

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.95/Bang/2023
Assessment year : 2018-19

M/s. MTR Maiya's, No.14, Lalbagh Road, Lalbagh Highway, Bengaluru – 560 027. PAN: AAOFM 2551N	Vs.	The Income Tax Officer, Ward 6(2)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Ravishankar S.V., Advocate
Respondent by	:	Shri P. Suresh Rao, Addl. CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	27.04.2023
Date of Pronouncement	:	02.05.2023

ORDER

Per Laxmi Prasad Sahu, Accountant Member

This appeal is filed against the order of the CIT(Appeals), National Faceless Appeal Centre, Delhi [NFAC] dated 27.12.2022, DIN & Order No. ITBA/NFAC/S/250/2022-23/1048280517(1) for the AY 2018-19.

2. The sole issue involved in this appeal is with regard to disallowance u/s. 36(1)(va) in order dated 22.08.2019 u/s. 143(1) of the Income-tax Act, 1961 [the Act] and confirmed by the CIT(Appeals).

3. The assessee is a partnership firm engaged in the business of food preparation and sweets etc. It filed return of income for AY 2018-19 declaring total income of Rs.1,04,89,720. The return was processed u/s. 143(1) of the Act determining total income of Rs.1,22,14,931, disallowing Rs.17,25,211 towards delay in payment of employees contribution to PF and ESI u/s. 36(1)(va) of the Act.

4. On appeal before the CIT(Appeals), the assessee submitted that out of Rs.17,25,211, a sum of Rs.15,55,547 was paid within the due date as per the EPF & ESI Acts and the balance of Rs.1,29,106/- was paid within the due date for filing return as per 139(1) of the Act. However, there was inadvertent error while filing Form 3CD in mentioning the correct qualifying dates of remittances. The correct details of contribution to EPF and ESI are as under:-

Deduction for the month	Employee PF Contribution	Due Date	Date of Remittance
April, 2017	3,32,962	15.05.2017	14.05.2017
May, 2017	3,23,432	15.06.2017	14.06.2017
August, 2017	3,90,309	15.09.2017	14.09.2017
September, 2017	4,59,067	15.10.2017	15.10.2017
Total	14,97,770		

Deduction for the month	Employee PF Contribution	Due Date	Date of Remittance
June, 2017	57,777	15.07.2017	15.07.2017

5. In view of the above, it was submitted that the total amount of Rs.15,55,547 has been deposited within the time prescribed under the respective Acts and therefore no addition is warranted to that extent.

6. The assessee also submitted that there was a delay in remittance of EPF & ESI under the respective Acts, but the remittance was made before the due date for filing return of income u/s. 139(1) of the Act, the details of which are as follows and hence no disallowance is called for:-

Deduction for the month	Employee PF Contribution	Due Date	Date of Remittance
Sept. 2017	10,020	15.10.2017	20.4.2018
Oct. 2017	10,089	15.11.2017	20.4.2018
Nov. 2017	10,069	15.12.2017	20.4.2018
Jan. 2018	1,334	15.02.2018	01.9.2018
Feb. 2018	3,839	15.03.2018	01.9.2018
Mar. 2018	5,207	15.04.2018	01.9.2018
Total	40,588		

Deduction for the month	Employee PF Contribution	Due Date	Date of Remittance
Aug. 2017	58,406	15.09.2017	21.09.2017
Sept. 2017	70,700	15.10.2017	19.10.2017
Total	1,29,106		

7. The assessee submitted that disallowance of the above amounts u/s. 36(1)(va) was a debatable issue and could not have been disallowed u/s. 143(1)(a) of the Act. The assessee placed reliance on various decisions of the High Courts and Tribunals.

8. However, the CIT(Appeals) dismissed the appeal of the assessee, against which the assessee is in appeal before the Tribunal.

9. The Id. AR reiterated the submissions made before the CIT(Appeals) and relied on the decision of Calcutta Bench of the Tribunal in the case of *Kanoi Paper & Industries Ltd.* [2002] 75 TTJ

48 (Cal). He further submitted that the salary for the month of Aug. & Sept. 2017 was paid in the subsequent month, therefore the due dates have to be considered from the actual date of payment of salary. Unless the salary is paid to the employees, employees contribution to the PF and ESI cannot be made.

10. On the other hand, the ld. DR relied on the orders of the lower authorities and submitted that the Hon'ble Supreme Court has resolved the issue in the case of *Checkmate Services (P.) Ltd. Vs CIT-1, [2022] 143 taxmann.com 178 (SC)*.

11. Heard both the sides, perused the entire material on record and the orders of the lower authorities. As far as the contention of the assessee that no disallowance can be made u/s. 143(1)(a) of the Act towards employees contribution to EPF and ESI is concerned, we find that this issue is settled by the Hon'ble Madras High Court in the case of *AA520 Veerappampalayam Primary Agricultural Cooperative Credit Society Ltd. Vs. DCIT reported in (2022) 138 taxmann.com 571* wherein it was held as under:-

“7. The scope of an 'intimation' under section 143(1)(a) of the Act, extends to the making of adjustments based upon errors apparent from the return of income and patent from the record, Thus to say that the scope of 'incorrect claim' should be circumscribed and restricted by the Explanation which employs the term 'entry' would, in my view, not be correct and the provision must be given full and unfettered play. The explanation cannot curtail or restrict the main thrust or scope of the provision and due weightage as well as meaning has to be attributed to the purposes of section 143(1)(a) of the Act.”

12. In view of the above judgment, the contention of the assessee that no disallowance could be made u/s. 143(1)(a) of the Act towards employees contribution to EPF and ESI is rejected.

13. It is submitted by the Id. AR that there was inadvertent error in Form 3CD in mentioning the correct dates and the relevant details to the extent of employees contribution to the extent of Rs.15,55,547 (14,97,770 + 57,777) have been already been reproduced in para 4 of this order. The assessee has produced copy of challans towards contribution to EPF and ESI. Since these documents have not been verified by the lower authorities, therefore, for the limited purpose of verification, this issue is remitted back to the AO for verification of the proof of payments as per section 36(1)(va) of the Act. The assessee is directed to produce the necessary documents in support of its claim. If the AO finds otherwise the addition shall be sustained.

14. In respect of disallowance of Rs. 1,29,106/- for the month of August 2017 & Sept. 2017 the assessee submitted that these payments were made in the following months, therefore the date of payment of salary should be considered the month in which the salary has been paid because the employee cannot contribute in the EPF/ESI without the payments made by the employer. He also submitted the copy of ledger account. The Id. AR also relied on the decision of Calcutta Bench of the Tribunal in the case of *Kanoi Paper & Industries Ltd.* [2002] 75 TTJ 48 (Cal) wherein it is held as under:-

“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 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.”

15. In view of the above, we remit this issue to the AO with a direction to examine and decide the issue in the light of the above judgment. Accordingly this issue is allowed for statistical purpose.

16. As far as the employees contribution to EPF & ESI the details of which are extracted in para 6 of this order to the extent of Rs.40,588/- is concerned, the submission of the assessee is that these remittances were within the due date for filing return u/s. 139(1) of the Act, though they were belated payments under the respective Acts and hence no disallowance is called for. This issue is settled by the Hon'ble Supreme Court judgment in *Checkmate Services (P.) Ltd. Vs CIT-I, [2022] 143 taxmann.com 178 (SC)* wherein it is held that that Section 43B(b) does not cover employees' contributions to PF, ESI etc., deducted by employer from salaries of employees and that employees contribution has to be deposited within the due date u/s 36(1)(va) i.e. due dates under the relevant employee welfare legislation like PF Act, ESI Act etc. failing which the same would be treated as income in the hands of the employer u/s.2(24)(x). Respectfully following this judgment, we sustain the disallowance to the extent of Rs. 40,588/- towards belated remittances towards employees contribution to EPF & ESI under the respective Acts.

17. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Pronounced in the open court on this 02nd day of May, 2023.

Sd/-

Sd/-

(GEORGE GEORGE K)
JUDICIAL MEMBER

(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 02nd May, 2023.

/Desai S Murthy/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.