IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.489/Coch/2018
Assessment Year : 2013-14

The Thiruvalla East Co-operative Bank Ltd., P.B No.4, Eraviperoor, Thiruvalla-689 542. [PAN:AAAAT 3051B]	Vs.	The Income Tax Officer, Ward-3, Thiruvalla.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri Mathew Joseph, CA
Revenue by	Smt. A.S. Bindhu, Sr. DR

Date of hearing	24/01/2019
Date of pronouncement	06/02/2019

O R D E R

Per CHANDRA POOJARI, AM:

This appeal filed by the assessee is directed against the order of the CIT(A), Kottayam dated 24/07/2018 and pertain to the assessment years 2013-14.

2. The only issue raised in this appeal is with regard to disallowance of provisions made by the assessee towards gratuity.

3. The facts of the case are that the Assessing Officer disallowed the provisions made by the assessee towards gratuity, leave salary, bonus and medical aid of

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retired staff during the period May, 2010 to January, 2012 on the ground that such sums are allowable only in the year of payment.

4. On appeal, the CIT(A) observed that the provisions were created only to meet the guidelines issued by RBI. The CIT(A) observed that the Ld. AR could not produce any evidence to prove that these provisions for gratuity represents the ascertained liability during the FY 2012-13. In view of the same, it was held that the provisions created by the assessee cannot be allowed as deduction during the AY 2013-14. Hence, the CIT(A) upheld the disallowance made by the Assessing Officer of provisions towards gratuity.

5. Against this, the assessee is int appeal before us. The Ld. AR submitted that during the year, the assessee bank had claimed the following provision for expenses in its accounts:

Provision for gratuity to retired staff	Rs.29,28,621/-
Provision for leave salary to retired staff	Rs.17,46,510/-
Provision of bonus to retired staff	Rs. 37,000/-
Provision for Medical aid to retired staff	Rs. 2,385/-

It was submitted that these provisions were made for the staff who retired between 2010 and 2012 whose gratuity was reworked consequent to the increase in the gratuity limit from Rs.3.5 lakhs to 10 lakhs. It was submitted that these provisions were also made as per the directions of the Registrar of Co-operative Societies in order to comply with the RBI guidelines. According to the

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Ld. AR, these are actual ascertained liabilities crystallized during the year and was not a contingent liability. The Ld. AR filed the certificates in respect of gratuity and other provisions which were produced before the CIT(A) and the certificates showing the names of retired employees which were provided to the Assessing Officer but were not filed before the CIT(A).

5.1 The Ld. AR relied on the decision of the ITAT, Chennai Bench in the case of Indian Overseas Bank vs. DCIT in ITA Nos. 77 & 35/Mds/2014 dated 03/04/2017

6. The Ld. DR relied on the order of the lower authorities.

7. We have heard the rival submissions and perused the record. Admittedly, in this case, there was a provision for gratuity at Rs.29,28,621/- which was disallowed on the ground that it was not actually paid and also not ascertained. Before us, the Ld. AR submitted that gratuity is an ascertained liability in respect of retired employees and this is to be allowed. In our opinion, payment of gratuity is governed by the provisions of section 43B(b) of the I.T. Act which reads as follows:

> *"43B Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of –*
>
> > *(b) any sum payable by the assessee as an employer by way of "contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees;*

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7.1. In our opinion, the judgment relied on by the assessee in the case of Indian Overseas Bank cited supra cannot be applied to the present case as in that case, the Tribunal was concerned with allowability of provisions for leave encashment wherein it was held as under:

> *29.1 We have heard both the parties and perused the material on record. The same issue came for consideration before this Tribunal in ITA No.2031/Mds./2013 for assessment year 2010-11 (supra) wherein held that:-*
>
> > *"92. The next issue in the appeal of the Revenue is that Commissioner of Income Tax (Appeals) erred in allowing provision made for leave salary. The counsel for the assesses submits that this issue has been decided in favour of the assessee for the assessment year 2008-09 in ITA No, 1815/Mds/2011 dated 2.4.2013 at page 11 to 14 in para 6 of the order. The Departmental Representative supports the order of tile Assessing Officer in rejecting the claim of the assessee for allowing provision for leave encashment invoking the provisions of section 43B of the Act.*
> >
> > *93. We find that the co-ordinate Bench of this Tribunal in ITA No.l815/Mds/2011 dated 2.4.2013 allowed the claim of the assessee by sustaining the order of the Commissioner of Income Tax (Appeals) observing as under:-**
> >
> > > *"6. The fifth ground of appeal relate to allowablility of provision for leave encashment. The issue has already been adjudicated by the Tribunal in. ITA No.818/Mds/2010 relevant to the assessment year 2007-08 in the case of the* assessee, *wherein the Tribunal has held as under:-*
> > >
> > > > *"We have heard the submissions made by both the parties and have perused the orders of the authorities below and the judgments referred & by both the sides. The relevant extract of the provisions of section 43B(f) are reproduced herein below:-*
> > > >
> > > > > *"43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act respect of—*
> > > > > *a) xxxxxxxxxx*
> > > > > b)xxxxxxxxxx

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c)xxxxxxxxxx
d)xxxxxxxxx
e) xxxxxxxxx
(f) any sum payable by the assessee as *an employer in lieu of any leave at the credit of his employee,*

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him; Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."

21. The Hon'ble Calcutta High Court in the case of Exide Industries (supra) has held that the original enactment of section 43B of the Income Tax Act was to curb unreasonable deduction on the basis of the mercantile system of accounting without discharging statutory liabilities on the one hand and claim appropriate benefit under the Act on the other introduced the provisions of section 43B(f). Under clause (f) of section 43B any sum payable by the employer to its employees as leave encashment shall be deductible only in computing the income referred to in section 28 of that previous year in which the sum is actually paid by the employer to its employees." The Hon'ble High Court further held that "while inserting the clause (f) no special reasons were disclosed. Without such reasons the enactment is inconsistent with the Original provisions of that section. Although the disclosure of the reasons was not mandatory, but in the interest of justice, it was incumbent upon the legislature to disclose the reasons. The legislature must disclose reasons which would be consistent with the provisions of the Constitution and the laws *of the land and not for the sole object of nullifying the Supreme Court decision." The Hon'ble High Court further held that "section 43B(f) was liable to be struck down as arbitrary and*

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inconsistent and de hors the decision of Hon'ble Supreme Court of India in the case of Bharat Earth Movers Ltd. (supra)."

22. In the present case, the assessee has created provisions for leave encashment of Rs.27.68 crores. The learned AR has relied on the judgment of the Hon'ble Calcutta High Court in the case of Exide Industries Ltd. (supra) wherein the Hon'ble Court has struck down the provisions of sub-clause (f) of section 438. The Hon'ble Supreme Court of India in the case of Bharat Earth Movers Ltd. Vs. CIT reported as 245 ITR 428 answering to the question : "whether, on the facts and in the circumstances of the case, the provision for meeting the liability for encashment of earned leave by the employee is admissible deduction?" held as under-

"A few principles were laid down by this court, the relevant of which for our purpose are extracted and reproduced as under:

(i) For an assesses maintaining his accounts on the mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in the case of amounts actually expended or paid;

(ii) Just as receipts, though not actual receipts but accrued due are brought in for income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;

(iii) A condition subsequent, the fulfilment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability;

(iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be

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made in a subsequent year if it can be satisfactorily estimated.

So is the view taken in in Calcutta Co. Ltd. v. CIT [1959] 37 ITR 1 (SC) wherein this court has held that the liability on the assessee having been imported, the liability would be an accrued liability and would not convert into a conditional one merely because the liability was to be dis-charged at a future date. There may be some difficulty in the estimation thereof but that would not convert the accrued liability into a conditional one ; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case.

Applying the above said settled principles to the facts of the case at hand we are satisfied that the provision made by the appellant-company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date, is entitled to deduction out of the gross receipts for the accounting year during which the provision is made for the liability. The liability is not a contingent liability. The High Court was not right in taking the view to the contrary. The appeal is allowed. The judgment under appeal is set aside. The question referred by the Tribunal to the High Court is answered in the affirmative, i.e., in favour of the assessee and against the Revenue."

The Hon'ble Madras High Court following the judgment of the Hon'ble Supreme Court of India, dismissed the appeal of the Revenue in the case of CIT Vs. Panasonic Home Appliances reported as 323 ITR 344 wherein similar question was involved. In view of the ratio laid down in the above judgments, this ground of appeal of the assessee is allowed."

In view of the aforesaid findings, we allow this ground of appeal of the assessee."

94. Respectfully following the said decision, we uphold the order of Commissioner of Income Tax (Appeals) and reject the grounds of appeal of the Revenue on this issue."

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29.2 In view of the above order of the Tribunal, this ground raised by the Revenue is rejected."

7.2 However before us, the Ld. AR has placed reliance on the order of the ITAT, Pune Bench in the case of U.B. Engineering Ltd. vs. DCIT in ITA No. 1019 & 09/PN/09 dated 30/11/2010 wherein it was held as under:

"This issue is relevant to appeal Vide ITA No. 1019/PN/09 for the A.Y 2001-02. In connection with this issue, Ld. Counsel for the assessee filed a chart showing that the identical issue was covered in favour of the assessee by the decision of the Tribunal in the assessee own case for the A.Y 2003-04 vide ITA 381/PN/07 a copy of which is placed at page 1 of the paper book. In this regard, Ld. Counsel mentioned that para 4 to 7 are relevant. Ld. DR for Revenue relied on the relevant orders of the Revenue.

3. We have heard both the parties and perused the said order of the Tribunal and reproduced para 4 to 7:-

"4. The observation of the A.O was that the assessee had made a provision of the premium payable towards the policy taken by the assessee under the Group Gratuity Scheme of the LIC. According to A.O only a provision was made however the same was not actually paid during the year under consideration. Invoking the provisions of sec. 43B a show cause was issued as to why the said provision be not disallowed being not paid. The explanation of the assessee was as under:-

"The assessee has made provision of Rs. 38.22 lakhs being premium payable to Life Insurance Corporation for the year under consideration. The premium payable to LIC has not been added back in the computation of the income as required by sec. 43B(b) of the I.T. Act, 1951. In this connection, we invite your Honor's attention to Note No. 3 of the Income Tax Returns which reads as follows:-

'Provision for gratuity premium of Rs. 33.22 lakhs has not been disallowed under section 43B(b), view of the provisions of sec. 40A(7)(b). Assessee relies on the decision of ITAT Jabalpur Bench in the case of Mewar Sugar Mills Ltd. vs. DCIT reported in TTJ Volume-61 page 633 (copy enclosed)

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In this connection, the assessee also wishes to submit further on the subject as under:-

"For the F.Y. under consideration, provision for Gratuity Premium was made In the books. Though the provision for Gratuity is covered u/s. 43B(b), no disallowance has been made in view of the provisions of section 40A(7)(b)."

Provision of section 40A(7) are applicable only if the provision towards gratuity is made. The distinguishing factor is that the company has taken policy under /group Gratuity Scheme of LIC. Further, section 40A(7) in clause (b) categorically mentions that nothing in clause (a) shall apply in relation to-

i) any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund, or for the purposes of payment of any gratuity that has become payable during the previous year. The assessee submits that the Assessee's Gratuity Fund is managed by the LIC and is approved under the Income Tax Act.

Moreover, the premium payable to the LIC is based, not only on the wages bill but also takes into account the increment in salary, interest rate, mortality rate etc.

Assessee relies on the judgement of ITAT Jaipur Bench in case of Mewar Sugar Mills Ltd., Vs. DCIT 61 TTJ 63 and of Madras High Court in the case of Tuttapullam Estates Vs. CIT (1991) 191ITR 131 (Mad.), in which it was held that where the provisions of gratuity was not based on any actuarial valuation but on the basis of 15 days wages for each year of completed service and a group insurance policy had been taken with the Life Insurance Corporation, the assessee was held entitled to claim only the Incremental liability relating to the accounting year as a deduction."

5. However the A.O was not convinced and held that since the payment of gratuity fund was a liability of the employer therefore the provision was to be added back to the total income. Against the addition an appeal was preferred. It was explained that since the assessee was facing severe liquidity crunch and also facing non-cooperation from its bankers, therefore could not make the payment of premium of gratuity

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during the year under consideration. Further the reliance was placed on George Williamson (Assam) Ltd. v. CIT 228 ITR 343. Ld. CIT(A) was not convinced and upheld the addition.

6. We have heard both the sides in the light of the material placed before us and case laws cited. At the out set it is worth to mention that in the case of George Williamson (Assam) Ltd. v. CIT 228 ITR 343 (Gauhati) the identical issue had cropped up wherein it was held as under:-

> *"In case a provision is made for payment of gratuity to retiring employees in respect of the previous year, it is not necessary that actual payment has to be made. If such amount is earmarked for payment of gratuity, i.e., provision is made for payment of gratuity, the amount has to be allowed for deduction."*

7. Since the Hon'ble Court has held that a provision for payment of gratuity is earmarked for payment then such an amount deserves to be allowed as a deduction. Considering the totality of the facts and circumstances of the case we hereby follow the aforementioned verdict and direct the A.O to allow the claim."

4. Thus, from the above extract reproduced, it is evident that the provisions of sec. 40A(7)(b) are applicable to the assessee's claim. As such, the fund in question is an approved one. Therefore, the issue is covered by the above referred findings of the Tribunal for the A.Y 2003-04. We find no reason to interfere in the said order. Accordingly relevant ground of the assessee's appeals is allowed in his favour."

7.3 Further, it is pertinent to mention herein the order of the ITAT, Jodhpur Bench in the case of Jodhpur Central Co-operative Bank Ltd. vs. JCIT (37 CCH 342) wherein by following the judgment of the Supreme Court in the case of CIT vs. Test Tool Co. Ltd. (263 CTR 257), it was held that payments made by assessee-company directly to LIC towards gratuity fund was allowable.

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7.4 Further, the Gauhati High Court in the case of George Williamson (Assam) Ltd. vs. CIT (228 ITR 343) held that there are three modes of payment, namely, (1) having an approved fund, (2) by having a fund though not approved, and (3) when there is no fund but provision is made for payment of gratuity. In the first two cases payment has to be made and in the third case it is not necessary to make payment but a provision has to be made for such payment. U/s. 43B of the Act, the Legislature has specifically mentioned about fund. Therefore, the meaning as given in section 43B cannot be said to be the same as in section 40A(7)(b)(i) of the Act. Thus, in this case, provision was made for payment of gratuity to retiring employees in respect of the previous year, it is not necessary that actual payment has to be made. If such amount is earmarked for payment of gratuity, i.e., provision is made for payment of gratuity, the amount has to be allowed for deduction. In view of this, we are inclined to decide the issue in faour of the assessee and against the Department.

7.5 In view of the above judgments, we are inclined to decide the issue in favour of the assessee and against the revenue and the ground taken by the assessee is allowed.

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8. In the result, the appeal of the assesse is allowed.

Order pronounced in the open Court on this 06th February, 2019.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi
Dated: 06th February, 2019
GJ

Copy to:
1. The Thiruvalla East Co-operative Bank Ltd., P.B No.4, Eraviperoor, Thiruvalla-689 542.
2. The Income Tax Officer, Ward-3, Thiruvalla.
3. The Commissioner of Income-tax(Appeals), Kottayam.
4. The Pr. Commissioner of Income-tax, Kottayam.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin

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