

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

**Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 344/Ahd/2022
Assessment Year 2013-14**

Income Tax Officer, Ward-2(1)(1), Ahmedabad (Appellant)	Vs	Rajinderkaur Sarabjitsingh Bagai L/h Rajvit Bagai 64/569, Pushpak Apartment, Mirambica School Road, Naranpura Ahmedabad-380013 PAN: AELPB9887P (Respondent)
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**Assessee Represented: Shri Rupesh Shah, A.R.
Revenue Represented: Shri Ashok Kumar Suthar, Sr. D.R.**

Date of hearing : 25-01-2024
Date of pronouncement : 15-02-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Revenue as against the appellate order dated 21.06.2022 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, (in short referred to as "CIT(A)"), arising out of the Rectification order passed under section 154 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year 2013-14.

2. The solitary ground raised by the Revenue is that the Ld. CIT(A) erred in law and on facts in deleting the disallowance of Rs.1,04,08,767/- on account of delayed payments towards ESIC & PF made u/s. 36(1)(va) of the Act, without verifying the due date of payment prescribed under the respective Act.

3. The brief facts of the case is that the Assessee is an individual and engaged in the business of manpower services in the name and style of M/s. Raj Contract Employee's Services. For the Assessment Year 2013-14, assessee filed her Return of Income on 12.10.2013 declaring total income of Rs.3,82,960/-. The assessee passed away on 10.12.2013. The Return of Income was processed u/s.143(1) of the Act and thereafter taken for scrutiny assessment. Regular assessment u/s.143(3) was made in the name of the legal heir vide order dated 04.12.2015 making an addition of Rs.76,667/- which is inclusive of addition of default in payment of PF & ESIC. After completing of the scrutiny assessment, the A.O. found that the assessee has not deposited employees PF & ESI contribution before the "due date" as prescribed in the respective Act. Hence a notice u/s. 154 of the Act was issued to rectify the mistake. The assessee did not present for the rectification proceedings in spite of two notices. Therefore the Assessing Officer completed the rectification proceedings vide order dated 09.07.2018 making an addition of Rs.1,04,08,767/-.

4. Aggrieved against this addition, the assessee filed appeal before Ld. CIT(A), NFAC. Before Ld. CIT(A), the assessee submitted the employees were paid their respective wages on 7th or 8th day of

succeeding month. As per the provisions of PF Act, the due date of monthly PF is the 15th of the subsequent month. Thus the Ld. A.O. has made mistake in calculating the due date for PF and ESI contribution and submitted the relevant contribution made the assessee as per the due date of the respective Acts as follows:

RAJ CONTRACT EMPLOYEE'S SERVICES

Employee's Provident Fund

Month:	Wages:	Employer's Contribution:	Employees' Contribution:	Wages Paid on:	Due Date for Contribution:	Contribution Paid on:	Contribution Paid
Apr-12	30,57,640.00	4,16,110.00	3,66,883.00	07/05/2012	20/06/2012	30/05/2012	7,82,993.00
May-12	34,41,265.00	4,68,303.00	4,12,911.00	08/06/2012	20/07/2012	21/06/2012	3,81,214.00
Jun-12	34,12,309.00	4,64,361.00	4,09,440.00	09/07/2012	20/08/2012	21/07/2012	8,73,801.00
Aug-12	30,77,689.00	4,18,844.00	3,69,306.00	08/09/2012	20/10/2012	22/09/2012	7,88,150.00
Sep-12	32,08,422.00	4,36,269.00	3,84,990.00	08/10/2012	20/11/2012	29/10/2012	8,21,259.00
Oct-12	33,55,464.00	4,56,289.00	4,02,679.00	06/11/2012	20/12/2012	29/11/2012	8,58,968.00
Nov-12	32,14,331.00	4,37,102.00	3,85,747.00	07/12/2012	20/01/2013	01/01/2013	8,22,849.00
Dec-12	35,97,486.00	4,89,228.00	4,31,727.00	07/01/2013	20/02/2013	01/02/2013	9,20,955.00
Jan-13	35,46,775.00	4,82,739.00	4,25,635.00	07/02/2013	20/03/2013	07/03/2013	9,08,374.00
Feb-13	32,00,914.00	4,35,675.00	3,84,079.00	07/03/2013	20/04/2013	02/04/2013	8,19,693.00
Mar-13	31,88,361.00	4,33,994.00	3,82,603.00	08/04/2013	20/05/2013	23/04/2013 24/04/2013	8,16,597.00
Total	3,63,00,656.00	49,38,914.00	43,56,000.00	-	-	-	92,94,853.00

