

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

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

ITA No. 276/Bang/2024
Assessment Year : 2019-20

M/s. Marigantum Narasimha Chari, 302, Samhitha Regency, I Main Road, Pai Layout, Old Madras Road, Benaganahalli, Bangalore – 560 016. PAN: ACAPC9124D	Vs.	The Income Tax Officer / DCIT, Circle – 2(2)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Smt. Sheetal Borkar, Advocate
Revenue by	:	Shri Parithivel .V, JCIT (DR)

Date of Hearing	:	17-04-2024
Date of Pronouncement	:	27-06-2024

ORDER

PER KESHAV DUBEY, JUDICIAL MEMBER

This appeal at the instance of the assessee is directed against the Addl./JCIT (A)-4, Kolkata / NFAC vide DIN & Order No.

ITBA/APL/S/250/2023-24/1059250049(1) dated 01.01.2024 passed u/s. 250 of the IT Act for the A.Y. 2019-20.

2. The assessee has raised the following grounds:

<i>Grounds of Appeal</i>		<i>Tax effect relating to each ground of appeal (see note below)</i>
1.	<i>The learned CIT(A) erred in passing the order in the manner he did.</i>	Gen
2.	<i>The learned CIT(A) ought to have appreciated that the amount of Employee's share to ESI and PF was paid within the due date as per EPF and ESI act. Hence disallowance as made is bad in law.</i>	
3.	<i>The learned CIT(A) ought to have appreciated that as per clause 38 of Employees provident fund scheme 1952, payment of contribution of employees share should be made within 15 days from the end of the month during which disbursement of salary.</i>	77,56,571/-
4.	<i>Without prejudice, the impugned additions are excessively arbitrary and unreasonable and liable to be deleted in full.</i>	Gen
5.	<i>For these and such other grounds that may be urged at the time of hearing the appellant prays that the appeal may be allowed.</i>	Gen
<i>Total tax effect (see note below)</i>		77,56,571/-

3. The brief facts of the case are that the assessee is running the business of manpower agency services under the name and style of "Southern Supplies and Smart Services" at Bengaluru. The assessee had filed his return of income for the Assessment Year 2019-20 on 31.10.2019 vide Acknowledgment No. 237577321311019 declaring total income of Rs.43,19,270/-.

Thereafter, the intimation u/s. 143(1) of the I.Tax Act vide DIN No. CPC/1920/A3/1973740824 dated 15.05.2020 was served on the assessee by disallowing Rs.77,56,571/- on the ground that the employees contribution of PF and employees contribution of ESI were not deposited in time as prescribed under the respective Act based on the observation in the Audit Report at para 20(b) of Form 3CD uploaded by the Chartered Accountant and accepted by the assessee.

4. Thus, the sole issue involved in this appeal is with regard to the disallowance u/s. 36(1)(va) in the intimation dated 15.05.2020 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 Calcutta High Court* in the case of *Kanoi paper Industries Ltd. vs. CIT* as well as the decision of ITAT "B" Bench, Bengaluru in the case of *MTR Maiyas vs. ITO* in ITA No. 95/Bang/2023 dated 02.05.2023 submitted that the employees share to ESI and EPF was correctly paid within the due dates as per the EPF and ESI Act as there was delay in remittance of salary 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. It is also submitted by the Ld.AR that there was inadvertent error by the Auditor in reporting para 20(b) of the Form 3CD in mentioning the correct dates to the extent of employees contribution amounting to Rs.77,56,571/-. Further, the Ld.AR also produced paper book comprising 63 pages

enclosing therein the copy of 3CD report and copy of the salary paid details and submits that the details need to be examined.

5. The Ld.DR on the other hand, supported the order of the Appellate Authority and by relying on the decision of Hon'ble Supreme Court in case of **CHECKMATE SERVICES LTD VS CIT-1 (2023) 6 SCC 45** 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. Further the Ld. DR relying on the decision of the ITAT "A" Bench, Bangalore in the case of Sri Elavarthy Ramana Reddy vs. DCIT in ITA No. 806/Bang/2023 vide order dated 14.12.2023.

As can be seen in the grounds of appeal filed before the First Appellate Authority, the assessee has contended that although there was delay in remittance of employees' contribution to ESI/EPF as per the relevant statutes but they were paid well before the due date of filing return of income. Whereas before us the Ld AR argued that 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 Employees provident fund scheme 1952, 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.

6. We have heard the rival submissions and perused the material available on record.

7. The Ground No. 1, 4 & 5 are general in nature & does not require any adjudication.

8. With regard to Ground No. 2 & 3 of the Assessee that 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 issue 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.

9. The relevant observation/extracts are reproduced below-

***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 assessee is a 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 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 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 assessee 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.”*

10. 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 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 No. 2 & 3 of the Assessee.

In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 27th June, 2024.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(KESHAV DUBEY)
Judicial Member

Bangalore,
Dated, the 27th June, 2024.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore