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

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

ITA No. 306/Bang/2024
Assessment Year : 2020-21

Shri Amit Kumar Rajendra Prasad Singh, Toshit Sanitation, No. 35, 4th Main Road, 12th Cross, Wilson Garden, Bangalore – 560 027. **PAN: AWEPS4679M**	**Vs.**	The Income Tax Officer Ward – 7[2][3], Bangalore.
APPELLANT		**RESPONDENT**

Assessee by	:	Shri Pranav Krishna, Advocate
Revenue by	:	Shri V. Parithivel, JCIT-DR

Date of Hearing	:	25-04-2024
Date of Pronouncement	:	28-06-2024

ORDER

PER KESHAV DUBEY, JUDICIAL MEMBER

This appeal at the instance of the assessee is directed against the Addl./JCIT(A)-4, Chennai order dated 29.12.2023 vide DIN & Order No. ITBA/APL/S/250/2023-24/1059202087(1) passed u/s. 250 of the IT Act, 1961 for the A.Y. 2020-21.

2. The assessee has raised the following grounds.

"1. The order of the learned Addl/ Joint Commissioner of Income tax [Appeal}-4, Chennai passed under Section 250 of the Act, in so far as it is against the Appellant is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the Appellant's case.

2. The learned Addl/Joint Commissioner of Income tax [Appeal]-4, Chennai is not justified in upholding the determination of total income of Appellant in the intimation u/s. 143[1] of the Act, at Rs. 68,35,620/- as against the returned income of Rs. 64,98,610/- and thereby confirming the addition of Rs. 3,37,012/- u/s.36[1][va] of the Act, allegedly based upon the disallowance indicated in the Tax Audit Report of the Chartered Accountant in Form 3CD, under the facts and in the circumstances of the appellant's case.

3. The learned Addl/Joint Commissioner of Income tax [Appeal]-4, Chennai failed to appreciate that the due date for making payment of the employee's contribution, would fall in the month, following the actual disbursal of the salary and the due date as per the Provident fund act, was not the 15th day, of each calendar month as indicated in the audit report and therefore, the addition made was misconceived, under the facts and in the circumstances of the case.

4. The learned Addl/Joint Commissioner of Income tax [Appeal]-4, Chennai failed to appreciate that the intimation passed by CPC under section 143[1] of the Act was bad in law, since the adjustment made was beyond the scope of the Act, under the facts and in the circumstances of the case.

5. The learned Addl/Joint Commissioner of Income tax [Appeal]-4, Chennai erred in passing the impugned order u/s. 250 of the Act without following the principles of natural justice and consequently the impugned order is liable to be cancelled on the facts and circumstances of the case.

6. Without Prejudice to the above, the learned Addl/Joint Commissioner of Income tax [Appeal]-4, Chennai is not justified in disposing off the appeal without considering all the submissions made by the Appellant and hence, the impugned order passed requires to be cancelled under the facts and circumstances of the case.

7. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the Appellant denies himself liable to be charged to interest u/s 234A, 234B and 234C of the Act, as computed in the intimation u/s.143[1] of the Act, which under the facts and in the circumstances of the Appellant's case deserves to be cancelled.

8. The Appellant craves leave to add, alter, amend, substitute or delete any or all of the grounds of appeal urged above.

9. For the above and other grounds to be urged during the course of hearing of the appeal the Appellant prays that the appeal be allowed in the interest of equity and justice."

3. The brief facts of the case are that the assessee is an Individual and filed his return of income for the Asst. Year 2020-21 declaring a total income of Rs. 64,98,610/-being income from business. The Assessee also accepted the tax audit report in Form 3CB along with the Form 3CD uploaded by the Chartered Accountant.

Thereafter a communication of proposed adjustment u/s. 143[1][a] of the Income Tax Act, 1961 ['the Act' for brevity] was issued on the Assessee proposing to make a disallowance of the contributions received from employees towards Provident Fund and ESI under Section 36[1][va] r.w.s. 143[1][a][iv] of the Act amounting to Rs. 3,26,956/- based on the disclosure in Form 3CD of the tax audit report filed by the Chartered Accountant & accepted by the Assessee.

Further the Assessee in response to the above communication submitted a detailed reply online disagreeing with the proposed adjustment sought to be made. The assessee submitted that no disallowance was called for in view of the judgements of the

Hon'ble Jurisdictional High Court in the case of Essae Teraoka [P.] Ltd in 366 ITR 408, CIT Vs Sabari Enterprises - [2008] 298 ITR 141 in terms of which the amount of employees' contribution remitted before the due date for filing of the return u/s 139 [1] of the Act are deductible, notwithstanding the provisions of Section 36[1][va] of the Act.

Thereafter, the Assistant Director of Income Tax, CPC passed an intimation u/s. 143[1] of the Act determining the Appellant's total income at Rs.68,35,620/- as against the returned total income of Rs. 64,98,610/-.

4. Aggrieved by the intimation passed under Section 143[1] of the Act, the Assessee preferred an appeal before the NFAC/ Addl./JCIT(A)-4, Chennai which was dismissed and held against the Appellant by relying on the judgement of Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd dated 12/10/2022. The Addl./JCIT(A)-4, Chennai observed that as per Article 141 of the Constitution of India, the law declared by the Supreme court shall be binding on all courts within the territory of India.

5. The Appellant again being aggrieved by the order of the Ld. Addl./JCIT(A)-4, Chennai is in appeal before this Hon'ble Tribunal.

6. Before us, the assessee filed additional evidences along with an Affidavit in terms of Rule 10 and 29 of the Income tax Appellate Tribunal Rules, 1963 as below-

(i) Ledger extract of salary for the Financial year 2019-20 (Page No.78 of the Paper Book No.2 dated 23/04/2024

(ii) Month wise Bank Statement extract evidencing actual disbursement of salary (Page No. 79 to 100 of the paper book No.2 dated 23/04/2024)

The Ld AR of the Assessee submitted that the Assessee could not produce the same before the Authorities below due to the non compilation of data in time as the details were not readily available with the assessee and prayed to admit the additional evidences as the failure was neither wilful nor deliberate.

The Ld. DR on the other hand has objected the production of the additional evidences at this stage and also submitted that in view of the Judgement of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd reported in [2022] 143 taxmann.com 178 (SC) these additional evidences has no material value.

We heard rival submissions & carefully considered the same. In our Opinion these additional evidences are very much necessary for proper adjudication of the case and also the reason explained by the assessee for not producing the same before the lower Authorities are bona fide. Accordingly we admit the additional evidences filed before us.

7. Now coming to the merits of the case, the sole issue involved in this appeal is with regard to the disallowance u/s. 36(1)(va) in the intimation dated 28/10/2021 passed u/s. 143(1) of the IT Act, 1961 and confirmed by the Addl./JCIT(A). Before us, the Ld.AR of the assessee by relying on the decision of Hon'ble ITAT in the case of Kanoi paper & Industries Limited vs. CIT in ITA 1260/CAL/1196 dated 28/05/2001 as well as the various other decisions of ITAT "B" Bench, Bengaluru in the case

of MTR Maiyas vs. ITO (2023) 152 taxmann.com 189 (Bang-Trib) and Sri. Elavarthy Ramana Reddy v. DCIT in ITA No. 806/Bang/2023 dated 14/12/2023 submitted that the employees share to ESI and EPF was correctly paid within the due dates as per the EPF and ESI Act as the monthly salary were actually paid in the subsequent month and further submitted that as per clause 38 of the Employees Provident Fund Scheme, 1952, the payment of contribution of employees share should be made within 15 days from the end of the month during which the disbursement of salary are made. Further, the Ld.AR also produced paper book No.1 & paper book No.2, paper books containing case Laws relied upon along with synopsis and computation of Income, Copy of Audited Financial Reports, Ledger A/c o Salary, Labour charges, Staff welfare exp. Provident fund Contribution A/c as well as ESI Contribution A/c. and submits that the details need to be examined.

8. The Ld. DR on the other hand, supported the order of the Appellate Authority and again by relying on the decision of Hon'ble Supreme Court in case of CHECKMATE SERVICES P. LTD reported in [2022] 143 taxmann.com 178 (SC) vehemently submitted that the deduction u/s. 36(1)(va) in respect of delayed deposit of amount collected towards employee contribution to PF & ESI cannot be claimed when deposited after the due date as per PF & ESI Act even though it is deposited within the due date of filing the return r.w.s. 43B of the IT Act, 1961.

9. We have heard the rival submissions and perused the material available on record. We note that the CPC has made

disallowance of Rs. 3,37,012/- for the belated remittance of Employee's share of PF & ESI on the basis of reporting at Sl. No. 20(b) of the tax audit report by the Auditor.

10. Now coming to Grounds of Appeal raised by the Assessee, the Ground No. 1, 8 & 9 are general in nature & do not require any adjudication.

11. With regard to Ground No. 2, 3 & 4 of the Assessee that the Intimation passed U/s 143(1) of the Act is bad in law since the adjustment made was beyond the scope of the Act as well as the amount of Employee's share to ESI & PF was paid within the due date as per EPF & ESI Act since as per clause 38 of the Employees Provident fund Scheme 1952, payment of contribution of employee's share should be made within 15 days from the end of the month during which disbursement of Salary is made, we are of the opinion that under the similar facts & circumstances, the key issues involved in the present case has been decided by this Tribunal in the case of Manikandan Vazhukkapara Kumaran in ITA No.577/Bang/2023 dated 29/11/2023 for the Asst. year 2018-19 wherein held as under: -

> "5. We have perused the submissions advanced by both sides in light of records placed before us.
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> 5.1 We note that the issue raised by the assessee is a preliminary issue challenging the validity of the adjustment made in an intimation issue to the assessee u/s 143(1)(a) of the Act. We note that the disallowance u/s 36(1)(va) of the Act has been made by the CPC in an intimation issued to the assessee u/s 143(1)(a) of the Act in all the appeals that are under consideration.
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> 5.2 We have heard the both the parties on admission of additional grounds. In our opinion, all the facts are already on record and there is no necessity of investigation of any fresh facts for the purpose of adjudication of above ground. Accordingly, by placing reliance on the judgement of Hon'ble Supreme Court in the case of NTPC Vs. CIT 229

ITR 383 (SC) we inclined to admit the additional grounds for the purpose of adjudication as there was no investigation of any fresh facts otherwise on record and the action of the assessee is bonafide.

5.3 Accordingly, the applications filed by assessee for admission of additional grounds on this preliminary legal issue in all the appeals before us stands admitted.

5.4 Before we adjudicate the issues raised by assessee on merits, it is necessary to consider the common legal issue raised by assessee raised in the additional grounds in all appeals.

5.5 It is submitted that, the assessee filed its return of income declaring total income for the relevant assessment years as under:

ITA No./ Assessment year	Return of income filed on	Total income declared (Rs.)
577/Bang/2023 2018-19	07.10.2018	54,23,830/-
578/Bang/2023 2018-19	29.10.2018	2,08,09,950/-
579/Bang/2023 2019-20	30.10.2019	2,92,81,530/-
580/Bang/2023 2020-21	07.01.2021	4,29,91,760/-

5.6 The ld. A.R. submitted that, the aforesaid returns were processed u/s 143(1) of the Act and communication for adjustment proposed u/s 143(1)(a)(iv) of the Act was issued to assessee on 1.10.2019, 15.05.2019, 06.12.2019 and 2.6.2020 respectively for the above assessees tabulated herein above. As per the said communication, it was proposed that the addition would be made on account of delay in respect of the employees' contribution by the assessee to the provident fund and ESI. In response to the notice, assessee furnished replies in respect of relevant assessment years under consideration. The CPC, thereafter issued the intimation u/s 143(1)(a) of the Act by disallowing amounts u/s 36(1)(va) of the Act as under:

ITA No./ Assessment year	Assessment year	Disallowance u/s 36(1)(va) of the Act
577/Bang/202	2018-19	39,79,421/-
578/Bang/2023	2018-19	77,17,455/-
579/Bang/2023	2019-20	3,61,41,511/-
580/Bang/2023	2020-21	3,43,18,071/-

5.7 Aggrieved by the intimation issued by the CPC, assessee preferred appeal before ld. CIT(A).

5.8 The National Faceless Appeal Centre passed the order upholding the disallowances by applying the decision of *Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT*

reported in (2023) 443 ITR 518. Aggrieved by the above order passed by the ld. CIT(A), assesse is in appeal before this *Tribunal*.

5.9 The ld. A.R. on the preliminary legal issue submitted that any intimation u/s 143(1)(a) of the Act, disallowance cannot be made as it is a debatable issue when there is a jurisdictional High Court's decision in favour of the assessee. The ld. A.R. submitted that the first proviso to section 143(1)(a) of the Act would clearly mention what adjustments would be proposed to be made only after an intimation to the assessee. He submitted that in the present facts of the case for all the assessment years under consideration, a communication was issued to assessee proposing to make such disallowance. However, the ld. A.O. has not considered the reply filed by the assessee in response to such communication and has made such disallowances which is against the principles of natural justice.

6. On the contrary, the ld. D.R. submitted that section 143(1) of the Act allows a disallowance to be made on the basis of audit report in Form 3CD, wherein the fact that employees contribution was paid beyond the due date of ESI & PF Act has been categorically mentioned. He submitted that the response of the assessee has been considered and thereafter the disallowance has been made in the intimation issued to the assessee. He opposed the objection raised by the assessee regarding the submissions filed not being considered.

7. We have perused the arguments advanced by both sides based on the materials placed on record. It is very clear that a communication was issued to assessee proposing for such disallowances in the hands of the assessee admittedly, which is based on the audit report and Form 3CD. There is no evidence with the assessee to establish that the reply filed by the assessee has not been considered by the ld. AO. Be that as it may, in the decision by *Hon'ble Madras High Court in case of AA 520 Veerapampalyam Primary Agricultural Cooperative Credit Society Ltd. Vs. DCIT reported in (2022) 138 taxmann.com 571*, it was held as under:

> "*The scope of an intimation u/s 143(1)(a) of the Act extends to the making of adjustments based upon errors apparent from the return of income and patent from the record. Thus, to say that the scope of incorrect claim should be circumscribed and restricted by the explanation, which implies the term "entered" would in my view not be correct and the provision must be given full and unfettered play. The explanation cannot curtail or restrict the main thrust or scope of the provision and due weightage as well as meaning has to be attributed to the purpose of section 143(1)(a) of the Act.*"

7.1 In view of the above, the contention of the assessee that no disallowance could be made u/s 143(1)(a) of the Act towards employees' contribution to ESI & PF stands rejected. **Accordingly, additional ground No.1 stands dismissed in all the appeals.**

8. The additional ground No.2-3 raised by the assessee afresh before this *Tribunal* is that the issue for depositing contributions under the provisions of the Provident Fund Act is to be determined from the end of the month in which the salary is disbursed to employees.

8.1 The assessee has filed additional evidence in order to justify the new argument raised before this *Tribunal* in additional ground No.2 vis-à-vis the interpretation of section 38 of PF Act. In the interest of rendering of substantial justice, we admit the additional evidences filed by both the assessees before us.

8.2 The ld. A.R. placed following arguments in respect of this contention:

2.1 "Section 2(24)(x) of the Act deems that the sums received by an assessee from his employees as contributions to any welfare fund, shall be treated as his income. It may therefore be stated that unless the amount is received from the employees, the same cannot be treated as the income of the assessee. Section 36(1)(va) provides a deduction of sums referred to in section 2(24)(x), if the such sum is credited by the assessee to the employee's account in the relevant fund on or before the due date. Explanation 1 to section 36(1)(va) provides the meaning of due date, which reads as follows.

> *"For the purposes of this clause, "due date" means the date by which the 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."*

2.2 In this context, the provisions of the Employees Provident Funds Miscellaneous Provisions Act, 1952 (in short, "the EPF Act") read with Employees' Provident Fund Scheme 1952 (in short, "the EPF Scheme") become relevant. The relevant provisions of the EPF Scheme are extracted as under.

> *38. Mode of payment of contributions*
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> *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 excluded employee and in respect of which provident fund contribution payable, 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] [or through PayGov platform or through scheduled banks in India including private sector banks authorized for collection on account of contributions and administrative charge:*
>
> *(2) The employer shall forward to the Commissioner, within twenty-five days of the close of the month, a monthly abstract in such form as the Commissioner may specify showing the aggregate amount of recoveries made from the wages of all the members and the aggregate amount contributed by the employer in respect of all such members for the month:*
>
> *Provided that an employer shall send a Nil return, if no such recoveries have been made from the employees :*

*2.3 Upon perusal of the above, it is clear that the employer, **before paying the wages**, shall deduct the employee's contribution from such wages. The employer then shall pay such amount collected, along with his own contribution, within 15 days of the close of every month. The use of the expression "before paying the wages", would mean that the deduction of contribution is at the stage of payment of wages. The amount so deducted shall be paid within 15 days from the close of*

the month. On a harmonious construction, the term 'month' has to be construed to be the month in which the wages are paid.

2.4 In this connection, reliance is placed on the decision of the Kolkata Bench of the Tribunal in Kanoi Paper & Industries Ltd. v. Asstt. CIT [2002] 75 TTJ 448 (Cal.), 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 (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.*

2.5 Considering the above decision, the Bangalore Bench of the Tribunal in MTR Maiya's v ITO (2023) 152 taxmann.com 189 (Bang-Trib) has remitted the issue on examining the aspect of due date, to the file of the AO. The relevant observations of the Tribunal are as follows: "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 judgement. Accordingly this issue is allowed for statistical purpose."

2.6 In the present case, the salary payments, which were due for a particular month, have been paid in the immediately subsequent month. This fact, as an instance, is proved by referring to the payment advice submitted to the Appellant's banker to disburse salaries to various employees for the month of February 2018 vide cheque dated 07.03.2018, which is enclosed as ***Annexure 1****. Therefore, the term 'month' should be considered as the month during which the salary is actually disbursed irrespective of the month to which the same relates to.*

2.7 This aspect of when is the 'due date' for payment, has not been examined by the CIT(A) although the PF rules were extracted. These were obviously not examined when the intimation was passed as this was a 'machine driven' exercise under the CPC scheme. In the instant case, if the due date of PF payment is reckoned as above, there would be no delay in remittance in the vast majority of cases. Relief is accordingly due to the appellant.

3 Conclusion:

3.1 The above submissions represent an abstract of our detailed submissions filed earlier on 11.10.2023. This submission has to be read along with the said previously filed submissions. In view of the above, the Appellant prays that the order passed by the learned CIT(A) be quashed or in the alternative, the aforesaid grounds and relief prayed for thereunder be allowed.

The Appellant submits accordingly."

Similar and identical arguments has been raised by the assessee in all the appeals under consideration.

8.3 The ld. A.R. in the paper book dated 11.10.2023 has placed relevant Acts of Provident Fund in order to appreciate the above arguments raised. He has also furnished paper books containing additional evidences for admission with a prayer to consider the additional evidences in light of section 38 of the Provident Funds Act.

9. On the contrary, the ld. D.R. placed reliance on the decision of *Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. cited (supra)* to submit that elaborate analysis has been made by *Hon'ble Supreme Court* to justify the disallowance made u/s 36(1)(va) of the Act in case of the present assessee. The ld. D.R. submitted that, in the light of provisions of section 36(1) r.w.s. 43B of the Act, the amount in respect of employees' contribution should be allowed only if it is paid within the prescribed time period as per the relevant Welfare Funds Act. He submitted that once there is a delay in payment of the contribution beyond the dates prescribed in the concerned statutory fund, the same would cease to be allowable as a deduction and such employee's contribution must be treated as enrichment of income in the hands of the assessee. He placed reliance on the specific observations by *Hon'ble Supreme Court* (supra) of section 36(1)(va) r.w.s. 2(24)(x) & section 43B of the Act to establish that;

i) there is no link between the nature and character of the employers contribution and the amount retained by the employer from out of employees contribution by way of deduction in which one was in the nature of liability to be paid by the employer;

ii) and that such deemed income as per section 2(24)(x) of the Act is to be treated as held in trust by such employer.

9.1 He placed emphasis of para 30 to 34 of the decision of *Hon'ble Supreme Court (supra)* in support of his contention, wherein the distinction between employer's contribution and the liability to deposit the amount retained in case of employees towards such fund has been

made out. He thus, vehemently supported the disallowance upheld by the ld. CIT(A) in the impugned order.

"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 favoring 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 otiose 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 are 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.

10.15 In the main ground No.2, the assessee has commonly raised the following issue, which has been reproduced from ITA No.578/Bang/2023.

> ***"2. Grounds relating to disallowance of employee contribution to provident fund***
>
> *2.1. The learned CIT(A), NFAC, Delhi erred in confirming the disallowance of employee contribution to provident fund amounting to Rs.77,17,455 in computing the business income of the appellant under Chapter IVD of the Income tax Act, 1961.*
> *2.2. The learned CIT(A), NFAC, Delhi erred in not appreciating that the employee contribution to provident fund amounting to Rs. 77,17,455 was paid within the due date as per section 139(1) of the Act.*
> *2.3. The learned CIT(A), NFAC, Delhi erred in not appreciating that employee contribution to provident fund cannot be disallowed as it was paid within the due date as per section 139(1) of the Act.*
> *2.4. On facts and circumstances of the case and law applicable, addition of Rs.77,17,455 to business income should be deleted."*

10.16 The above issue is now settled by the decision of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. cited (supra), which has been followed by the ld. CIT(A) while considering the appeals of the assessees. We do not find any infirmity in the same and the same is upheld. Accordingly, the main grounds raised by the assessees for all the years under consideration also stands dismissed."

12. In the light of aforesaid discussion & relying on this Tribunal's decision in the case of Manikandan Vazhukkapara Kumaran in ITA No.577/Bang/2023 dated 29/11/2023 for the Asst. year 2018-19 we are of the Opinion that plea of the assessee that disallowance made while passing the Intimation U/s 143(1) as well as the payment of contribution of employee's share should

be made within 15 days from the end of the month during which disbursement of Salary cannot be accepted and accordingly we dismiss the Ground Nos. 2, 3 & 4 of the Assessee.

13. The Ground Nos. 5 & 6 are that the Ld Addl/JCIT(A)/NFAC has neither given reasonable opportunity of being heard by not providing Video Conferencing nor considered the submission made by the Assessee. Further the AR of the Assessee submitted that the proposed disallowance u/s. 143(1)(a) was only Rs.3,26,956/- whereas while passing the intimation U/s 143(1) of the Act the disallowance was Rs.3,37,012/- which is more than the proposal of adjustment u/s. 143(1)(a). In our opinion it is appropriate to limit the disallowance specified in Notice issued u/s. 143(1)(a) of the Act. Accordingly these grounds of the Assessee are partly allowed.

14. With regard to Ground No. 7 for levy of Interest u/ss. 234B & 234C we are of the opinion that levy of interest u/ss. 234B & 234C are consequential and mandatory nature. We order accordingly.

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

Order pronounced in the open court on 28th June, 2024.

Sd/-	Sd/-
(CHANDRA POOJARI)	(KESHAV DUBEY)
Accountant Member	Judicial Member

Bangalore,
Dated, the 28th June, 2024.
/MS /

Copy to:

1. Appellant	2. Respondent
3. CIT	4. DR, ITAT, Bangalore
5. Guard file	6. CIT(A)

By order

Assistant Registrar,
ITAT, Bangalore