

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
SHRI NARENDER KUMAR CHOUDHRY, JM

ITA No. 1430/MUM/2021  
(Assessment Year 2019-20)

Mindcrest (India) Pvt. Ltd.  
106, Peninsula Centre,  
Parel,  
Mumbai-400012  
(Appellant)

Vs.

ACIT, CPC  
Bengaluru-560500

(Respondent)

PAN No. AACCM5872D

Assessee by : Mr. Sarla Agarwal, AR  
Revenue by : Shri Ashok Kumar Ambastha, DR

Date of hearing: 10.07.2023  
Date of pronouncement : 14.07.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee Mindcrest (India) Pvt. Ltd. ('the assessee/appellant') for assessment year 2019-20 against the appellate order passed by the National Faceless Appeal Center (NFAC) [the "Ld. CIT(A)"] dated 23.07.2021 for assessment year 2019-20 wherein the appeal filed by the assessee against the intimation passed u/s 143(1) of the Act was dismissed.



02. The only grievance of the assessee is with respect of disallowance of delayed payment of employees' contribution to the provident fund of ₹7,17,65,000/- u/s 36(1)(va) of the Act. As the said payments were made beyond the due date prescribed under the respective provident fund Act but before the due date of filing return of income of income tax. Thus the only grievance in this appeal is with respect to the above disallowance.
03. The briefly stated the fact shows that the assessee has filed its return of income on 28.11.2019 which was processed u/s 143(1) of the Act and resulted into an intimation dated 30.04.2020. The return of income disclosed the business income of ₹ 6,66,52,618/- which was processed by the Central Processing Center at ₹ 6,83,17,268/-. The only adjustment is at serial no. 14 of business and professional annexure wherein the disallowance of ₹17,17,650/- made on account of amounts debited profit and loss account to the extent of disallowable.
04. Against the order of the CPC, the assessee preferred an appeal before Ld. CIT(A). The Ld. CIT(A) has noted that there is amendments brought in the recent financial Act wherein the delayed payment cannot be allowed as deduction. He relied upon the several decisions of the Hon'ble High Courts and confirmed the addition. He did not consider decision of the Hon'ble Jurisdictional High Court in 368 ITR 749.



05. The Matter reached to the coordinate bench wherein vide order dated 26.04.2022 in ITA No. 1430/Mum/2021 appeal of the assessee was allowed. Later on Ld. AO preferred miscellaneous application before the co-ordinate bench in MA No. 64/Mum/2023 wherein the order of the co-ordinate bench passed earlier, was recalled by order dated 17.05.2023. Therefore, now this appeal is reinstated.
06. The fact clearly shows that now this issue is squarely covered by the decision of the Hon'ble Supreme Court in Checkmates Services Pvt. Ltd. Vs CIT (2022) 143 taxmann.com 178 (SC). According to that decision if the employees' contribution to the provident fund is not deposited within prescribed the due dates as per the Provident Fund Act, that same becomes a income of the assessee u/s 2(24)(x) and if same was not deposited within the due date prescribed of the respective statute, same is not allowable to the assessee as deduction under the head of business and profession. Therefore, this appeal is those squarely covered against the assessee.
07. However, the assessee has raised an alternative claim that the due date of depositing employees' contribution to the provident fund shall be counted from the end of the month in which salary is actually paid. For this proposition the three decisions of the co-ordinate bench were relied upon. The assessee also stated that if the due date for depositing provident fund dues is considered as



the month of payment of salary, there is no disallowance. Such details are submitted at page no. 23 of paper book. It was, further, the claim that assessee dispute that from which date period of 15 days should be counted for the purpose of section 38 of the Provident Fund Act for this proposition the Ld. AR relied upon the decision of Hon'ble Delhi High Court case of Delhi Press Patra Prakshan Ltd. Vs Region Provident Fund [WB (c) No. 3850/1992 and 3887/1993]. According to the Ld. AR assessee is consistently following cycle based on payment of wages Act and therefore the due date of 15 days should be counted from the month when salary is paid or payable. Therefore, according to her there counted cannot be any disallowance.

08. The Ld. Departmental Representative vehemently supported the order of the lower authority and submitted that the decision of the Hon'ble Supreme Court squarely covered issue against the assessee. It was further stated that the provisions of section 38 of the Provident Fund Act are absolutely clear and time of 15 days should be counted from the end of the month in which the wages become due. He, further, submitted that the decision relied upon by the Ld. AR of the Hon'ble Delhi High Court are not relied in view of various decisions of the Hon'ble High Courts, further the decisions of the co-ordinate benches are not corrected in view of the decision of the Hon'ble High Court.



09. We have carefully considered the rival contention and perused order of the lower authority. In this case the details of contribution received from employees' contribution which are paid before the due date prescribed are mentioned at Serial No. 20(b) wherein the details of contribution received from employees as referred in section 36(1)(va) is mentioned. This detail also shows that the assessee is dues date of payment and assessee is actual date of contribution deposited. There is no that the assessee has deposited such contribution beyond prescribed the due date as per the tax audited report and the return on income. Based on this the CPC made adjustment which has confirmed by the Ld. CIT(A).
010. Honourable Supreme Court in checkmate services Ltd 2022 SCC OnLine SC 1423 has categorically held that if the employees contribution is not paid within the due dates prescribed under the respective provident fund/ESIC act, same is not allowable under section 36 (1) (va) of the act. Therefore, the issue is squarely covered against the assessee.
011. However, Assessee has also submitted that if the due date as per the provident fund act is considered from the wage month as held by the Hon. Delhi High court in , the disallowance is nil and therefore the matter should be restored to the file of the AO for granting this benefit. We find that the due date is not required to be considered from the date of payment of the salary or from the wage month but from the date when it becomes due. Honourable



Gujarat High Court in case of Ask Me Lab Con Services Ltd. v. Income Tax Officer 2019 SCC ONLINE GUJ 1094 have considered following question:-

[B] “Whether on the facts and circumstances of the case and in law, due date for the payment of such contribution arose in the month subsequent to the month in which wages/ salary actually disbursed and therefore the liability to deduct employees' contribution arises only on paying salary to employees?’

012. Answering the above question division bench of honourable High Court held as under:-

“3. Learned counsel for the appellant would not dispute that the issue of disallowance of late deposited employees' contributions of PF and ESIC stands covered by the Division Bench judgment of this Court in case of Commissioner of Income Tax v. Gujarat State Road Transport Corporation reported in [2014] 366 ITR 170 (Guj). He however raised a slightly different contention which did not arise for consideration before this Court in case of Gujarat State Road Transport Corporation (supra). He submitted that in terms of section 38 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, reference to the time limit for depositing the contributions within 15 days of close of the month must be to the month in which the salary payment is made. For example, therefore if the salary payment for the month of June is made on 5th July, the employer would have time upto 15th of August for depositing the employee's contribution of provident



fund. Looking from this angle, there was no delay or default on the part of the present assessee.

4. In terms of section 36(1)(va) of the Act, any sum received by the assessee from any of his employees to which the provisions of section 2(24)(x) applies, would be deducted as long as such sum is credited by the assessee to the employee's account in the relevant funds on or before due date. Explanation to the said subsection provides that for the purpose of the said clause, "due date" means a date by which the assessee is required as an employer to credit an employee's contribution to the account in which relevant fund under any Act, rule, order or notification issued there under or under any standing order, award, contract of service or otherwise. section 38 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, becomes relevant. Subsection (1) thereof 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 an excluded employee, 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



authorized for collection” on account of contributions and administrative charge]:

“Provided that the Central Provident Fund Commissioner may for reasons to be recorded in writing, allow any employer or class of employer to deposit the contributions by any other mode other than internet banking”

5. This provision thus requires an employer before paying the employee his wages to deduct the employee's contribution along with the employer's own contribution as fixed by the Government. It is further required that he shall within fifteen days of the close of every month pay the same to the fund such contribution and administrative charges. In terms of this provision thus, after deducting the employee's contribution towards the funds, the same has to be deposited with the Government within fifteen days of the close of every month. Reference to fifteen days of the close of the month must be in relation to the month during which the payment of wages is to be made and corresponding liability to deduct employee's contribution to the fund arises. The expression “within fifteen days of the close of every month” therefore must be interpreted as having reference to the close of the month, for which, the wages are required to be paid with corresponding duty to deduct employee's contribution and to deposit the same in the fund.

6. Learned counsel for the appellant is therefore not correct in contending that if such wages are paid in the following month, the liability to deposit the employee's contribution to the fund gets differed by another month.”



013. Further honourable Madras High Court in commissioner of income-tax v madras radiators and pressings ltd. [2003] 264 ITR 620 (Mad) wherein the second question was as under:-

“2. Whether the Tribunal was right in law in reckoning the date of pay- ment of salary (viz.) seventh of the succeeding month as the date from which the due date of payment to the Government of ESI and EPF dues and the delay thereon is to be considered ?”

014. Division bench of The honourable High Court held as under:-

“Thus as seen from the above provisions, it is clear that it is the responsi- bility 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 seventh day of the 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 seventh day of the succeeding month would not in any way alter the initial responsi- bility of the employer for making payment of contributions, which he is statu- torily 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

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Commissioner [1997] 91 FJR 661, wherein the Division Bench of this court held as follows (page 665) :

“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."

015. The learned authorized representative has referred the decision of the honourable Delhi High Court in case of Delhi Press Patra Prakashan Ltd. [supra] wherein the issue was whether the wage month should be considered as per the cycle of the wage payment adopted by the assessee consistently. Therefore, the honourable single judge held that The deposit of such contribution, therefore, is required to be made by the employer within fifteen days of the close of the wage month and not the British English Calendar month under para 36 of the Scheme.
016. However as the above decision of the honourable Gujarat High Court and Honourable Madras High Court rendered by the division bench is have categorically dealt with this issue. The decision of the honourable Delhi High Court (rendered by single judge) is in direct contradiction with the decision of the honourable to high courts therefore, we following the decision of the division



bench is of the two high courts, hold that there is no relevance of the date of the payment of wages for reckoning the limit of 15 days. Even in that case also, it was not decided that due date is to be taken from the date of payment. The issue before the honourable High Court was that whether the employer can decide a wage month or not. Therefore, even otherwise, that decision does not help the case of the assessee.

017. Therefore, as the law is clear and not at all ambiguous, as held by the two honourable high courts, there is no reason to set-aside issue back to the file of the learned assessing officer to take any other due date other than the date to be taken from the date when the wages becomes due. Accordingly, this argument is also rejected.
018. Accordingly we dismiss ground number 1 and 2 of the appeal of the assessee.
019. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 14.07. 2023.

Sd/-  
(NARENDER KUMAR CHOUDHRY)  
(JUDICIAL MEMBER)

Sd/-  
(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)



Copy of the Order forwarded to :

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai