

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'SMC' अहमदाबाद
IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD

श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य के समक्ष।
BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकर अपील सं/ ITA No.500/Ahd/2023
निर्धारण वर्ष/Assessment Year: 2014-15

Khimji Ramdas India Pvt. Ltd., 2 nd Floor, City Square Godrej Garden City, Jagatpur, Ahmedabad-382470 PAN : AADCK 6056 C	बनाम Vs.	The ITO, Ward-2(1)(2), Ahmedabad, present jurisdiction The DCIT, Circle-2(1)(1), Ahmedabad
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
निर्धारिती की ओर से / Assessee by :	Shri Aatish Shah, AR & Shri Anil N. Shah, AR	
प्रत्यर्थी की ओर से / Revenue by:	Shri Hishikes Hemant Patki, Sr DR	

सुनवाई की तारीख / **Date of Hearing** : 22/07/2024
घोषणा की तारीख / **Date of Pronouncement**: 24/07/2024

आदेश/ORDER

The present appeal has been filed by the assessee against order passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [in short referred to as "ld. CIT(A)"] under section 250 of the Income Tax Act, 1961 [in short referred to as "the Act"] dated 12.05.2023 pertaining to Assessment Year (AY) 2014-15.

2. Grounds raised are as under:-

"1. The Ld. AO Wd. 2(1)(2) has erred in law and on facts in passing the impugned order which is bad in law and liable to be quashed and the Ld. CIT(Appeals) have similarly CIT(A) have erred in law and on facts in confirming the impugned order vide his order passed Us.250 of the Income Tax Act, 1961 in appeal vide his order dtd.12-05-2023 Din & Order No.ITBA/NFAC/S/250/2023-24/1052777862(1) Dtd. 12/05/2023.

2. The Ld. CIT(A) has erred in law and on facts without considering/adjudicating,

a. Ground No.2 before him that, "The Ld. AO have erred in law and on facts in passing the order U/s.154 of the Act and the same is beyond the scope of rectification U/s.154 of the Act and we pray to quash such order" and,

b. Each of the ground, ground-wise separately.

3. The Ld. AO has erred in law and on facts in determining carried forward business loss at Rs.8,52,970 as against originally determined at Rs.35,72,242 by reducing there from Rs.27,19,302 by reducing there from the disallowance of the said amount of Rs.27,19,302 disallowed by him U/s.36(1)(va) r.w.s. 2(24)(x) of the Act and the Ld. CIT(A) has erred in law and on facts in confirming the same. We pray to set aside the same and determine the carried forward business loss at originally determined at Rs.35,72,242,

4. The Ld. AO has erred in law and on facts in making the impugned addition of Rs.27,19,302 U/s.36(1)(va) of the Act r.w.s.2(24)(x) of the Act and the Ld. CIT(A) has erred in law and on facts in confirming the same.

5. The Ld. AO has, while making the impugned addition has erred in law and on facts in reckoning and considering the due date for making the payment of the employees contribution and thereby have erred in making the impugned disallowance of Rs.27,19,302 U/s.36(1)(va) of the Act and the Ld. CIT(A) has erred in law and on facts in confirming the same.

6. The Ld. AO have erred in law and on facts in not considering the mistake by the bank while putting the rubber stamp of tender date in respect of payment of Rs.6,08,002 towards Employee's PF (P&G Division) for the month of January 2014 salary of which was made on 18/02/2014 and thereby have committed an error in considering the date of said payments and Ld. CIT(A) has erred in law and on facts in confirming the same. We pray to delete the disallowance in respect of the same,

7. The Ld. AO have erred in law and on facts in not considering the fact that, the company had received a distributorship of Britannia Industries Limited and for that it had opened a new division called namely as CPD (Consumer Products Division) and have also not considered the fact that for complying the provisions of the Acts relating to the Provident Fund and ESIC, rules thereof and payment of contributions of employees/employers, the appellant was required to obtain the sub code from the said respective authorities and by not considering the facts the company was required to make the payment of such sub codes which was not possible and the Ld. AO has, by not considering these aspects, held that the payment of the following was late and have erred in law and in facts in disallowing the same

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- a. Rs. 1,26,200 - PF (CPD Division)
- b. ~~Rs. 32,614~~- ESIC (CPD Division)
- Rs.1,58,814 - Total

and Ld. CIT(A) has erred in law and on facts in confirming the above. We pray to delete the disallowance in respect of the above.

8. The Ld. AO has erred in law and on facts in not considering the grace period of 5 days for payment of the dues in respect of Employee's contribution to PF as have been provided under the Employees Provident Fund Act and thereby have committed an error in working out the due dates and thereby the sum of Rs.12,70,580-PF (P&G Division) and Ld. CIT(A) has erred in law and on facts in confirming the same. We pray to delete the disallowance in respect of the same,

9. The Ld. AO have erred in law and on facts in not considering date of tender of the Demand draft and thereby have committed an error in law and facts in working out the late payments considering the date of actual clearing as against date of tender of the Demand draft and thereby making disallowance on this count of

- a. Rs 12,70,580-PF (P&G Division)
- b. Rs. 5,76,993 - ESIC (P&G Division)
- Rs. 18,47,573-Total

and Ld. CIT(A) has erred in law and on facts in confirming the above. We pray to delete the disallowance in respect of the above.

10. The Ld. AO have erred in law and on facts in not considering the fact that, the payment of Employee's Contribution of ESIC amounting to Rs.1,04,911 had been made within 15 days from the end of the month from which the disbursement of salary is actually made and Ld. CIT(A) has erred in law and on facts in confirming the above. We pray to delete the disallowance in respect of the above.

11. The Ld. AO has erred in law and on facts in not considering that, the due dates for payment as well as the dates of payments in proper perspective and in the light of law/case law and thereby he has committed an error in disallowing the payments of contribution of Employee's PF and ESIC to the Authorities concerned and we pray to delete the entire disallowance of Rs.27,19,302 as has been made by the Ld. AO and Ld. CIT(A) has erred in law and on facts in confirming the same. We pray to delete the disallowance in respect of the same.

12. Both the Ld. AO as well as the Ld. CIT(A) have erred in law and on facts in concluding that, the provisions of Sec. 43B of the Act does not cover

employees' contribution and it is not covered under the provision Sec. 43B of the Act.

13. The Ld. CIT(A) has erred in law and on facts in observing that, " By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to employees and thereby trying to justify his confirming the impugned addition.

14. While confirming the impugned addition of Rs.27,19,302, the Ld. CIT(A) has erred in law and on facts in holding that, the amendments made by the Finance Act, 2021 in Sec. 36 and in Sec. 43B of the Act are clarificatory in nature.

15. Your appellant craves a leave to add, amend, alter or delete any ground of appeal wherever the occasion demands."

3. Brief facts of the case are that an order u/s 154 of the Act was passed in the case of the assessee for rectification of mistake apparent from the record in the order passed u/s 143(3) of the Act on the assessee. The mistake sought to be rectified, as is evident from the bare perusal of the order passed u/s 154 of the Act, is to the effect that the employees' contribution to ESI and PF which was deposited delayed by the assessee and which clearly emanated from the records having been disclosed in the Tax Audit Report filed by the assessee in Form No. 3CD, was not disallowed in terms of provisions of Section 2(24)(x) r.w.s. 36(1)(va) of the Act. The quantum of such disallowance noted by the Assessing Officer was Rs.27,19,302/-; the details of which are reproduced in the order as under:-

Type of payment	Month	Sum received from employees	Due date of payment	Actual date of payment
	Jan-14	8465	21.02.2014	18.06.2014
	Feb-14	9200	21.03.2014	18.06.2014
	Mar-14	9808	21.04.2014	18.06.2014
PF&P&G	June-13	572966	15.07.2013	22.07.2013
	Dec-13	697614	15.01.2014	23.01.2014
	Jan-13	608002	15.02.2014	12.03.2014
	Dec-13	19435	15.01.2014	05.05.2014
	Jan-14	34436	15.02.2014	05.05.2014

