

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

**BEFORE SHRI S RIFAUR RAHMAN, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA Nos. 2307, 2308 & 2309/Mum/2023
(Assessment Years: 2017-18, 2018-19 & 2019-20)

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| Kaarya Facilities and Services Limited 115, Inspire Hub, Western Heights, J P Road, Andheri (W), Mumbai-400 058 | Vs. | ITO – 12(3)(1) Room No. 643, 6 th Floor, Aayakar Bhavan, M. K Road, Mumbai |
| PAN/GIR No. AADCK 5987 G | | |
| (Assessee) | : | (Respondent) |
| Assessee by | : | Shri Shouvik Kumar Roy |
| Respondent by | : | Shri P. D. Chougule |
| Date of Hearing | : | 14.12.2023 |
| Date of Pronouncement | : | 29.01.2024 |

ORDER

Per Kavitha Rajagopal, J M:

The captioned appeals have been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) (‘ld.CIT(A) for short), National Faceless Appeal Centre (‘NFAC’ for short) passed u/s.250 of the Income Tax Act, 1961 (‘the Act’), relevant to Assessment Years (‘A.Y.’ for short) 2017-18, 2018-19 & 2019-20.

2. The appeals are time barred and the assessee had filed an Affidavit for condoning the said delay. After hearing both the parties, we are of the considered opinion that the assessee had ‘sufficient cause’ for the delay in filing the present appeals and we, therefore, deem it fit to condone the delay. Delay condoned.

3. The solitary issue involved in all these appeals are the disallowance made u/s. 36(1)(va) of the Act pertaining to the delayed payment of employees contribution to PF

& ESIC paid after the due date under the relevant Acts but before filing of the return of income. The assessee has also filed additional grounds in all these appeals pertaining to the impugned addition.

4. As the issues are common in all these appeals, we hereby pass a consolidated order by taking ITA No. 2307/Mum/2023 as a lead case.

ITA No. 2307/Mum/2023 (A.Y. 2017-18)

5. The brief facts are that the assessee company is engaged in the house keeping services and had filed its return of income dated 31.10.2017, declaring total income at Rs.80,46,007/- and the same was processed u/s. 143(1) of the Act where the Central Processing Centre ('CPC' for short)/ld. Assessing Officer ('A.O.' for short) made a disallowance of Rs.3,13,682/- being the delayed deposit of PF & ESIC u/s. 36(1)(va) of the Act which was paid before filing of the return but after the due date prescribed under the relevant Acts along with the other additions.

6. The assessee was in appeal before the ld. CIT(A) who had upheld the addition made by the ld. CPC/ld. A.O. by placing reliance on the decision of the Hon'ble Apex Court in the case of *Checkmate Services P. Ltd. vs. CIT* (in Civil Appeal No. 2833 of 2016 vide order dated 12.10.2022).

7. The assessee is in appeal before us, challenging the order of the ld. CIT(A) in upholding the impugned addition made u/s. 36(1)(va) of the Act.

8. The learned Authorised Representative ('ld. AR' for short) for the assessee submitted that the assessee had filed additional grounds of appeal where the 'due date' as

per EPF/ESIC should be considered as '15 days from the close of the month of actual wage disbursement' instead of '15 days from the close of the month for which wages are payable'. The Id. AR elaborated on the additional ground raised by the assessee by contending that the Hon'ble Apex Court in the case of *Checkmate Services P. Ltd.* (supra) has not expressly specified the 'due date' as per EPF and ESIC and neither the same has been specified in EPF Act, 1952. The Id. AR further stated that the nature of the business of the assessee which is into supplying of manpower services and housekeeping service is of the nature that the actual wage disbursement is mostly delayed due to the reason of delayed payment from the clients. The Id. AR further stated that the wages are paid to the employees only when authorization is received from its clients which is always scattered or delayed. In such cases, the Id. AR contended that the due date for deposit of the employee's contribution to PF & ESIC should be 15 days from the close of the month of the actual wage disbursement. The Id. AR prayed that the additional ground shall be admitted. The Id. AR relied on the following decisions:

| <i>Citation</i> | <i>Date of order</i> | <i>ITAT Bench</i> |
|---|----------------------|-------------------|
| <i>DCIT Ahmedabad vs. M/s. Rajratna Metal Industries (ITA No. 793/Ahd/2018)</i> | <i>4/10/2018</i> | <i>Ahmedabad</i> |
| <i>Suzlon Energy Ltd. vs. DCIT, Ahmedabad (ITA No. 765/Ahd/2018)</i> | <i>27.06.2018</i> | <i>Ahmedabad</i> |
| <i>Suzlon Energy Ltd. vs. DCIT, Ahmedabad (CO No. 77/Ahd/2017)</i> | <i>25.06.2019</i> | <i>Ahmedabad</i> |
| <i>DCIT Ahmedabad vs. Schutz Dishman Biotech Ltd. (ITA No. 525/Ahd/2015 & CO No. 49/Ahd/2015)</i> | <i>01.01.2019</i> | <i>Ahmedabad</i> |
| <i>Master Polishers, Mumbai vs. ADIT CPC Bangalore (ITA No. 252/Mum/2023)</i> | <i>26.04.2023</i> | <i>Mumbai</i> |

9. The learned Departmental Representative ('Id. DR' for short), on the other hand, controverted the said fact and stated that the law has been clearly settled by the Hon'ble

Apex Court in the case of *Checkmate Services P. Ltd.* (supra). The ld. DR further contended that the issue of reckoning the due date has been dealt with in detail by the Hon'ble Madras High Court in the case of *CIT vs. Madras Radiators and Pressings Ltd.* [2003] 264 ITR 620 (Mad), where it has categorically stated that the due date should be 15 days from the close of the month for which wages are payable. The ld. DR vehemently opposed for the admission of the additional ground raised by the assessee.

10. We have heard the rival submissions and perused the materials available on record. We deem it fit to admit the additional ground pressed by the assessee by relying on the decision of the Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. vs. CIT* [1998] 229 ITR 383 (SC) where no further verification would be required by the ld. A.O. After duly considering the submissions of the rival parties, it is observed that the moot question involved in the additional ground is whether the due date prescribed under the provisions of section 36(1)(va) r.w.s. 2(24)(x) of the Act is 'whether from the close of the month for which wages are payable' or 'the month of the actual wage disbursement'. The ld. AR has relied on the decision of the co-ordinate bench in the case of *Master Polishers* (supra) where the bench had remanded the issue back to the file of the ld. A.O. to verify which would be the month for reckoning the due date. It is pertinent to point out that the co-ordinate bench in the subsequent decision has reversed its view and has considered 'the month when the wages are payable' to be the month for reckoning the due date as per the provisions of the Act. We would also place our reliance on the decision of Hon'ble Madras High Court in the case of *Madras Radiators and Pressings Ltd.* (supra) which has categorically specified that 'the due date commenced

when the salary was payable' and not when the salary was disbursed. The relevant extract of the said decision is cited hereunder for ease of reference:

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 anyway 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 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 npt. 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.

11. From the above decision, it is evident that the Hon'ble Madras High Court has cleared the ambiguity in interpreting the "due date" for the purpose of provision of section 36(1)(va) of the Act. On this observation, the arguments of the Id. AR fails and we are, therefore, inclined to dismiss the additional ground raised by the assessee. With regard to the other grounds of appeal raised by the assessee, we deem it fit to dismiss the same in view of the decision rendered by the Hon'ble Apex Court in the case of *Checkmate Services P. Ltd.* (supra).

12. In the result, the appeal filed by the assessee in ITA No. 2307/Mum/2023 is dismissed.

ITA Nos. 2308 & 2309/Mum/2023 (A.Ys. 2018-19 & 2019-20)

13. As the facts are identical in these two appeals, the finding in ITA No. 2307/Mum/2023 applies mutatis mutandis to these appeals also.

16. In the result, the appeals filed by the assessee in ITA Nos. 2308 & 2309/Mum/2023 are also dismissed.

Order pronounced in the open court on 29.01.2024.

Sd/-

Sd/-

(S Rifaur Rahman)
Accountant Member

(Kavitha Rajagopal)
Judicial Member

Mumbai; Dated : 29.01.2024
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai