

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H', NEW DELHI**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Anubhav Sharma, Judicial Member

ITA No. 377/Del/2023 : Asstt. Year : 2017-18

ITA No. 378/Del/2023 : Asstt. Year : 2018-19

Tiger 4 India Ltd., 7, Lower Ground Floor, L.S.C. B-1, Vasant Kunj, New Delhi-110070	Vs	ACIT, Circle-25(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AADCT3974E		

Assessee by : Sh. S. K. Bansal, CA

Revenue by : Sh. Amit Katoch, Sr. DR

Date of Hearing: 05.02.2024

Date of Pronouncement: 08.02.2024

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the orders of National Faceless Appeal Centre (NFAC), Delhi dated 20.12.2022.

2. Since, the issue involved in both the appeals are similar, they were heard together and being adjudicated by a common order. In ITA No. 377/Del/2023, following grounds have been raised by the assessee:

"1. That the Order dated 20-12-2022 passed by the Learned CIT (A), National Faceless Appeal Centre, Delhi (Ld. CIT (A)) is bad in law, opposed to the facts of the case and liable to set aside.

2. That the Learned CIT, (Appeals) erred in confirming the additions on account of belated employees' contribution to PF and ESI ignoring the fact that the appellant Company is engaged in the business of

supplying manpower and it is the responsibility of Principal Employer to deposit PF/ESI contributions and not the appellant. Accordingly no additions are warranted in the hands of appellant for delayed deposits of employees' contributions to PF/ESI.

3. That the Ld CIT(A) further erred in placing reliance merely on the decision of the Hon'ble Supreme Court in Chekmate Services (P) Ltd without appreciating the fact that Till 12.10.2022 (the day on which the Hon'ble Supreme court passed the order) the disallowance of belated employees contribution to ESI and PF was a debatable issue and such adjustments cannot be made u/s.143(1)(a).

4. That the Ld CIT(A) further erred in not appreciating the fact that the enabling provision of "increase in income" contained in sub-clause (iv) of Sec. 143(1) having been given effect only from 01.04.2021 by way of amendment of the said w.e.f. 01-04-2021. Therefore, adjustment prior to A.Y.2021-22 on account of increase in income is not in accordance with law.

5. That the Ld CIT(A) further erred in confirming the additions of Rs. 3,60,35,261 originally made by the CPC Bangaluru ignoring the fact that the same is otherwise allowable under Section 37 of the Income Tax Act, 1961.

6. That the Ld CIT(A) erred in holding that the assessment of the appellant was completed by selecting case under scrutiny after issuing notice u/s 143(2) as against the fact that no such notice was ever issued and the case was never selected in scrutiny."

3. The written submission of the Id. AR is as under:

"The only issue involved in this appeal relates to addition on account of alleged delayed deposition of Employees' Contribution to Provident Fund (PF) and Employees' State Insurance (ESI) which is being contested in different grounds of appeal.

<i>AS PER APPELLANT</i>
<i>Appellant had deposited the Employees' contributions to PF and ESI with the relevant Authorities within the due dates as prescribed under Section 36(1)(va) of the Income Tax Act, 1961.</i>

<i>AS PER ASSESSMENT ORDER</i>	<i>AS PER LEARNED CIT (A)</i>
<i>Employees' Contribution to ESI and PF added back under section 143(1) on account of delayed deposition under Accrual method.</i>	<i>Sustained the additions holding that Employer has statutory obligation to deduct and deposit employees' contribution every month within 15 days of the succeeding month.</i>

Brief Facts of the Appeal

a. Appellant is a Limited Company engaged in the business of supply of manpower primarily security guards and other workers to I.T. Sector, Banking Sector, Corporates etc. The business activities are spread across many States in the country. The appellant has its head office at Delhi and Branches across the country.

b. The appellant supplies various security guards mostly gunmen to banks, other security guards to other entities whose salaries are reimbursed by the respective entities.

c. Monthly attendance of various security personnels are received by the Branches of the appellant from the respective clients after the close of the month by 15th of the following month. (kindly see PB pages 227 to 233 for some of the attendance sheets prepared by the concerned

branches and the client after the end of the month to which attendance pertains).

Thus attendance of all its manpower supplied to various clients across India for a month is received at the concerned Branches of the appellant in the subsequent month. These are checked at the Branch level and then forwarded to H R section in the head office for preparing salary and wages sheets.

d. For Example attendance for the month of April 2017 was received by the appellant from its clients only after the close of April i.e. in the month of May 2017. Details of salary due to each such person and the amount of employees contribution to ESI and PF alongwith Employers' share thereto would be worked out in the month of May 2017 only. In such a case, it would not be possible to deposit the employees contribution to ESI and PF for April 2017 by 15th May 2017 on accrual basis for the reason that their attendances are received in May-17 (normally during 1 to 15th). Salary due is prepared after receiving attendance and accordingly quantum of ESI and PF contributions would also be worked out in May 2017 only.

e. Your honour, bills for salaries and wages payable to the work force supplied to an entity for a month is raised only after the close of the that particular month i.e. in the subsequent month only when attendance details are received by the appellant and amount of salaries and employer's contribution to ESI and PF are worked out. Journal Voucher entries for salaries and wages payable for a month alongwith employees' contribution to ESI and PF are recorded in the books of accounts on accrual basis

only after determination of relevant amounts at the end of that month.

f. Payment of salaries and wages pertaining to a month happens only after the same is worked out in the subsequent month. Thus, salary due to an employee for the month of say April 2017 would be paid in the month of May 2017.

g. In the present case, the tax auditor reported the amount of employees' contribution to ESI and PF on accrual basis in the Tax Audit Report (PB pages 44 to 53) which in any case could not be deposited by 15th of the succeeding month to which the salary pertains for the reasons stated above.

Central Processing Centre of the Income Tax department had made additions for delayed deposit of employer and employees' contribution to ESI and PF by taking due dates as mentioned on accrual basis in the tax audit report. The learned CIT (Appeals) NFAC had deleted the additions made by the CPC on account of employers' contribution to the said funds since these were deposited within due dates specified under Section 43-B of the Income Tax Act, 1961.

h. However, additions under Section 36(1)(va) on account of employees' contribution to the said fund were sustained by the Ld CIT (A) holding that Employer has statutory obligation to deduct and deposit employees' contribution every month within 15 days of the succeeding month irrespective of whether the salary, wages etc have been actually paid or not.

i. Section 36(1)(va) defines the "due dates" the date by which an 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 thereunder or under any standing order, award, contract of service or otherwise.

Vide clause 38 of the Employees' Provident Fund Scheme 1952 the 'due date' for deposit of employees' contribution under the ESI and PF Acts are required to be reckoned with reference to the month of actual payment of salary and wages and not when the liability to pay arises as per accrual system of accounting.

j. Your honour, in the present case, the appellant had deposited the employees contributions to Provident fund and ESI by the due dates as mentioned in section 36(1)(va). Kindly refer PB pages 64 to 70 for deposit of PF and PB pages 98 to 104 for deposition of ESI.

From the perusal of above details, your honour will find that barring few cases, the Employee's contribution to PF were deposited within the due dates specified under The Provident Fund Scheme, 1952. Thus for example, salary for the month of April 2017 was paid in May 2017 (PB pages 169 to 171), the due date of deposition of impugned ESI and PF would be 15-06-2017 but the appellant deposited all PF and ESI contributions of employees on 18-05-2017 i.e. immediately after disbursement of salaries and wages. Similarly in other months also, there is no delay.

PRAYER

In the facts and circumstances of the present appeal, the appellant prays your honour that for computing the period of delay in deposition of employees' contribution to PF and ESI, the due date may kindly be reckoned from the end of the month in which salary and wages are disbursed by the appellant and not month to which the salary pertains. It is in accordance with provisions of relevant Act as specified under Section 36(1)(va) of the Income Tax Act, 1961.

Reliance is placed on the following decisions:

1. Hon'ble Kolkata Bench of the Tribunal in the case of Kanoi Paper Industries Ltd. Vs. ACIT (75 TTJ 448)

2. Hon'ble Delhi ITAT in the cases of

- Benson Movers P. Ltd., New Delhi vs. ACIT, Circle-4(2), New Delhi on 17 November, 2023.*
- Vigilant Security Placement & Detective Services Pvt. Ltd. Vs. DCIT in ITA. No. 2740/Del/2022 dated 13.06.2023,*
- Dignus Services Vs. ITO in ITA. Nos. 116 & 117/Del/2023 dated 26.09.2023*
- Sentinel Consultants Pvt. Ltd. Vs. ACIT in ITA. Nos. 7 & 8/Del/2023 dated 12.06.2023*
- B. L. Kashyap & Sons Ltd. in ITA. No. 2622/Del/2022 dated 18.07.2023*
- VVDN Technologies Pvt. Ltd. in ITA. No. 164/Del/2023 dated 4.07.2023*

3. Hon'ble Bombay ITAT in the case of Fluid Air (India) Ltd. Vs. DCIT 63 ITD 182 (Bom)

4. In this connection, the appellant also places reliance on the judgment of the Hon'ble Supreme Court in the case of CIT v. J.H. Gotla (1985) 156 ITR 323 (SC), K. P. Varghese v. ITO (1981) 131 ITR 597 (SC) and CIT v. Vegetable Products Ltd. (1973) 88 ITR 192 (SC) at page 195 to argue that the court may modify the language used by the legislature so as to achieve the intention of the legislature and to produce a rational result and furthermore that any case of ambiguity is required to be resolved in favour of the assessee."

4. Heard the arguments of both the parties and perused the material available on record.

5. The issue of ESI/PF payment has attained finality by the order of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-I, vide order dated 12th October, 2022 wherein it was observed that employers have to deposit the employee's contribution towards EPF/ESI on or before the due date for availing deduction. In the cases before the Hon'ble Apex Court, the employers had belatedly deposited their employees' contribution towards the EPF and ESI, considering the due dates under the relevant provisions of the Act. The Assessing Officer ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the IT Act, such sums received by the appellants constituted "income". It was held that those amounts could not have been allowed as deductions under Section 36(1)(va) of the IT Act when the payment was made beyond the relevant due date under the respective acts. The Income Tax Appellate Tribunal and later the Gujarat High Court dismissed the challenge against this order of AO. In appeal, the court

noted that the Hon'ble Kerala High Court has also ruled in favour of revenue on this issue whereas the Hon'ble High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi have favoured the interpretation beneficial to the assessee. The Hon'ble Apex Bench effectively reversed the judgment in Commissioner of Income Tax vs. Alom Extrusions Ltd. (1 SCC 489) relied upon by the assessee.

6. The Hon'ble Apex Court in the case of Checkmate Services P. Ltd. vs. Commissioner Of Income Tax-I in CA No. 2833/2016 vide order dated 12.10.2022 observed that there is a marked distinction between the nature and character of the two amounts viz., the employers' contribution and employees' contribution required to be deposited by the employer. The first one is 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 employees' income and held in trust by the employer. The Hon'ble Apex Court held as under:

"In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43 B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assesseees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are

deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43 B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction."

7. As the issue of payment of employees contribution towards the PF has been ruled against the assessee by the Hon'ble Supreme Court, the appeal of the assessee on this ground is liable to be dismissed.

8. In the result, the appeals of the assessee are dismissed.
Order Pronounced in the Open Court on 08/02/2024.

Sd/-

(Anubhav Sharma)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 08/02/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR