether the reply was found unacceptable). The efforts to get the intimation under section 143(1) rectified under section 154 did not yield results either. Aggrieved, the assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is aggrieved and is in appeal before us.

3 Learned counsel for the assessee, has a three-fold submission. His first plea is that in the light of law laid down by Hon'ble jurisdictional High Court, in the case of **Khatau Junkar Ltd Vs K S Pathania [(1992) 196 ITR 55 (Bom)]** the scope of *prima facie* disallowance under section 143(1) is inherently very limited and only such a disallowance can be made under this statutory provision as can be conclusively held to inadmissible based on material on record. It is submitted that a claim backed by the binding judicial precedents of Hon'ble jurisdictional High Court- as in this case, at the minimum, cannot fall in this category. Our attention was invited to Hon'ble

jurisdictional High Court's judgments in the cases of **CIT Vs Hindustan Organic Chemicals Limited [(2014) 366 ITR 1 (Bom)]** and **CIT Vs Ghatge Patil Transports Ltd [(2014) 368 ITR 749 (Bom)].** What is on record, in this case, is an audit report which is prepared by a third party, i.e. an independent tax auditor, and a lapse in the tax audit report, as indeed in this case, cannot be put against the assessee for the purpose of a disallowance under section 143(1). For this short reason alone, according to the learned counsel, the impugned adjustment must be deleted. The next plea is that it is a settled legal position, in the light of the binding judicial precedents from the Hon'ble jurisdictional High Court, that as long as the payments towards provident fund dues are made before the due date of filing of the income tax return under section 139(1), even beyond the permissible time limit under the relevant statute under which payment is made, the payments so made are deductible in the computation of business income. The disallowance is thus unwarranted. While on this aspect of the matter, learned counsel has invited our attention to the judicial precedents holding so, and the fact that, even after noting the assessee's reliance on these binding judicial precedents- including by Hon'ble jurisdictional High Court, learned CIT(A) has relied upon the decisions of the lower forums or by Hon'ble non-jurisdictional High Courts. Such conduct, according to the learned counsel, is impermissible. Finally, his next plea is that the insertion of Explanations to Section 36(1)(va) and 43B, by the Finance Bill 2021, is prospective in nature, and, accordingly, so far as the period prior to 1st April 2021 is concerned, such a disallowance cannot come into play. Our attention is invited to a series of decisions of the coordinate benches holding so. It is thus submitted that for this reason also, the impugned adjustment under section 143(1) must stand deleted. Shri Chourasia, the learned Senior Departmental Representative, on the other hand, invites our attention to the fact that there is a significant difference between the earlier legal position, i.e. when judgments as in the case of Khatau Junkar *(supra)* were delivered vis-à-vis the law as it stood at the material point of time. It is submitted that the scope of expression '**an incorrect claim, if such claim is apparent from any information in the return**' appearing in Section 143(1)(a) is now statutorily defined under Explanation to Section 143(1) and it means a claim, on the basis of an entry, in the return,—**(i) of an item, which is inconsistent with another entry of the same or some other item in such return; (ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or (iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction**. It is submitted that when the audit report itself points out the delay in payment of provident fund dues, the claim of deduction for provident fund dues, to that extent, is "inconsistent" with another entry, i.e. by way of the tax audit report input, and that, in any event, any disallowance of expenditure in question is indicated in the audit report but not taken into account in computing the total income in the return. He submits that the Assessing Officer CPC cannot be faulted for going by the information submitted by the tax auditor, appointed by the assessee, and that the tax audit report is an integral part of the income tax return filed by the assessee. The disallowance is thus justified for this short reason alone. As regards the legal

position regarding the deductibility of payments in question even when it is paid after the due date under the relevant statute but as long as the same is made before the due date of filing of income tax return, learned Departmental Representative submitted that there are decisions on both the sides, i.e. in favour of the assessee as also against the assessee, and that, in any event, this analysis is irrelevant when the income tax return itself points out that there are payments beyond the due date which are clearly inadmissible under the statutory provisions. As regards the amendment having prospective effect only, the learned Departmental Representative relies upon the reasoning adopted by the learned CIT(A) and the unambiguous scheme of the Act. Our attention is invited to the Explanatory Memorandum to the Finance Bill 2021, which categorically states that, under the heading 'Explanation added to Section 36(1)(va)', "**For the removal of doubts, it is clarified that the provisions of Section 43B shall not apply and shall never be deemed to have applied for the purpose of determining 'due date' under this clause**" and, under the heading 'Explanation added to Section 43B of the Act", that "**For the removal of doubts, it is clarified that the provisions of this Section shall not apply, and shall be deemed to have never been applied to a sum received by the assessee from any of the employees to which the provisions of sub-clause (x) of clause 24 of Section 2 applies**". The intent of the legislature is thus said to be unambiguous. Our attention is then invited to the words of the statute, and it is submitted that it cannot be open to us to disregard the specific words in the legislation itself which specifically uses the expression "shall never be deemed to have been applied". It is suggested that while the amendment is to take effect from the date specified, that is 1st April 2021, once that amendment takes effect, it has to apply also on pending cases as it provides covering the earlier cases as is clearly discernible from the peculiar expressions employed therein. We are thus urged to confirm the impugned adjustments and decline to interfere in the matter. In a brief rejoinder, it is submitted that the tax auditor is an independent professional and, even though the tax auditor is appointed by the assessee, the views of the assessee need not be the same as that of the tax auditor and that a statement by the tax auditor cannot be binding on the assessee. It is submitted that in any event the tax auditors in question had subsequently revised the tax audit report and corrected the due dates of payment. It is also reiterated that the settled legal position, as binding on the Assessing Officer CPC in view of the situs of the jurisdictional Assessing Officer and in view of the judgment of Hon'ble jurisdictional High Court, is that the payments made beyond the due date under the relevant statute but before the due date of filing of the income tax return under section 139(1) cannot attract the disallowance for the reason of delay. Once again learned counsel has referred to and relied upon the decisions of the coordinate benches holding that the insertion of Explanations to Section 36(1)(va) and 43B, by the Finance Bill 2021, is prospective in nature, and, accordingly, so far as the period prior to 1st April 2021 is concerned, such a disallowance cannot come into play. We are thus once again urged to delete the impugned adjustment.

4. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

5. In our considered view, it is quite evident, from a careful look at the related statutory provisions, that there is a material difference in the scheme of processing the income tax return under section 143(1)(a) as it stands now vis-à-vis as it stood at the point of time when Khatau Junkar judgment *(supra)* by Hon'ble jurisdictional High Court was delivered. That was the time when incorrect claims could be disallowed only when such a deduction was "**on the basis of information available in such return, accounts or documents is *prima facie* inadmissible**" [*see Section 143(1)(a)(iii) as it then stood]* and it was in this context that the connotations of the expression "***prima facie* inadmissible**" came up for consideration before Hon'ble Courts above. While the expression used in section 143(1)(a)(i) is materially similar inasmuch as its wordings are "**an incorrect claim, if such incorrect claim is apparent from any information in the return**", there are two important things that one must bear in mind- (a) firstly, the expression "**an incorrect claim, if such incorrect claim is apparent from any information in the return**" is well defined in Explanation to Section 143(1), and; (b) secondly, and perhaps much more importantly, that is just one of the permissible types of adjustments, denying a deduction, under section 143(1)(a) which goes well beyond such adjustments and includes the cases such as "**(iii) disallowance of loss claimed, if the return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139; (iv) disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return; (v) disallowance of deduction claimed under sections 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, if the return is furnished beyond the due date specified under sub-section (1) of section 139; or (vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return".** So far as the first point is concerned, it must be noted that the expression "**incorrect claim apparent from any information in the return**", for the purpose of Section 143(1)(a), is further defined, under Explanation to Section 143(1), and it means that a claim, on the basis of an entry, in the return,—**(i) of an item, which is inconsistent with another entry of the same or some other item in such return; (ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or (iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction**. On the second point, it is useful to bear in mind the fact that the scheme of Section 143(1)(a) thus permits the processing of the income tax return in the manner that the total income or loss of the assessee is computed after making the adjustments for **(i) any arithmetical error in the return; (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return; (iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139; (iv) disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return; (v) disallowance of deduction claimed under**

sections 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, if the return is furnished beyond the due date specified under sub-section (1) of section 139; or (vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return". The adjustments under clause (vi) above are no longer permissible after 1st April 2018. Clearly, thus, there is a significant paradigm shift in the processing of income tax returns under section 143(1), and the decisions rendered in the context of old Section 143(1)(a) cease to be relevant. Learned counsel thus derives no advantage from the judgments rendered in the context of old Section 143(1)(a)- such as Hon'ble jurisdictional High Court's judgment in the case of **Khatau Junkar** *(supra).* To that extent, we must uphold the plea of the learned Departmental Representative.

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(1)(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. It is, however, important to take note of the fact that unlike the old scheme of 'prima facie adjustments' under section 143(1)(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 proposed under section 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 present legal position, an interactive and cerebral process. When an assessee raises objections to proposed adjustments 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, the 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 the 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 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(1)(a)**", and has not even struck off the portion inapplicable. To put a question to ourselves, can such casually assigned reasons, which are purely on a standard template, can be said to be sufficient justifications for a 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, and when consideration of objections raised by the assessee is an integral part of the process of finalizing the 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 with 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 sits 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 has 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 and Ors., [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 since what we have encountered in this case is no longer an isolated aberration. This has become a recurring phenomenon. ……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 quasi-judicial functionaries as well. Viewed thus, reasons in a quasi-judicial order constitute the soul of the quasi-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 of the 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(1)(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(1)(a)(iv), must prevail- more so when the tax auditor is appointed by the assessee himself, is clearly unsustainable in law. While Section 143(1)(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 [1963] 3 SCR 338,** speaking through Hon'ble Justice Subba Rao 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 it 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 a 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 would 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 it in 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 High Court. To that extent, the provisions of Section 143(1)(a)(iv) must be read down. What essentially follows is that 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. It is 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(i) 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 long as 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 the 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 this 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(1)(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 the purposes of this clause, 'due date' means 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",** 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 the Explanation to Section 36(1)(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 this due date in the tax audit report constituted "**disallowance of expenditure indicated in the audit report but not taking into account in the computation of total income in the return**" as is *sine qua non* for disallowance of Section 143(1)(a)(iv). When the due date under Explanation to Section 36(1)(va) is judicially held to be not 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 due 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 the 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 is 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 an adjustment was to be permissible in the scheme of Section 143(1), whether the insertion of Explanation 2 to Section 36(1)(va), with effect from 1st April 2021, must mean that so far as the assessment years prior to the assessment years 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(1)(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(1)(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. Pronounced in the open court today on the 27th day of April 2022.

Sd/xx *Sd/xx*
Sandeep S Karhail **Pramod Kumar**
(Judicial Member) (Vice President)
Mumbai, dated the 27th day of April 2022.

Copies to: *(1) The Appellant* *(2) The respondent*
(3) CIT *(4) CIT(A)*
(5) DR *(6) Guard File*

By order etc

Assistant Registrar/Sr.PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai