

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI
BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.1965/MUM/2024
Assessment Year: 2021-22

Diamour Jewels Pvt. Ltd. Unit No.C7, Ground Floor, WICEL, Plot F, MIDC Marol, Andheri East, Mumbai – 400 093 (PAN : AACCD5530F)	Vs.	Centralised Processing Centre, Income Tax Department Bengaluru
(Appellant)		(Respondent)

Present for:

Assessee : Ms. Krupali Mehta, CA
Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 10.07.2024
Date of Pronouncement : 25.07.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), Chandigarh, vide order no. ITBA/APL/S/250/2024-25/1064054431(1), dated 12.04.2024 passed against the intimation issued by Centralised Processing Centre, Bengaluru, (CPC) u/s. 143(1) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 22.09.2022 for Assessment Year 2021-22.

2. Grounds taken by the assessee are reproduced as under:

"1. The learned Addl/JCIT(A) has erred in disallowing payment made of Rs. 6,46,040/- u/s 36(1)(va) for A.Y. 2021-22 ignoring the fact that the due date of payment was falling in the period of Covid Pandemic - complete lock down and on account of operational and economic difficulties, the payment in due date was not in the control of the appellant.

2. The learned Addl/JCIT(A) has not considered the Circular by Employee's Provident Fund Organisation Head Office, New Delhi dated 15.05.2020 bearing Ref. No. C- I/Misc/2020-21/Vol.1/1112, relaxing the establishments and factories covered under EPF from levy of Penalty for delay in deposit of dues during lock down.

3. The learned Addl/JCIT(A) has violated the principle of natural justice by ignoring submissions made on 10.04.2024 though the due date mentioned in the notice u/s 250 was 25th April, 2024 and passed the order in hurry on 12th April, 2024 itself.

3. Brief facts of the case are that assessee filed its return of income on 07.02.2022 reporting total income at Rs.1,96,51,570/-. Return of the assessee was processed by CPC, u/s. 143(1) whereby disallowance of Rs.6,46,040/-(correct figure is Rs.6,26,351/-) was made u/s. 36(1)(va) towards delayed deposit of employees' contribution of Provident Fund (PF) and ESI. The delay in deposit of PF and ESI of the employees' share was for the month of April 2020 and May 2020. These months fell in the period of lockdown when pandemic of COVID-19 was at its peak. Due dates to deposit for these two months were 15.05.2020 and 15.06.2020. Assessee deposited the delayed amount in the month of June 2020 when there was relaxation in the lockdown and banking was permitted. The details of deposit of employees' share of PF and ESI for the year under consideration and delay thereon is tabulated as under:

Diamour Jewels Pvt. Ltd.**F.Y. 2020-21****A.Y. 2021-22**

Particulars	Amount	Actual Date	Due Date	Delay (Days)
PROVIDENT FUND	344,794	15-06-20	15-05-20	31
PROVIDENT FUND	243,164	16-06-20	15-06-20	1
PROVIDENT FUND	195,088	12-07-20	15-07-20	-
PROVIDENT FUND	207,162	13-08-20	15-08-20	-
PROVIDENT FUND	272,223	12-09-20	15-09-20	-
PROVIDENT FUND	308,879	10-10-20	15-10-20	-
PROVIDENT FUND	311,294	14-11-20	15-11-20	-
PROVIDENT FUND	320,285	11-12-20	15-12-20	-
PROVIDENT FUND	328,196	11-01-21	15-01-21	-
PROVIDENT FUND	321,428	14-02-21	15-02-21	-
PROVIDENT FUND	337,308	12-03-21	15-03-21	-
PROVIDENT FUND	341,087	08-04-21	15-04-21	-

Particulars	Amount	Actual Date	Due Date	Delay (Days)
EMPLOYEES STATE INSURANCE	38,393	15-06-20	15-05-20	31
EMPLOYEES STATE INSURANCE	29,875	15-06-20	15-06-20	-
EMPLOYEES STATE INSURANCE	23,464	12-07-20	15-07-20	-
EMPLOYEES STATE INSURANCE	23,874	13-08-20	15-08-20	-
EMPLOYEES STATE INSURANCE	26,835	12-09-20	15-09-20	-
EMPLOYEES STATE INSURANCE	31,237	10-10-20	15-10-20	-
EMPLOYEES STATE INSURANCE	31,270	14-11-20	15-11-20	-
EMPLOYEES STATE INSURANCE	33,807	11-12-20	15-12-20	-
EMPLOYEES STATE INSURANCE	35,244	11-01-21	15-01-21	-
EMPLOYEES STATE INSURANCE	35,074	14-02-21	15-02-21	-
EMPLOYEES STATE INSURANCE	36,071	12-03-21	15-03-21	-
EMPLOYEES STATE INSURANCE	36,970	08-04-21	15-04-21	-

3.1. Assessee furnished copies of challans for the three delayed deposits which were made on 15.06.2020 and 16.06.2020, placed in the paper book and the same are extracted below:

ESIC PAYMENT RECEIPT

ESIC Challan Number	03120117222083
Party Code	31001036160000910
Party Name	DIAMOUR JEWELS PVT LTD
Amount	38393.00
Total Amount(in words)	Rupees Thirty Eight Thousand Three Hundred Ninety Three and Paise Zero Only.
Transaction Status	Successful
CIN Number	150620009873
Bank Reference No	49319762
Transaction Date-Time	15/06/2020 09:16:52 PM
Debit Date (From Employer's Account)	15/06/2020 21:17:32
Payment through Bank	ICICI BANK LTD.

This is a computer generated receipt hence does not require any signature.

EPFO PAYMENT RECEIPT

Establishment Code	MHBAN1014249000
Wage Month	Apr2020
TRRN	3102006013424
CRN	229150620011165
Bank Reference Number	49319614
Payment Status	CONFIRMED
Amount of Account No1	218582.00
Amount of Account No2	6896.00
Amount of Account No10	112420.00
Amount of Account No21	6896.00
Amount of Account No22	0.00
Amount Total	344794.00
Request Received on (Date and Time)	15/06/2020 21:12:17
Debit Date (From Employer's Account)	15/06/2020 21:13:18
Payment through Bank	ICICI BANK LTD.

This is a computer generated receipt hence does not require any signature.

EPFO PAYMENT RECEIPT

Establishment Code	MHBAN1014249000
Wage Month	May2020
TRRN	3102006013606
CRN	229160620001366
Bank Reference Number	49331276
Payment Status	CONFIRMED
Amount of Account No1	136350.00
Amount of Account No2	5790.00
Amount of Account No10	95236.00
Amount of Account No21	5788.00
Amount of Account No22	0.00
Amount Total	243164.00
Request Received on (Date and Time)	16/06/2020 12:35:26
Debit Date (From Employer's Account)	16/06/2020 12:36:17
Payment through Bank	ICICI BANK LTD.

This is a computer generated receipt hence does not require any signature.

4. Ld. CIT(A) by placing reliance on the decision of Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. v. CIT [2022] 143 taxmann.com 178 (SC) did not allow the deduction and dismissed the appeal of the assessee. According to him, Hon'ble Supreme Court had confirmed the stand of the Department that if the employees' contribution towards EPF and ESI is not deposited within the due dates under the relevant Act as mandated by the explanation in Section 36(1)(va), the same will not be allowable as a deduction. Aggrieved, assessee is in appeal before the Tribunal.

5. Before us, ld. Counsel for the assessee reiterated the facts and referred to the documentary evidences placed on record as extracted above. She referred to circular issued by Employees' Provident Fund Organisation dated 15.05.2020 vide circular No. C-I/Misc/2020-21/Vol.I/1112. The circular is issued by the office of Additional CPFC(Hqrs) Compliance & Legal with the approval of the Central PF Commissioner and is addressed to all the Additional CPFCs in charge of Zones, RPFCs in charge of Regional Offices and OICs in charge of District Offices. The subject of the said circular is "*Relief to establishments and factories covered under EPF and MP Act, 1952 from levy of penal damages for delay in deposit of dues during lock down to prevent Covid 19*". According to the ld. Counsel, this circular by the EPF Organisation has granted relief to the employers by considering the difficulty faced by the establishments for timely deposit of contribution during the period of lockdown due to operational and economic reasons.

6. Per contra, ld. Sr. DR strongly relied on the decision of ld. CIT(A) as well as asserted that the issue is settled by the Hon'ble Supreme Court in the case of Checkmate Services (supra) which very much covers the case of the assessee against it.

7. We heard both the parties and perused the material on record. The undisputed fact is that the delay pertains only to the two months of April, 2020 and May, 2020 which were the peak period of pandemic of COVID-19 when lockdown was imposed by the government. It is also a fact that when there was relaxation in the lockdown, assessee vigilantly deposited employees' contribution for these two months on 15.06.2020 and 16.06.2020 without waiting for any further delay on this account. It is also undisputed that for all other months, assessee had deposited the employees' contribution of PF and ESI within the due dates prescribed under the relevant Acts irrespective of extended period of COVID-19 pandemic.

7.1. Before we delve into the issue raised before us, in the aforesaid factual matrix, it is worth taking note of the certain key data points relating to pandemic of COVID-19 and lockdown imposed thereby. We note that to control the spread of the coronavirus COVID-19 pandemic, the Government of India imposed various phases of lockdown starting from the third week of March 2020. The World Health Organization (WHO) declared COVID-19 a pandemic on 11.03.2020. In India, a complete nationwide lockdown was implemented for a total of 68 days through four phases, from 25.03.2020 to 31.05.2020 plus a pre-lockdown phase. The overall period was divided into five phases, starting from Phase 0 (pre-lockdown), followed by Phases 1-4, as per the lockdown phases implemented by the Government of India. Table below briefly lists the durations and restrictions imposed during each phase of the lockdown in India:

S. No.	Phase Name	Dates	Major restriction or relaxations
1.	Phase 0 (Pre-lockdown)	1-24 March 2020 (24 days)	No restriction; all activities in business-as-usual mode
2.	Phase 1	25 March- 14 April 2020 (21 days)	All transport, industrial establishment, commercial and private establishments, and hospitality services closed
3.	Phase 2	15 April-3 May 2020 (19 days)	Restrictions similar to Phase 1 Allowed: Farming operation, some industries, movement of cargo
4.	Phase 3	4-17 May 2020 (14 days)	Cities classified into three zones (Red, Orange, and Green). Relaxation of rules in the Green and Orange zones. Allowed: Activities permitted during Phase 2 and construction activities and movement of vehicles for selected activities. Restrictions similar to Phase 1 applied in the Red zones
5.	Phase 4	18-31 May 2020 (14 days)	Allowed: Movement of vehicles without any special conditions along with the opening of the industry

7.2. We have perused the afore stated circular issued by EPF Organisation according to which delay in deposit of contributions during the lockdown period is without *mens rea* of the employer and such delay cannot be attributed to any culpable state of mind of the employer and therefore does not attract penal provisions of section 14B of the EPF Act. It is stated in this circular that for any delay in payment of any contributions or administrative charges due for any period during the lockdown, no proceeding would be initiated for levy of penal damages in such cases.

7.3. In the given peculiar set of facts and circumstances of this present case, the moot point before us to be considered in respect of the aforesaid delay in depositing employees' contribution to PF and ESI is the effect of circular issued by EPF Organisation as referred above, whereby levy of penal damages on account of delay under the relevant Act for deposit of contributions during the period of lockdown has been waived off vis-a-vis the decision of Hon'ble Supreme Court in the case of Checkmate Services (Supra) wherein the sole focus of the Hon'ble Court while deciding the instant issue was in the context of due dates prescribed under the relevant Act for claiming deduction under section 36(1)(va) of the Act.

7.4. The contention raised before us is that since the penal damages have been waived off by the EPF Organisation itself for the delay in deposit of contributions during the period of lockdown, there cannot be any adverse effect of not depositing the employees' contribution of EPF and ESI within the meaning of section 36(1)(va) of the Act.

8. We delved into the judgment of the Hon'ble Supreme Court in the case of Checkmate Services (supra) to address the issue raised before us. In para 2 of the said decision, Hon'ble Court noted that as per the Assessing Officer, employees' contributions were paid beyond the due dates as prescribed under the respective Acts, the right to claim such sums as allowable deduction while computing the income was lost forever. Hon'ble Court noted section 38 of the EPF Scheme which specifies timeline for deposit, i.e. "*within fifteen days of the close of every month*". Circular issued by CBDT bearing no. 495 dated 22.09.1987 was also referred in para 9 which dealt with the scope and effect of the sections 36(1)(va) and provisos to section 43B inserted in the Act. The caption of the said circular reads as "*Measures of penalising employers*

who misutilise contribution to the provident fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948, or any other fund for welfare of employees."

8.1. Contention of the Revenue before the Hon'ble Court was that *"when the assessee did not deposit the employees' contribution in the PF account before the due date provided under the EPF/ESI Act, the assessee was disentitled to deduction under Section 36 in the relevant assessment order, though the assessee might have deposited the employees' contribution on or before the due date of filing of the return under Section 139 of the IT Act."*

8.2. Hon'ble Court in para 35 and 52 took note of the memorandum explaining the provisions in the Finance Bill, 1987 through which section 2(24)(x), section 36(1)(va) and second proviso to section 43B were introduced. It was observed that *"these provisions were introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods."*

8.3. According to the Hon'ble Court, *"the essential character of an employees' contribution is that it is part of the employees' income, held in trust by the employer and needs to be deposited on or before the due date under the relevant Act. These have to be deposited in terms of such welfare enactments. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law."* Thus, the essential condition for claim of deduction towards employees' contribution of PF/ESI is that the terms of particular / relevant enactments governs their allowability under the provisions of the Act.

8.4. In the present case before us, in the given peculiar fact pattern and circumstance, when the EPF Organisation itself has waived off the levy of penal damages for delayed payment during the period of lockdown by issuing the aforesaid circular, there is no question of treating the delay which occurred during the period of lockdown detrimental to the assessee under the Act, more specifically under the explanation to section 36(1)(va) of the Act. The delay in deposit of PF and ESI of the employees' share is for the month of April 2020 and May 2020. These months fell in the period of lockdown when pandemic of COVID-19 was at its peak. Due dates to deposit for these two months were 15.05.2020 and 15.06.2020 as per the relevant enactments. Assessee deposited the delayed amount in the month of June 2020 when there was relaxation in the lockdown and banking was permitted. There is no mischief on the part of the assessee in holding the employees' contribution for long periods as contemplated in the memorandum explaining the provisions introduced in the Finance Bill, 1987 and CBDT circular (supra) and dealt by the Hon'ble Supreme Court in Checkmate Services (supra). In fact, assessee demonstrated its vigilance in depositing the impugned amounts at the first opportunity it got when the relaxation was given in the lockdown. Also, for all the subsequent months, the deposits have been on or before the prescribed due dates under the relevant enactments. Thus, in the present case under its peculiar set of facts, there cannot be any adverse effect on the assessee of not depositing the employees' contribution of EPF and ESI within the meaning of section 36(1)(va) of the Act when the relevant enactment itself had given a waiver from levy of penal damages for the delay in deposit '*during the lockdown period*'. We delete the addition so made. Grounds taken by the assessee in this respect are allowed.

8.5. Before parting, we make it abundantly clear that our above observations and findings are specific to the peculiar set of facts in the present case, elaborately narrated above, which cannot be taken as laying down a precedence on the issue addressed.

9. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 25 July, 2024

Sd/-
(Satbeer Singh Godara)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 25 July, 2024

MP, Sr.P.S.

Copy to :

- 1 The Appellant
- 2 The Respondent
- 3 DR, ITAT, Mumbai
- 4 Guard File
- 5 CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai