

आयकर अपीलीय अधिकरण
मुंबई पीठ " एच ", मुंबई
श्री विकस अवस्थी, न्यायिक सदस्य एवं
सुश्री पद्मावती, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " H", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
MS. PADMAVATHY, ACCOUNTANT MEMBER
आअसं.2251 /मुं/2021(नि.व.2019-20)
ITA NO.2251/MUM/2021(A.Y.2019-20)

Kader Exports Private Limited
D Wing, 3rd Floor, Amerchand Mansion 16,
Madame Cama Road,
Colaba, Mumbai - 400 039.
PAN: AACCK-9753-H

..... अपीलार्थी/Appellant

बनाम Vs.

The Dy.Commissioner of Income-tax ,
Central Circle -3, Thane,
6th Floor, Ahar IT Park, Road No.16Z, Nehru Nagar,
Wagle Industrial Estate,
Thane (West), Thane.

..... प्रतिवादी/Respondent

Assessee by : Shri Gyaneshwar Kataram
Revenue by : Smt. Usha Gaikwad, Sr. AR

सुनवाई की तिथि/ Date of hearing : 04/07/2023
घोषणा की तिथि/ Date of pronouncement : 04/07/2023

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-11, Pune [in short 'the CIT(A)'] dated 17/11/2021, for the assessment year 2019-20.

2. The solitary issue raised in the appeal by assessee is against disallowance of Rs.73,76,200/- made u/s. 36(1)(va) of the Income Tax Act, 1961 [in short 'the Act'] in respect of Employee's share of Contribution to Provident Fund (PF) and Employees State Insurance (ESI). The Id. Authorized Representative of the assessee submits that the Assessing Officer while making disallowance u/s. 36(1)(va) has made disallowance of the entire amount without considering the fact that in some of the months, the assessee had made contribution before the 'due date'. The Id. Authorized Representative of the assessee submitted that the due date has not been defined under the Provident Fund Act, 1952 or the Employees State Insurance Act, 1948. The due date has been explained in Clause 38 of the Employees Provident Fund Scheme 1952. To support his submissions he placed reliance on the following decisions:

- (i) Madras Radiators & Pressing Ltd., 59 ITD 515(Mad)
- (ii) The Master Polishers vs. ADIT, ITA No.252/Mum/2023 for A.Y. 2020-21 decided on 24/04/2023.

3. On the other hand, Smt. Usha Gaiwad representing the Department submitted that the Hon'ble Supreme Court of India in the case of Checkmate Services (P) Limited vs. CIT, 448 ITR 518 as laid the controversy to the rest. Hence, there is no ambiguity that the assessee is not eligible for claiming deduction in respect of Employees' share of Contribution towards PF and ESIC, if the contribution is made after the 'due date' has specified under the respective laws.

4. Both sides heard. The Assessing Officer made disallowance u/s. 36(1)(va) of the Act in respect of deposit of Employees' share of Contribution towards Provident Fund and ESIC after the due date as specified under the respective Acts/Scheme formulated under the relevant laws. It is no more *res-integra* that

the Employees' share of Contribution deposited beyond 'due date' specified under the respective Act, that is the Provident Fund Act and Employee's State Insurance Act is not an allowable deduction u/s 36(1)(va) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The Hon'ble Apex Court in the case of Checkmate Services (P) Limited (supra) has now laid the controversy to the rest in this regard.

5. The Id. Counsel for the assessee placed reliance on the decision in the case of Master Polishers (supra) for determining the 'due date' for deposit of Employee's share of contribution towards PF and ESI. The Id. Counsel also referred to Clause 38 of the Employees' Provident Fund Scheme, 1952. Undisputedly, 'due date' is neither defined under Employees' State Insurance Act, 1948 (ESIA) nor the term is defined under the Provident Fund Act, 1952 (PFA). Section 39 of the ESIA explains the expression "Contributions" for the purpose of determining due date. The relevant provision is contained in sub section (4) to section 39 of the ESIA. The same is reproduced herein below:

"4) The contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period the contributions shall fall due on such days as may be specified in the regulations."

Regulation 31 of the Employee's State Insurance (General) Regulations, 1950, specifies the time limit for payment of contributions. The relevant extract of Regulation 31 is reproduced herein below:

31. Time for payment of contribution.

An employer who is liable to pay contributions in respect of any employee shall pay those contributions within 15 days of the last day of the calendar month in which the contributions fall due."

Similar provision is contained in Clause 38 of Employees' Provident Fund Scheme, 1952. For the sake of completeness, the relevant extract of the same is also reproduced herein below:

"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 excluded employee and in respect of which provident fund contribution payable, as the Central Government may fix. **He shall within fifteen days of the close of every month pay the same to the fund.**"*

From conjoint reading of sub section (4) to section 39 of the ESIA and Regulation 31 of the ESI (Gen.) Regulations, it is unambiguously clear that the contribution payable under the said Act shall fall due on the last date of the wage period and the same shall be paid within 15 days of the last day of the calendar month in which the contribution fall due. In other words, the Employer has to deposit contribution within 15 days from the end of the calendar month for which the wages are due. To put it in simple words, the last day of calendar month is the due date for wages and within 15 days thereof the contribution has to be made towards PF and ESIC. Whether we refer to provisions of ESIA or EPF laws the wage period ends on the last day of calendar month irrespective of the date of payment of wages. Consequently, the contribution under ESIA and EPF has to be made within 15 days from the last day of calendar month. Our this view is fortified by the decision rendered in the case of CIT vs. Madras Radiators and Pressings Ltd., 264 ITR 620 (Madras). The relevant extract of the judgment is reproduced herein below:

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 authorized to recover from the employee's 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 Commissioner* (1997) 91 FJR 661 (Mad), 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 favor of the Revenue."

(Emphasized by us)

Similar view has been expressed by the Co-ordinate Bench in the case of Creative Textile Mills Pvt. Ltd. vs. DCIT in ITA No.409/Mum/2022, for the assessment year 2018-19, decided on 31.05.2023.

6. The contention of Id. Authorized Representative of the assessee is that the Assessing Officer has made addition even in respect of contribution made before the due date. We deem it appropriate to restore the grounds raised by the assessee to the AO for fresh adjudication keeping in view our above observations and the decision rendered in the case of Checkmate Services (P) Limited(supra). The AO shall decide the issue *de novo* after considering the submissions of the assessee, in accordance with law.

7. In the result, appeal of assessee is allowed for statistical purpose.

Order pronounced in the open court on Tuesday the 4th day of July, 2023.

Sd/-

(PADMAVATHI. S)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 04/07/2023

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

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

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BY ORDER,

(Dy./Asstt.Registrar)/Sr. Private Secretary ITAT,
Mumbai