

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-A”BENCH: BANGALORE**

SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.1056/Bang/2022
AssessmentYear:2020-21

SOLIFLEX PACKAGING PRIVATE LIMITED Plot No. 13,14, and 15, Road No. 02, Antharasanahalli Industrial Area Tumkur, KARNATAKA - 572106 PAN NO : AAWCS7349M	Vs.	Asst. Director of Income-tax CPC Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri K. G. Acharya, CA
Respondent by	:	Shri Ganesh R Gale, Standing Counsel for Department. (DR)

Date of Hearing	:	20.12.2022
Date of Pronouncement	:	05.01.2023

ORDER

This appeal filed by the assessee is against the order passed
by CIT(A) dated 15.9.2022 on the following grounds of appeal:

1. *The Learned AO has made disallowance of expenditure in respect of Employee Contribution to Provident Fund(PF) u/s 36(1)(va) of the Income Tax Act.,1961. The Learned AO has eared in disallowing the employees contribution to PF by contending that the contributions were paid beyond the due date specified under the The Employees' PF Scheme,1952.*
2. *As per the employees' PF Scheme, 1952, the due date specified is 15 days from the close of the month in which wages for any period are paid (not from end of month for which wages are due). The Learned AO has failed to appreciate the fact that the employees' contribution has been paid within*

15 days from the end of the month in which wages are paid and hence, there are no delays.

3. *The Appellant assessee craves leave to add, alter, amend or to delete any of the grounds of appeal on or before hearing of appeal, and to file written submissions and paper book at the time of actual hearing before the Hon'ble ITAT*
2. The brief facts of the case are that the due date for filing the return of income was 15.02.2021, whereas assessee has filed return of income on 09.03.2021 declaring income from business or profession at Rs.11,86,650/-, the return was processed 143(1)(a) on 18.12.2021 by disallowing u/s 36(1)(va) r.w.s. 2 (24)(x) of the I.T. Act. 1961 for Rs. 5,42,940/- for delayed deposit of the employees' Contribution to PF & ESI, accordingly the income was determined at Rs. 17,29,590/-. Aggrieved from the above order, the assessee has filed appeal before CIT(A) and the assessee has also filed detailed reply and relied on some case laws, which have been considered by the ld. CIT(A) & dismissed the appeal of the assessee. Aggrieved from the order of the CIT (A), the assessee filed appeal before the Income Tax Appellate Tribunal.
3. The ld. AR reiterated the submissions made before the lower authorities and he has also filed written submissions which is as under:-

Submissions

1. Sec. 2(24)(x) of the Income Tax Act reads as under:

"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"

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**Sabarish Padmanabhan
Managing Director**

2. Sec. 36(1)(va) of the Income Tax Act reads as under

“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.”

Explanation.—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

3. Para 38 of the The Employees’ PF Scheme, 1952 reads as under

(1) The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee’s contribution from his wages which together with his own contribution as well as an administrative charge of such percentage [of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than excluded employee and in respect of which provident fund contribution payable, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the fund [electronic through internet banking of the State Bank of India or any other Nationalized Bank] [or through PayGov platform or through scheduled banks in India including private sector banks authorized for collection on account of contributions and administrative charge

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Sd/-
Sebanish Padmanabhan
Managing Director

M/s. Soliflex Packaging Private Limited. – ITAT Appeal AY 2020-21

4. The Learned AO has erred in law and facts of the case in making an addition of Rs. 4,41,164/- in respect of delayed payment of employees' contribution to PF although the assessee has deposited the employee contribution to PF within 15 days from the end of month in the **wages are actually paid by the assessee.**

5. The table showing

- a. Date of Wage payment
- b. Due date for payment of employees' contribution to PF
- c. Actual date of payment of employees' contribution to PF

is enumerated as below

Nature of Fund	Wage due Month	Actual date of wage payment	Due date for Payment of PF	Actual date of payment of PF	Amount paid
Provident Fund	April	08-05-2019	15-06-2019	17-05-2019	1,40,075
Provident Fund	May	11-06-2019	15-07-2019	26-06-2019	1,44,718
Provident Fund	June	10-07-2019	15-08-2019	20-07-2019	1,56,371
Total					4,41,164

The challans evidencing the PF payments have been enclosed as **Annexure – 1.**

As per the provision of PF Scheme, the criteria for considering the payment due date depends on the **Actual Wage payment date** and that the due date for payment by the establishment shall be 15 days from the end of the Actual Wage payment date. In the above table, the wages for the month of April is paid on 08.05.2019 and therefore the due date for payment of PF shall be 15 days from the end of May i.e., 15.06.2019. Considering the actual date of payment i.e., 17.05.2019, the Employees contribution to PF is paid within the due date under the PF laws and is therefore deductible U/s 36(1)(va).

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Managing Director

M/s. Soliflex Packaging Private Limited. – ITAT Appeal AY 2020-21

6. The Learned CIT & AO has failed to take into consideration the following case laws which are passed in favour of the assessee on similar issues:

- a. Fluid Air (India) Ltd. Vs. D.C.I.T. (1997) 63 ITD 182 (Mumbai) &
- b. Madras Radiators & Pressings Ltd. Vs. D.C.I.T. (1996) 59 ITD 515 (Mad.)/ (1996) 56 TTJ (Mad.) 662)

wherein it was held that the due date for payment of PF is within 15 days from the end of the month in which the wages are PAID by the assessee.

7. In the case of Fluid Air (India) Ltd. Vs. D.C.I.T. (1997) 63 ITD 182 (Mumbai), the Honorable ITAT of Mumbai observed the following:

13. Another question to be decided in this case is the determination of 'due date' for making payment and for this purpose, we would like to consider the provisions of sections 36(2) and 38 of the Employees' Provident Fund Scheme, 1952 because there seems to be some ambiguity in those provisions. Section 36(2) reads as under :

"Every employer shall send to the Commissioner within 15 days of the close of each month a return -

(a) in Form 5, of the employees qualifying to become members of the Fund for the first time during the preceding month together with the declarations in Form 2 furnished by such qualifying employees, and

(b) in such form as the Commissioner may specify, of the employees leaving service of the employer during the preceding month :

Provided that if there is no employee qualifying to become a member of the Fund for the first time or there is no employee leaving service of the employer during the preceding month, the employer shall send a 'Nil' return.

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Sabarish Padmanabhan
Managing Director

M/s. Soliflex Packaging Private Limited. – ITAT Appeal AY 2020-21

Section 38 reads as under :

"Mode of payment of contributions. -- (1) The employee shall, before paying the members his wages in respect of any period or part of period for which contributions are payable, deduct the employees' contribution from his wages which together with his own contribution as well as an administrative charges of such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employees, and in respect of which provident fund contributions are payable as the Central Government may fix, he shall within fifteen days of the close of every month pay the same to the Fund by separate bank drafts or cheques on account of contributions and administrative charges."

14. Reading together sections 36 and 38 it could be said that there is certain amount of ambiguity over the expression "15 days from the close of the month". There is also force in the submission of the assessee's counsel that in the case of ambiguity the benefit should be given to the assessee.

15. As the term 'month' has not been defined in the Act, so had the assessee paid the salary and wages on the last day of the month, there would have been no difficulty in defining the month or the due date. But in the case before us, the salary and wages had been paid on the 7th day from the end of the month to which it relates. So, there arises certain amount of ambiguity with regard to the period of 15 days from the close of each month. From reading of sections 36 and 38 reproduced above it can easily be said that there is ambiguity. Therefore, we are of the opinion that there is force in the submission of the assessee that benefit of ambiguity should be given to the assessee. Viewed in this context we hold that most of the payments having been made within 9 to 22 days from the date of payment of salary and wages will be deemed to have been made within due date and, therefore, no disallowance could be made on this account.

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Sabarish Padmanabhan
Managing Director

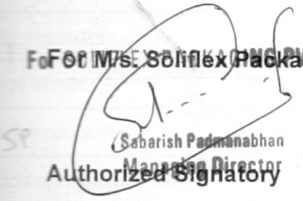
M/s. Soliflex Packaging Private Limited. – ITAT Appeal AY 2020-21

8. The Copy of Judgment passed by Mumbai ITAT in case of Fluid Air (India) Ltd. Vs. D.C.I.T. (1997) 63 ITD 182 (Mumbai ITAT) is attached **Annexure 2** and the copy of Para 36 and Para 38 of The Employees' PF Scheme, 1952 is attached as **Annexure 3**

Appeal / Prayer

We pray that the above amount of Rs. 4,41,164/- relating to employees' contribution to PF should be fully allowed and should not be added back to the Total Income for AY 2020-21.

For M/s. Soliflex Packaging Private Limited


SP
(Sabarish Padmanabhan)
Managing Director
Authorized Signatory

In addition to the above, he submitted that the lower authorities were not justified for making disallowance u/s 36(1)(va) r.w.s. 2(24)(x) of the Act. The assessee paid the amount of PF within the period prescribed in the respective Act. The period should be counted from the month in which the actual salary is paid to the employees but not from the month for which the salary is paid. He reiterated the judgment cited supra and also referred to section 36 & 38 of the Employee's PF Scheme, 1952, which is placed on the paper book at page No. 21 to 23. He further requested that the matter may be sent back to Assessing Officer for the verification for the date of payment of salary to its employees and decided the

issue in the light of the judgment of Fluid Air (India) Ltd. vs. DCIT (1997) 63 ITD 182 Mumbai

4. The Id.DR relying on the order of the lower authorities & submitted that the CIT(A) has decided the issue on merits and he has relied on several judgments of various High Courts. He also submitted that the addition can be made while processing the return as per sec. 143(1) of the Act. In support of his arguments, he relied on the judgment of the Hon'ble Madras High Court in the case of AA520 Veerappampalayam Primary Agricultural Cooperative Credit Society Ltd. Vs. Deputy Commissioner of Income-tax reported in (2022) 138 taxmann.com 571. He submitted that the issue is squarely covered in favour of the Revenue on the recent judgment of Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. Vs CIT-1 reported in [2022] 143 taxmann.com 178. He further submitted that the assessee did not deposit the employees' contribution to PF/ESI within the due date as per the respective Act, which was clear from the tax audit report uploaded by the assessee at the time of filing the return of income.

5. After hearing both the sides and perusing the entire materials available on records and order of the authorities below I observed that the disallowance made by the AO (CPC) on the basis of audit report uploaded by the assessee and further observed that from the written submissions the assessee has paid salary as per the table above and the PF has been deposited within the 15 days from the date of payment of salary in the same month in which the salary has been paid and this fact has been brought by the assessee before me first time, therefore , considering the entire submissions from both the sides and case law relied by both the sides, I think it fit to send back this issue to the file of the AO for verification of actual date of payment of salary & PF and decide the issue following the judgment of Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. Vs CIT-1 reported in [2022] 143 taxmann.com 178 and Fluid Air (India) Ltd. vs. DCIT (1997) 63 ITD

Page 10 of 11

182 Mumbai. Accordingly appeal of the assessee is allowed for statistical purpose.

6. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 05th January, 2023.

Sd/-
(Laxmi Prasad Sahu)
Accountant Member

Bangalore,
Dated : 05th January,2023.
Devadas/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.