

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'एसएमसी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH KOLKATA

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री गिरीश अग्रवाललेखा सदस्य के समक्ष ,
Before Shri Sanjay Garg, Judicial Member and Shri Girish Agrawal, Accountant Member

I.T.A. No.39/Kol/2023
Assessment Year: 2015-16

Phoenix Udyog Pvt. Ltd.....Appellant
9, Vishal Market,
West Mukherjee Nagar,
New Delhi-110009.
[PAN: AACCP4046N]

vs.

DCIT, Circle-1(1), Kolkata..... Respondent

Appearances by:

Shri S. M. Surana, AR, appeared on behalf of the appellant.

Shri Ankur Goyal, JCIT, Sr. DR, appeared on behalf of the Respondent.

Date of concluding the hearing : October 18, 2023

Date of pronouncing the order : October 18, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 23.12.2022 of the National Faceless Appeal Centre [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act').

2. The sole issue involved in this appeals is relating to the disallowance made by the Assessing Officer/Central Processing Centre (CPC) u/s 36(1)(va) r.w.s. 2(24)(x) of the Act on account of delayed deposit of employees' contribution to PF/ESI i.e. after the due date as provided under the respective welfare enactments.

3. The issue is squarely covered by the decision of the Coordinate Bench of the Tribunal in the case of Microviews Infosystems Pvt. Ltd. vs. DCIT in ITA No.642/Kol/2022 decided on 27.06.2023, wherein, the Tribunal has made the following observations:

“3. It is to be noted that the issue raised by the assessee has come to rest by the recent verdict of the Hon’ble Supreme Court in Checkmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC) dated 12.10.2022, wherein, it has been held that “deduction u/s 36(1)(va) in respect of delayed deposit of amount collected towards employees’ contribution to PF cannot be claimed even though deposited within the due date of filing of return even when read with Section 43B of the Income-tax Act,1961. The Hon’ble Supreme Court has held that by virtue of section 2(24)(x) of the Act, the amounts received or deducted by an employer u/s 36(1)(va), it retains its character as an income (albeit deemed) by virtue of section 2(24)(x), unless the condition stipulated by Explanation to section 36(1)(va) are satisfied i.e. depositing such amount received or deducted from the employee on or before the due date. The Hon’ble Supreme Court held that there is a marked distinction between the nature and character of the two amounts – the employer’s liability is to be paid out of its income, whereas, the second is deemed an income, by definition, since it is the deduction from the employee’s income and held in trust by the employer. The Hon’ble Supreme Court thus held that the conditions of section 43B prescribing the due date as the date of filing of return of income in case the employers’ contribution towards ESI/PF would not be applicable in case the employees’ contribution as provided u/s 36(1)(va) of the Act and that the due date in respect of deposit of employees’ contribution would be such as prescribed u/s 36(1)(va) of the Act.

4. It has been held time and again that law declared by a court will have retrospective effect, if not otherwise stated to be so specifically. It is also well settled proposition that whenever, a previous decision is overruled by a larger bench of the Supreme Court, the previous decision is completely wiped out and Article 141 will have no application to the decision which has already been overruled and the court would have to decide the cases according to the law laid down by the latest decision of the Hon’ble Supreme Court and not by the decision which has been

expressly overruled. The above reasoning stems from the principle that when a court decides a matter, it is not as if it is making any new law but it is as if it is only restating what the law has always been. The reliance in this respect can be placed on the decision of the Hon'ble Supreme Court in the case of "RamdasBhikaji and Choudhary vs. Sadananda" (1980) 1 SCC 550 and on the recent decision of the Hon'ble Supreme Court in the case of "Manoj Parihar and Ors. Vs. State of Jammu & Kashmir and Ors" SLP(C) No.11039 of 2022 vide order dated 27.06.2022; "PV Goerge vs. State of Kerala" (2007) 3 SCC 557; Assistant Commissioner vs. Saurashtra Kutch Stock Exchange Ltd. (2008) 14 SCC 171, wherein, the Hon'ble Supreme Court has held that judges do not make law, they only discover and find the correct law. Even, that where an earlier decision of the court operate for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which were earlier not correctly understood.

In view of the above stated legal position, the law declared by the Hon'ble Supreme Court will be retrospectively applicable and it will be treated that earlier decisions of different High Court favouring the assessee would be of no benefit of assessee at this stage as the said decisions of the High Courts are treated to be never existed or to say are wiped out by the aforesaid decision of the Hon'ble Supreme Court.

5. *The ld. counsel has not disputed the aforesaid proposition of law. However, the ld. counsel in this appeal has raised the new question as to what would be the due date for deposit of employees' contribution to provident fund. He, in this respect, has contended that as per relevant provisions of Employees Provident Funds Miscellaneous Provisions Act, 1952 (in short, "the EPF Act") read with Employees' Provident Fund Scheme 1952 (in short, "the EPF Scheme"), the employer has to first collect/deduct the receipts out of the salary of the employees, therefore, the due date applicable for deduction of the employees' contribution will be the 'date of payment of salary' and unless the amount is not received by the assessee/employer from the salary of the employees, the same cannot be treated as income of the assessee. He has submitted that the due date of 15th of every month, therefore, is to be construed in reference to the 15th of the month succeeding to the month in which the salary is disbursed and employees' contribution received out of that salary. He has contended that*

since in this case the salary was usually disbursed on 7th day or thereafter of the subsequent month to the month in which the salary becomes due and since the 15 days have to be calculated from the close of the month in which the employees' contribution was deducted or received on disbursement of salary, therefore, the due date will be 15th day of the month next to the month of disbursement of salary to the employees. The Ld. Counsel, therefore, has submitted that if the facts of the case are appreciated in the light of the aforesaid proposition, there will not be found any delay in depositing the amount into the employees' contribution to the PF made by the assessee. Apart from raising the above oral contentions, the ld. Counsel has also filed the following written submissions:

*"The contentions of the assessee is that when the collection /receipt of the deduction out of salary/wages can be treated as income, whether on the date of deduction or on the date when salary/wages due for the particular month. *As per section 2(24)(x) of the IT Act 1961 (Act) 38 of the Provident Fund scheme 1952 (PF Scheme) it is the date when the amount is received (collected) from the employee that the same is treated as income of the assessee. Therefore, unless the amount is received by the assessee the same cannot be treated as income. As per section 5 of the Act also the amount can be treated as income when received because in case of such deduction there is no question of accrual of income.*

When the amount is received from employee, the same is treated as income for the purpose of sec 2(24)(x) of the Act. The provisions of section 2(24)(x) applies only when the assessee has received the amount from the employee and not otherwise since, only when the assessee has received the amount of PF from the employee as is clearly stated in section 36(1)(va) collection from employee Thereafter, once there is collection/ receipt of the amount which is treated as income u/s 2(24)(x), the same can be claimed as deduction u/s 36(1)(va) only when paid within the due date as per the provisions of the relevant statute.

The next question arises as when the amount is due? Whether from the end of the month for which the wages/salary is due or from the month in which the wages/salary is distributed to the employees and the amount is in fact received from the employees which can be the date on which the amount is actually disbursed to the employee.

Now on the last date of the month, for which the salary is due but not paid, the assessee cannot receive the amount from employee and the same cannot be treated as income of the assessee and consequently section 36(a)(va) will not apply. Once the amount is received in the next month on disbursement of salary, it becomes income of the assessee and the assessee has then to pay the said amount before the due date. Therefore, the due date is to be calculated from the date of actual disbursement.

Attention is also invited to section 38 of the PF Scheme to find out the due date which is 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, www.epfmdia.gov.in 4 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 provider! 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 Gov 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.

(2) The employer shall forward to the Commissioner, within twenty-five days of the 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 are necessary to comply with the 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 6A, 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. [Provided that the employer shall send to the Commissioner returns or details as required under subparagraph (2) and (3) above, in electronic format also, in such form and manner as may be specified by the Commissioner].”

It is apparent from the aforesaid section that the assessee, before paying the member his wages deduct employees contribution from his wages and “together with” his own contribution, shall within fifteen days of the close of every month, pay the “same” to the fund. The word “deduct” “together with” and “same” clearly gives the interpretation that the employers has to pay the amount so deducted together with his own amount of contribution within 15 days of the month. There is no other provision fixing the time limit for payment of the contribution.”

Not only that section 38(2) and 38(3) also says the same thing, that the employer shall forward within 25 days and one month respectively of the close of the month an abstract of the recoveries made from wages. This also shows that the days are counted from the month in which recovery/collection is made. This clearly says that the amount is to be paid within 15 days of the next calendar month in which the amount is collected/received from the employer.

The calculation of the contribution has to include all types of payments of wages and salary and payments in lieu of the salary/wages actually drawn for the whole month which can be seen from sec 29(2) of PF Scheme. That calculation is possible only after the end of the month. Therefore, there is no question of calculation of PF payable before the end of the month. The relevant month for the purpose of limitation shall therefore be the month of actual disbursement of salary/wages. Sec 31(3) may

also be seen which says that any sum deducted shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted. This also shows that it is the date of deduction from employees which is crucial for the purpose of determining the due date.

In this respect form No. 12A,(page 269) column 2 of which speak “wages on which contributions are recovered” and column three says “amount of contributions due as per recoveries made in the wages/acquittance register” being statement of contributions made to be submitted as per sec 38(2). Therefore, what is crucial is the date on which recovery made. Kindly also see form no. 6A (at page 251, the 5th column) which also says “Amount of workers contributions deducted from wages”

Attention is also invited to form 3A wherein it has been recognized that the actual payment of salary/ wages for a particular month is in the next month. It is stated that March paid in April and so on and last February paid in March. This also shows that it is the actual date of payment from which due date is to be counted.

In the course of hearing, a query was raised by the Bench as to what happens to PF if the salary is not at all paid, whether there is liability of payment of PF or not. The answer is straight. Section 2(24)(x) as well as sec 36(1)(va) will not apply since there is no receipt by the employer by way of deduction, hence there will be no income u/s 2(24)(x) and as a corollary to that section 36(1)(va) will have no application. In that case if the employer pays PF of the employee, without deduction and without payment of salary, the provisions of sec 36(1)(va) will not be applicable. It is a different matter whether at all the employer will get deduction u/s 37 or not.

Another query was raised with reference to the applicability of Schedule IV of the Act. It may be noted that schedule IV applies only to the Recognized PF's under IT Act and not the statutory PFS. Moreover, section 4(b) of Schedule IV also states that the contribution of the employee shall be deducted from his salary and paid to the fund. Here also the contribution is to be made after deduction but for the same there is no provision or due date. Hence the same also goes in favour of the assessee.

As far as the applicability of schedule II for recovery is concerned, the same applies only in case of complete non-payment so that under the recovery provisions of that schedule recovery can be made.

The issue came for consideration in the case of Hamilton Research & Technology Ltd. in ITA No 477/Cal/96 dated 7.1.2000 an unreported decision a copy of which is attached

Reliance is also placed on the decision of Kanoi Paper and Industries Ltd. (kol) 75 TTJ 448 wherein it was held 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. ”

Reliance is also placed on the decision of ITAT Mumbai in the case of Fluid Air India Ltd. (Mum) 63 ITR 182 wherein it was held as under:-

"Mode of payment of contributions. — (I) The employee shall, before paying the members his wages in respect of any period or part of period for which contributions are payable, deduct the employees' contribution from his wages which together with his own contribution as well as an administrative charges 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 employees, 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 charges. "

14. Reading together sections 36 and 38 it could be said that there is certain amount of ambiguity over the expression "15 days from the close of the month". There is also force in the submission of the assessee's counsel that in the case of ambiguity the benefit should be given to the assessee.

15. As the term 'month' has not been defined in the Act, so had the assessee paid the salary and wages on the last day of the month, there would have been no difficulty' in defining the month or the due date. But in the case before us, the salary and wages had been paid on the 7th day from the end of the month to which it relates. So, there arises certain amount of ambiguity with regard to the period of 15 days from the close of each month. From reading of sections 36 and 38 reproduced above it can easily be said that there is ambiguity. Therefore, we are of the opinion that there is force in the submission of the assessee that benefit of ambiguity should be given to the assessee. Viewed in this context we hold that most of the payments having been made within 9 to 22 days from the date of payment of salary and wages will be deemed to have been made within due date and, therefore, no disallowance could be made on this account.

It is trite that when two interpretations are possible the interpretation which is in favour of the assessee should be taken. Useful reference can be made to the decision of Supreme Court in the case of Vegetable Products 88 ITR 192 which is often relied on for the said proposition by the Tribunals and Courts.

- The provisions of section 30, and 38 were also referred to in the case of Checkmate Services P Ltd. 448 ITR 518 but only for the purpose of showing the liability of the employer but the issue with regard to the definition of month or due date of payment of the PF was not the issue. However, it has been held by the Hon'ble Court that because of deeming provision u/s 2(24(x) the amount when received from employee will be the income and it will be allowed as deduction u/s 36(1)(va) only when such deduction from employee is paid within the due dates.*

Hence the legal issue with regard to the payment of PF may be decided in favour of the assessee.

It is however submitted that with regard to the payment of the ESI, section 31 of ESI Regulations Act 1950 read with section 39 of the ESI Act is clear that the payment of ESI is to be made within 21 days from the end of the month for which it is due. Hence if any payment is not made within 21 days of the end of month, the same shall be disallowed. In fact this also throws light as to the due date under a particular statute on the basis of plain language of the provisions.”

6. *It is pertinent to mention here that the ld. counsel for the assessee in this case has raised this issue relating to the due date of deposit of employees' contribution under the EPF Act 1952. He has not disputed about the due date of employees' contribution to ESI fund. The due date as mentioned in the Clause 31 of The ESI(General) Regulation, 1950, is 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 21 days of the last day of the calendar month in which the contributions fall due.”

7. *The Ld. Counsel has fairly admitted that there is delay in deposit of employees' contribution to ESI. However, in respect of the due date of employees' contribution to PF Act, the plea of the ld. counsel is that since there is certain amount of ambiguity over*

the expression “15 days from the close of the month” as provided in Para 38 of the EPF Scheme 1952 and that the benefit of the said ambiguity should be given to the assessee. Apart from the case laws, as referred to in the above reproduced written submissions, the Ld. Counsel has also relied upon the decision of the co-ordinate Madras Bench of the Tribunal, in the case of “Madras Radiators and Pressing Ltd.” reported in 59ITR 515.

8. The ld. DR, on the other hand, has relied upon the decision of Hon’ble Supreme Court in Checkmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC) dated 12.10.2022.

9. We have considered the rival contentions and gone through the record. Before proceeding further, it will be relevant to reproduce the relevant provisions of the EPF Act 1952 and EPF Scheme 1952. Section 2(b) of the EPF Act, 1952, defines the ‘Basic Wages’ as under:

“Section 2 (b) : “basic wages” means 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, but does not include—.....”

The above definition would show that the emoluments earned by an employee, whether **paid or payable** to him in the future, they would be deemed to be his basic wages subject to exclusions of the amounts as mentioned under sub section 2(b)(i) to 2(b)(iii).

9.1 Now, Section 6 of the said Act provides for Contributions and matters which may be provided for in the Scheme:

Section 6: Contributions and matters which may be provided for in Schemes.—1[***] The contribution which shall be paid by the employer to the Fund shall be [ten per cent] of the basic wages, [dearness allowance and retaining allowance (if any)] for the time being payable to each of the employees [(whether employed by him directly or by or through a contractor)], and the employees’ contribution shall be equal to the contribution payable by the employer in respect of him and may, [if any employee so desires, be an amount exceeding ten per cent. of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section.

Provided that.....”

9.2 It is imperative here to reproduce certain paras of the Employees Provident Fund Scheme, 1952 (In short, ‘the Scheme’).

“30.Payment of Contribution

(1) : The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

32. Recovery of a member’s share or contributions

(1): The amount of a member’s contribution paid by the employer or a contractor shall, notwithstanding the provisions in this Scheme or any law for the time being in force or any contract to the contrary , be recoverable by means of deduction from the wages of the member and not otherwise.

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 [electronic through internet banking of the State Bank of India or any other Nationalized Bank] [or through PayGov platform or through scheduled banks in India including private sector banks authorized for collection on account of contributions and administrative charge:”

10. A perusal of the above definitions of basic wages and contributions as envisaged in the Act would reveal that the contribution are required to be payable on basic wages whether paid or which have become payable. Therefore once the employee has earned basic wages, the Act under Section 6 r/w Para 30, 32 &38 of the ‘Scheme’ casts a duty upon the employer to deposit the

contribution with the Employees Provident Fund Organisation. As per Para 30 of the Scheme, the employer at the first instance has to pay both the contribution payable by himself and also on behalf of the member employed by him. Under Para 32, the employer is authorised before paying the member employee his wages to deduct the employee's contribution from his wages. As per para 38 of the Employees' Provident Funds Scheme prescribes mode of payment, 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 electronically through internet banking of the authorised banks, portal etc. Para 38 of the scheme is to be read in consonance with the Para 30 and 32 of the Scheme along with relevant provisions of the EPF Act, 1952.

11. The Employees Provident Fund and Miscellaneous Provisions Act, 1952 is a beneficial piece of legislation for providing social security to the employees and their families and casts an obligation upon the employer to make compulsory deduction for provident fund and to deposit in the workers account in the EPF office. The hon'ble Apex Court in the case of "Maharashtra State Coop. Bank Ltd. Vs. Provident Fund Commissioner (2009) 10 SCC 123" has held, "Since the Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e. the workers employed in factories and other establishments, it is imperative for the courts to give a purposive interpretation to the provisions contained therein keeping in view the Directive Principles of State Policy embodied in Articles 38 and 43 of the Constitution".

11.1 If the contention canvassed by the ld. counsel for the assessee is to be accepted, then it will mean that if the employer does not pay the salary to the employees, he will not be liable to deduct and deposit employees' contribution to PF then it will be at the option of the employer to delay the payment of PF by clocking/retaining the disposal of their salaries to the employees. If such an interpretation is to be given, the entire object of purpose of enactment of such welfare statute would get defeated.

12. The Hon'ble Supreme Court of India in the case of "Organo Chemical Industries & Anr vs Union Of India & Ors." 1979 AIR 1803 has held:

“The initial responsibility for making payment of the contribution of the employer as well as of the employee, lies on the employer. Para 30 of the Scheme makes it incumbent on the employer that he shall, in the first instance, pay both the contribution payable by himself and also on behalf of the member employed by him. Under para 38, the employer is authorised before paying the member employee his wages in respect of any period or part of period for which contributions are payable, to deduct the employee's contribution from his wages. It further provides that the deposit of such contribution shall be made by the employer within fifteen days of the close of every month, i.e., a contribution for a particular month has got to be deposited by the 15th day of the month following. A breach of any of these requirements is made a penal offence. Section 14 of the Act provides for penalties. Failure to comply with the requirements of s. 6 is punishable with various terms of imprisonment which may extend to a period of six months, or with fine which may extend to one thousand to two thousand rupees, under the provisions of s. 14, depending upon the nature of the breach, viz., failure to pay the contributions, or failure to submit the necessary returns, or failure to pay administrative charges. Section 14A provides for offences by companies and other corporate bodies. Para 76 of the Scheme provides for punishment for failure to pay contributions etc., and in particular by cl. (d), every employer guilty of contravention or of non-compliance with the requirements of the Scheme, shall be punishable with imprisonment which may extend to six months or with fine of Rs. 1,000/-.”

“In its working, the authorities were faced with certain administrative difficulties. An employer could delay payment of Provident Fund dues without any additional financial liability. Parliament, accordingly, inserted s. 14B for recovery of damages on the amount of arrears. The reason for enacting s. 14B is that employers may be deterred and thwarted from making defaults in carrying out statutory obligations to make payments to the Provident Fund. The object and purpose of the section is to authorise the Regional Provident Fund Commissioner to impose exemplary or punitive damages and thereby to prevent employers from making defaults.”

12.1 Thus, the hon'ble Supreme court, in clear terms has held that the initial responsibility for making payment of the contribution of the employer as well as of the employee, lies on the employer, however, the employer is authorised before paying the member employee his wages in respect of any period or part of period for

which contributions are payable, to deduct the employee's contribution from his wages.

12.2 The Hon'ble Madras High Court in the case of "Presidency Kid Leathers (P) Ltd. vs Regional Provident Fund" (1999) IILLJ 980 (Mad.) has held as under:

"10. As per Para 38 of the Employees' Provident Fund 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 15th of every month. Para 30 of the Scheme imposes an obligation on the employer to remit both shares of contributions in the first instance and para 32 of the Scheme enables the employer to recover 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 14-B of the Act,.."

12.3 Identical view has been taken by the Hon'ble Punjab & Haryana High Court in the case of "KapurBhimber Union vs Regional Provident Fund"(1966) ILLJ 870 (P&H) and also in the case of "M/s Elsons Cotton Mills v. Regional Provident Fund Commissioner, Faridabad and other" L.P.A. No. 891 of 1986, decided on June 30, 1998 and further held that the deposit of provident fund dues by the stipulated time of 15th of the month following to which the dues relate as provided under para 38 of the E.P.F. Scheme, 1952 is an unqualified absolute statutory obligation of the employer.

13. It is to be noted that Ld. Counsel for the assessee, has relied upon certain decisions of the Coordinate Benches of the Tribunal, however, the issue is found squarely covered against the assessee by the various decisions on the issue of the hon'ble Apex Court and different High Courts of the country. One of the decisions relied upon by the counsel is the decision of the Madras Bench of the Tribunal in the case of "Madras Radiators & Pressings Ltd." reported in 59 ITR 515 which has also been referred to in its order by the Mumbai Bench of the Tribunal in this case of "Fluid Air India Ltd."(supra) which has also been strongly relied upon by the counsel. However, we find that the said decision of the Tribunal in the case of "Madras Radiators &

Pressings Ltd.” (supra) has been overruled by the Hon’ble Madras High Court. In the said case titled as “Cit v/s Madras Radiators & Pressings Ltd.” (2003) 129 Taxman709 (Mad.), before the Hon’ble Madras High Court, following issues were raised by the revenue:

“1. “Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that there was certain amount of ambiguity over the expression '15 days from the close of the month' as defined in section 38 of the Employees' Provident Fund Scheme, 1952, vis-a-vis month in which salary becomes due to the employees and the salary is paid to the employee ?”

2. Whether the Tribunal was right in law in reckoning the date of payment of salary (vii) 7th 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 ?”

13.1 The Hon’ble Madras High Court has deliberated upon the various provisions of the E.P.F. Act, 1952 and E.P.F. Scheme, 1952, has made the following observations:

“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 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."

14. In view of the discussion made above, we are not convinced with the contentions raised by the counsel for the assessee. The issue is squarely covered against the assessee by the decisions of

the hon'ble Apex court and many High Courts of the country. There is no merit in the appeal of the assessee, the same is accordingly, hereby dismissed."

4. Respectfully following the above decision of the Coordinate Bench of the Tribunal, we do not find merit in the present appeal of the assessee and the same is accordingly dismissed.

5. In the result, the appeal of the assessee stands dismissed.

Kolkata, the 18th October, 2023.

Sd/-

**[गिरीश अग्रवाल /Girish Agrawal]
लेखा सदस्य/Accountant Member**

Sd/-

**[संजय गर्ग /Sanjay Garg]
न्यायिक सदस्य/Judicial Member**

Dated: 18.10.2023.

RS

Copy of the order forwarded to:

1. Phoenix Udyog Pvt. Ltd
2. DCIT, Circle-1(1), Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches