

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE “C” BENCH, BANGALORE**

**Before Shri Chandra Poojari, Accountant Member  
and  
Shri Keshav Dubey, Judicial Member**

<b>ITA No. 874/Bang/2024</b> (Assessment Year: 2021-22)		
Mahantesh H #6, Poojari Krishan Bldg. Bhavani Road, Hebbagodi Bangalore 560099 PAN – AOYPM2771G  (Appellant)	vs.	DCIT, Circe 4(1)(1) Koramangala Bengaluru  (Respondent)
Assessee by:	Shri Subramanya Bhat, CA	
Revenue by:	Shri V. Parithivel, JCIT-DR	
Date of hearing:	12.06.2024	
Date of pronouncement:	20.08.2024	

**ORDER**

**Per: Keshav Dubey, J.M.**

This appeal at the instance of the assessee is directed against the Addl. JCIT(A)'s Order dated 04.01.2024 passed under Section 250 of the Income Tax Act, 1961 (the Act) in respect of Assessment Year (AY) 2021-22.

2. The assessee has raised the following grounds of appeal: -

- “1) The order passed by the learned Commissioner of income tax (Appeals) NFAC, u/s 250 of the Income Tax 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 appellant denies himself liable to be assessed to a total income of Rs.69,76,510/-against the returned income of Rs. 19,53,230/- on the facts and circumstances of the case.*
- 3) The appellant denies himself to be liable to the disallowances of Rs.50,23,277/- under section 36(1)(va) of the Act on the fact and circumstances of the case.*

- 4) *The learned CIT(A) failed to appreciate that the intimation issued under section 143(1) of the Act was bad in law, since adjustment made was beyond the scope of the Act, on the facts and circumstances of the case.*
  - 5) *The learned CIT(A) failed to appreciate that clause 38 of the employee provident fund scheme which states that "due date for contribution to employee provident fund should be 15 days from end of the month actual disbursement of wages is made" on the facts and circumstances of the case.*
  - 6) *The learned CIT(A) failed to appreciate that the PF and ESI contributions were remitted before the due date of filing return of income stipulated under section 139(1) of the Act and accordingly, no addition was warranted on the facts and circumstances of the case.*
  - 7) *The appellant craves leave to add, alter, modify, delete or substitute any or all of the grounds, to file detailed written submissions and to file a paper book at the time of hearing the appeal.*
  - 8) *In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed and appropriate relief may be granted in the interest of justice and equity."*
3. The brief facts of the case are that the assessee being an individual, filed his return of income for the impugned assessment year 2021-22 on 31.03.2022 declaring total income Rs. 19,53,230/-. The said return was processed u/s. 143(1) of the Act dated 21.11.2022 wherein adjustments u/s. 143(1)(a) was retained on the alleged ground that the disallowance of expenditure indicted in the audit report is not taken into account in computing the total income in the return u/s. 143(1)(a)(iv) of the Act amounting to Rs.50,23,277/-. Aggrieved by the order of the CPC, Bengaluru passed u/s. 143(1) of the Act the assessee preferred an appeal before the CIT(A) by raising the following issues: -
- i. The CPC was not justified in making the addition on contribution to Provident Fund and other funds of Rs.59.23,277/-
  - ii. Interest u/s. 234 of the Act.
4. The Id. CIT(A), on the other hand, relying of the judgement of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. v. CIT in Civil Appeal No. 2830 to 2833 of 2016 and 159 of 2019 dated 12.10.2022 and keeping in view the amendment made by Finance Act, 2021 in s. 36 and s.43B of the Act confirmed the addition made on account of delayed payment of

employees' contribution to PF and ESI of Rs.50,23,277/- and accordingly dismissed the appeal. Aggrieved by the order of the Id. CIT(A) the assessee has filed the present appeal before the Tribunal.

5. The assessee filed a paper book comprising 50 pages as well as appeal memo comprising 43 pages enclosing therein the following: -

- i. Copy of Audit Report for AY 2021-22
- ii. Copy of Bank Statement for FY 2020-21
- iii. PF and ESI working sheet for FY 2020-21
- iv. Copy of Judgement Hon'ble High Court Fatheraj Singhvi vs Union of India

6. Before us, the learned A.R. of the assessee submitted that the intimation issued u/s. 143(1) of the Act is bad in law since the adjustment was made beyond the scope of the Act on the facts and circumstances of the case. Further, the learned A.R. of the assessee vehemently submitted that as per clause 38 of the Employees Provident Scheme, which states that "due date for contribution to Employees Provident Fund should be 15 days from the end of the month in which actual disbursement of wages is made".

7. The learned D.R., on the other hand, vehemently supported the orders of the authorities below and by relying on the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. (supra) submitted that the deduction u/s. 36(1)(va) in respect of delayed deposit of amount collected towards employees contribution to PF and ESI cannot be claimed when deposited after the due date as per the PF & ESI Act even though it is deposited within the due date of filing the return. Further the learned D.R. strongly relied on the decision of the ITAT 'A' Bench, Bangalore in the case of Manikandan Vazhukkapara Kumara v. ACIT in ITA No. 577/Bang/2023 vide order dated 29.11.2023. Thus the sole issue involved in this appeal is with

regard to the disallowance u/s. 36(1)(v) of the Act in the intimation dated 21.11.2022 passed u/s. 143(1) of the Act and confirmed by the CIT(A).

8. We have heard the rival contentions and perused the material on record. The preliminary contention of the assessee that by intimation u/s. 143(1) of the Act disallowance cannot be made since the adjustment made is beyond the scope of the Act as well as on the other contention that the amount of employees share to EPF and ESI was paid within the due date as per the EPF & ESI Act since as per clause 38 of the Employees Provident Fund Scheme, 1942 the payment of contribution by employees share should be made within 15 days from the end of the month in which disbursement of salary is made cannot be accepted as we are of the opinion that under similar facts and circumstances the issue involved in the present case has been decided by this Tribunal in the case of Manikandan (supra). The relevant observation/extracts are reproduced below: -

“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 assesseees. We do not find any infirmity in the same and the same is upheld. Accordingly, the main grounds raised by the assesseees for all the years under consideration also stands dismissed.”*

9. In the light of the aforesaid discussion and relying on the order of the Tribunal in the case of Manikandan (supra) we are of the opinion that the plea of the assessee cannot be accepted and accordingly we dismiss the grounds of appeal of the assessee.

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

Order pronounced in the open Court on 20<sup>th</sup> August, 2024.

Sd/-  
**(Chandra Poojari)**  
**Accountant Member**

Sd/-  
**(Keshav Dubey)**  
**Judicial Member**

Bengaluru, Dated: 20<sup>th</sup> August, 2024  
n.p.

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2. *The Respondent*
3. *The CIT, concerned*
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*By Order*

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*Assistant Registrar  
ITAT, Bangalore*

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	05.08.2024		Sr. PS/PS
2	Draft placed before author	06.08.2024		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement			Sr. PS/PS
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			