

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"D" BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.1190/Mum./2023**  
**(Assessment Year : 2019-20)**

Diwyesh Mahendra Dave  
301, Corporate Center, LBS Marg  
Mumbai (West) 400 080  
PAN – AAAPD2637C

..... Appellant

v/s

Dy. Commissioner of Income Tax  
Circle-41(2)1, Mumbai

..... Respondent

Assessee by : Shri S.M. Bandi  
Revenue by : Smt. Mahita Nair

Date of Hearing – 05/07/2023

Date of Order – 14/07/2023

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 15/03/2023, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*], for the assessment year 2019-20.

2. In this appeal, the assessee has raised the following grounds:-

*"1. On the facts and circumstances of the case and in law, the LD. CIT (A) grossly erred in confirming the adjustment made by the AO, CPC Bengaluru, in intimation U/S 143 (1).*

2. *On the facts and circumstances of the case and in law, the LD. CIT (A) grossly erred in confirming the adjustment of Rs. 5,16,707/- U/S 36(1)(va) made by the AO, CPC Bengaluru, in intimation U/S 143 (1).*

*The appellant humbly prays that the relief as prayed above may please be granted.*

*The appellant craves leave to add, to alter, to amend, to amplify, to delete, or to revise any of the ground on or before the hearing."*

3. The only dispute raised by the assessee is against the disallowance on account of delayed payment of employees' contribution to Provident Fund (P.F) and Employees State Insurance Corporation (E.S.I.C) under section 36(1)(va) of the Act.

4. The brief facts of the case as emanating from the record, are: The assessee is an individual and is engaged in the business of contract manpower, pay-roll processing and recruitment consultant. For the year under consideration, the assessee filed its return of income on 16/10/2019 declaring a total income of Rs.83,89,140. The said return of income was processed vide intimation dated 01/05/2020 issued under section 143(1) of the Act computing the total income of the assessee at Rs.89,05,840, inter-alia, after making disallowance of Rs.5,16,707, on account of delayed payment of employees' contribution to P.F. and E.S.I.C. under section 36(1)(va) of the Act. Vide impugned order, the learned CIT(A) dismissed the appeal filed by the assessee following the decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. v/s CIT, [2022] 448 ITR 518 (SC). Being aggrieved, the assessee is in appeal before us.

5. During the hearing, the learned Authorised Representative ("*learned AR*") by referring to the provisions of the Provident Fund Scheme submitted that the employee's contribution to PF is required to be deposited within 15 days from the close of every month. The learned AR further submitted that the term "*every month*" should be read as the month in which the salary is paid, which in the present case is subsequent to the month for which the salary is paid. Thus, the learned AR submitted that not all the payments towards employees' contribution to PF and ESIC are beyond the due date. In support of its submission, the learned AR placed reliance upon the decision of the coordinate bench of the Tribunal in *The Master Polishers v/s ADIT*, in ITA No. 252/Mum./2023.

6. On the other hand, the learned Departmental Representative ("*learned DR*") submitted that the issue arising in the present appeal is squarely covered in favour of the Revenue by the decision of the Hon'ble Supreme Court in *Checkmate Services Pvt. Ltd. (supra)*.

7. We have considered the submissions of both sides and perused the material available on record. We find that the Hon'ble Supreme Court in *Checkmate Services Pvt. Ltd. (supra)* held that the payment towards employees' contribution to P.F./E.S.I.C., after the due date prescribed under the relevant statute is not allowable as a deduction under section 36(1)(va) of the Act.

8. We further find that the coordinate bench of the Tribunal in *Creative Textile Mills Pvt. Ltd. v/s DCIT*, in ITA No. 409/Mum./2022, vide order dated

31/05/2023, following the decision of the Hon'ble Madras High Court in CIT v/s Madras Radiators & Pressing Ltd., 264 ITR 620 (Madras), rejected the similar arguments as raised by the learned AR before us. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as under:-

*"3. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. 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 1260/Mum/1996. T (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 the employer's share of as 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."*

9. Since, in the present case, employees' contributions to P.F. and E.S.I.C. were found to be deposited after the due date prescribed under the relevant statute, therefore respectfully following the aforesaid decision of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. (supra), the grounds raised by the assessee are dismissed.

10. In the result, the appeal by the assessee is dismissed.

Order pronounced in the open Court on 14/07/2023

**Sd/-**  
**PRASHANT MAHARISHI**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 14/07/2023**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai