

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.420/Nag./2022
(Assessment Year : 2020-21)

Stellar Refractories Pvt. Ltd.
S-3/S-4, Ashoka Residency
North Ambazari Road, Dharampeth Extn. Appellant
Shivaji Nagar, Nagpur 440 010
PAN - AAICS4249Q

v/s

Dy. Commissioner of Income Tax
Circle-1, Nagpur Respondent

Assessee by : Shri Rajesh Loya
Revenue by : Shri Abhay Y. Marathe

Date of Hearing - 06/06/2024

Date of Order - 06/06/2024

ORDER

PER K.M. ROY, A.M.

The instant appeal has been preferred by the assessee challenging the impugned order dated 17/10/2022, passed by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2020-21.

2. The assessee has raised following grounds of appeal:-

"That the Intimation Order of the learned Asst. Director of Income Tax, CPC, Bangalore passed u/s. 143(1) is bad in law and wrong on facts and the learned CIT(A) erred in not adjudicating the legality of the case.

(2) That the learned AO CPC erred in law and on facts in making addition of Rs.1,46,050/- holding that the employees contribution to Provident Fund is paid after the due date and the learned CIT(A) erred in confirming the action

of the AO. On the facts and circumstances of the case, as per Employee Provident Fund Act which is governed by Employee Provident Fund Scheme, 1952 the due date for making payment (Rule 38 of the scheme) is within 15 days of the close of every month. The month should have been considered a month in which payment of salary is made from which deduction of Provident Fund is made and therefore contribution is deposited within due time.

(3) That the learned CIT(A) erred in law and on facts in confirming the action of learned AO by accepting the disallowance made by CPC merely through electronic processing u/s 143(1). On the facts and circumstances of the case, the disallowance on account of appellant's failure to pay the employee's contribution to Provident Fund/ ESIC within the prescribed due dates as per section 36(1)(va) is outside the purview and scope of adjustments as envisaged u/s 143(1)(a)(iv). The action of the learned authorities is illegal.

(4) That the learned CIT(A) erred in law and on facts in confirming the action of AO in charging interest u/s. 234C of the Income Tax Act. The interest charged is improper.

(5) That for any other ground with kind permission of your honour at the time of hearing of appeal.”

3. Before us, the learned A.R. for the assessee admitted that employees contribution to PF/ESI deposited after due date under the relevant Acts is not allowable as deduction u/s 36(1)(va) of the Act in view of decision of the Hon'ble Supreme Court in the case of Checkmate Service (P.) Ltd. v. CIT [2022] 143 taxmann. com 178/[2023] 290 Taxman 19/[2022] 448 ITR 518. However, the Ld. Counsel before us submitted that as per the clause 38 of the Provident Fund Scheme, the employee's contribution to the provident fund is required to be deposited 15 days from the close of every month. He submitted that the term "every month" under the clause 38 of the Employee's Provident Fund Scheme 1952 should be read as the month of payment of the salary, which is a month subsequent to the month for which salary was paid. In support of contention, the Ld. Counsel relied on the decision of the Tribunal in the case of the Master Polishers in ITA No. 252/Mum/2023, for assessment

year 2020-21, wherein the Tribunal has restored the matter back to the file of the Assessing Officer for deciding the term every month.

"3. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute before us is regarding the due date before which the employee's contribution should be deposited into provident fund account. The Ld. Counsel of the assessee has referred to clause 38 of the employee's provident fund which reads that provident contribution fund are payable to Central Government within 15 days of the close of every month. The Ld. Counsel has referred to the decision of the Co-ordinate Bench of the Tribunal (Kolkata) Bench in the case of Kanoi Paper & Industries Ltd. v. Asstt. CIT [2002] 75 TTJ 448 (Cal.), in ITA No. 1260/Mum/1996. The Tribunal in the case of Master Polishers (supra), has referred to the said finding. For ready reference, said finding is reproduced 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."

4. However, we find that the Hon'ble Madras High Court in the case of CIT v. Madras Radiators & Pressing Ltd. [2003] 129 Taxman 709/264 ITR 620, has held that the term "every month" in clause 58 of the Provident Fund Scheme should be read as month in which the wages were actually earned i.e. salary payable. The relevant finding of the Hon'ble Madras High Court is reproduced as under:-

"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 in 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 contrib/utions 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."
(Emphasis Supplied Externally)*

3.2 The Hon'ble High Court being higher in hierarchy of judiciary than the Tribunal, therefore, following the decision of the Hon'ble Madras High Court (supra), we reject the prayer of the Ld. Counsel of the assessee for restoring the matter back to the Assessing Officer. The grounds of appeal of the assessee are accordingly dismissed.

4. In the result, the appeal of the assessee is dismissed.

5. The learned A.R. further submitted as follows:-

"1) payment of employee contribution to PF for the month of November-2019 was due on 15-12-2019 which was made on 16-12-2019, the next day as 15-12-2019 was holiday (Sunday).

Section 10 of the General Clauses Act provides right to person to do on the next working day what he could have done on previous day, had it not been a holiday.

After removal of grace period of 5 days allowed for payment of employee contribution to PF/ESIC and after the judgement by the Hon'ble Supreme Court in case of Checkmate Services Pvt Ltd [2022] 143 taxmann.com 178 dated 12-10-2022, the Hon'ble Delhi High Court and Hon'ble ITAT Delhi dealt with the issue when the due date of payment of PF contribution is Sunday or public/ gazetted holiday. Even the online banking services were available on public/gazette holiday, the court held that the payment made on next working day will be considered as made within due date considering the provisions of General Clauses Act. Following case laws were relied upon earlier while filing Gist of submission - 1:

(i) PCIT Vs. Pepsico India Holding (P.) Ltd [2023] (156 taxmann.com 25 Delhi) dated 5-9-2023

Section 36(1)(va) of the Income-tax Act, 1961-Employee's contribution (General) - Whether where deposit of employee's contribution towards provident fund was due on 15-8-2018 but it was made on 16-8-2018 i.e., next working day, 15-8-2018 being a National Holiday, deduction claimed under section 36(1) (va) would have to be allowed - Held, yes [Para 7] [In favour of assessee]

(Refer P.B. Page No. 61-62)

(ii) G. D. Foods and Manufacturing (India) (P.) Ltd Vs. ADIT [2023] 152 taxmann.com 323 (Delhi-Trib.) dated 10-07-2023

Section 36(1)(va) of the Income-tax Act, 1961 read with clause 10 of the General

Clauses Act, 1897 - Employee's contributions (PF/ESI) - Assessment year 2019-20

- Assessee made payment towards employee's contribution towards EPF and ESI with a one day delay - Assessing Officer disallowed same on ground that deposit of contribution was made beyond stipulated period prescribed in respective Acts - It was noted that due date for depositing contribution of ESIC & EPF fell on Sunday or gazetted holiday and assessee had made payment on very next day Further, assessee had no intention not to deposit contribution of ESI & EPF well within time and depositing contribution very next day of holiday proved bona fide of assessee - Whether contributions of ESIC and EPF made by assessee with one day delay was allowable when due date for payment of ESIC and EPF contributions prescribed in respective Acts of ESI & PF fell on Sunday or gazetted holiday - Held, yes [Para 11] [in favour of assessee]

(Refer P.B. Page No.63 to 65)

(2) We also rely on the latest decision rendered by Delhi High Court in case of M/s. Aero Club Vs. ACIT in ITA No. 267/2023 dated 5-9-2023 (Copy attached) in which relying on the decision of Pepsico India Housing (P.) Ltd (supra), the Hon'ble Delhi High Court again deleted the disallowance of PF/ESIC paid on national holiday.

(3) The issue also came up before the Pr. Commissioner & Ex-officio Additional Secretary to the Government of India u/s 35EE of the Central Excise Act, 1944 in case of M/s Dow Chemical International Pvt Ltd. Order no. 1098-1099 dated 24-11-2022 was passed in which respondent relied upon section 10 of the General Clauses Act, 1897 for computing time limitation for filing rebate claim. In para 8 of the said order, it is held as under:

"Government observes that it is unambiguously clear from the above text that if the court or office is closed on a day when any act or proceeding is directed to be done, the act or proceedings shall be considered as done or taken on the next day afterwards on which office is open. In the instant case, the one year time limitation period ends on 13.12.2014. Therefore, the next date Le. 15.12.2014 shall be considered as the last date according to the General Clauses Act, 1897 due to 13th and 14th being Saturday, Sunday respectively.

Government finds that it is not disputed that Respondent had filed the claim on 15.12.2014 and therefore well within the time limitation period of one year as per section 11 B of Central Excise Act, 1944 reads with General Clauses Act, 1897. Department's contention that the General Clauses Act is not applicable since the respondent could have filed the claim online even when the office was closed is not valid and legal. In view of above, Government finds that rebate to the Respondent cannot be denied on the ground of limitation of time."

6. The learned A.R. submitted that the Id. CIT(A) committed an error in not accepting the plea of the assessee that the deposit of ESI contribution for the month of June and July, 2018 of Rs. 3,89,086/- and EPF contribution of Rs.15,47,915/- for the month of June and July, 2018 was delayed by one day, wherein the due date under the respective Acts falling either on Sunday or gazetted holiday therefore, the same is allowable. Further submitted that, the said delay is covered / condonable in view of Section 10 of General Clauses Act 1977 as well as Section 4 of the Limitation Act, 1963. The Ld. Counsel further submitted that except the said additions, other additions/disallowance made by the A.O. which has been upheld by the CIT(A) are not pressed in the present Appeal in view of the ratio laid down in the case of Checkmate Services (supra). The Ld. Counsel for the assessee taken us through the provisions of General Clauses Act and also various judicial pronouncements and submitted that the above mentioned disallowance deserves to be deleted.

7. Per contra, the Ld. Departmental Representative relied on the order of the CIT(A).

8. We have heard both the parties and perused the material available on record. The only issue remains for consideration in the present Appeal that whether the contributions of ESIC and EPF made by the Assessee with one

day delay is allowable when the due date for payment of ESIC and EPF contributions prescribed in the respective acts of ESI & PF falls on Sunday or gazetted holiday?.

9. The section 10 of the General Clauses Act, 1998 reads as under:–

"10. Computation of time. (1) Where, by any 19 [Central Act] or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open: Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877 20, applies.

(2) This section applies also to all 19 [Central Acts) and Regulations made on or after the fourteenth day of January, 1887."

10. Thus, in our opinion, considering the fact that the due date for depositing the contribution of ESIC & EPF falls on Sunday and gazetted holiday, the said delay of one day deserves to be condoned as per Section 10 of General Clauses Act. Further it is also observed that the assessee has no intention not to deposit the contribution of ESI & EPF well within the time, depositing the contribution very next day of Holiday proves the bona-fide of the Assessee. Therefore, in our opinion, the authorities have committed error in disallowing the deposit made with one day delay where the due date under respective acts falls either on Sunday or on gazetted holiday.

11. In view of the above discussion, we allow Ground no.2, of the assessee and delete the disallowance of delayed deposit of EPF for ₹ 1,46,050, The assessee could not demonstrate any apparent error in calculation of interest under section 234C of the Act. So, ground no.4, is dismissed.

12. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open Court on 06/06/2024

Sd/-
V. DURGA RAO
JUDICIAL MEMBER

Sd/-
K.M. ROY
ACCOUNTANT MEMBER

NAGPUR, DATED: 06/06/2024

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Nagpur; and*
- (5) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Sr. Private Secretary
ITAT, Nagpur