

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

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.1166/Mum/2023 & 1167/Mum/2023
(Assessment Year :2018-19 & 2019-20)**

M/s. Modern Veer Rays Security Force (India) Private Limited 6 th Floor Atlanta Centre Sonawala Road Goregaon East Mumbai	Vs.	Deputy Commissioner of Income Tax Centralized Processing Centre Bangalore
PAN/GIR No.AAACM3692H		
(Appellant)	..	(Respondent)

Assessee by	Shri Rakesh Joshi
Revenue by	Ms. Neena Jeph
Date of Hearing	25/07/2023
Date of Pronouncement	23/08/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the assessee against separate impugned order of even date, 28/02/2023 passed by NFAC Delhi in relation to the adjustment made u/s.143(1) for the A.Ys. 2018-19 and 2019-20.

2. In both the years issues involved are common arising out of identical set of facts, therefore, the same were heard together.

The grounds of appeal raised in both the years are reproduced hereunder:-

Grounds Taken in AY 2018-19

1. On the facts and in the circumstances of the case as well as in law the Learned CIT(A) has erred in confirming the action of Learned CPC in disallowing sum Rs. 18,33,82,186/- towards Employee's contribution to PF/ESIS without appreciating the fact that there is no delay in payment of employee contribution as per provisions of Provident fund scheme.

2. On the facts and in the circumstances of the case as well as in law the Learned CIT(A) has erred in confirming the action of Learned CPC in disallowing sum of Rs.18,33,82,186/- towards Employee's contribution to PF/ESIS on the alleged plea that the same has not been paid within the due date prescribed under the Act, without considering the facts and circumstances of the case.

3. On the facts and in the circumstances of the case as well as in law the Learned CIT(A) has erred in confirming the action of Learned CPC in disallowing sum of Rs.11,84,46,784/- towards provision for Gratuity, without considering the facts and circumstances of the case.

Grounds Taken in AY 2019-20

1. On the facts and in the circumstances of the case as well as in law the Learned CIT(A) has erred in confirming the action of Learned CPC in disallowing sum of Rs. 20,40,79,237/- towards Employee's contribution to PF/ESIS without appreciating the fact that there is no delay in payment of employee contribution as per provisions of Provident fund scheme.

2. On the facts and in the circumstances of the case as well as in law the Learned CIT(A) has erred in confirming the action of Learned CPC in disallowing a sum of Rs. 20,40,79,237/- towards Employee's contribution to PF/ESIS, on the alleged plea that the same has not been paid within the due date prescribed under the Act.

3. The brief facts and the background of the case are that assessee is a security services company, which provides services to various corporate and public places like Airport, Banks, Hospital, schools, etc. The assessee is having more than 30,000 employees across the country. The company enters into service provider agreement with these clients wherein it has to provide experienced and competent personnel at client's place for security purposes. These employees are deputed at client's place and carry out day to day work as per direction of the client. At the end of the month client certify the attendance of the employee, based on which assessee company raises the bill on the client. As per terms of the agreement assessee company shall pay salary to the employee within 10 days from the work certified by the client. The assessee company pays salary to the employee as per agreement and also pays PF, both own contribution as well as employee contribution immediately after payment of salary. In the tax audit report the payment of PF details has been mentioned by the auditor based on which, CPC has disallowed employee's contribution to EPF & ESIC payment made beyond 15th of next month for which the employee worked for at client's place. In AY 2018-19, tax auditor has also wrongly mentioned gratuity payment disallowable u/s 43B of the Act, hence based on the audit report the same was disallowed u/s 143(1).

4. In first appeal, ld. CIT(A) has also confirmed the action of CPC for disallowance of employee contribution to PF/ ESIC relying on decision of Supreme Court in case of **Checkmate Services P Ltd. Vs CIT (143 Taxmann.com 178) (SC)** and also confirm

addition U/s 43B for gratuity payment. He has also referred to various decisions of the Tribunal while confirming the action of the ld. AO.

5. Before us the ld. Counsel for the assessee had filed following additional evidences vide application dated 17/07/2023 under Rule 29 of ITAT Rules 1963.

Sr. No.	Nature of Documents	Page No.	
		From	To
1	Chart Showing the due date of EPF/ESIC & Actual Date of Payment	50	58
2	Ledger copy of Salary account	59	81
3	Ledger copy of Salary payable for one month	82	137
4	Copy of agreement entered with client	138	175
5	Copy of Attendance sheet as certified by client	176	195
6	Certificate issued by auditor clarifying mistake in tax audit report revised Annexure to Form 3CD for EPF/ESIC due date and payment details.	196	207

6. We have heard both the parties at length and also perused the relevant material placed on record. In so far as the issue of Employees contribution to provident fund / ESIC as per the

provisions of section 36(1)(va), any sum received by the assessee from any of his employees will be allowed as deduction, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. "Due date" here means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there under or under any standing order, award, contract of service or otherwise.

7. Accordingly, due date as defined under EPF Act is relevant. Section 38 of Employee Provident Fund Scheme 1952, the due date of payment has been defined as under:-

“38. Mode of payment of contributions.

*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** [electronic through internet banking of the State Bank of India or any other Nationalized Bank] [or through Pay Govt. platform or through scheduled banks in India including private sector banks 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."

8. Similarly, for ESIC also the relevant provision of The Employees' State Insurance (General) Regulations, 1950 are as under:-

"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:***

Provided that where a factory/establishment is permanently closed, the employer shall pay contribution on the last day of its closure:

Provided that an employer may opt, in such manner as may be prescribed, by the Director General for payment of amount in advance towards contribution to be adjusted against contributions payable by him (Including employees' contribution) for a wage period so that the balance of advance amount continues to be more than the contributions due and payable at the end of the concerned wage period. Such an employer shall furnish in the prescribed pro forma Form 5-A, a six monthly statement of contributions payable and paid in advance with the balance left at the end of each month along with return of contributions to the appropriate regional office of the Corporation."

9. From the above provisions of the EPF regulation & ESIC regulation, it is clear that the payments need to be made within 15 days from the close of the month in which the payment of salary is due or payable. This interpretation has also been upheld by the Hon'ble Gujarat High Court in case of **PCIT Vs. Suzlon Energy Ltd. (115 Taxmann.com 340)**). In the case of the assessee as stated above, the assessee company is providing security services to various corporate and public places for which

it deputes its employee who carry our work at clients' place. After end of the month the client certify the number of days worked by the particular employee and accordingly, Assessee Company raises the bill on the said client and pay salary to the employee. To demonstrate this fact, copy of attendance verification by the client has been enclosed on page 176-195 onwards of the paper book, on which our attention was drawn. Thus, in this case the salary is due and payable only in the subsequent month when the client certifies the attendance of the employee so deputed at his place. As per agreement entered with these clients, (sample copies of which have been enclosed at pages 138-175) there is specific clause of salary payable to such employee within 10 days in next month. So in case of the assessee both the events, i.e., salary payable and salary paid falls due in the subsequent month and accordingly the due which date as per PF falls in the subsequent to the month when salary due. The salary Expenses ledger copy (enclosed on page 59-81 of the paper book) shows that salary for the month of April is booked on 5th May 2017 and similarly for the month of May it was booked on 5th June, 2017 and so on. Copy of agreement with client, salary ledger as per the books of the assessee has been placed in the paper book to demonstrate this fact.

10. The Tax auditor after considering these facts issued a revised certificate that there is a mistake in the tax audit report in reporting payment details and due date of deposit of these statutory payments. Copy of the revised certificate has been enclosed at pages 196- 207 of the paper book alongwith revised

annexure to Form 3CD for EPF/ESIC due date and payment details. The adjustment u/s 143(1) of the Act was carried out based on the then report of the Tax Auditor and now that the tax auditor has clarified this aspect by issuing a certificate which clearly shows that there is no delay in majority of the payments which we have also perused and find that the Auditor's certificate is correct as per books and agreements.

11. Whence there is no delay in payment of EPF/ESIC which is in violation of due date given in respective Acts, then no disallowance can be made u/s 36(1)(va). It has been further brought to our notice that on similar fact in case of group company of the assessee, M/s Modern Facility Management Pvt. Ltd. (ITA: No. 116-117/M/2023) where the coordinate bench of the ITAT vide order dated 05/07/2023 has set aside the matter to AO to verify the additional evidence and delete the addition since there is no delay as per revised certificate of the Tax auditor.

12. We also find from perusal of the records that in the case of assessee, salary due and payable is only in the subsequent month, when the client certifies the attendance of the employee so deputed at his place and as per the agreement salary is payable to such employee within 10 days in next month. Thus, salary payable and salary paid falls due in subsequent month and therefore, the due date as per the PF and ESCI Act also falls in subsequent to the month when the salary is due. This is evident from the copy of ledger account of the salary as noted

above and it is seen that there is no delay in most of the payments which is evident from documents appearing at pages 197-207. Later on, the tax auditor have also clarified that there is no delay. Accordingly, we set aside this issue to the file of the ld. AO to examine the details and the revised certificate of the auditor and if it is found that there is no delay, then no disallowance should be made as in the case of the assessee the delay is to be seen when the salary payable and salary paid falls due in subsequent month and the due date has to be reckoned from the subsequent month. The AO is directed to verify and grant consequential relief.

13. Now, on the issue of gratuity payment, the facts are that assessee-company entered into an arrangement with the employees that on completion of every year, the services of each employee would be provided with service weightage, which would get accumulated during period of service and the same could be withdrawn by the employees at the time of retirement or termination of service. The assessee claimed deduction on a provision made by way of retirement benefit based on service weightage of the employee as valued by the actuary consultant as per Accounting Standard-15 issued by ICAI, (copy of such valuation report has been enclosed in pages 31-49 of the paper book). The assessee is having more than 30,000 employees across the country and considering the nature of service there is higher turnover of employee, so while leaving the service employee claim their gratuity and no such deduction claimed by the assessee at the time of payment to the employee.

14. The tax auditor due to oversight in AY 2018-19 reported the said gratuity provision in form 3CD as disallowable u/s 43B of the Act. Based on this report the said amount was added to the total income in the intimation issued u/s 143(1) of the Act. Later when the said fact was brought to the attention of tax auditor, he realised his mistake and issued a certificate that since the said provision is based on actuary valuation hence the same is allowable u/s 40A(7)(b) of the Act. Section 40A(7)(b) states that a provision made by the assessee by way of contribution towards an approved gratuity fund or for the purpose of payment of any gratuity that has become payable during the previous year, however, would not be hit by section 40A(7)(a). The provision made by the assessee as per valuation of actuary is amount payable to the employee as per AS-15 of ICAI. Hence considering these facts, the Tax auditor issued certificate clarifying the above position of law. Copy of certificate of tax auditor is enclosed at page 196 of the paper book. Since the adjustment u/s 143(1) of the Act was carried out based on the report of the Tax Auditor and since the tax auditor has clarified by issuing a certificate withdrawing his comment in the earlier report, hence it has been argued before us that the said disallowance is no longer sustainable.

15. It has been pointed out that in A.Y.2019-20 which is also subjudice before us, the tax auditor has correctly reported the said provision in the tax audit report and therefore, no disallowance has been proposed in intimation u/s 143(1) by the CPC, Bangalore. It has also been stated that said expenses have

been allowed in subsequent years also and there is no change in the facts of the case in the present year. Further it has also been brought to our notice that in the case of group company of the assessee M/s Modern Facility Management Pvt. Ltd. (supra), where the coordinating bench of the Hon'ble ITAT vide order dated 05/07/2023 has noted that the disallowance was made for want to details and set aside the matter to AO to verify the details submitted and decide the issue as per provisions of law.

16. Thus, looking to the fact that now the tax auditor have issued the certificate clarifying the said position of law and the adjustment have been made only based on earlier report of the tax auditor therefore, we direct the ld. AO to consider the revised certificate of the tax audit report and we admit all the additional evidences filed before us and direct the ld. AO to verify and grant consequential relief and to work out disallowance as per revise certificate of tax auditor.

17 Our finding given therein will also apply on the grounds taken for A.Y.2019-20 which is only with regard to disallowance of employee's contribution to PF and ESI.

18. In the result, both the appeals of the assessee are partly allowed for statistical purposes.

Order pronounced on 23rd August, 2023.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 23/08/2023
KARUNA, sr.ps

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,

(Asstt. Registrar)
ITAT, Mumbai