	Feb-14	35592	15.03.2014	05.05.2014
	Mar-14	36767	15.04.2014	05.05.2014
ESIC	Apr-13	81214	21.05.2013	23.05.2013
	May-13	74750	21.06.2013	22.06.2013
	Jun-13	78146	21.07.2013	24.07.2013
	Jul-13	84485	21.08.2013	22.08.2013
	Dec-13	104911	21.01.2014	08.02.2014
	Jan-14	92493	21.02.2014	04.03.2014
	Feb-14	83121	21.03.2014	22.03.2014
	Mar-14	82785	21.04.2014	25.04.2014
ESIC CPD	Dec-13	5142	21.01.2014	18.06.2014
TOTAL		2719302		

4. The same was confirmed by the Id. CIT(A).

5. The solitary pleading of the Id. Counsel for the assessee before us was that the assessee had explained in detail that none of the payments qualified for disallowance in terms of the said section, and that despite pointing out the same to the Id. CIT(A), the order of the Assessing Officer had been upheld by him without dealing with the submissions of the assessee on merits. In this regard, our attention was drawn to the submissions made to the Id. CIT(A), placed before us in paper-book filed on 04.12.2023 at page Nos. 1 to 8, as under:-

"Dtd.22/11/2021

*To,
The Hon. Commissioner of
Income Tax (Appeals)-2
Ahmedabad.*

Hon'ble Sir,

*Reg. : KHIMJI RAMDAS INDIA PVT. LTD., Ahmedabad. PA No. AADCK6056C
Sub. : Hearing in Appeal No. 2/10089/2018-19
Ref. : Notice bearing No.ITBA/APL/S/APL-1/2019-20/1015704768(1)*

With regard and reference to the above we most respectfully submit herewith as under:

1. *In the matter and as uploaded along with the appeal e-filed, we submit herewith an application u/r. 46A of the income Tax Rules 1962 to consider the additional evidences along with an affidavit in support thereto, additional evidences along with list thereto in duplicate with a prayer to kindly admit and consider the same.*

2. With regard to Ground No. 1,2,3 and 4 in respect of total disallowance of loss of Rs.2719302 out of the total business loss eligible for carry forward as determined by the Hon'ble CIT(A) of Rs.35,72,242, we most respectfully state that, the appellant Company had furnished its Return of Income on 18.11.2014 and was assessed U/s,143(3) of the Act vide order Dtd.15.12.2016, after considering and after giving effect of brought forward unabsorbed loss and depreciation, the Company was assessed at "NIL". Later, the Company was issued notice U/s.154 of the Act proposing to rectify the assessment completed as stated above by disallowing Employees' Contribution to EPF of Rs.27,19,302 which is stated to have been paid late / was remained unpaid by the Company as per the details given in the order passed U/s.154 of the Act and the same is also stated to have reported in Annexure No.5 to Form 3CD as employees' contribution to EPF. The Company replied to the notice vide its reply dtd.06.08.2018 and thereby objected to the proposed action of rectification as in its view, there was no mistake apparent from the record within the meaning of Sec. 154 of the Act or otherwise which could be rectified by passing the order U/s.154 of the Act. But, however, the Ld. AO considered the reply as untenable in law and passed impugned order and thereby reduced the amount of carry forward business loss by Rs.27,19,302 by disallowing Rs.27,19,302 U/s. 36(l)(va) r.w.s. 2(24)(x) of the Act out of the loss allowed to be carried forward of Rs.35,72,242 as per appeal effect to the CIT(A)'s order dtd.26.04.2018 and thereby restricted the said amount of carried forward loss at Rs.8,52,970 (Rs.35,72,242 - Rs.27,19,302). Considering the same, it can be seen that, the order passed by the Ld. AO is beyond the scope of rectification U/s.154 of the Act and we pray to quash such order and to order to delete the said disallowance of carried forward business loss of Rs. 27,19,302.

3. Without prejudice to our main submissions with regard to Ground No. 1,2,3 and 4 that the order passed by the Ld. AO is beyond the scope of rectification U/s.154 of the Act and we pray to quash such order and to order to delete the said disallowance of carried forward business loss of Rs.27,19,302, we submit herewith in respect of other grounds as under:

3.1 With regard to Ground No. 5 in respect of disallowing Rs.6,08,002 (Pg. 21), we state that, during the course of assessment u/s. 143(3), this issue was discussed with the AO and it was also explained to him that, the Company had paid Rs. 12,95,749 towards EPF for the month of January,2014 on dtd. 14.02.2014 which is duly acknowledged by the State Bank of India, St. Xavier's H.S. Road Br., Ahmedabad 380 014 (Pg. 22), for which it issued the token dtd.14/02/2014 on receipt of the DD of Rs. 12,95,749 bearing No. 591845 dtd.13.02.2014 issued by Bank of Baroda, Law Garden Branch, Ahmedabad under which the payment for EPF was made. The amount of Rs. 12,95,749 included Employer's share of Contribution of Rs. 6,31,550, Employees' share of contribution of Rs. 6,08,002 and Administrative Charges of Rs. 55,726 for the month of January,2014 (01/2014). However, while delivering the said Combined Challan after clearing of the DD for the said amount of Rs. 12,95,749 for the said month of Jan,2014, the bank clerk /peon put a rubber stamp of dtd.12.03.2014 but however, on the said Challan the date of deposit of the said DD is correctly mentioned as dtd.14.02.2014 as appearing on the token referred to herein earlier. From this fact, it is clear that, the appellant Company made payment on dtd. 14.02.2014 vide DD referred to herein earlier dtd.13.02.2014. Without considering this aspect, the Tax auditor in Annex. No.5 of Form No. 3CD mentioned the date of payment as 12.03.2014 instead of dtd.14.02.2014 as mentioned on the combined Challan issued by the SBI bank on receipt of the DD & combined Challan. In fact the Company paid the amount before the due date of payment 15.02.2014. Considering this aspect while passing the order U/s. 143(3) of the Act, by considering this aspect and considering the payment being in time and since it did not attract any disallowance, Ld. AO accepted the claim of the Company and did not disallow the said

amount of Rs. 6,08,002. But, however, only because of audit objection, the Ld. AO issued notice u/s.154 of the act and without considering this aspect as well the fact that, the disallowance as have been made cannot be made by passing order U/s.154 of the Act, he disallowed the said sum of Rs.6,08,002 and included the same in total disallowance of Rs. 27,19,302 by passing an order U/s.154 of the Act which in our humble view is not correct and the considering the payment of Rs.6,08,002 well in time, the same should be allowed and we pray for the same. The evidences in support of the same is submitted at Sr. No. II of the list of additional evidences submitted vide Para 1 of this submission. (Pg. 21 to 24)

3.2 With regard to Ground No. 6 in respect of disallowing PF of Rs.126,200 and ESIC of Rs.32,614 of CPD division we state that, during the year under appeal, the Company had received a distributorship of Britannia Industries Ltd. and for the purpose had opened a new division namely, CPD. For this, since the Company was required to apply for Sub Code to the PF & ESI Authorities. Company got the Distributorship from Britannia Industries w.e.f.dtd. 11/12/2013. Immediately there upon, the Company applied for sub code from the PF & ESI Authorities and supplied the required details & documents vide it's applications dtd.11/12/2013 (Pg. No. 73) to both the said authorities. There upon, after considering the same, the Company had been granted Sub Code Number 59998 by the PF Authorities vide their letter No. GJ/PFC/AHD/59998/ENF-I/T-11/2701 dtd.31/03/2014 and Sub Code No.37201078210021001 had granted by the ESI Authorities vide their letter dtd.20/05/2014 (Pg. No. 74). Copy of the registration letters are submitted at Sr. No.III of the list of additional evidences submitted vide Para 1 of this submission. (Pg. 71 to 74)

Further, It is pertinent to note that, before making any payment in respect of ESIC & PF Contributions, whether pertaining to Employers' or Employees' Contribution, it is must to mention the Sub Code Numbers in the Challan under both the Acts. Without mentioning the said Sub Codes, no payments can be made in respect of PF and ESIC Contribution. As soon as the Company received the Sub Code, without any delay on it's part, it deposited PF and ESIC contributions from employees as under:-

a. **Employees' Contribution of PF (CPD division) of Rs.1,26,200 on dtd.29/04/2014 as under:**

Sr. No.	For the Month of	Dt. of Payment of Salary	Amt. of Employees Contribution To PF and payment thereof to the PF authorities	Dt. of deposit of Employees Contribution To PF	Due date of payment of PF inclusive of 5 days of grace period from the date of payment of salary of the respective month*	Date of tender	Date of clearing	Pg. No.
1.	Dec-13	09-01-2014	19,435	29-04-2014	20/02/2014	29-04-2014	05-05-2014	54-55
2.	Jan-14	08-02-2014	34,436	29-04-2014	20/03/2014	29-04-2014	05-05-2014	56-57
3.	Feb-14	07-03-2014	35,592	29-04-2014	20/04/2014	29-04-2014	05-05-2014	58-59
4.	Mar-14	09-04-2014	36,737	29-04-2014	20/05/2014	29-04-2014	05-05-2014	60-62
		Total	1,26,200					

b. **Employees' Contribution of ESIC (CPD division) of Rs.32,614 on dtd.29/04/2014 as under:**

Sr. No.	For the Month of	Dt. Of Payment of Salary	Amt. of Employees Contribution To ESIC and payment thereof to the ESIC authorities	Dt. Of deposit of Employees Contribution To ESIC	Due date of payment of ESIC from the date of payment of salary of the respective month*	Date of tender	Date of clearing	Pg. No.
1.	Dec-13	09-01-2014	5,142	16-06-2014	21/02/2014	16-06-2014	18-06-2014	63-66
2.	Jan-14	08-02-2014	8,465	16-06-2014	21/03/2014	16-06-2014	18-06-2014	64-65
3.	Feb-14	07-03-2014	9,200	16-06-2014	21/04/2014	16-06-2014	18-06-2014	67-68
4.	Mar-14	09-04-2014	9,808	16-06-2014	21/05/2014	16-06-2014	18-06-2014	69-70
		Total	32,614					

Copies of the aforesaid Challan paid by the company are submitted at St. No. 1(a)(B) of the list of additional evidences submitted vide Para 1 of this submission.

It is to be noted that, the tax auditor while preparing the tax audit report did not considered the grace period which is available to the appellant under the respective law of PF. If the same would have been considered both by the Ld. AO and tax auditor, the due dates would have become 20th of the respective month as against reported by the tax auditor and considered by the Ld. AO as 15th of respective month. Similarly, with respect to the dates of payment in fact, the dates of Demand draft tendered are required to be considered being the Demand draft on the local branches, which is not considered by the authorities. If these aspects would have been considered both by the tax auditor as well as the Ld. AO, the dates of payments should have been considered the dates of tender of Demand draft as mentioned herein in the above tables.

Considering the above facts and relevant case laws the due dates for payment is required to be considered with reference to the related month of payment of salary. If the same is considered, the due dates for payments of PF/ ESIC will be as shown in the above referred tables. But considering the fact that, the appellant could have made the payment only on the receipt of the sub codes as have been contented herein earlier it could not have made the payment till it received the sub codes under both the Act PF and ESIC.

It is to be noted that, in the absence of having the sub codes allotted to the Company, it was impossible to make the payments under the respective Acts and since the payments have been made immediately by the Appellant Company, the payments may be considered as in time specified and hence no disallowance in respect of the PF of Rs. 126,200 and ESIC of Rs.32,614 paid by the company is called for and the same shall be allowed and we pray for the same

3.3 With regard to Ground No. 7 in respect of not considering the grace period of 5 days for payment of the dues in respect of Employee's contribution to PF as have been provided under the Employees Provident Fund Act and with regard to Ground No. 8 in respect of not considering date of tender of the Demand draft and thereby have committed an error in law and facts in working out the late payments considering the date of actual clearing as against date of tender of the Demand draft and thereby disallowing sum of Rs. 12,70,580 PF (P&G Division) and Rs. 5,76,993 - ESIC (P&G Division), we submit herewith details of payment and due dates thereof in respect thereof as under:

a. Employees' Contribution of PF (P&G division) of Rs.12,70,580 is as under:									
Sr. No.	For the Month of	Dt. Of Payment of Salary	Amt. of Employees Contribution To PF and payment thereof to the PF authorities	Dt. Of deposit of Employees Contribution To PF	Due date of payment of PF inclusive of 5 days of grace period from the date of payment of salary of the respective month*	Date of tender	Date of clearing	Page No.	
1.	Jun-13	06-07-2013	5,72,966	19-07-2013	20/07/2014	19-07-2013	22-07-2013	14-17	
2.	Dec-13	08-01-2014	6,97,614	18-01-2014	20/01/2014	18-01-2014	23-01-2014	18-20	
		Total	12,70,580						

b. Employees' Contribution of ESIC (P&G division) of Rs.5,76,993 as under:									
Sr. No.	For the Month of	Dt. Of Payment of Salary	Amt. of Employees Contribution To ESIC and payment thereof to the ESIC authorities	Dt. Of deposit of Employees Contribution To ESIC	Due date of payment of ESIC from the date of payment of salary of the respective month	Date of tender	Date of clearing	Page No.	
1.	Apr-13	07-05-2013	83,214	21-05-2013	21-05-2013	21-05-2013	23-05-2013	25-27	
2.	May-13	07-06-2013	74,750	20-06-2013	21-06-2013	20-06-2013	22-06-2013	28-31	
3.	Jun-13	06-07-2013	78,146	22-07-2013	21-07-2013	22-07-2013	24-07-2013	32-34	
							May be considered in time since 21/07/2013 was Sunday		
4.	Jul-13	07-08-2013	84,485	19-08-2013	21-08-2013	19-08-2013	22-08-2013	35-38	
5.	Jan-14	08-02-2014	92,493	18-02-2014	21-02-2014	18-02-2014	04-03-2014	42-45	
6.	Feb-14	07-03-2014	83,121	18-03-2014	21-03-2014	18-03-2014	22-03-2014	46-49	
7.	Mar-14	07-04-2014	82,785	19-04-2014	21-04-2014	19-04-2014	25-04-2014	50-53	
		Total	5,76,993						

The above shows that, considering the grace period for payment and the date of the tender of Demand draft the above payments are in time but however, while issuing the tax audit report have not considered this aspect and similarly while disallowing the above sums the Ld. AO have not considered the said aspect and that too while passing the order u/s. 154 of the Act which in our humble view is not tenable in law In support of the above, we submit herewith copies of Challan paid, Counterfoil of the bank and copy of demand draft wherein the details as appearing in the above table appears. Considering the same, the disallowance made by the Ld. AO is not tenable in law and the payment of Rs.12,70,580 PF (P&G Division) and Rs. 5,76,993 - ESIC (P&G Division) may be allowed and we pray for the same. Copies of the aforesaid Challan paid by the company are submitted at St. No. 1(a)(A) of the list of additional evidences submitted vide Para 1 of this submission.

3.4 Further, in respect of disallowance of Rs.1,04,911 out of the total disallowance of Rs.27,19,302 under appeal, we submit herewith details of payment and due dates thereof in respect of Employees' Contribution of ESIC (P&G division) of Rs.1,04,911 is as under:

under appeal, we submit herewith details of payment and due dates thereof in respect of
Employees' Contribution of ESIC (P&G division) of Rs.1,04,911 is as under:

Sr. No.	For the Month of	Dt. Of Payment of Salary	Amt. of Employees Contribution To ESIC and payment thereof to the ESIC authorities	Dt. Of deposit of Employees Contribution To ESIC	Due date of payment of ESIC from the date of payment of salary of the respective month*	Date of tender	Date of clearing	Pg. No.
1.	Dec-13	08-01-2014	1,04,911	25-01-2014	21-02-2014	25-01-2014	08-02-2014	39-41
		Total	1,04,911					

Copies of the aforesaid Challan paid by the company are submitted at St. No. 1(a)(A)(8) of the list of additional evidences submitted vide Para 1 of this submission.

In respect of the above we rely on the following judgments:

1. *Kanoi paper & Industries Ltd. vs. ACIT 75 TTJ 448* wherein it was observed and held, "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."
2. *Suzlon Energy Ltd vs. DCIT in ITA Nos. 764 & 765/Ahd/2018* wherein it has been held in the light of the judgment passed by the Hon'ble Tribunal in the case of *Rajratna Metal industries Ltd Vs. ACIT (ITA No.940/Ahd/2015; order dated 22.09.2017)* wherein it was observed that, "The assessee's case however is that relevant due date has to be seen not from the relevant month of salary but the one

pertaining to its payment. He then files a computation chart indicating it to have paid above employees' PF/ESI contributions on 22.05.2009 and 28.05.2009 as against the due dates thereof following on 20.06.2009. The Revenue fails to dispute this factual position. We therefore quote this tribunal's coordinate bench decision in Kanoi paper & Industries Ltd. vs. ACIT 75 TTJ 448 that the relevant date in such case is that of month of the actual payment of wages/salaries. We therefore rely on the above coordinate bench decision and direct the Assessing Officer to delete the impugned disallowance as well."

3. *Fluid Air (India) Ltd. Vs. DCIT (1997) 63 ITD 182 (Mumbai) wherein it has been observed as under:*

"As the term 'month' has not been defined in the Act, so had the assessee paid the salary and wages on the last day of the month, there would have been no difficulty in defining the month or the due date. But in the case before us, the salary and wages had been paid on the 7th day from the end of the month to which it relates. So, there arises certain amount of ambiguity with regard to the period of 15 days from the close of each month. From reading of sections 36 and 38 reproduced above it can easily be said that there is ambiguity. Therefore, we are of the opinion that there is force in the submission of the assessee that benefit of ambiguity should be given to the assessee. Viewed in this context we hold that most of the payments having been made within 9 to 22 days from the date of payment of salary and wages will be deemed to have been made within due date and, therefore, no disallowance could be made on this account.

4. *Madras Radiators & Pressings Ltd. Vs. DCIT(1996) 59 ITD 515 (Mad.)/(1996) 56 TTJ (Mad) 662 wherein it has been observed that, "The term month' has not been defined in the Act..... Reading together ss. 36 and 38, it could be said that there is certain amount of ambiguity over the expression "15 days from the close of the month". There is also force in the submission of the assessee's counsel that in the case of ambiguity the benefit should be given to the taxpayer. Viewed in this context we hold that payments have been made within the due date and, therefore, no part of it can be disallowed."*

Considering the above as well as the case laws and judgments, the due dates for payment is required to be considered with reference to the related month of payment of salary. If the same is considered, the due dates for payments of PF/ ESIC will be as shown in the above referred table the payments and the payments thereof may be considered as in time specified and hence no disallowance is called for in view of the above fact and request your Honor to kindly allow the payment of Rs.1,04,911 considering the same to be in time as against the same being disallowed by the AO.

4. We also rely on the judgement of ITAT, Hyderabad passed in the case of Value momentum Software Services Private Limited vs. DCIT, ITA No. 2197/Hyd/2017 dtd.19/05/2021. In the said case, the AO has disallowed a sum of Rs.8,11,648/- under section 43B towards late deposit of employees contribution to EPF account after the due date prescribed in the respective statutes but before the filing of return u/s. 139(1). It has been held that, "The Revenue's case in tune thereof relies on Section 36(va) read with explanation thereto that it is not Section 43B but the former provision which is applicable in such an instance. We find no merit in the Revenue's foregoing stand. We take note of the explanatory memorandum

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to the Finance Act, 2021 proposing amendment in both Section 36(va) as well as Section 43B by inserting corresponding Explanations that although the impugned employees provident fund comes under the former provision only, the same is applicable from 01-04-2021 onwards. Meaning thereby that the legislature itself has condoned the impugned default before 01-04- 2021. "

The facts of the above case is squarely applicable on our case. In view of the above fact, we request your Honor to kindly allow the payment of Rs.27,19,302 considering the same to be in time as against the same being disallowed by the AO.

Kindly grant suitable date for further submissions and oblige."

6. Referring to the above submissions made by the assessee, it was pointed out on merits that the impugned payments did not qualify for disallowance on facts for various reasons being:-

- (i) The acknowledgement of bank of receipt of the payment was incorrectly stamped by the bank for the succeeding month, though it was cleared by the bank in the same month and the Auditor had mentioned the incorrect date in the Tax Audit Report.
- (ii) Certain payments were all made delayed in the month of June 2014 for the reason that they related to new division of the assessee which was required to apply for a sub-code to the PF and ESI Authorities which the assessee company obtained only in the month of May/June and it was only thereafter that it was possible for the assessee to deposit the dues to the ESI and PF authorities.
- (iii) The auditors reporting in the Tax Audit Report did not consider the grace period allowed under the ESI and PF laws for depositing the dues and the delay ought to have been considered, therefore, from the grace period allowed under the respective laws.

The Id. Counsel for the assessee pointed out that all necessary evidences had also been filed before the Id. CIT(A) and attention was drawn to various judicial decisions in support of assessee's contention.

7. He, thereafter, referred to the order of the Id. CIT(A) pointing out that it was a mere three pages order which did not deal with the contentions of the assessee on merits of the case itself. That without dealing with the facts of the case as pointed out by the assessee to him, the Id. CIT(A) had simply confirmed the order of the Assessing Officer. He, therefore, pleaded that the matter be restored back for reconsideration.

The Id. Counsel for the assessee further pointed out that even the Assessing Officer had not afforded sufficient opportunity of hearing to the assessee while passing the order u/s 154 of the Act.

8. Drawing our attention to paragraph No.3 of the order, he pointed out that the assessee was issued notice on 30.07.2018 which was served to the assessee on 02.08.2018 requesting the assessee to attend the office on 08.08.2018. He pointed out that the assessee did submit a reply on 06.08.2018, but without giving any further opportunity to the assessee, an order u/s 154 of the Act was passed by the Assessing Officer.

9. The request of the Id. Counsel for the assessee, therefore, was that since the assessee had pointed out certain facts in relation to the deposit of employees' contribution to ESI & PF, the same would require verification and the matter, therefore, be restored back to the Assessing Officer for verification and re-consideration.

The Id. DR fairly agreed with the same.

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10. In view of the above, since it is an admitted fact that the assessee's pleadings on merits on the issue of disallowance of employees' contributions to ESI and PF amounting to Rs.27,19,302/- made in terms of provisions of Section 2(24)(x) r.w.s. 36(1)(va) of the Act in the order passed u/s 154 of the Act has not been considered by either of the authorities below, it is considered fit and in the interest of justice to restore the issue back to the Assessing Officer. The Assessing Officer is directed to give due opportunity of hearing to the assessee and thereafter adjudicate the issue in accordance with law.

Ground No.2-14 is accordingly allowed for statistical purposes.

11. Ground No.1 is a legal ground raised by the assessee challenging the validity of order passed u/s 154 of the Act. No arguments were made vis a vis the said ground.

Ground No.1 is therefore dismissed.

12. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 24/07/2024 at Ahmedabad.

Sd/-

(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER
(अन्नपूर्णा गुप्ता, लेखा सदस्य)

Ahmedabad, dated 24/07/2024

*btk**

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT,
6. गार्ड फाइल / Guard file.

आदेशानुसार/ BY ORDER,

TRUE COPY

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad