

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "B", MUMBAI  
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
**ITA No. 3216/Mum/2022 (A.Y. 2015-16)**

**New Rampgreen Technologies Private Limited**

F-12, Shilpin Centre,  
GD Ambedkar Marg,  
Wadala,  
Mumbai-400 031

**PAN: AADCV9341F**

..... Appellant

Vs.

**ITO, 7 (2) (4)**

Room No.807, Old CGO Building,  
M.K. Road,  
Mumbai-400 020

..... Respondent

Appellant by : Shri Sunil KishanlalSoi  
Respondent by : Shri Chetan M. Kacha, Sr. AR

Date of hearing : 12/04/2023  
Date of pronouncement : 15/05/2023

**ORDER**

**PER GAGAN GOYAL, A.M:**

This appeal by assessee is directed against the order of National Faceless Appeal Centre; Delhi (for short 'NFAC') dated 30.11.2022 u/s. 143(3) of

the Income Tax Act, 1961 (for short 'the Act') for A.Y. 2015-16. The assessee has raised the following grounds of appeal:

*"1. On the facts and circumstances of case and law the Ld. CIT(A) erred in confirming the assessment order u/s. 143 sub section 3 of the Income Tax Act which is passed against the principal of natural justice.*

*2. the NFAC Delhi erred in confirming the addition of Rs.43, 82,253/- u/s. 36(1) (va) r.w.s. 2(24) (x) of the Income Tax Act, 1961.*

*3. the NFAC Delhi erred in confirming the addition of Rs.12, 12,371/- u/s 40A (2) (a) of the Income Tax Act, 1961.*

*4. The NFAC Delhi erred in confirming the charging of interest u/s. 234A, 234B and 234C of the Income Tax Act, 1961.*

*5. The NFAC Delhi erred in confirming the initiation of the penalty proceeding u/s. 271(1) (c) of the Income Tax Act, 1961.*

*6. The assessee craves leave to add further grounds or to amend or alter the existing grounds of appeal on or before the date of hearing."*

1. Brief Facts of the case are that Assessee Company is involved in business of taking up jobs for EBay India Pvt. Ltd. For salary processing & management of other services like hotel booking, conference arrangement and other allied services. Assessee filed its return of income on 27-08-2015 declaring total income of Rs. 8, 68,530/-. Case of the assessee was selected for scrutiny under CASS and assessed at Rs. 64,63,153/- after disallowance of Rs. 43,82,253/- u/s. 36(1) (va) r.w.s. 2(24)(x) and Rs. 12,12,371/- u/s. 40A(2)(a) of the Act. Assessee being aggrieved with this order of AO preferred an appeal before the Ld. CIT (A). Order of Ld. CIT (A) also confirmed the contentions of AO and there was no relief to the assessee.

2. Being further aggrieved assessee preferred the present appeal before us. We have gone through the order of AO, order of Ld. CIT (A) and submissions of the assessee along with case laws relied upon. Issue wise analysis and our observations are as under, Ground wise:
  
3. Ground No. 1 is general in nature and not required any adjudication. Ground No. 2 is a substantive ground challenging disallowance made u/s. 36(1) (va) r.w.s. 2(24) (x) of the Act. On this issue we observed that payments were made after the due date prescribed in respective laws, but before the due date of filing the return u/s. 139(1) of the Act. Apparently, the order of AO is correct in view of order of Hon'ble Apex court in the case of **Checkmate Services Pvt. Ltd. V. CIT, Dated: 12-10-2022**. But assessee's arguments are on different footing, presenting facts in another way vide its submissions submitted on 11-04-2023.
  
4. Assessee's counsel through his submissions relied upon the judicial pronouncements in the case of **Fluid Air (India) Ltd. Vs. DCIT (1997) 63 ITD 182, Madras radiators & Pressings Ltd. Vs. DCIT (1996) 59 ITD 515 and Kanoi Paper & Industries Ltd., Calcutta Vs. ACIT, ITA No. 1260/KOL/1996**. Through these citations assessee tried to strengthen its contention w.r.t. due date as per section 38 of the EPF & MP, 1952. We have gone through these case laws and cruxes of these case laws are as under:

### **Fluid Air (India) Ltd. vs. DCIT (1997) 63 ITD 182**

*"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. [Emphasis supplied]*

*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."*

**Madras radiators & Pressings Ltd. vs. DCIT (1996) 59 ITD 515**

*"One of the questions to be decided in this case is the determination of the due date for payment of such contributions. Section 38 of the Employees' Provident Fund Scheme, 1952 is as follows:*

*"38. Mode of payment of contributions.-(1) The employee 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 an excluded employee, 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 charge."*

*The term 'month' has not been defined in the Act. The learned Advocate contends that the condition that the payment should be made "within 15 days from the close of each month" should be reckoned from the month in which such contributions are received by the assessee from its employees and not to the month in respect of which such contributions are received by the assessee. Difficulty in the interpretation will not arise if the salary is paid for a particular month on the last day of the same month. But in cases where the salary is paid within 7 days from the end of the month to which it relates, there arises a certain amount of ambiguity with regard to the period of 15 days from the close of each month. There is support for this ambiguity from the provisions of section 36(2) of the Employees' Provident Fund Scheme, 1952, which dealt with the duties of the employer. Sub-section (2) is as follows:*

*"(2) 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." [Emphasis supplied]*

*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 taxpayer.*

*Viewed in this context we hold that payments have been made within the due date and, therefore, no part of it can be disallowed.”*

5. Case laws discussed above clearly confirm the contention of A.O. about date as per respective laws. **Fifteen days are to be reckoned from close of the month in which, salary was actually paid.** It is quite logical, as employer is not enjoying employee's money as the contribution by employee neither quantified nor collected before settlement of salary.
  
6. With this background of discussion and submissions of the assessee, we found it legally tenable and direct the AO to recalculate the amount of disallowance keeping in view the calculations submitted by assessee vide page no. 7 & 8 of the submissions before us. In the result ground no. 2 raised by the assessee is allowed for statistical purposes.
  
7. Ground No. 3 pertains to disallowance of Interest paid to related parties amounting to Rs. 12, 12,371/- u/s. 40A (2) (a) of the Act. During the year under consideration assessee paid interest of Rs. 28 Lacs to M/s. Lakshaya Circuits Pvt. Ltd. (Related Party) @ 24.25% per annum. We observed that during the year under consideration, assessee has already availed term loan of Rs. 6,06,91,404/- @ 13.50% and has already crossed its O.D. Limit amounting to Rs. 52,44,414/-. It proves that assessee was running its business on a very high leverage ratio as the assessee's own funds are very meager as compared to the loans from various parties including financial institutions.
  
8. Assessee's Balance Sheet as submitted before us vide page nos. 14 to 26 of paper book, confirms assessee's own net worth is in negative and primarily

sustaining because of loan funds. In such type of situation financial acumen of assessee can be challenged by the stakeholders but, the same can't be challenged or disallowed by revenue, simply because loans have been taken from Related Parties. Disallowance u/s. 40A(2)(a) can't be made in an automated manner, AO must understand the business model of the assessee, position of own funds, loans already taken and needs of the situation.

9. As argued before us and substantiated also by the assessee that he has dire need of fund, which were available neither with him nor with financial institutions (As assessee already has over exposure with them). In this situation, without collateral and at a short notice funds can be provided by some known person only may be at higher rate of interest taking advantage of assessee's financial position. As demonstrated before us that a lot of money from various parties of assessee was in hold and assessee has to pay salary even from borrowed funds, in that set of facts and situation, we don't find any anomaly in higher rate of interest paid by assessee. In view of above facts and considering assessee's arguments, we are of the considered view that no disallowances u/s. 40A (2) (a) is warranted. Ground No. 3 raised by the assessee is allowed and AO is directed to delete the addition made u/s. 40A (2) (a) amounting to Rs. 12, 12,371/-.
  
10. As far as ground no. 4 is concerned, its a settled legal position that Interest u/s. 234A and 234C is fastened to returned income only and can't be disturbed by virtue of any variation in returned income vis-à-vis assessed income. Hence, AO is directed to delete interest liability u/s. 234A and 234C if, he charged any. Liability u/s. 234B is consequential to assessed income finally arrived at by our order, hence is to be recalculated based on relief by virtue of this order. In the result Ground No. 4 is also partially allowed for statistical purposes.

**11. In the result assessee's appeal is partially allowed for statistical purposes.**

Order pronounced in the open court on 15<sup>th</sup> day of May, 2023.

Sd/-

(KULDIP SINGH)  
JUDICIAL MEMBER

Sd/-

(GAGAN GOYAL)  
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 15/05/2023

*Mahesh R. Sonavane*

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)  
**ITAT, Mumbai**