

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'B' DELHI**

**BEFORE SHRI P.K.BANSAL, VICE PRESIDENT
AND
SH.C.M.GARG, JUDICIAL MEMBER**

**ITA No.2991/Del/2014
(ASSESSMENT YEAR: 2009-10)**

The Faridabad Central Co-op Bank Ltd., SCO-27, Sector-16, Faridabad. PAN-AAAFF2989B	vs	ACIT, Circle-1, Faridabad
(Appellant)		(Respondent)
Appellant by	None	
Respondent by	Sh.Anshu Prakash, Sr.DR	
Date of Hearing	18.10.2017	
Date of Pronouncement	18.10.2017	

ORDER

PER P.K.BANSAL, VICE PRESIDENT

This appeal filed by the assessee against the order dated 14.03.2014 of the CIT(A)-2, Faridabad relating to assessment year 2009-10 by taking as many as two grounds of appeal. None appeared on behalf of the assessee even though no notice was duly served. We, therefore, set aside to dispose the appeal after hearing the Ld. DR on merit. Ground No.1 relates to the sustenance of Rs.01 crore on account of provision for leave salary to the staff.

2. After hearing the Ld. DR and going through the tax authorities below, we noted that the said issue is duly covered by the decision of this Tribunal in "E" Bench in ITA No.4240/Del/2012 and other vide order dated 09.11.2015 in which one of us was the party in the decision, this Tribunal held as under:-

6. "We have carefully considered the rival submission and are of the view that with effect from 01.04.2002, clause (f) has been added in section 43B of The Income Tax Act which provides that deduction of provision of earned leave of employees made by the assessee shall not be allowed as deduction in computing the business income of the assessee provided such sum is actually paid. If same is not paid in the year of provisioning same shall be allowed subsequently in the year of payment. Hon'ble Calcutta High Court in Exide Industries Ltd. vs. Union of India, 292 ITR 470 has struck down the constitutional validity of section 43B(f) being arbitrary, unconscionable and de hors the facts Apex Court decision in the case of Bharat Earth Movers 245 ITR 428. Subsequently other Tribunal decisions cited by the Ld. AR are based on the decision of Hon'ble Calcutta High Court and deleted the addition. However, it has come to the notice of the bench that revenue has preferred an appeal against the order of Hon'ble Calcutta High Court and honourable supreme court has stayed it vide its order dated 08/05/2009 as under :-

"Pending hearing and final disposal of the Civil Appeal, Department is restrained from recovering penalty and interest which has accrued till date. It is made clear that as far as the outstanding interest demand as of date is concerned, it would be open to the Department to recover that amount in case Civil Appeal of the Department is allowed.

We further make it clear that the assessee would, during the pendency of this Civil Appeal, pay tax as if Section 43B(f) is on the Statute Book but at the same time it would be entitled to make a claim in its returns."

7. We are afraid we cannot agree with the views of ld. AR that addition may be deleted.

As rightly submitted by the learned AR, the provisions of section 43B (f) was struck down by the Calcutta High Court as arbitrary and de hors of the apex court judgment in Bharat Earth Movers (supra). It is also an admitted fact that the apex court has stayed the judgment of the Calcutta High Court in Exide Industries Ltd. (supra). Therefore, the correct position of law is that we should read the statute as if those provisions are there on the statute book. This Tribunal being a quasi-judicial authority has to decide the appeal only based on the provisions of section 43B (f) of the Act. In other words, the provisions of section 43B(f) cannot be ignored since the judgment of the Calcutta High Court in the case of Exide Industries Ltd. was stayed by the apex court. Therefore, the claim of the assessee could be allowed only if it is actually paid on the due date for filing the return of income. It is not the case of the assessee that the amount claimed as leave encashment was paid before the due date for filing the return of income. Our view is further strengthened by decision of Honourable Kerala high court where in it is held while considering identical facts and circumstances in case of South Indian bank limited V CIT 45 taxmann.com 428 (Kerala) that :- "6. Then coming to the second issue, it pertains to the provision made for leave encashment and the disallowance claimed was under Section 43B (f). As already stated above, the opinion of the CIT (Appeals) was set aside by the Tribunal in the light of the stay order of the judgment of the High Court of Calcutta in Exide Industries case (supra) and the SLP stated above is still pending. Therefore, the opinion of the Tribunal so far as disallowance claimed in respect of leave encashment under Section 43B(f) of the Act, as on today, the provision seems to be in force in the light of the stay order granted by the Apex Court in the SLP. Therefore, as long as Section 43B (f) is on Statute, the said disallowance is justified"

