

**IN THE INCOME TAX APPELLATE TRIBUNAL ‘F’ BENCH, MUMBAI**

**BEFORE MS. KAVITHA RAJAGOPAL, JM AND  
SHRI OMKARESHWAR CHIDARA, AM**

ITA No. 754/Mum/2024  
(Assessment Year: 2018-19)

Subodh Kumar Agarwal 204, 2 <sup>nd</sup> Floor, Shokeen Plaza, Plot No. 3, Pocket 7, Dwarka, Sector 12, New Delhi – 110 075	Vs.	Dy. CIT, CPC Bangalore, Karnataka - 560 500
PAN/GIR No. AABPA 7184 J		
<b>(Assessee)</b>	:	<b>(Respondent)</b>
<b>Assessee by</b>	:	None
<b>Respondent by</b>	:	Ms. Rajeshwari Menon
<b>Date of Hearing</b>	:	29.07.2024
<b>Date of Pronouncement</b>	:	25.10.2024

**ORDER**

**Per Kavitha Rajagopal, J M:**

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2018-19.

2. During the appellate proceedings, it was observed that the appeal has been filed by the assessee with a delay of one day for which we deem it fit to condone the said delay. Delay condoned.

3. As there was no representation on behalf of the assessee, we hereby dispose of this appeal by hearing the learned Departmental Representative ('Id.DR' for short) and on perusal of the materials available on record.

4. The assessee has raised the following grounds of appeal:

1. *THAT the impugned order dated 20.12.2023 is bad in law as well as in terms of the facts of the case.*
2. *THAT the Ld. CIT (Appeals) without applying his mind to the facts and circumstances of the present matter, upheld the tax liability computed by the Ld. Assessing Officer and dismissed the appeal of the Appellant by concluding that once the claim of deduction as per the law is not allowable, same can be disallowed in the intimation u/s 143(1). The judgment of Hon'ble Supreme Court in Checkmate Service Pvt Ltd & Others vs. CIT & Others (2022) 448 ITR 518 (SC) is a law, which has to be interpreted that this was the position of law from the date of enactment of provision. It was further stated that as per Article 141 of the Constitution of India, the law declared by the Hon'ble Supreme Court shall be binding on all Courts within the territory of India.*
3. *That it is pertinent to mention that the Ld. CIT (Appeals) in the Impugned Order has stated that the Appellant has failed to file its response to notice under section 250 of the Act. However, in the subsequent paragraphs of the Impugned Order, the Ld. CIT (Appeals), has himself admitted and cited the contentions and case laws as relied upon by the Appellant in his written submissions.*
4. *THAT it is pertinent to mention that considering the fact that the appeal for the AY 2019-20 which was based on the similar facts and similar question of facts and law was already allowed by the Ld. CIT (Appeals)-15, Delhi. Therefore, in the light of the said order, the Ld. CIT (Appeals), ought to have considered the appeal for the present assessment year as well, on merits.*  
*The reliance is placed upon the case of Prima Paper & Engineering Pvt. Ltd. v. Commissioner of Income Tax, IT Appeal (L) No. 403 of 2013. It was held that*  
*“Having regard to the following facts:- (i) appellant's appeal raising the same question for the earlier assessment year has been admitted. (ii) the decision of the Special Bench of the Tribunal, which has been followed by the Tribunal in the impugned order, has not been approved by the Madras High Court in Velayudhaswamy Spinning Mills (P.) Ltd. v. Asstt. CIT [2012] 21 taxmann.com 95 and (iii) the delay in filing the appeal has been caused on account of what appears to be negligence on the part of the staff of the appellant's consultant, we are of the view that interests of justice would be served if delay in filing the appeal is condoned, subject to the condition that the appellant shall pay costs quantified at Rs. 10,000/- to the respondent, which shall be paid within one month from today.”*
5. *THAT the Ld. CIT (Appeals) while issuing the Impugned Order has failed to acknowledge the decision passed in the case of the Appellant for the Assessment Year 2019-20. The Ld. CIT (Appeals), NFAC in the present matter, completely erred in law and fact by not considering that not only did the Appellant deposited the Employee's contribution to ESIC and PF before the last date of filing the relevant income tax return for the relevant assessment year but has also deposited it in accordance with the other applicable statutory provisions.*
6. *THAT it is pertinent to make reference to the clause 38 of Employees' Provident Fund Scheme, 1952, which pertains to mode of payment of contribution. The relevant extract of clause 38 is reproduced hereinunder:*

*“38. Mode of payment of contributions (1) 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: 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.”* From the bare perusal of the above, it is apparent that the assessee is entitled to make the payment in respect of the contribution within 15 days from the close of the month during which the disbursement of salary/wages is actually made and not from the date of accrual. Therefore, if salary for the month of May is paid in the month of July, the prescribed time for deposit of employee contribution will begin from the date when actual credit of salary is made in the month of July and not from any other date. The table evincing the details of the deposit of PF and ESIC, clearly shows that the disallowance made by the Ld. CIT (Appeals) for the whole assessment year cannot be allowed to be sustained.

7. *THAT the Ld. CIT (Appeals), before making disallowance for the whole assessment year ought to have applied his mind to the fact that the due date for deposit of employee contribution towards PF/ESIC has to be ascertained in respect of each and every challan, separately.*
8. *THAT the Ld. CIT (Appeals) failed to differentiate between “Wage Period” and the period of actual disbursement of the wages. It is the case of the Appellant that the stipulation relating to making payment within 15 days from the close of the "month" means the month of actual disbursement of the wages and not the month to which the wage relates. It is, thus, strongly contended that inasmuch as all the disputed payments of contribution were made by the assessee within the aforesaid due date as per interpretation sought by the Appellant in the above way, no account should be considered to be disallowable under the provisions of section 43B of the Act read with section 36(1)(va).*
9. *THAT in the case of Fluid Air (India) Ltd. v. Dy. CIT [1997] 63 ITD 182 (Mumbai) it was held that the provisions of section 43B and section 36(1)(va) of the Act, should be interpreted liberally, that ambiguity regarding interpretation of words "fifteen days from the close of the month" in clause 38 of the Employees Provident Fund Scheme, 1952, ought to be decided in favour of the assessee and finally that for all payments made within the previous year, deduction ought to be allowed despite a few days delay in actual payment.*
10. *THAT Reliance has also been placed on the judgment of the Hon'ble Supreme Court in the case of CIT v. J.H. Gotla [1985] 48 CTR (SC) 363: [1985] 156 ITR 323 (SC), K.P. Varghese v. ITO [1981] 24 CTR (SC) 358: [1981] 131 ITR 597 (SC) and CIT v. Vegetable Products Ltd. 1973 CTR (SC) 177: [1973] 88 ITR 192 (SC) at p. 195 to argue that the Court may modify the language used by the legislature so as to scheme the intention of the legislature and to produce a rational result and furthermore that any case of ambiguity is required to be resolved in favour of the assessee.*
11. *THAT it is also apposite to mention the decision of the Hon'ble Calcutta Bench of this Hon'ble Tribunal in the case of Kanoi Paper and Industries Ltd. v. Asstt. CIT [2002] 75 TTJ 448 (Cal) wherein it was observed that the accrual of liability towards payment of salary without actual disbursement would not fasten obligation for deposits of employee's contribution in the labour Acts per se. The said view has also been upheld by various coordinate benches of this Hon'ble Tribunal. The relevant extract of the aforesaid judgement is reproduced herein below:*

“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.”

12. That, in the case of *Sentinel Consultants (P.) Ltd. v. ACIT*, (2023) 153 taxmann.com 151 (Delhi-Trib.), it was contended by the Ld. Counsel for the Appellant that the month during which the disbursement of salary is actually made would be relevant for the purposes of determination of due date of deposit under the respective statute. The accrual of liability towards payment of salary without actual disbursement would not fasten obligation for deposits of employees contribution in the labour Acts per se as observed by the co-ordinate bench in *Kanoi Paper and Industries Ltd. v. Asstt. CIT* [2002] 75 TTJ 448 (Cal). Thus, the Hon’ble Delhi Bench “G”, without expressing any opinion on merits on the aforesaid aspect, remanded the matter back to the assessing officer. Similarly, the same bench vide order dated 18.10.2023 in the case of *Sai Computers Ltd., Sai Dham, Victoria Park, Meerut v. ADIT, CPC, New Delhi* (I.A. No. 2864/Del/2022, Assessment Year 2019- 20), has also upheld the aforestated contention of the Appellant. In this case it was observed that the crux of the judgment in *Checkmate Pvt. Ltd. vs. CIT* (2022) 143 taxmann.com 178 (SC) is that employees’ contribution stands on a different footing than employer’s contribution. However, the assessee is entitled to show that the employee’s contribution to PF/ESIC has been timely deposited qua the due date of payment of salary under the respective statute. Furthermore, qua the contention of due date of payment of salary under the respective statute Hon’ble Delhi Bench “G”, relied upon *Kanoi Papers* (supra). The relevant extract of the aforesaid judgement is reproduced herein below:

“4. We find merit in such alternative plea towards timely deposit of employees’ contribution to PF/ESIC qua the due date prescribed under relevant legislations and regulations. Thus, while the action of the Revenue for making adjustments towards belated payment to employees’ contribution is endorsed on first principles, the matter is restored back to the file of the designated Assessing Officer for the purposes of ascertaining whether there is any delay in deposit of such contributions qua the due date

*in the light of the Kanoi Papers (supra). It shall be open to the assessee to place all factual matrix before the Assessing Officer and take all pleas for evaluation and determination of the issue by the Assessing Officer. The Assessing Officer shall examine this alternative aspect and pass a fresh order in accordance with law after giving proper opportunity to the assessee of being heard.”*

13. *The reliance is placed on the following judgments of the Hon'ble Tribunal: a. Rambir Singh v. Income Tax Officer Ward-5, I.T.A. No. 2397/Del/2022 (Assessment Year 2019-2020) b. Rakesh Janghu v. Dy. Commissioner of Income Tax Circle-28 (1), New Delhi, I.T.A. No. 379/Del/2023 (Assessment Year 2020-2021) Therefore, in the light of the foregoing, it is strongly asserted that the Appellant has fulfilled the requisite criteria for availing the deduction on account of deposit of employee's contribution to PF and ESIC. Thus, the additions made by the Ld. CIT (Appeals), shall be set aside and the present matter may be adjudicated in the light of the contentions made hereinabove.*

14. *THAT above grounds of the Appeal are independent and without prejudice to each other. The appellant craves the leave to add/amend/withdraw any grounds of appeal at the time of hearing or at any time before hearing with due permission of the Hon'ble Tribunal.*

5. Brief facts of the case are that the assessee had filed his return of income dated 01.10.2018 for the impugned assessment year and the same was processed u/s. 143(1) of the Act where the ld. CPC/ld. A.O. vide intimation dated 15.12.2019 made an addition/disallowance of Rs.46,06,795/- on account of delayed deposit of PF and ESIC, towards employees contribution u/s. 36(1)(va) of the Act.

6. Aggrieved by the said intimation, the assessee was in appeal before the first appellate authority.

7. The ld. CIT(A) vide order dated 20.12.2023, upheld the disallowance made by the CPC/ld.A.O. on the basis of the decision of Hon'ble Apex Court in the case of *Checkmate Services Pvt. Ltd. vs. CIT* [2022] 143 taxmann.com 278 (SC).

8. The assessee is in appeal before us, challenging the impugned order of the ld. CIT(A).

9. We have heard the ld. DR and perused the materials available on record. It is observed that the assessee has challenged the addition/disallowance made by the ld. A.O.

and upheld by the Id. CIT(A) on the delayed payment of PF and ESIC towards employees contribution. As this issue is no longer *res integra* and stands squarely covered by the decision of the Hon'ble Apex Court in the case of *Checkmate Services Pvt. Ltd.* (supra), wherein it was held that the employees contribution deducted by the assessee u/s. 36(1)(va) of the Act is an allowable deduction only when the same is deposited by the employer on or before the due date specified under the relevant Acts and the same would amount to the employer's income u/s.2(24)(x) of the Act, if the same is not deposited in the relevant statutory funds. The same is binding on all courts as per Article 141 of Constitution of India and, therefore, we decline to interfere with the same.

10. The other grounds of appeal raised by the assessee pertains to the issue of the payment of the same within 15 days from the close of the month, whether pertains to the actual disbursement of the wages or the month in which the salary was due. The assessee has relied on various decisions of the Tribunal to substantiate that 15 days from the close of the "month" should be interpreted as the month during which disbursement of salary is actually made, should be reckoned for the purpose of determination of due date of deposits under the relevant Acts and not the month when the salary was due to the employees. It is observed that the Hon'ble Madras High Court in the case of *CIT vs. Madras Radiators & Pressing Ltd.* 264 ITR 620 (Mad.) has held that the term 'every month' in clause 38 of the Provident Fund Scheme should be read as 'month in which the wages were actually earned, i.e., the salary payable and not when the salary was paid'. It further reiterates that the responsibility of the employer to make the payment towards the

employer's contribution irrespective of the facts that whether the wages are paid in time or not. The relevant extract of the said decision is cited herein under for ease of reference:

4. *In our considered opinion, we are of the view that the Tribunal is not correct in coming to the conclusion that there was some ambiguity in construing the expression "month" used in para 38 of the scheme under the Provident Fund Act on the premise that the assessee used to pay the salary to its employees only on the 7th day of succeeding month under Section 5 of the Payment of Wages Act. It is true that Section 5 of the Payment of Wages Act provided for payment of wages in respect of certain categories of industries on or before the 7th day of succeeding month. However Section 4 of the Act provided for fixation of wage period and also provided that no wage period shall extend one month.*

5. *Para 29 of the scheme under the Provident Fund Act provided that the contribution payable should be calculated on the basis of the basic wages and other allowances actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis. The expression "basic wages" is defined as all emoluments, which are earned by an employee while on duty or on leave or on holidays with wages in either case, in accordance with the terms of the contract of employment and which are paid or payable in cash to him.*

6. *Para 30 of the scheme of the Provident Fund Act imposed an obligation on the employer to remit both the shares of contributions in the first instance and para 32 empowered the employer to recover the employees' contributions from the wages of the employees. As per para 38 of the scheme, the employer is required to remit both the contributions together with the administrative charges thereon within 15 days before the close of every month.*

7. *Thus as seen from the above provisions, it is clear that it is the responsibility of the employer to make payment of the contributions at the first instance irrespective of the fact, whether the wages are paid in time or not. Hence the actual payment of wages on the 7th day of succeeding month would not any way alter the situation and give room for interpreting that the "close of 15th day" has to be calculated from the end of the month in which the wages were actually paid. The payment of wages on the 7th day of succeeding month would not in anyway alter the initial responsibility of the employer for making payment of contributions, which he is statutorily authorised to recover from the employees salary, whether the salary is paid in time or not, Hence the one and only reasonable conclusion is that the employer has to remit both the contributions to the provident fund within 15 days from the close of the month for which the employees earned their salary i.e. salary payable. Our view has been fortified by the Division Bench of this Court in Presidency Kid Leather (P) Ltd. v. Regional Provident Fund Commissioner (1997) 91 FJR 661 (Mad), wherein the Division Bench of this Court held as follows :*

*"As per para 38 of the Employees' Provident Funds Scheme, the employer is required to remit both the employees' as well as the employer's share of contributions together with administrative charges thereon before the close of the 15th of every month. Para 30 of the scheme imposes an obligation on the employer to remit both the shares of contributions in the first instance and para 32 of the scheme enables the employer to recover the employees' contributions from the wages of the employees. The initial responsibility for making payment of the contributions lies on the employer irrespective of the fact whether the wages are paid in time or npt. As such, the provident fund payments made after the due date will attract the penal damages under Section 14B of the Act."*

*The Tribunal committed serious error in coming to the contrary conclusion. Hence the first two questions of law referred to us are answered in the negative against the assessee and in favour of the Revenue.*

11. It is also pertinent to point out that the co-ordinate bench in the case of *Creative Textiles Pvt. Ltd.* (in ITA No. 409/Mum/2022 vide order dated 31.05.2023) has also relied on the said decision and decided this issue in favour of the Revenue.

12. From the above observation, we do not find any infirmity in the order of the Id. CIT(A) and, therefore, are inclined to dismiss the grounds of appeal raised by the assessee.

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

*Order pronounced in the open court on 25.10.2024*

Sd/-

(Omkareshwar Chidara)  
Accountant Member

Mumbai; Dated :25.10.2024  
Roshani, Sr. PS

Sd/-

(Kavitha Rajagopal)  
Judicial Member

**Copy of the Order forwarded to :**

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

BY ORDER,

(Dy./Asstt.Registrar)  
ITAT, Mumbai