

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/TAX APPEAL NO. 860 of 2019**

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THE PRINCIPAL COMMISSIONER OF INCOME TAX-4  
Versus  
M/S SUZLON ENERGY LTD.

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Appearance:

MRS MAUNA M BHATT(174) for the Appellant(s) No. 1  
MR TUSHAR HEMANI SENIOR ADVOCATE WITH MS ADITI SHETH WITH  
MS VAIBHAVI K PARIKH(3238) ADVOCATES for the Opponent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA  
and  
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 11/02/2020

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1 This Tax Appeal under Section 260A of the Income Tax Act, 1961 [for short, 'the Act, 1961'] is at the instance of the Revenue and is directed against the order passed by the Income Tax Appellate Tribunal, Ahmedabad 'D' Bench, Ahmedabad dated 25<sup>th</sup> June 2019 in CO No.77/Ahd/2017 for the A.Y. 2011-12.

2 This Tax Appeal was ordered to be admitted on the following substantial question of law:

*“Whether the Appellate Tribunal has erred in law and on facts in setting aside the appeal of the assessee to the file of Assessing Officer on addition of Rs.15,20,519/- made on account of late payment of employee's contribution towards PF, ESIC etc.?”*

3 It appears from the materials on record that the issue is with regard to addition of Rs.15,20,519/- on account of the late payment of the employees contribution towards Provident Fund Employees State Insurance Corporation, etc. The additions were made on account of the employees contribution to the PF / ESI as the same was not deposited within the prescribed period in law. The Assessing Officer made additions by invoking provisions of Section 36(1)(va) read with Section 2(24)(x) of the Act, 1961.

4 The assessee being dissatisfied with the assessing order preferred appeal before the CIT(A). The CIT(A) dismissed the appeal preferred by the assessee by holding that the PF / ESI contribution was not deposited within the prescribed time period. The assessee went in appeal before the Appellate Tribunal. The Appellate Tribunal placing reliance on the decision in the case of **CIT vs. Gujarat State Road Transport Corporation reported in (2014) 41 taxmann.com 100 (Guj)** quashed and set aside the order passed by the CIT(A). The Tribunal held as under:

*“13. We have heard the respective parties and we have also perused the relevant materials available on record including the orders passed by the Coordinate Bench in assessee’s own case. It further appears from the record that Ld. CIT(A) while confirming the orders passed by the Ld. AO relied upon the judgment passed by the jurisdictional High Court in the case of CIT vs. Gujarat State Road Transport Corporation, reported in (2014) 41 taxmann.com 100 (Guj.) holding that employees’ contribution to the Employees’ Provident Fund (EPF) Employees’ State Insurance Corporation (ESIC) deposited beyond the due date prescribed u/s. 36(I)(va) of the Income Tax Act, 1961 would not be eligible for deduction u/s. 438 of the Act even after deposited before the due date of filing of tax return.*

*Upon perusal of the order passed by the Coordinate Bench we could understand that the Ld. Tribunal pleased to direct the AO to decide whether there was any delay or not in making such payment by the assessee. It has further observed that any delay deposit of PF/ESIC is to be*

disallowed in terms of the Hon'ble Gujarat High Court judgment as cited above. The relevant portion of the said judgment is as follows:-

"3. Learned representatives fairly agree that the aforesaid issue is squarely covered against the assessee by Hon'ble jurisdictional High Court's judgment in the case of CIT vs. Gujarat State Road Transport Corporation, 366 ITR 170 (Guj.), wherein it is categorically held that in the case of delayed deposit of employees ' contribution to PF, the same will not deductible in computing income under section 28 of the Act. The law so laid down by the Hon'ble jurisdictional High Court is binding on us. The mere fact that an appeal against the said decision is pending before the Hon'ble Supreme Court does not dilute binding nature of this judicial precedent. As regard dismissal of SLP in the case of Rajasthan State Beverages Corporation Ltd (2017) 84 taxmann.com 185 (SC), it is only elementary that when a SLP is dismissed by a non-speaking order, it does not constitute a law declared by Hon'ble Supreme Court, and as such, it is not binding under Article 141 of the Constitution of India. The authority, for this proposition, is contained in a series of judgments of Hon'ble Supreme Court, including, inter alia, in the cases of State of Manipur vs. Thingujam Brojen Meetai, (1996) 9 SCC 29, Om Prakash Gargi v. State of Punjab, (1996) 11 SCC 399 and Sun Export Corpn. v. Collector of Customs, AIR 1997 SC 2658. We, therefore, see no legally sustainable merit in the case of the assessee and, respectfully following the judgment of Hon'ble jurisdictional High Court in the case of Gujarat State Road Transport Corporation (supra), dismiss the grievance of the assessee in principle. We may, however, add that a co-ordinate bench of this Tribunal, in the case of Rajratna Metal Industries Ltd vs. ACIT (ITA NO.940/Ahd/2015; order dated 22.09.2017/ has observed as follows:

"3. Assessee's latter substantive ground challenges correctness of both the lower authorities' action disallowing/adding a sum of Rs.3,85,810/- u/s. 36(1)(va) r.w.s. 2(24) of the Act on account of late payment of employees' contribution to PF & ESI in question. There is no dispute that Hon'ble jurisdictional High Court's decision in CIT vs. Gujarat State Road Transport Corporation (2014) 366 ITR 170 (Guj) upholds such a disallowance in principle. The assessee's case however is that relevant due date has to be seen not from the relevant month of salary but the one pertaining to its payment. He then files a computation chart indicating it to have paid above employees' PF/ESI contributions on 22.05.2009 and 28.05.2009 as against the due dates thereof following on 20.06.2009. The Revenue fails to dispute this factual position. We therefore quote this Tribunal's coordinate bench decision in Kami Paper & Industries Ltd. vs. ACIT 75 TTJ 448 that the relevant date in such case is that of month of the actual payment of wages / salaries. We therefore rely on the above co-ordinate bench decision

and direct the Assessing Officer to delete the impugned disallowance as well.”

4 In effect thus while any delayed deposit of PF/ESI is to be disallowed, in terms of Hon'ble Gujarat High Court's judgment in the case of Gujarat State Road Transport Corporation (*supra*), the question as to whether there is a delay or not may be decided by the Assessing Officer in the light of above observations by the coordinate bench. The assessee will get relief, if found admissible, on that basis.

5. In the result, appeals of the assessee are allowed for statistical purposes.””

5 The Revenue being dissatisfied with the order passed by the Appellate Tribunal is here before this Court with the present appeal.

6 The substantial question of law as raised by the Revenue for our consideration is no longer *res integra*, more particularly, in view of the decision of this Court dated 15<sup>th</sup> October 2018 in the case of **M/s Checkmate Facility and Electronic Solutions Pvt Ltd vs. Deputy Commissioner of Income Tax Circle 1 rendered in Tax Appeal No.1256 of 2018**. We quote the entire judgement delivered by the Coordinate Bench of this Court as follows:

“1. Appellant-assessee has challenged the judgment of the Income Tax Appellate Tribunal dated 22.03.2018. Following questions are presented for our consideration:

“1. Whether on facts and in law, the Income Tax Appellate Tribunal is right in confirming disallowance of Rs. 1,16,87,091/u/s 2(24)(x) r.w.s. 36(1)(va) for delay in payment of employee's contribution to PF and ESI in spite of the fact that it was deposited before due date of filling return of income?

2. Whether on facts and in law, the Income Tax Appellate Tribunal is right in confirming disallowance of Rs. 1,16,87,091/u/s 2(24)(x) r.w.s. 36(1)(va) for delay in payment of employee's

*contribution to PF and ESI, when the delayed payment is considered on the basis of date on which salary pertains to and not the day on which salary is paid ignoring provisions of clause 38 of the Employees' provident fund scheme, 1952."*

2. *The issue arises in following background. The assessee is a private limited company. For the assessment year 201314, the assessee had filed the return of income declaring total income of Rs.65,65,980/-. The return was taken in scrutiny by the Assessing Officer. In the order of assessment passed by him under section 143(3) of the Income Tax Act, 1961 ('the Act' for short) a disallowance of employees' contributions towards provident fund and ESI amounting to Rs.1,16,87,091/was made. This was on account of the fact that the assessee though had deducted such contributions, failed to deposit the same with the statutory authorities within the due date. The Assessing Officer referred to all such deductions and late depositing the contributions in the order of assessment. All these deposits would indicate that the assessee had made the deposits late beyond 20<sup>th</sup> of Month following the month for which such deduction was being made. The date of 20<sup>th</sup> of each month was chosen by the Assessing Officer was made considering the normal period of 15 days for making deposit and a further grace period of five days specified under the statute. Since the assessee was delayed in making the deposits even beyond such extended period, he applied the disallowance in terms of section 36(1)(va) of the Act.*
3. *Learned counsel for the appellant would not dispute that the issue of disallowance of late deposited employees' contributions of PF and ESIC stands covered by the Division Bench judgment of this Court in case of Commissioner of Income Tax v. Gujarat State Road Transport Corporation reported in [2014] 366 ITR 170 (Guj). He however raised a slightly different contention which did not arise for consideration before this Court in case of Gujarat State Road Transport Corporation (supra). He submitted that in terms of section 38 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, reference to the time limit for depositing the contributions within 15 days of close of the month must be to the month in which the salary payment is made. For example, therefore if the salary payment for the month of June is made on 5<sup>th</sup> July, the employer would have time upto 15<sup>th</sup> of August for depositing the employee's contribution of provident fund. Looking from this angle, there was no delay or default on the part of the present assessee.*
4. *In terms of section 36(1)(va) of the Act, any sum received by the assessee from any of his employees to which the provisions of section 2(24)(x) applies, would be deducted as long as such sum is credited by the assessee to the employee's account in the relevant funds on or before due date. Explanation to the said subsection provides that for the purpose of the said clause, "due date" means a date by which the assessee is required as an employer to credit an employee's contribution to the account in which*

relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise. Section 38 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952, becomes relevant. Subsection (1) thereof reads as under:

*“(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 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”.*

5. *This provision thus requires an employer before paying the employee his wages to deduct the employee’s contribution along with the employer’s own contribution as fixed by the Government. It is further required that he shall within fifteen days of the close of every month pay the same to the fund such contribution and administrative charges. In terms of this provision thus, after deducting the employee’s contribution towards the funds, the same has to be deposited with the Government within fifteen days of the close of every month. Reference to fifteen days of the close of the month must be in relation to the month during which the payment of wages is to be made and corresponding liability to deduct employee’s contribution to the fund arises. The expression “within fifteen 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 duty to deduct employee’s contribution and to deposit the same in the fund.*
6. *Learned counsel for the appellant is therefore not correct in contending that if such wages are paid in the following month, the liability to deposit the employee’s contribution to the fund gets differed by another month.*
7. *Tax Appeal is therefore dismissed.”*

7 Thus, the dictum as laid in the aforesaid decision is that Section 38 of the Employees Provident Funds and Miscellaneous Provisions Act,

1952 makes it obligatory for the employer before paying him his wages to deduct the employee's contribution along with the employer's own contribution as fixed by Government. The employer is further obliged to pay the same within fifteen days of the close of every month pay i.e. such contribution and administrative charges. The reference to fifteen days of the close of the month must be in relation to month during which the payment of wages is to be made and corresponding liability to deduct employee's contribution to the fund arises. This Court held that the expression "within fifteen 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 duty to deduct employee's contribution and to deposit the same in the fund.

8 In such circumstances referred to above, the finding recorded by the Tribunal that if such wages are paid for the following month, the liability to deposit the employee's contribution to the fund gets differed by another month is not the correct statement of law.

9 In view of the aforesaid, this appeal succeeds and is hereby allowed. The impugned order passed by the Tribunal is hereby quashed and set aside.

10 The substantial question of law is answered accordingly in favour of the Revenue and against the assessee.

**(J. B. PARDIWALA, J)**

**(BHARGAV D. KARIA, J)**

CHANDRESH