

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

**BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA Nos.5 and 6/Bang/2024
Assessment Years : 2018-19 and 2019-20

Shri. Trimbak Konher Patil, 2B, Shant Nagar, Navanagar, Hubballi – 560 025. PAN : AFMPP 1122 M	Vs.	ITO, Ward – 2(1), Hubli.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Vinay Kulkarni, CA
Revenue by	:	Shri. Nilanjan Dey, Addl. CIT, and Shri. S. Subramanian, Addl. CIT (DRs)(ITAT), Bengaluru.

Date of hearing	:	04.03.2024
Date of Pronouncement	:	04.03.2024

ORDER

Per George George K, Vice President:

These appeals at the instance of the assessee are directed against two orders of CIT(A), both dated 02.11.2023, passed under section 250 of the Income Tax Act, 1961 (hereinafter called ‘the Act’). The relevant Assessment Years are 2018-19 and 2019-20.

2. Common issues are raised in these appeals. Hence, they were heard together and are being disposed off by this consolidated order. Identical grounds are raised in both the appeals. The grounds raised read as follows:

1. *The learned CIT (A) has applied the explanation 5 inserted in section 43B w.e.f 01.04.2021 retrospectively, which is against the Judicial Pronouncements.*

2. *The very addition made by CPC u/s 143(1)(a) and subsequent confirmation of the same is against express provision of the Act.*

3. Brief facts of the case are as follows:

Assessee is a proprietary concern deriving income from labour contract. For the Assessment Year 2018-19, the return of income was filed on 31.10.2018 declaring total income of Rs.14,04,220/-. Intimation under section 154 of the Act was passed by the Additional Director of Income Tax, CPC, on 29.04.2017. In the said intimation issued, total income was computed at Rs.92,46,580/- as against the declared income of Rs.14,04,220/-. In the said intimation, a solitary addition of Rs.78,42,360/- was made by disallowing the payments of employees' contribution to the PF and ESI accounts for the reason that the said amounts were not paid within the due date specified under respective Acts.

4. For the Assessment Year 2019-20, the return of income was filed on 31.10.2019 declaring a total income of Rs.13,78,537/-. The AO passed an order under section 154 of the Act on 29.04.2021 determining the total income of the assessee at Rs.69,11,530/-. The AO made a solitary addition of Rs.55,32,993/- by disallowing payments of employees' contribution to PF and ESI the for the reason that the said amounts were not paid within the due date specified under respective Acts.

5. Aggrieved by the Orders passed by AO making the aforesaid disallowance for Assessment Years 2018-19 and 2019-20, assessee filed appeals before the First Appellate Authority (FAA). Before the FAA it was contended that though the employees' contribution was not paid within the due dates specified under the respective Acts, the same has been paid within the due date specified under section 139(1) of the Act. The CIT(A), however, rejected the contentions of the assessee.

The CIT(A) took note of the retrospective amendment brought into section 36(1)(va) and 43B of the Act. The CIT(A) further relied on the judgment of the Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd., reported in 448 ITR 518 (SC) in rejecting the contentions of the assessee.

6. Aggrieved by the Orders of the CIT(A), assessee has filed the present appeals before the Tribunal for the Assessment Years 2018-19 and 2019-20. Assessee has filed Paper Books for each of the Assessment Years enclosing therein the salary and wages ledger for the Assessment Years 2018-19 and 2019-20, the case laws relied on, agreement entered into between the clients, the relevant provisions of the PF and ESI Acts, etc. Assessee has also filed the written submissions. In the written submissions it is contended that assessee is a labour contractor and there is no primary liability on him to collect and remit the employees' contribution directly to the fund in view of the express provision of the PF and ESI Act. Further, it was contended that assessee had not made a claim of deduction under section 36(1)(va) of the Act. Therefore, there is no question of making a disallowance by the AO. It was contended that if at all, addition ought to have been made under section 2(24)(x) of the Act instead of making a disallowance under section 36(1)(va) of the Act. On a query by the Bench, the learned AR submitted that the above contentions raised before the Tribunal was not raised before the AO or the FAA since at that given point of time, the judgment of the Hon'ble jurisdictional High Court in case of Essae Teraoka Pvt. Ltd Vs. DCIT, reported in 366 ITR 408 (Karnataka) was in favour of the assessee. Therefore, it was prayed that in the interest of justice and equity, the matter may be restored to the files of the CIT(A) for adjudication of the above submissions.

7. The learned DR supported the orders of the AO and the CIT(A).

8. We have heard the rival submissions and perused the material on record. For the Assessment Years 2018-19 and 2019-20, admittedly assessee had not paid the employees' contribution to PF and ESI account within the due dates specified under the respective Acts. Such being the scenario, the Hon'ble Apex Court judgment in the case of Checkmate Services Pvt. Ltd., (supra) will squarely apply. The Hon'ble Apex Court in the aforesaid judgment has categorically held that if the employees' contributions are not paid within the due dates specified under the respective Acts, assessee will not be entitled to deduction under section 36(1)(va) of the Act.

9. The contention of the assessee in the written submissions before the ITAT is different. The contention of assessee for the Assessment Year 2018-19 is reproduced below for ready reference:

“A. Under the Income Tax Act, as per provisions of section 2 (24) (x) following is considered as income which reads as follows:

*“any sum received by the assessee from his **employees** as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the employees' state insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees:)”*

The amount so treated as income is allowed as deduction from income as per provisions of section 36 (1) (va) which reads as follows:

*“ any sum received by the assessee from any of his **employees** to which the provision of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employees' account in the relevant fund or funds on or before the due date.”*

*The above-mentioned provisions are applicable to the assessee who receives any amount from his **employees** with a corresponding liability to deposit the same in the relevant **fund**.*

The words 'employer', 'employee' are not defined in the Income Tax Act,1961. The definition of the same as per PF and ESI Act and

responsibility and mode of payment of contributions into the relevant fund are as follows:

1) A) Relevant provisions of Employees Provident Funds Scheme, 1952 and

*Para 30: payment of contribution: - (1) The **employer** shall in the first instance, pay both the contribution payable by himself (in the scheme referred to as the employer's contribution) and on behalf of the member employed by him directly or by or through a **contractor**, the contribution payable by such member (in this scheme referred to as members contribution).*

30 (2): in respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this scheme referred to as the employer 's contribution) and also administrative charges'

B) Relevant Provisions of EPF and Miscellaneous provisions Act,1952

2 (f) Employee means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of (an establishment,) and who gets his wages directly or indirectly from the employer, (and includes any person-(i) employed by or through a contractor in or in connection with the work of the establishment; (ii) engaged as an apprentice, not being an apprentice engaged under the apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;)

In the EPF websites, the following answers are given for the questions raised.

Question number 18: How the contract employees are protected and given their P.F. when the contractor is not paying the dues to the principal employer?

*Ans: It is the duty of the **principal employer** to ensure that the Contractor discharges his liability. The Principal Employer must allow payment of bills after ensuring that the Contractor has enrolled and complied in respect of all eligible contract employees every month. The Principal Employer can check the remittance and employee name by using the Establishment Search option available in our website www.epfindia.gov.in. The path is OUR SERVICES >> For Employers >> Important Links >> Establishment Search (Also view Remittances and member name). If the Principal Employer ensures that all contract employees activated their universal account number (UAN), then any default by the contractor can be nipped in the bud.*

Question number 372:- when a contractor is not paying the dues to EPF, how the EPF contribution of contract employees are protected?

*Ans: Section 8A of the Act enjoins upon the **Principal Employer** a statutory duty to ensure that a contractor discharges his liability. The Principal Employer may recover all EPF dues in respect of EPF members of the contractor from any amount payable to the said contractor. Moreover, paragraph 30 of the Scheme prescribes that the employer shall, in the first instance, pay the EPF dues in respect of all employees employed directly or through a contractor.*

A letter in this regard dated 01.02.2021 bearing No. C-1/011 (16) 2020-21/ABRY/1179 issued by Addl. CPFC (Compliance) makes it clear that, payment of contributions by contractor in the fund is sufficient compliance with the provisions of section 8A of the Act read with Para 30-32 of the EPF scheme, 1952 by principal employer.

2) Relevant provisions of the Employee's State Insurance Act, 1948

*Section 40: principal employers to pay contributions in the first instance:
- (1) the principal employer shall pay in respect of every employee whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.*

Section 41 Recovery of contribution from immediate employer.

(1) A principal employer, who has paid contribution in respect of an employee employed by or through an immediate employer, shall be entitled to recover the amount of the contribution so paid (that is to say the

employer's contribution, as well as employee's contribution if any) from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the immediate employer

Section 2(13): The definition of 'immediate employer': The definition of immediate employer as per section 2(13) of the ESI Act, 1948 includes contractor.

2 (9) "Employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this act applies and-

- i.who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment or whether such work is done by the employees in the factory or Establishment or elsewhere; or*
- ii. who is employed by or through an **immediate employer** on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment, or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or*
- iii.whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose service is so lent or let on hire has entered a contract of service.*

From the above provisions of the Act, Scheme, answers given in frequently asked questions and letter issued by Addl. CPFC (compliance) for the purpose of both EPF Act, Scheme and ESI Acts, employees of contractor or immediate employer are treated as employees of principal employer. Hence it is the primary duty of Principal Employer to pay the contribution to the fund in case of employees employed by him or through immediate employer and recover the same from contractor or immediate employer wherever applicable.

Both the Acts make this thing amply clear by way of enabling the employer or the principal employer to collect the employee's contribution employed through the contractor or immediate employer from the contractor or immediate employer.

This being the case there is no primary liability on the contractor or immediate employer to collect and remit the employees' contribution directly to the fund.

The appellant being the contractor or immediate employer and in view of the above express provisions of the EPF and ESI Acts, we are of the humble opinion that the provisions of sections 2(24) (x) and 36(1) (va) are not applicable to the appellant as there is no basic liability fastened on the contractor or immediate employer to remit the amount into the fund.

(B) Honorable Income Tax Appellate Tribunal Delhi benches have referred the matter to learned Assessing Officer to ascertain whether the basis for calculation of default under the relevant PF-ESI Act is to be made based on the actual disbursement of salary or based on accrual of liability. The relevant case laws are Sentinel Consultants P. Ltd Vs ACIT Circle- 22 (2), New Delhi and Benson Movers P Ltd, New Delhi Vs ACIT, Circle-4 (2), New Delhi. These decisions are rendered post Checkmate Service Pvt Ltd decision. In the case of this appellant though the entry for salary payable is passed at the end of every month, the same is disbursed in the following month.

(c) Moreover, the CPC while making the addition to returned income has taken total deduction of Rs.71,53,728.00 of EPF made from employees' salary as belated payment instead of taking the belated payment of Rs.59,11,277.00 as mentioned in the appeal order. (para 16 of the NFAC order dated 02.11.2023)

(d) Even assuming that, for the time being the addition made by the CPC, Bangalore to the returned income is correct, the CPC should have made the addition by enhancing the income reported under the head 'Income from business or profession' or 'income from other sources' and not by way of disallowance of expenditure. The amount in question is a income and this is told in clear terms by Honorable Supreme Court in Checkmate Service Pvt Ltd decision as follows:

*Para 53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as **an income (albeit deemed)**, by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date.*

For the Assessment year in question even CPC cannot do so because section 143 (1) (a) (iv) allowed such addition of income indicated in the audit report but not taken into account in computing the total income in the return, by amending the clause w.e.f. 01.04.2021.

In view of the above provisions of the EPF Act and ESI Act, Honorable ITAT Delhi benches decisions and provisions of section 143(1) (a) the addition made to the returned income is beyond the scope of the provisions of section 143 (1) (a) adjustments. Hence it is prayed to delete the addition of Rs 78,42,360/- made to the returned income.”

10. We find that the above contentions raised now before the Tribunal was never raised before the AO nor the CIT(A). In the interest of justice and equity, we are of the view that the above contentions of the assessee need to be adjudicated by the CIT(A) (since there needs to be examination of factual aspects). Accordingly, the matter is restored to the files of the CIT(A). The assessee shall co-operate with the Revenue and shall not seek unnecessary adjournment in the matter. It is ordered accordingly.

11. In the result, appeals filed by the assessee are allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(LAXMI PRASAD SAHU)
Accountant Member

Sd/-

(GEORGE GEORGE K)
Vice President

Bangalore.

Dated: 04.03.2024.

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Copy to:

1. Appellants
2. Respondent
3. DRP
4. CIT
5. CIT(A)
6. DR, ITAT, Bangalore.
7. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.