

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 409/MUM/2022
Assessment Year: 2018-19

Creative Textile Mills Pvt. Ltd.,
212, Cama Indl. Esate, Sun
Mill Compound, Lower Parel,
Mumbai-400013.

PAN No. AAACC 5458 P
Appellant

DCIT CPC,
Post Box No. -1 Electronic
City Post Office,
Karnataka-560 100.

Vs.

Respondent

Assessee by : Mr. Sunil Hirawat
Revenue by : Ms. Richa Gulati

Date of Hearing : 22/05/2023
Date of pronouncement : 31/05/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 23.08.2021 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2018-19. The appeal was originally adjudicated on 20.05.2022, however subsequently on the Miscellaneous Application filed by the Revenue, the appeal has been recalled by the order of the Tribunal dated 13.04.2023 passed in MA No. 405/Mum/2022, and thus this appeal came before us for



hearing. The grounds raised by the assessee are reproduced as under:

1. *On facts and in law, the Ld. Commissioner of Income-tax Appeals (hereinafter referred to as Ld. CIT-A) had erred in confirming the disallowance of Rs.10,09,648/- being belated payment of PF/ESIC u/s 36(1)(va) of the Income-tax Act.*
2. *On facts and in law, the Ld. CIT(A) erred in not appreciating that the amendment made by Finance Act, 2021 is prospective in nature under the facts and circumstances, the addition of Rs.10,09,648/- ought to have been deleted.*

2. Before us, the Ld. Counsel of the assessee admitted that employees contribution to PF/ESI deposited after due date under the relevant Acts is not allowable as deduction u/s 36(1)(va) of the Act in view of decision of the Hon'ble Supreme Court in the case of **Checkmate Services Pvt. Ltd. v. CIT reported in 143 taxmann.com 178**. However, the Ld. Counsel before us submitted that as per the clause 38 of the Provident Fund Scheme, the employee's contribution to the provident fund is required to be deposited 15 days from the close of every month. He submitted that the term "every month" under the clause 38 of the employee's provident fund scheme 1952 should be read as the month of payment of the salary, which is a month subsequent to the month for which salary was paid. In support of contention, the Ld. Counsel relied on the decision of the Tribunal in the case of " the Master Polishers" in ITA No. 252/Mum/2023 for assessment year 2020-21,



wherein the Tribunal has restored the matter back to the file of the Assessing Officer for deciding the term every month.

3. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute before us is regarding the due date before which the employee's contribution should be deposited into provident fund account. The Ld. Counsel of the assessee has referred to clause 38 of the employee's provident fund which reads that provident contribution fund are payable to central government within 15 days of the close of every month. The Ld. Counsel has referred to the decision of the Co-ordinate Bench of the Tribunal (Kolkata) Bench in the case of **Kanoi Paper and Industries Ltd ACIT in ITA No. 1260/Mum/1996**. The Tribunal in the case of Master Polishers (supra) has referred to the said finding. For ready reference, said finding is reproduced as under:

“6. Clause 38 of the Employees' Provident Fund Scheme, 1952, fixes the time limit for making payment in respect of contribution to the provident fund to be 15 days from the close of the month concerned. However, the issue here is whether the "month" should be considered to be the month to which the wages relates or the month in which the actual disbursement of the wages is made, we are of the considered opinion that the expression "month" should mean here the month during which the wages/salary is actually disbursed irrespective of month to which the same relates. Thus, the scheme of the government in this regard is that once a deduction is made in respect of the employees' contribution to the provident fund from the salary/ wages of the employee or the employer also makes his contribution, factually at the



time of disbursement of the salary the payment in respect of such contribution should be made forthwith. If for some reason or other the payment of salary for a particular month be held up for considerable period of time it cannot be said that the employer would be liable to make payments in respect of the "employer's" as well as "employees" contribution in respect of wages for such period within a period of 15 days from the close of the month to which the wages relates. On the other hand, in our view, most appropriate interpretation would be that the employer would be at liberty to make payment of the contribution concerned within 15 days (subject however to the further grace period) from the end of the month during which the disbursement of the salary is actually made and the contribution of the, provident fund are, thus, generated, inasmuch as, the provision relating to the disallowance of such contribution on account of delay is rather an artificial provision. In our view, a liberal approach has got to be made to this issue. Ultimately, therefore, we reverse the order of the lower authorities and direct the assessing officer to examine whether the payments of contribution in the present case were made within 15 days (allowed with further grace period of 5 days) from the close of the respective months during which the disbursement of the salary/wages were actually made. The assessing officer should recompute the amount disallowable, if any, on the above basis and take appropriate action accordingly.”

3.1 However, we find that the Hon’ble Madras High Court in the case of **the Commissioner of Income-tax v. Madras Radiators & Pressing Ltd. 264 ITR 620 Madras** has held that the term “every month” in clause 58 of the Provident Fund Scheme should be read as month in which the wages were actually earned i.e. salary payable. The relevant finding of the Hon’ble Madras High Court is reproduced as under:



“4. In our considered opinion, we are of the view that the Tribunal is not correct in coming to the conclusion that there was some ambiguity in construing the expression "month" used in para 38 of the Scheme under the Provident Fund Act on the premise that the assessee used to pay the salary to its employees only on the 7th day of succeeding month under section 5 of the Payment of Wages Act. It is true that section 5 of the Payment of Wages Act provided for payment of wages in respect of certain categories of industries on or before the 7th day of succeeding month. However section 4 of the Act provided for fixation of wage period and also provided that no wage period shall extend one month.

5. Para 29 of the Scheme under the Provident Fund Act provided that the contribution payable should be calculated on the basis of the basic wages and other allowances actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis. The expression "basic wages" is defined as all emoluments, which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him.

6. Para 30 of the Scheme of the Provident Fund Act imposed an obligation on the employer to remit both the shares of contributions in the first instance and para 32 empowered the employer to recover the employees' contributions from the wages of the employees. As per para 38 of the Scheme, the employer is required to remit both the contributions together with the administrative charges thereon within 15 days before the close of every month.

7. Thus as seen from the above provisions, it is clear that it is the responsibility of the employer to make payment of the contributions at the first instance irrespective of the fact, whether the wages are paid in time or not. Hence the actual payment of wages on the 7th day of succeeding month would not any way alter the situation and give room for interpreting that the "close of 15th day" has to be calculated from the end of the month in which the wages were actually paid. The payment of wages on the 7th day



of succeeding month would not in any way alter the initial responsibility of the employer for making payment of contributions, which he is statutorily authorised to recover from the employees salary, whether the salary is paid in time or not. **Hence the one and only reasonable conclusion is that the employer has to remit both the contributions to the Provident Fund within 15 days from the close of the month for which the employees earned their salary i.e., Salary payable.** Our view has been fortified by the Division Bench of this court in *Presidency Kid Leather (P) Ltd. v. Regional Provident Fund CIT (1997) 91 F.J.R. 661*, wherein the Division Bench of this court held as follows :

"As per para 38 of the Employees' Provident Funds Scheme, the employer is required to remit both the employees' as well as the employer's share of contributions together with administrative charges thereon before the close of the 15th of every month. Para 30 of the Scheme imposes an obligation on the employer to remit both the shares of contributions in the first instance and para 32 of the Scheme enables the employer to recover the employees contributions from the wages of the employees. The initial responsibility for making payment of the contributions lies on the employer irrespective of the fact whether the wages are paid in time or not. As such, the Provident Fund payments made after the due date will attract the penal damages under section 14B of the Act."

The Tribunal committed serious error in coming to the contrary conclusion. Hence the first two questions of law referred to us are answered in the negative against the assessee and in favour of the revenue."

(emphasis supplied externally)

3.2 The Hon'ble High Court being higher in hierarchy of judiciary than the Tribunal, therefore, following the decision of the Hon'ble Madras High Court (supra), we reject the prayer of the Ld. Counsel of the assessee for restoring the matter back to the Assessing



Officer. The grounds of appeal of the assessee are accordingly dismissed.

4. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on 31/05/2023.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 31/05/2023

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai