

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "H" NEW DELHI]

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं .I.T.A No. 164/Del/2023
निर्धारण वर्ष/Assessment Year : 2018-19

ACIT, Circle : 25 (1) New Delhi.	बनाम Vs.	M/s. VVDN Technologies Pvt. Ltd., 0, 12/10, East Patel Nagar, New Delhi - 110 008.
		PAN No. AABCE7582R
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारित की ओरसे / Assessee by :	Ms. Monika Aggarwal, Advocate;
राजस्व की ओरसे / Department by :	Shri Toufel Tahir, Sr. D. R.;

सुनवाई की तारीख/ Date of hearing :	22.06.2023
उद्घोषणा की तारीख/ Pronouncement on :	04.07.2023

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. This appeal is filed by the Revenue against the order of the Id. Commissioner of Income Tax (Appeals) (hereinafter referred to as

CIT (Appeals)/National Faceless Appeal Centre (NFAC) dated 7.10.2022 for assessment year 2018-19.

2. The Revenue in its appeal has raised the following grounds:-

“1. Whether on the facts and circumstances of the case, the Ld. CIT(A), NFAC is correct in deleting the disallowance of Rs.1,85,73,689/- without appreciating the legal position that expenditure on account of employees contribution to PF and ESIC is not covered u/s 43B of IT Act, but is covered u/s 36(1)(va) r.w.s 2(24)(x) whereby such expenditure is allowable only if the said amounts are paid within the due date under the relevant Act and not allowable even if paid before the due date for filing of return of income?”

2. Whether on the facts and circumstances of the case, CIT(A) NFAC erred both in law and on facts in disallowing sum of Rs.2,15,45,113/- representing Employees Stock Option Scheme expenses under section 37 of the Act.”

3. The ld. DR at the outset submits that in so far as ground No. (1) is concerned the issue is squarely covered by the decision of the Hon’ble Supreme Court in the case of Checkmate Services P. Ltd. Vs. CIT in Civil Appeal No. 2833 of 2016 (dated October 12, 2022) wherein the Hon’ble Supreme Court held that the employees’ contribution remitted beyond the due date specified under PF and ESI Acts is not an allowable deduction.

4. On the other hand, the ld. Counsel for the assessee requests only for a direction to the Assessing Officer to verify the due dates as interpreted by the Calcutta Bench in the case of Kanoi Paper & Industries Ltd. Vs. ACIT [(2002) 75 TTJ 448 (Cal)] wherein it has been held that employer would be at liberty to make payment

of the contribution within 15 days from the end of the month during which the disbursement of the salary is actually made and the contributions to the PF/ESI are thus generated. The Id. Counsel submits that the Mumbai Tribunal in the case of The Master Polishers Vs. ACIT in ITA. No. 252/Mum/2023 by order dated 26.04.2023 restored the matter back to the file of the Assessing Officer with a direction to find out “every month” specified in Provident Fund Scheme whether it is for the month for which salary/wages are due or month of the payment is referred to. The Id. Counsel submits that a similar direction may be given.

5. We have heard the parties and perused the case laws relied on. In the case of The Master Polishers Vs. ACIT (supra) the Mumbai Tribunal held as under:-

“2. In the ground No. 1 and 2 of the appeal, the assessee is aggrieved with the disallowance upheld by the Ld. CIT (A) in respect of employee's contribution to ESI/PF, which was made by the CPC as an adjustment and further sustained in rectification order u/s 154 of the Act. The Ld. CIT(A) has upheld the disallowance in view of binding precedent of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. v. CIT in Civil Appeal No. 2833 of 2016, observing as under:

"4. Having pursued the rectification order, the grounds of appeal and the written submissions the issue of admissibility of payment of employees' contribution of SIC/PF beyond the due date as per the relevant Statute, raised through ground number 1 is not tenable in view of decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. VS CIT in Civil Appeal No2833 of 2016 with CA No2830/2016, CA No. 159/2019, CA No.2832/2016 and CA No: 2831/2016 vide judgment dated 12.10.2022, wherein it was held that deduction u/s 36(1)(va) of the IT Act is admissible only of the amount so received from employees for PF/ESIC is credited

in specified account within the due date as per the relevant Statute. In the instant appeal, it is an admitted position of the appellant that there was delay in crediting the contribution so collected in the specified account within the due date as per the relevant Statute."

3. Before us, the Ld. Counsel of the assessee submitted that assessee was engaged in providing manpower securities services etc. He submitted that salary/ remuneration payment to staff for the month was paid in subsequent month, preferably before 7th day of next month. For example, payment for month of April 2019 was paid on or before 7th of May 2019. The Ld. Counsel referred to the provisions of section 36(1)(va) of the Act and submitted that employee's contribution was deposited as per the due date prescribed under the relevant Act. The Ld. Counsel further referred to the employee provident fund scheme 1952 formulated under the provisions of the relevant Act. The relevant clause no. 38 of the scheme is reproduced as under:

"38. Mode of payment of contributions. (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 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:]

[Provided that if the payment is made by a cheque it should be drawn only on the local bank of the place in which deposits are made.)

Provided further that where there is no branch of the Reserve Bank or the State Bank of India) at the station where the "(factory or other establishment) is situated, the employer shall pay to the Fund the amount mentioned above by means of Reserve Bank of India (Government Drafts

at parl separately on account of contributions and administrative charge.

2) The employer shall forward to the Commissioner, within twenty-five days of close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the month:

Provided that an employer shall send a Nil return, if no such recoveries have been made from the employees:

Provided further that in the case of any such employee who has become a member of the Pension Fund under the Employees' Pension Scheme, 1995, the aforesaid Form shall also contain such particulars as necessary to comply with the are requirements of that Scheme.

(3) The employer shall send to the Commissioner within one month of the close of the period of currency, a consolidated Annual Contribution Statement in Form 6-A, showing the total amount of recoveries made during the period of currency from the wages of each member and the total amount contributed by the employer in respect of each such member for the said period. The employer shall maintain on his record duplicate copies of the aforesaid monthly abstract and consolidated annual contribution statement for production at the time of inspection by the Inspector."

3.1 The Ld. Counsel referred to the above clause and submitted that the employer is required to deposit the PF/ESI contribution of the assessee within 15 days of the close of every month. According to the Ld. Counsel, term 'every month is the month of payment of the salary/remuneration to the employee and not the month for which salary or wages were due to the employee. He accordingly submitted that if the term 'month' is taken as the month of payment of the wages/salary to the employee, then all the payment of employee's contribution are within the due date. The Ld. Counsel has provided a list of the monthly payment for provident fund and ESI, which is reproduced as under:-

The Master Polishers**Assessment Year :: 2020-2021**

Sum received from employees towards contributions to Provident Fund mentioned in section 2(24)(x) and due date for payment and the actual date of payment to the concerned authorities under section 36(1)(va):

Salary Month	Employees Contribution	Due Date	Actual date of payment	Delay In Payment
Provident Fund				
April, 2019	€14,177	15/06/2019	15/05/2019	-
May, 2019	581,174	15/07/2019	15/06/2019	-
June, 2019	602,898	15/08/2019	16/07/2019	-
July, 2019	623,223	15/09/2019	14/08/2019	-
August, 2019	634,089	15/10/2019	18/09/2019	-
September, 2019	681,246	15/11/2019	15/10/2019	-
October, 2019	757,330	15/12/2019	14/11/2019	-
November, 2019	775,292	15/01/2020	13/12/2019	-
December, 2019	828,293	15/02/2020	15/01/2020	-
January, 2020	794,098	15/03/2020	15/02/2020	-
February, 2020	819,947	15/04/2020	13/03/2020	-
March, 2020	731,320	15/05/2020	15/04/2020	-
	8,443,087			

Salary Month	Employees Contribution	Due Date	Actual date of payment	Delay In Payment
ESIC Contribution				
April, 2019	125,327	15/06/2019	15/05/2019	-
May, 2019	114,987	15/07/2019	15/06/2019	-
June, 2019	117,738	15/08/2019	16/07/2019	-
July, 2019	53,221	15/09/2019	14/08/2019	-
August, 2019	52,875	15/10/2019	17/09/2019	-
September, 2019	52,983	15/11/2019	15/10/2019	-
October, 2019	56,605	15/12/2019	14/11/2019	-
November, 2019	57,214	15/01/2020	13/12/2019	-
December, 2019	60,262	15/02/2020	15/01/2020	-
January, 2020	57,191	15/03/2020	15/02/2020	-
February, 2020	58,900	15/04/2020	13/03/2020	-
March, 2020	51,479	15/05/2020	14/05/2020	-
	858,774			

For The Master Polishers,

RICHARD
DIAS
Partner

Digitaly signed by
 RICHARD DIAS
 Date: 2023.04.03
 150534 40117

4. On the contrary, the Ld. Departmental Representative (DR) submitted that the term 'every month' mentioned in section 38 of the employees contribution scheme 1952 should be interpreted as month for which salary/remuneration is due to the employee. He submitted that for clarification on the issue-in-dispute of term 'month', matter may be restored to the file of the Assessing Officer and he may be directed to verify the term 'month' from the respective provident fund or ESI authorities.

5. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. The issue-in-dispute is in respect of employee's contribution to provident fund

(PF) and employee state insurance corporation (ESIC) fund amounting to Rs.84,43,087/- and Rs.8,58,774/- respectively. The provisions of the Act provide for payment of the employee's contribution of PF/ESI on or before the due date prescribed under the relevant PF/ESI and the issue-in-dispute is in respect of due date prescribed. According to the assessee, the due has to be reckoned within 15 days from the close of the month in which payment is made to the employee, whereas according to Revenue the contribution has to be deposited within the 15 days from the close of the month for which salary/wages of the employee is due. The Ld. Counsel has referred to the decisions of the Hon'ble Calcutta Tribunal in the case of Kanoi Paper & Industries Ltd. Vs. ACIT ITA No. 1260/Cal/1996. The relevant finding of the Tribunal 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"

5.1 In our opinion, it will be appropriate if the term 'every month' specified in Provident Fund scheme, whether it is the month for which salary/wages are due or month of the payment is referred to Relevant Authorities for finding out with reference to any judicial precedent in respect of provisions of the relevant Act. Accordingly, we restored this issue back to the file of the Ld. Assessing Officer with the direction to find out from the relevant PF authorities about the term 'every month' as mentioned in clause 38 of the employees provident fund scheme. Similarly, he may find out from the ESI Authorities. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The grounds of appeal of the assessee are accordingly allowed for statistical purposes."

6. Placing reliance on this decision the ld. Counsel submits that a direction may be given to the Assessing Officer to verify the "due date" specified in the PF Act and decide the issue accordingly. Considering the submissions of the ld. Counsel and the decision of the Mumbai Tribunal (supra) we restore this issue to the file of the Assessing Officer to decide the issue keeping in view the directions by the Mumbai Bench of the

Tribunal in the case of The Master Polishers Vs. ACIT (supra). This ground is allowed for statistical purposes.

7. Coming to ground No. 2 of the Revenue i.e. whether expenses incurred on employees stock option scheme is allowable as deduction under section 37 of the Act, we find that the issue is covered in favour of the assessee by the Hon'ble Delhi High Court in the case of Pr. CIT Vs. Lemon Tree Hotels Pvt. Ltd. [(2019) 104 taxmann.com 26 (Del)]. We also notice that the Id. CIT (Appeals) while allowing the claim of the assessee followed the decision of the Hon'ble Delhi High Court in the case of PCIT Vs. Lemon Tree Hotels Pvt. Ltd. (supra) and also referred to the decision of the Special Bench Bangalore Tribunal in the case of CIT Vs. Biocon Ltd. [430 ITR 151 (SB)]. Thus, we see no infirmity in the order passed by the Id. CIT (Appeals) in allowing the claim of ESOP expenses under section 37(1) of the Act. The ground raised by the Revenue is rejected.

8. In the result, appeal of the Revenue is partly allowed for statistical purpose.

Order pronounced in the open court on : 04/07/2023

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 04/07/2023

MEHTA

Copy forwarded to :

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	30.06.2023
Date on which the typed draft is placed before the dictating member	30.06.2023
Date on which the typed draft is placed before the other member	04.07.2023
Date on which the approved draft comes to the Sr. PS/ PS	04.07.2023
Date on which the fair order is placed before the dictating member for pronouncement	04.07.2023
Date on which the fair order comes back to the Sr. PS/ PS	04.07.2023
Date on which the final order is uploaded on the website	04.07.2023
Date on which the file goes to the Bench Clerk	04.07.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	