8. **Since the provisions made by assessee of leave encashment**

remains to be paid, we are of the considered opinion that the Commissioner of Income Tax (Appeals) has rightly confirmed the disallowance made by the Assessing Officer on unpaid leave encashment provisions applying provision of section 43B (f) of the Income tax Act.

9. During the course of hearing before us Ld. AR raised o another issue that the provision of leave encashment is not covered in section 43B (f) of the act but u/s 43B

(b) of the act which provides about 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.

10. We have considered the above argument but reject it at threshold because of the reason that leave encashment is not a scheme where employer and employee contributes but is a provision to be made according to accrual method of accounting where payment due to employees on their retirement or otherwise for their accrued leave for the tenure of the service. Further it is not for the welfare of the employees but it is wages due to the employees for the services rendered by them according to the terms of employment. It is also not a statutory payment but a contractual payment. Further finance Act 2001 has introduced section 43B (f) wherein leave encashment provision were covered, therefore it is apparent that earlier to that it was allowed on accrual basis irrespective of the year of payment.

11. Therefore in view of above appeal of assessee for all the three years are dismissed.””

3. The decision of the Co-ordinate Bench is binding on us, we accordingly confirmed the order of the Ld.CIT(A). Thus, Ground No.1 stands dismissed.

4. Ground No.2 relates to the sustenance of the disallowance of Rs.36,89,755/- on account of the deduction of the penalty interest.

5. We heard the Ld. DR and we noted that the Assessing Officer found that there was a difference of Rs.36,89,755/- in the profit as per the Profit & Loss A/c as per the computation of income. The assessee explained that the difference is due to the penal interest amounting to Rs.36,89,755/- which the assessee claimed as deduction as per computation of the income. The Assessing Officer noted that this interest is penal in nature, therefore, he disallowed the same. When the matter sent before the Ld.CIT(A), Ld.CIT(A) took the view that the said interest was

penal in nature and, therefore, confirmed the order of the Assessing Officer. In our view, the issue is duly covered by the decision of the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Company vs CIT 123 ITR 429* in which Hon'ble Supreme Court held while dealing with the same issues in respect of the sugarcane cess that such interest to be deductible on the ground that it was in reality part and parcel with the liability to pay cess and was not penalty accretion to the cess. Similar view has been taken by the Hon'ble Supreme Court in the case of *Dhampur Sugar Mills vs CIT 188 ITR 787* in which interest payable under the Sugarcane Regulation and Purchase Supply Act for delayed in payment of commission to the agents was held allowable. In the case of *CIT vs Modi Industries Ltd. 197 ITR 517*, interest payable on arrears of tax under the Uttar Pradesh Sugarcane Purchase Tax Act was held to be allowable. Similar view has been taken by Hon'ble Supreme Court in respect of interest for delayed payment of the sales tax in the case of *CIT vs Laxmi Devi Sugar mills 241 ITR 131*. In view of the said decision of the Hon'ble Supreme Court which were rendered subsequent to the decision referred to by the Ld.CIT(A), we hold that the interest paid by the assessee is compensatory in nature and accordingly set aside the order of the Ld.CIT(A) and delete the said addition.

6. In the result, the appeal filed by the assessee is partly allowed.

The order is pronounced in the open court on 18th October, 2017.

**Sd/-
(C.M.GARG)
JUDICIAL MEMBER**

**Sd/-
(P.K.BANSAL)
VICE PRESIDENT**

Date:- 18.10.2017
Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, JABALPUR