Employee's State Insurance Corporation

Month:	Wages:	Employer's Contribution:	Employees' Contribution:	Wages Paid on:	Due Date for Contribution:	Contribution Paid on:	Contribution Paid
Apr-12	14,29,767.00	68,073.00	25,021.00	07/05/2012	21/06/2012	22/05/2012	93,094.00

May-12	14,61,498.00	69,577.00	25,577.00	08/06/2012	21/07/2012	22/06/2012	95,154.00
Jun-12	13,60,348.00	64,759.00	23,807.00	09/07/2012	21/08/2012	23/07/2012	88,566.00
Aug-12	13,80,180.00	65,696.00	24,154.00	08/09/2012	21/10/2012	25/09/2012	89,850.00
Sep-12	14,63,609.00	70,317.00	25,614.00	08/10/2012	21/11/2012	25/10/2012	95,931.00
Oct-12	14,89,756.00	70,912.00	26,070.00	06/11/2012	21/12/2012	27/11/2012	96,982.00
Nov-12	14,76,288.00	70,265.00	25,836.00	07/12/2012	21/01/2013	29/12/2012	96,101.00
Dec-12	19,27,240.00	91,721.00	33,727.00	07/01/2013	21/02/2013	30/01/2013	1,25,448.00
Jan-13	18,91,924.00	90,045.00	33,110.00	[07/02/2013	21/03/2013	26/02/2013	1,23,155.00
Feb-13	17,34,100.00	82,539.00	30,347.00	07/03/2013	21/04/2013	29/03/2013	1,12,886.00
Mar-13	14,87,484.00	70,655.00	26,031.00	08/04/2013	21/05/2013	23/04/2013	96,826.00
Total	1,71,02,194.00	8,14,559.00	2,99,294.00	-	-	-	11,13,993.00

4.1. The Ld. CIT(A) after considering the facts in detail and set aside the matter back to the file of Assessing Officer by observing as follows:

5.9.6. (iii) Whether the due dates to be taken under the PF/ESI Acts are within 15 days from the end of the month when the wage becomes due (as has been taken by the AO) or is it within 15 days from the end of the month in which wage is actually paid (as is being argued by the Appellant)?

I find that this issue has been decided in favour of the Appellant by Hon'ble Jurisdictional ITAT Ahmedabad in the case of Rajratna Metal Industries Ltd vs. Addl.CIT, ITA No.940/Ahd/2015 While deciding the issue, the Hon'ble ITAT, Ahmedabad has followed the decision of Hon'ble Kolkata High Court in the case of Kanoi Paper and Industries Ltd vs. ACIT (2002) 75 TTJ Cal 448 Relevant part of the decision of Hon'ble High Court of Kolkata is reproduced below.

"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 able 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."

In view of the above decisions. I hold that the due date for payments of employees and employer's contributions towards PF/ESI is within 15 days (allowed with further grace period of 5 days) from the end of the month in which the wage is actually paid

5.9.7. (iv) Whether the disallowance so made by the AO u/s 154 is in the nature of debatable issue or not and therefore beyond the scope of section 154 of the Act?

