IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No.171/Bang/2024
Assessment Year: 2019-20

C.S. Manjunath Swacha Enterprises Near Govt. Well 1st Cross, Upparahalli Karnataka 572 102 **PAN NO : AKFPM4892H**	**Vs.**	CPC Bangalore & ITO Ward-1 & TPS Tumakuru
APPELLANT		**RESPONDENT**

Appellant by	:	Sri C.S. Prahallada, A.R.
Respondent by	:	Shri V. Parithivel, D.R.

Date of Hearing	:	12.06.2024
Date of Pronouncement	:	12.06.2024

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of NFAC dated 16.11.2023 for the assessment year 2019-20. The assessee has raised following grounds of appeal:

1. *In our case the assessee neither deducted ESIC and EPF from the employees nor paid the employers contributions from his service costs. He is only an agent collects employee benefits from the organizations/institutions and remits to the government. Since he neither deduct ESIC and EPF from the employees nor paid the employers contributions from his service costs the question of disallowance will not arise.*

2. *In our case, we have paid taxes with in the previous year with few days delay only as furnished in form 3CD of the said year. On verification, I come to know that in the audit report the due date is considered on the basis of 15 days following the end of the month for which the salary relates to the employees, instead of the actual date of deduction. The assessee has deducted the ESI, PF etc., on the1st day of every month except in the last month wherein the deduction was done on 31st of*

March2019. The details of the salary deduction monthwise and due dates are shown in the separate schedule wherein only March 2019 deduction was delayed by 5 days.

3. *Under section 43B (b) "any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees". The assessee is supposed to make payment before the due date applicable in his case for furnishing there turn of income under sub section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return. In our case we have paid taxes with in the previous year with few days delay only as furnished in form 3CD of the said year2. The parliament by way of amendment to Section36(1)(va) and Section 43B of the Act via Finance Act 2021passed amendments to disallow delayed payment of employees contribution to EPF and ESI. Hence the amendments are effective from A.Y. 2021-22 and not earlier to it.*

4. *Further Income Tax Appellate Tribunal (ITAT), New Delhi has passed orders in favour of the assessee in Kiwi Enterprises (P) Ltd Vs ACIT 2022SCC online ITAT 148 AY 2013-14 that "delayed payment of employees contribution to EPF and ESIC is not disallowable as amendments to Section36(1)(va) and section 43B effected by Finance Act2021 were applicable prospectively. 4. As per the well established principle of interpretation of statutes as expounded by the Hon'ble Apex court in CIT Vs Vatika Township Pvt Ltd reported in2014, 49 Taxma.com (249SC) "unless it is expressly provided or impliedly demonstrated any provision of statute is to be read as having prospective effect and not retrospective effect.*

5. *The assessee couldn't file the appeal before your good selves for the reason the assessee was suffering from illness from 15th January 2024 to20th January 2024. Regarding this doctor certificate is enclosed. Please condone the delay and do the needful."*

2. It was noted at the time of hearing that there was a delay of 7 days in filing the appeal before this Tribunal. It was explained before us that the delay was due to non-noticing of the mail sent by the NFAC as the assessee was not well versed in ITBA Portal.

3. We have heard the rival submissions and perused the materials available on record. We find good and sufficient reason in filing the appeal before this Tribunal with a short delay of 7 days and the same is condoned and the appeal is admitted for adjudication.

4. The ld. A.R. submitted that the values mentioned in the Clause 20(b) of tax audit report [i.e., Details of contributions received from employees for various funds as referred to in section 36(1)(va)] is not correct. Instead of mentioning only the employees contribution part, audit report has mentioned the total contribution amount (i.e, both employer and employees contribution). Without prejudice to above and as stated in Grounds of Appeal submitted on 21/01/2024, the ld. A.R. submitted that the Appellant has neither deducted ESIC and EPF from the employees nor paid the employers contributions from his service costs. Appellant is only an agent who collect employee benefits from the organizations/institutions and remits to the government. The Appellant receives the contracted amount from the institutions/organisations in respect of each employee on the number of man days worked. i.e., employee's wages and Appellant's margin. Out of the payments received, the Appellant pays employee's wages and payments to ESIC/PF departments and retains small amount towards his margin. As per EPF Scheme and ESI Act, 1948 the Appellant is only a contract employer and not the principal employer.

4.1 The ld. A.R. further submitted that the Appellant's total contract receipts for the year 2018-19 is Rs. 5,61,09,279/-. Whereas the principal employers have delayed giving payments to the Appellant for Rs. 2,69,96,002/- (more than 48% of the contract receipts). Few ledger extracts of principal employers were submitted to your good selves on 29/03/2024. It is clear from the above that the delay in payments to ESI and PF funds is purely attributable to the principal employer and not the contract employer. Principle employer cannot be absolved from the statutory compliances just by entering into agreements with contract employers.

4.2 Further, he submitted that that as per para 30 of EPF Scheme it is the responsibility of the principal employer to pay the employees contribution to the government and not the contractor/agent. An extract of the same has been provided below:

> (3) It shall be the responsibility of the principal employer to pay both the contribution payable by himself in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor and also administrative charges.
>
> *Explanation:* For the purposes of this paragraph the expression "administrative charges" means such percentage of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, and in respect of which Provident Fund Contribution are payable as the Central Government may, in consultation with the Central Board and having regard to the resources of the Fund for meeting its normal administrative expenses, fix.

4.3 Similar provision has been available in Section 40 of Employee's State Insurance Act, 1948, an extract of the same is provided below:

> **40. Principal employer to pay contributions in the first instance**
>
> (1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.
>
> (2) Notwithstanding anything contained in any other enactment but subject to the provisions of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by deduction from his wages and not otherwise:

4.4 In this regard he relied on recent Bangalore ITAT decision - in case of SHRI TRIMBAK KONHER PATIL VS INCOME TAX OFFICER (ITA NOS 5 AND 6/BANG/2024) dated 04-03-2024, wherein it was held that:

"Both the Acts make this thing amply clear by way of enabling the employer or the principal employer to collect the employee's contribution employed through the contractor or immediate employer from the contractor or immediate employer.

This being the case there is no primary liability on the contractor or immediate employer to collect and remit the employees' contribution directly to the fund. The appellant being the contractor or immediate employer and in view of the above express provisions of the EPF and ESI Acts, we are of the humble opinion that the provisions of sections 2(24)(x) and 36(1)(va) are not applicable to the appellant as there is no basic liability fastened on the contractor or immediate employer to remit the amount into the fund."

4.5 He submitted tat as per section 2(9) of ESIC Act, the term employee means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

4.6 From the above definition it is clear that employees working in the factory or establishment are the employees of the owner of factory or establishment and not the agent/contractor through whom they are entered. Thus, the employees with respect to whom disallowance point is raised are not the employees of Appellant.

4.7 From the above the ld. A.R. for the assessee categorically stated that the Appellant is only an agent who collect employee benefits from the organizations/institutions and remits to the government. the provisions of sections 2(24)(x) and 36(1)(va) are not applicable to the appellant as there is no basic liability fastened on the contractor or immediate employer to remit the amount into the fund.

4.8 Without prejudice to above; he submitted that, the amount of delayed contribution to PF and ESI in respect of employees contribution would be treated as income in the hands of the assessee u/s 2(24)(x) and on subsequent payment of the same, it would be a business expenditure, which can be claimed u/s.37(1) of the Act. Thus, where there is late payment of PF or ESI, the same can be claimed under section 37(1) upon making payment of the same. As the Appellant made payment for ESI and PF in the same month and year, income shown will be allowed as deduction in the same month and year and the net tax affect shall be NIL. He placed reliance on ITA NO 98/CTK/2022 in case of NIRAKAR SECURITY & CONSULTANCY SERVICES PVT LTD VS INCOME TAX OFFICER in ITAT OF CUTTACK dated 17-10-2022

4.9 Further, the ld. A.R. stated that any delay in the payment of employee contributions should be treated as income under section 2(24)(x) rather than being disallowed under section 36(i)(va). The question of disallowance under section 36(i)(va) does not arise since the Appellant has not claimed the expense in their books. However,

in the order under section 154 dated 06.06.2023, the expense was erroneously disallowed instead of being added to income. Hence, the treatment made in the order is not correct in the law. Therefore, order under section 154 and consequently order under section 250 needs to be squashed.

4.10 Based on all the above submissions, the ld. A.R. for the assessee prayed to set aside the impugned order prejudicial to the interest of the Appellant or on the other hand to allow the belated payments under 37(1).

5. The ld. D.R. relied on the order of the Tribunal in the case of Manikandan Vazhukkapara Kumaran Vs. ACIT in ITA No.577/Bang/2023 dated 29.11.2023 and submitted that the issue is already settled by the Hon'ble Supreme Court by the judgement in the case of Checkmate Services Pvt. Ltd. VS CIT-1 in Civil Appeal 2833/2016 vide its judgment dated 12 October 2022. Hence, he submitted that the adjustment u/s 143(1) of the Act made after verifying the tax audit report filed u/s 44AB of the Act along with return of income and now the assessee cannot take any argument contrary to the returns and documents filed with the assessee before the CPC.

6. We have heard the rival submissions and perused the materials available on record. Admittedly, this issue came for consideration before this Tribunal in the case of Ramzanali Asgar Khan in ITA Nos.806 & 807/Bang/2024 dated 5.6.2024 wherein after following the earlier order of the Tribunal in ITA No.577/Bang/2021 in the case of Manikandan Vazhukkapara Kumaran Vs. ACIT decided the issue as follows:

"10. *We have perused the submissions advanced by both sides in the light of various decisions relied by both sides.*

10.1 *In the present facts of the case, the assessees are proprietary concern, engaged in the business of manpower supply for the years under consideration. Admittedly in the audit report filed along with return of income, the assessee had mentioned the details in respect of the contributions failed to be deposited with the statutory funds within the due date. The CPC after issuing communication to the assessee, made disallowance of such contributions in the hand of the assessee for the years under consideration in an intimation issued u/s 143(1)(a) of the Act. It is the contention of the ld. A.R. that at the time when disallowance was made, this issue was covered by the jurisdictional High Court in the favour of assessee by the decision in case of Essae Teraoka (P) Ltd. v. DCIT reported in (2014) 43 taxmann.com 33, according to which, since the deposit to the respective funds was made before the due date of filing the respective fund was made before the due date of filing of the original return of income, any delay that happened stood condoned.*

10.2 *Subsequently, by virtue of the decision of Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. cited (supra), the ratio has been laid down that any delay in depositing the employees contribution to the respective funds by an employer would amount to disallowance u/s 36(1)(va) of the Act of such contribution. Further, it is a trite law that any ratio expressed by Hon'ble Supreme Court would relate back to the time from which the provision has been enacted and therefore, such law declared by Hon'ble Supreme Court was retrospectively applicable, and the decisions rendered by various Hon'ble High Courts favouring assessee would be of no benefit at that stage.*

10.3 *The ld. A.R. though did not dispute this position submitted that, what would be the due date for deposit of the employees' contribution to the PF would have to be computed from the date when the employer pays salary to such employees. He has referred to section 38 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 in his argument in support.*

10.4 *He thus submitted that in terms of section 38 of the Act, Employees provident fund and Miscellaneous Provisions Act, 1952 refers to the time limit for depositing the contribution within 15 days of the close of the month must be to the month in which the salary payment is made. He submitted that the entire additional evidence filed before this Tribunal establishes that there is a delay in paying salary to the employees and therefore, if that is taken into consideration, there cannot be any delay that would be attributable towards the deposit of employees' contribution to the relevant fund. He also submitted only a minor amount would fall within the purview of disallowance u/s 36(1)(va) of the Act. The ld. A.R. thus prayed that the additional evidence filed by assessee may be admitted and the issue may be remanded to the ld. AO for necessary verification based on such additional evidences.*

10.5 *At the request of the ld. A.R., we had directed the ld. D.R. to carry out necessary verifications and sufficient time was granted to the ld. D.R. in order to respond to the additional evidence filed by assessee.*

10.6 *The ld. D.R. after going through the entire additional evidences submitted that, apparently the dates have been shifted and therefore, there is delay only in respect of few contributions. However, the ld. D.R. submitted that had this to be the*

case, why would the auditor in the audit report give different dates. He raised the concern in respect of the same by submitting that merely because there were decisions of jurisdictional High Court which was in favour of the assessee during the relevant period would not support the auditor to tinker with the actual date of payment of salary and actual deposit of employees' contribution with the relevant fund. He submitted that all these evidences now tendered by the assessee are mere after thought and therefore, cannot be entertained. He also submitted that these arguments or submissions are raised by the assessee for the first time before this Tribunal.

10.7 *After considering the above submissions by both sides, we are compelled to analyze the provisions of Provident Fund Act relied by the ld. A.R. which is filed at the paper book pages 58 to 198 filed on 11.10.2023. Section 38 of the Employees Provident Fund Act reads as under:*

> *"Section 38 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, becomes relevant. Sub-section (1) thereof reads as under:*
>
> > *The employer shall, before paying the member his wages in respect of any period or part of period for which contributions are payable, deduct the employee's contribution from his wages which together with his own contribution as well as an administrative charge of such percentage [of the pay (basic wages, dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, as the Central Government may fix. He shall within fifteen days of the close of every month pay the same to the fund "electronic through internet banking of the State Bank of India or any other Nationalized Bank authorized for collection" on account of contributions and administrative charge]:*
> >
> > *"Provided that the Central Provident Fund Commissioner may for reasons to be recorded in writing, allow any employer or class of employer to deposit the contributions by any other mode other than internet banking".*

10.8 *The above provision requires an employer to deduct the employees' contribution before paying the employee his wages and further requires to deposit such contribution withheld by the employer along with employer's own contribution to the relevant fund held by the Government. It is further requires that the employer shall within 15 days of the close of every month pay the same to such fund along with administrative charges. It is thus, clear that after deducting the employees' contribution towards the fund the same has to be deposited with the Government within 15 days of the close of every month. In our opinion, reference to 15 days of the close of every month has to be in relation to the month during which the payment of wages is to be made and the corresponding liability to deduct employees' contribution to such fund immediately arises. Further, the expression "within 15 days of the close of every month", therefore, must be interpreted as having reference to the close of the month for which the wages are required to be paid with*

corresponding date to deduct employees' contribution and to deposit the same with the relevant fund.

10.9 *On perusal of section 38 of the Employees Provident Fund & Miscellaneous Provisions Act, 1952, the phrase used in respect of the wages that an employer is supposed to pay to an employee for any period or part of period, are represented as, contributions that are "payable". This means, the legislature is very clear in its intent that the employer is supposed to deduct the contributions in respect of the funds at the end of the month when the employee is eligible to receive his or her wages and the employer is cast upon with the duty to pay the necessary dues. The section 38 therefore, envisages that, at the end of every month when the employer is due to make the payment to such employees, the necessary contributions have to be deducted and deposit within 15 days of such deductions. With such an understanding, the argument advanced by the ld. A.R. cannot be appreciated that, in a case the salary or wages are paid in a subsequent month, the liability to deposit the employees' contribution to the fund gets deferred by another month.*

10.10 *The dictum laid down by Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. Cited (supra) is that section 38 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 makes it obligatory for the employer before paying and employee the wages or salary to deduct the employees' contribution. Thus, to analyze in the form of an example assuming a circumstance that the employer does not make payment of salary/wages to the employees for 2 to 3 consecutive months. This does not mean that the employer gets the benefit of depositing the employees' contribution of such months for which the salary was not paid on time to such employees will get shifted. That would render the entire provision otios and is not the intention of the legislature also.*

10.11 *We have carefully gone through the additional evidences for all the years under consideration and note that such shifting of depositing the contribution on behalf of the employees by the assessee is not in consonance with the provisions of section 38 as observed herein above and argued by the ld. D.R.*

10.12 *In additional ground No.3, the argument of ld. A.R. is that audit report originally filed by the assessee is wrong as the auditor mentioned single date of remittance though there were multiple dates of remittances in each month.*

10.13 *The ld. A.R. pleaded before us that audit report is wrongly prepared by the tax auditor for which there is no evidence brought on record regarding any confirmation from the tax auditor. In our opinion, such arguments to tarnish a professional is not appreciated. Based on the above discussion, we do not find any merit to consider the same.*

10.14 *We, therefore, do not find any merit in the new argument raised by the assessee in additional ground No.2 requesting to remand the issue back to the Ld. AO to verify the claim of disallowance in the light of the additional evidences filed by assessee. We, therefore, dismiss additional ground No.2 raised the assessee, as such argument is not in consonance with the provisions of Section 38 under Employees Provident Fund and Miscellaneous Provisions Act, 1952.*

Accordingly, the additional ground nos. 2-3 raised by assessees stands dismissed in all the appeals."

6.1. The assessee filed an affidavit from CA stating as follows:

1. *I was the auditor of Swacha Enterprises (Proprietor: C S Manjunath) for the Financial year 2018-19*

2. *I had mentioned delay in filing PF and ESI returns in clause no. 20(b) of the Tax Audit report (Form 3CB)*

3. *I had included both employers and employees contribution in the said clause instead of mentioning only employees contribution. It is a clerical mistake in the report.*

4. *This affidavit is required to be produced before the ITAT Bangalore*

6.2 In our opinion, this affidavit of CA of the assessee is self-serving document without explaining how he committed such mistake while auditing books of accounts and he being the tax auditor of assessee company, he has to exercise due diligence while auditing the same. The affidavit made by CA of the assessee is not supported by any iota of evidence. Hence, we do not give any credence to this affidavit.

6.3 However, the ld. A.R. before us wanted to reargue the case by placing reliance on the order of the Cuttack Bench in ITA No.98/CTK/2022 dated 17.10.2022 in the case of Nirakar Security & Consultancy Services Pvt. Ltd. Vs. ITO, which was delivered before the judgement of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. VS CIT-1 in Civil Appeal 2833/2016 vide its judgment dated 12 October 2023.

6.4 Further, he has also relied on the judgement of Bangalore Bench of Tribunal in ITA No.5 & 6/Bang/2024 dated 4.3.2024 in the case of Sri Trimbak Konher Patil Vs. ITO, wherein the issue was remitted by observing as under:

> 10. *We find that the above contentions raised now before the Tribunal was never raised before the AO nor the CIT(A). In the interest of justice and equity, we are of the view that the above contentions of the assessee need to be adjudicated by the CIT(A) (since there needs to be examination of factual aspects). Accordingly, the matter is restored to the files of the CIT(A). The assessee shall co-operate with the Revenue and shall not seek unnecessary adjournment in the matter. It is ordered accordingly.*

6.5 This decision has not been laid down in ratio descendi so as to follow the same. Accordingly, we do not find any merit in the issue raised by the assessee before us and the appeal of the assessee is dismissed.

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

Order pronounced in the open court on 12th June, 2024

Sd/-	**Sd/-**
(Keshav Dubey)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 12th June, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.