

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA**

Before: **Shri P.M. Jagtap, Accountant Member** and  
**Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A No. 632/Kol/2015**

A.Y: 2009-10

**West Bengal State  
Warehousing Corporation**

PAN: AAACW2341R

[Appellant]

**Vs.**

**D.C.I.T., Cir-2, Kolkata**

[Respondent]

For the Appellant

: Shri T.P. Kar, FCA, Id.AR

For the Respondent

: Shri Sallong Yaden, Addl.CIT, Id.Sr.DR

Date of hearing : 09-11-2017

Date of pronouncement : 14-12-2017

**ORDER**

**Shri S.S.Viswanethra Ravi, JM:**

This appeal by the Assessee is directed against the order of the Commissioner of Income Tax (Appeals), 1, Kolkata dt. 18-03-2015 for the A.Y 2009-10.

2. Ground no. 1 is relating to confirmation of disallowance of Rs.33,00,058/- made on account of provision for leave encashment by the CIT-A.

3. At the outset, the Id.AR submits that the issue in hand is squarely covered in favour of assessee by an order of this Tribunal on a similar issue in the case of Exide Industries Ltd supra dt. 30-08-2017 in I.T.A No. 1508/Kol/2012 for the A.Y 2007-08 and order dt. 20-01-2016 in ITA Nos. 189 & 1414/Kol/2007 for the A.Ys 2003-04 & 2004-05 and by the order dt. 15-09-2017 in assessee's own case ITA Nos. 951,952/Kol/2015 for the A.Ys 2006-07 & 2008-09 and in view of the same prayed that the issue involved may be restored to the file of AO.

4. On the other hand, the Id.DR did not controvert the above submissions of the Id.AR of the assessee.

5. Heard rival submissions and perused the material available on record. We find that this Tribunal in the case of Exide Industries Ltd *supra* decided the issue in restoring the matter to the file of the AO with a direction to await till the final decision of the Hon'ble Supreme Court in the case of *supra* by observing as under:-

"25. The issue raised in Ground No. 8 relates to the disallowance of 1.51 crores made by the Assessing Officer and confirmed by the Id. CIT(Appeals) on account of provision made by the assessee for leave encashment.

26. The assessee-Company during the year under consideration had made a provision of Rs.1.51 crores for leave encashment on the basis of an actuarial valuation and the same was claimed as deduction by relying on the decision of the Hon'ble Calcutta High Court in assessee's own case reported in 292 ITR 470 and the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers reported in 245 ITR 428. The Assessing Officer, however, disallowed the claim of the assessee for provision of leave encashment relying on the Clause (f) inserted in Section 43B by the Finance Act, 2001 w.e.f. 1<sup>st</sup> April, 2002. The Id. CIT(Appeals) confirmed the said disallowance. The assessee challenged the constitutional validity of Clause (f) inserted in Section 43B before the Hon'ble Calcutta High Court by way of a Writ Petition and although the same was initially dismissed by the Single Bench, it was admitted and ruled in favour of the assessee by the Division Bench of the Hon'ble Calcutta High Court by holding that the introduction of Clause (f) to Section 43B is ultra virus of the Act in the absence of disclosure of the objects and being inconsistent with the basic intent of Section 43B. Thereafter the Department filed the SLP against the decision of the Hon'ble Calcutta High Court and while admitting the same, the Hon'ble Supreme Court vide its judgment dated 08.09.2008 stayed the judgment of the Hon'ble Calcutta High Court until further orders.

27. At the time of hearing before us, the Id. Counsel for the assessee has contended that even though the decision of the Hon'ble Calcutta High Court holding Clause (f) of Section 43D as ultra virus is stayed by the Hon'ble Supreme Court while admitting the SLP filed by the Revenue, the same has not been reversed and this Tribunal, therefore, is bound to follow the same being a binding precedent. He has also contended that the decision of the Hon'ble Calcutta High Court was stayed by the Hon'ble Apex Court vide its judgment dated 08.09.2008 until further orders and there being another Interim Order passed by the Hon'ble Supreme Court on 08.05.2009, the stay granted earlier stands automatically vacated. A copy of the said interim order dated 08.05.2009 is placed on record before us, the contents of which are extracted below:-

"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 the 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".

28. We have carefully perused the Interim Order dated 8<sup>th</sup> May, 2009 passed by the Hon'ble Supreme Court in the matter. It is

*observed that the Hon'ble Apex Court in the said order has made it clear that the assessee, during the pendency of the Civil Appeal, would pay tax as if Section 43B(f) is on the Statute Book, but at the same time, it would be entitled to make claim in its return. Keeping in view all these developments, the Coordinate Bench of this Tribunal in the case of Dy. CIT -vs.- BLA Industries Pvt. Ltd. (ITA No. 1434/KOL/2012 dated 16.01.2015) has restored the similar issue to the file of the Assessing Officer with a direction to await till the final decision of the Hon'ble Supreme Court on the issue and then to decide the issue accordingly. Following the said decision of the Coordinate Bench, we restore this issue to the file of the Assessing Officer with the similar direction. Ground No. 8 is accordingly treated as allowed for statistical purposes.*

6. In view of above discussion, we remand the issue to the file of the AO to await till the final decision of Hon'ble Supreme Court on the issue. Ground raised by the assessee is allowed for statistical purpose.

7. Ground no. 2 is relating to confirmation of disallowance of Rs.22,37,863/- made on account of gratuity premium paid to LIC.

8. At the outset, the Id.AR of the assessee submits that the issue in hand is squarely covered in favour of assessee by the order dt. 11-05-2016 in assessee's own case ITA Nos. 1761-1763/Kol/2011 for the A.Ys: 2003-04, 05-06 & 07-08, the same is on record and referred to para 5 of the said order and prayed to allow the ground no. 2 raised by the assessee.

9. On the other hand, the Id. DR relied on the order of the CIT-A in confirming the action of the AO on this issue.

10. Heard both the parties and perused the record. We find that the Id. AR of the assessee has rightly pointed out that the issue in hand is squarely covered in favour of the assessee by the said order dt. 11-05-2017 in assessee's own case *supra*. The Tribunal vide order dt. 11-05-2016 has decided the issue in favour of assessee and the relevant portion of which is reproduced herein below:-

*"5. We find from the facts of the case that the assessee has applied for approval of gratuity fund and despite numerous reminders the CIT has not taken any action. We find that there is no fault on the part of the assessee and the CIT has not raised any dispute contrary to the application till date. We also find that the assessee has filed several reminders but of no avail. In such circumstances, we are of the view that there is no*

*fault on the part of the assessee and approval can be treated as deemed approval and assessee is allowed to take benefit of provision for gratuity. Accordingly, this issue of assessee's appeal is allowed."*

11. Following the same, we are of the view that the CIT-A was not justified in confirming the impugned addition. The same is liable to be deleted. Thus, ground no. 2 raised by the assessee is allowed.

12. Ground no. 3 is relating to confirmation of disallowance of Rs.44,621/- made on account of amortization of expenditure.

13. The Id. AR argued that the assessee incurred expenditure in constructing boundary wall on leasehold land. But, however, the AO arbitrarily disallowed the same by observing the cost of boundary wall is actually the cost of land. He also submits that the assessee is entitled to claim the cost of said expenditure by amortization. In support of the contention, the Id.AR of the assessee submitted that the assessee has claimed the depreciation on the boundary wall constructed to cover the entire land. The total cost incurred on construction is amortised in the form of depreciation over the period of the lease of 90 years since this expenditure is of revenue in nature. The AO treated the boundary wall construction as improvement cost to the land. The boundary wall is depreciated but the land is not. The Id. AR of the assessee before us drawn to the attention of accounting policy mentioned in the audited Balance Sheet, wherein the cost of boundary wall on leasehold land is amortised over the period of the lease. Accordingly, it is in the nature of depreciation being revenue in nature. In terms of section 32 the assessee is entitled to claim the depreciation towards cost of construction of boundary wall. Both the authorities (AO and CIT-A) were not correct in making such presumption that the cost of construction of boundary wall is the cost of improvement of land and in view of above, prayed to allow this ground of assessee.

14. On the other hand, the Id.DR submits that the issue in hand is squarely covered in favour of revenue vide para no. 7 of the said

order 11-05-2016 in assessee's own case supra and prayed to dismiss the ground no.3 raised by the assessee.

15. Heard both the parties and perused the record. We find that the Id.AR of the assessee before us submitted detailed submission in support of this claim. We find that the tribunal while deciding the same issue involved for the A.Ys 2003-04, 05-06 and 07-08 in assessee's own case supra held that the assessee is not entitled to claim amortization valuing the cost of construction of boundary wall on leasehold land and, therefore, uphold the findings of AO and CIT-A being capital in nature and the relevant portion is reproduced herein below:-

*"7. We have heard rival submissions and gone through facts and circumstances of the case. We find that the assessee claimed a sum of Rs.44,628/- being amortised value of cost of boundary wall on leasehold land for const of construction of boundary wall being expenditure of improvement of cost of land. The AO and CIT(A) dismissed the claim of the assessee. Before us, it was claimed that it is in the nature of depreciation and fixed amount of expenditure for the cost of boundary wall was equally spread over the period of lease. We find that the AO has taken the cost of boundary wall as cost improvement and the assessee has claimed the same as amortization of such expenditure but section 35D of the Act does not provide amortization of expenses which are capital in nature. Accordingly, we confirm the order of CIT(A) and this issue of assessee's appeal is dismissed."*

16. Following the same, we are of the view that the CIT-A was justified in doing so. We find no infirmity in the impugned order of the CIT-A in confirming the same on this issue. Thus, ground no. 3 raised by the assessee is dismissed.

17. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 14-12-2017

Sd/-  
**P.M. Jagtap**  
**Accountant Member**

Sd/-  
**S.S. Viswanethra Ravi**  
**Judicial Member**

Dated : 14-12-2017

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: West Bengal State Warehousing Corporation,  
6A, Raja Subodh Mullick Square, 4<sup>th</sup> Floor, Kolkata-13.
2. Respondent/Revenue: The DCIT, Cir-2, Aaykar Bhawan,  
P-7 Chowringhee Square, Kolkata-69.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order, Sr.PS/H.O.O

ITAT Kolkata