The Appellant has tried to make out a case that this being a debatable issue, it falls out of the purview of sec 154. However, it is not so since the details of payments of employees contribution towards PF/ESI are mentioned by Tax Auditor at sr. no.20(b) of Form 3CD. Similarly, the details of payments of employer's contribution towards PF/ESI are mentioned at sr.no. 26(B) of Form 3CD. It is evident that the adjustment

towards late payment of PF/ESI u/s 36(1)(va) is allowed us 154, as long as it is certified in the Form 3CD. It is therefore evident on facts, that the issue is not a debatable one as claimed by the appellant. Plain and simple, Form 3CD specifically mentions the late payment of PF/ESI at sr.no.20(b) and 26(B) and the AO has to simply disallow such amounts in terms of section 36(1)(va) and 43B of the Act. The argument of the appellant that the issue is debatable is therefore not tenable. The ingredients of an adjustment u/s. 154 are satisfied in case of the Appellant. As regards case laws relied upon by the Appellant, the same are distinguishable on facts especially after the amendments vide Finance Act 2021 inserting Explanation 2 and Explanation 5 to sections 36(1)(va) and 43B respectively making it amply clear that the law never intended that delayed payments of Employee's contribution (as per the relevant Acts) to specified funds is allowable under the Act.

5.9.8. Directions to the AO

In view of the above discussions at para 5.2 to para 5.9.7, the AO is directed as under:

1. The due dates for payments of employees' and employer's contribution towards PF/ESI is within 15 days (plus grace period of 5 days) from end of the month when the wage is actually paid and not from and of the month when the wage has become due. In view of this, the AO is directed to recompute the new due dates and see whether there has been a delay or not.

- Payments of employees' contributions towards PF/ESI beyond the due dates as per the respective Acts are to be disallowed even if these are paid on or before the due date of filing the return u/s 139(1) of the Act.*

- Payments of employer's contributions towards PF/ESI beyond the due dates as per the respective Acts but paid on or before the due date of filing the return u/s 139(1) of the Act is to be allowed.*

The Appellant is directed to furnish all relevant details online before the AO for the purpose of carrying out the above exercise. The AO is further directed to give effect by passing a speaking order. Grounds on this issue are, therefore, allowed for statistical purpose.

5. Aggrieved against the same, the Revenue is in appeal before us raising the solitary ground stated supra. The Ld. Sr. D.R. Shri Ashok Kumar Suthar appearing for the Revenue supported the order passed by the Assessing Officer and submitted Jurisdictional High Court in the case of CIT vs. Gujarat State Road Transport

Corporation has held that the assessee is not entitled for deduction of Employees' contribution to PF and ESI in computing the income, if such income is not credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as per explanation to section 36(1)(va) of the Act. This judgment is being confirmed by Hon'ble Supreme Court in the case of Checkmate Services. Therefore the Ld. Sr. D.R. pleaded that the disallowance made by the A.O. is correct in law and the same is to be upheld.

6. Per contra, Ld. Counsel Shri Rupesh Shah appearing for the assessee supported the order passed by the Ld. CIT(A) has relied upon Jurisdictional Tribunal decision in the case of Rajjratna Metal Industries Ltd. and further submitted that the Assessing Officer has not given effect to the Ld. CIT(A) order as and today. The Ld. Counsel also made a submission the Rectification order passed by the Assessing Officer is amount to change of opinion only and reviewing his own order which is not permissible in law and therefore Rectification order is liable to be quashed.

7. We have given our thoughtful consideration and perused the materials available on record. The assessee's submission that the Rectification order is amounting to change of opinion is not legally correct, since the details of payments of Employee's contribution towards PF/ESI are clearly reflecting in the Tax Audit Report filed in Form No. 3CD by the assessee. From this report only, the A.O. made the disallowance u/s.36(1)(va) and 43B of the Act, which are forming part of the assessment records. However as per Hon'ble

Supreme Court judgment, the disallowance is liable to be made only against the Employee's contribution to PF/ESI and not to the Employer's contribution. It is seen from the details of the PF/ESI contributions both Employer's and Employee's contribution amounting to Rs.1.04 crores were disallowed by the Assessing Officer under the Rectification order, which is not legally correct. Therefore we direct the Assessing Officer to make disallowance on the late payment of Employee's contribution to the concerned authority after verifying the correct "due dates". Thus we do not find any infirmity in the direction given by the Ld. CIT(A) to the Assessing Officer. Thus the Grounds raised by the Revenue is devoid of merit and the same is hereby dismissed.

8. In the result, the appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 15-02-2024

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 15/02/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद