

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.2/Bang/2024
Assessment year : 2020-21

Bellur Hiriyaniyah Sridhar Murthy, No.65, East Anjaneya Temple Street, Basavangudi, Bangalore – 560 004. PAN: AIZPS 3972L	Vs.	The Income Tax Officer, Ward 5(2)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Rajagopal, CA
Respondent by	:	Shri Subramanian S., Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	06.03.2024
Date of Pronouncement	:	26.03.2024

ORDER

Per Laxmi Prasad Sahu, Accountant Member

This appeal is filed by the assessee against the order dated 02.11.2023 of the CIT(Appeals), National Faceless Appeal Centre, Delhi [NFAC], for the AY 2020-21 on the following grounds:-

“1. The impugned order passed by the learned Commissioner of Income Tax (Appeals) under section 250 of the Income Tax Act, 1961 to the extent which is against the Appellant is opposed to law, without jurisdiction, weight of evidence, probabilities, facts and circumstances of the case.

2. The intimation of the learned assessing officer in so far it is prejudicial to the interest of the appellant is bad, erroneous in

law, addition made is excessive and contrary to the facts and circumstances of the case and the Ld. Commissioner (Appeals) erred in upholding the same.

3. The learned Assessing Officer has erred, in law and in facts, by disallowing the employees contribution to provident fund and employees state insurance amounting to Rs. 2,01,791/- and the Ld. Commissioner (Appeals) erred in upholding the same.

4. The learned Assessing Officer has erred, in law and in facts, by not considering the provisions of Section 30 and Section 32 of the Employees' Provident Fund Scheme, 1952 wherein it is provided that the remittance of employees' contribution and employer's contribution to provident fund is to be paid by the employer in the capacity of employer and the Ld. Commissioner(Appeals) erred in upholding the same.

5. The learned Assessing Officer has erred, in law and in facts, by not considering the Appellant's submission and passing an intimation/ order contrary to the decision of Hon'ble Supreme Court and the Ld. Commissioner(Appeals) erred in upholding the same, as the addition made in the order is excessive.

6. The Ld. Commissioner (Appeals) is erred in sustaining the addition made by the Ld. AO in his order by taking recourse to the amendment by way of insertion of Explanation 2 to section 36(1)(va) and Explanation 5 to the section 43B which takes effect from 1st April 2021 and is applicable to the AY 2021-22 onwards and hence not applicable to the current AY 2020-21, such amendment was substantive in nature and not formed part of statute books of the current FY 2019-20, application of law retrospectively is bad in law and the Ld. Commissioner(Appeals) erred in upholding the same.

7. The interest demand made u/s 234A, 234B and 234C is excessive and the details of the computation of the same was not provided to the Appellant.

8. The Appellant submits that each of the above grounds are mutually exclusive and without prejudice to one another.

9. The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of objection at any time before or at the time of hearing before the Honourable Income Tax Appellate Tribunal ('Tribunal'), so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law. For these and other grounds that may be urged at the time of hearing of appeal, the Appellant prays that the appeal may be allowed for the advancement of substantial cause of justice and equity.”

2. The brief facts of the case are that the assessee filed return of income declaring total income of Rs.1,84,73,160 on 15.01.2021. The return was processed by CPC u/s. 143(1) dated 08.12.2021 and made addition of Rs.2,01,794 towards delayed remittances of employees share of ESI/PF u/s. 36(1)(va) of the Act against which the assessee filed appeal to the First Appellate Authority (FAA) with detailed written submissions. The FAA after discussing the details and relying on the judgment of Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd. reported in [2022] 143 taxmann.com 178 dismissed the appeal of the assessee. Aggrieved from this order, the assessee filed appeal before the ITAT.

3. The Id. AR reiterated the submissions made before the FAA and also filed paperbook containing 1-52 pages including written submissions which are as under:-

“Regarding remittance of employee welfare fund contributions

within due-date: [Ground no. 4 and 5]:

1 As per the decision of the *Checkmate Services Pvt. Ltd.* [2022] 143 [taxmann.com](https://www.taxmann.com) 178, the due date for remittance of ESI/PF needs to be

reckoned as per the due date provided under respective statute of ESI/PF [Para 54) and the law upheld by the Apex Court is the law of the land.

2. In the present case, the Appellant has disbursed the **salaries in the subsequent month** and remitted the contribution of ESI/PF for the month of June, August, September, December 2019, January and March 2020 within the due date as per **Annexure no. 1.**
3. Therefore the due dates have to be reckoned from the actual date of payment of salary as unless the salary is paid to the employees, employees' contribution to the PF and ESI cannot be made. Hence, kindly note that no disallowance is called for to this extent.
4. Please note in Form 3CD due date for remittance of ESI/PF was considered as 15th day from the end of the previous month, enclosed as per **Annexure no. 2.**
5. However the Ld. Commissioner (Appeals) without providing the opportunity has passed the order mechanically.
6. Further please note the issue involved in the appeal is covered by the decision of coordinated bench of **M/s. MTR Maiya's in ITA No.95/Bang/2023 dated 02.05.2023** (Para 14 and 15) and the gist of the case is as under:

In respect of disallowance of Rs. 1,29,106/- for the month of August 2017 & Sept. 2017 the assessee submitted that these payments were made in the following months, therefore the date of payment of salary should be considered the month in which the salary has been paid because the employee cannot contribute in the EPF/ ESI without the payments made by the employer. He also submitted the copy of ledger account. The ld. AR also relied on the decision of Calcutta Bench of the Tribunal in the case of Kanoi Paper & Industries Ltd. (supra) wherein it is 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 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 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."

15. In view of the above, we remit this issue to the AO with a direction to examine and decide the issue in the light of the above judgment. Accordingly this issue is allowed for statistical purpose.

7. Also the Hon'ble Delhi Tribunal in case of Sai Computers Ltd. Vs Assistant Director of Income Tax, CPC [2023] 155 taxmann.com 607 dated 18.10.2023, has considered the decision of Checkmate Pvt. Ltd. v. CIT (2022) 143 taxmann.com 178 has remanded back the matter to the file of the IA. AO for the purposes of ascertaining whether there is any delay in deposit of such contributions qua the due date in the light of the Kanoi Papers & Industries Ltd. v. CIT 75 'TTJ 448 (Cal) and the gist

of the case is as under, in Para 3 and 4:

"The assessee by way of instant appeal challenged the disallowance of employees' contribution to PF/ ESIC under section 36(1)(va) read with section 43B amounting to Rs. 1.19 crores.

The assessee argued that the timely payment of employees' contribution, as per the judgment in *Checkmate Pvt. Ltd. v. CIT* (2022) 143 taxmann.com 178 (SC), should be based on the due date of payment of salary under the respective statutes. The assessee further referred to the decision in *Kanoi Papers & Industries Ltd. v. CIT 75 77J 448* (Cal), which stated that the due date should be calculated from the end of the month in which salary was disbursed.

There is merit in alternative plea towards timely deposit of employees' contribution to PF/ ESIC qua the due date prescribed under relevant legislations and regulations. Thus while the action of the revenue for making adjustments towards belated payment to employees' contribution is endorsed on first principles, the matter is restored back to the file of the designated Assessing Officer for the purposes of ascertaining whether there is any delay in deposit of such contributions qua the due date in the light of the *Kanoi Papers & Industries Ltd. v. CIT 75 77J 448* (Cal). It shall be open to the assessee to place all factual matrix before the Assessing Officer and take all pleas for evaluation and determination of the issue by the Assessing Officer. The Assessing Officer shall examine this alternative aspect and pass a fresh order in accordance with law after giving proper opportunity to the assessee of being heard. 'Para 4]

In the result, the appeal of the assessee is allowed for statistical purposes. [Para 5]"

8. Your honours may note that both the above orders of M/s MTR Maiya's and M/s Sai Computers orders in original were passed u/s 143(1) of the Act.
9. Thus out of the total addition of Rs.23,13,160/-, contribution of Rs.22,70,783/- was remitted within due date and hence Ld. Officers below erred, in law and in facts, by making addition of Rs.22,70,783/- and the addition so made is excessive.
10. Reliance is also placed on the *Article 265 of the Constitution* and the *CBDT Instruction no. 14 of 1955.*"

4. The Id. AR further submitted that provisions have been made in the books of account at the year end on estimate basis. In Form 3CD as per sl.No.20(b), there is wrong reporting of date. The assessee is paying salary in the month of April, 2022 in the following month, therefore the due date shall be considered from the actual payment of salary to concerned employee, but not from the related month for which salary is paid. Therefore, due date shall be considered as 15th day of the following month in which actually salary was paid. He gave one example that suppose the employee of salary for April, 2019 was paid on 15.05.2019, as per PF Act the due date of 15 days shall be considered upto 15.06.2019. Accordingly, the assessee has deposited within the due date and provisions of section 36(1)(va) will not apply and the addition made is not correct. He requested that the matter may be sent back to the AO in the light of coordinate Bench decision in the case of M/s. MTR Maiya's in ITA No.98/Bang/2023 dated 02.05.2023 and for determination of due date in the light of the decision of Calcutta Bench in the case of Kanoi Paper & Industries Ltd. [2002] 75 TTJ 448 (Cal).

5. The Id. DR relied on the order of the lower authorities and he submitted that this issue has been settled by the Apex Court in the case of Checkmate Service Pvt. Ltd. (supra). During the course of proceedings before the FAA, the assessee was unable to satisfy the due date of payment of salary as per terms of employment. As per clause 38 of Employees Provident Fund Scheme, 1952, the time limit for

making payment in respect of contribution to PF is 15 days from the close of the month concerned i.e., for the salary for the month of April, 2019 the due date will be 15.05.2019 and not 15.06.2019 as submitted by the Id. AR. The books of account have been audited and tax auditor has correctly reported the due date of payment and actual date of payment in Form 3CD at sl. No.20(b). The assessee is challenging the tax audit report is wrong whereas it was accepted by the assessee before filling of return of income after uploading in the assessee's e-portal of the income tax web site. Once the audit report accepted by the assessee, it can not be disregarded. Accordingly the CPC has disallowed and the FAA has confirmed the additions.

6. Considering the rival submissions, we note that CPC has disallowed the belated deposit of PF/ESI amount of Rs.2,92,794 u/s. 36(1)(va) as per tax audit report as reported in Sr. No. 20(b). The Id. FAA has also confirmed the addition following the judgment of Apex Court in the case of Checkmate Services Pvt. Ltd. (supra). During the course of hearing the Id. AR was asked to submit financial statements for the previous, current and subsequent assessment years', Form 3CD and copy of salary ledger and computation of income to which the assessee filed and is placed on record. Here the dispute is only the due date of payment of employees contribution under the respective act as per section 36(1)(va) as well as clause 38 of the P.F. Act, 1952. The Id. AR has given with example noted supra that due date should be considered in the manner stated above. However, the Id. DR submitted that due date should be considered as per clause 38 of EPF Scheme,

1952 which is 15 days from the close of the month concerned. During the course of hearing, we also asked the Id. AR what is the due date of salary as per terms and conditions of employment, but the assessee could not submit any credible evidence in regard to due date of payment of salary. He relied on the judgment of coordinate Bench in the case of MTR Maiyya's (supra). We also note from the financial statements that assessee has made provision at the year end. If there is no salary due, then why the assessee was required to make provision. The AO has to examine why due date reported in tax audit report and submitted by the assessee before us are different. Considering the totality of facts of the case, we deem it fit to send back the issue to the AO for fresh consideration in the light of the above observations and decision as per law, after giving opportunity of hearing to the assessee. The assessee is directed to produce all the documents required and not to seek unnecessary adjournment for early disposal of the case.

7. In the result, the appeal by the assessee is allowed for statistical purposes.

Pronounced in the open court on this 26th day of March, 2024.

Sd/-

Sd/-

(GEORGE GEORGE K.)
VICE PRESIDENT

(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Bangalore,

Dated, the 26th March, 2024.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. Pr. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.