

आयकर अपीलीय अधिकरण “डी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

आयकर अपील सं./I.T.A. No.3369/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2007-08)

Dy. CIT-9(1)(2), Room No. 260A, 2 nd Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	बनाम/ Vs.	M/s. Aptech Limited A-65, Aptech House, MIDC, Andheri (E), Mumbai-400 093
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AADCA 0602 L		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Ram Tiwari
प्रत्यर्थी की ओर से/Respondent by	:	Shri Rutuja Pawar
सुनवाई की तारीख / Date of Hearing	:	04.01.2018
घोषणा की तारीख / Date of Pronouncement	:	01.03.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue is directed against the order by the Commissioner of Income Tax (Appeals) dated 29.04.2014 and pertains to the assessment year 2007-08.

2. The grounds of appeal read as under:

- i) “Whether on the facts and in the circumstances of the case, the Ld. CIT-(A) erred in deleting the penalty on the issue of provision for rebate claimed without appreciating the fact that the same was a mere provision and was

patently not allowable which amounts to furnishing inaccurate particulars in the return of income, thus liable for penalty?"

ii) "Whether on the facts and in the circumstances of the case, the Ld. CIT-(A) erred in deleting the penalty on the issue of provision for leave encashment without appreciating the fact that the same was not paid before the due date of filing of return of income as mandated by clause (f) of Section 43B of the IT, Act, thereby making a claim which is patently inaccurate, hence liable for penalty?" "

Apropos the issue of penalty on the issue of provision for rebate:

3. In this case during the course of assessment proceedings the assessee explained that in relation to the contract entered with Directorate of Education, National capital region of Delhi for imparting computer education and supplying related accessories the Directorate withheld certain payments on the ground of delayed installation of infrastructure, non-performance of infrastructure, faculty absenteeism etc. The assessee submitted that this loss was incurred in the ordinary course of conduct of its business. For its claim of rebate, the assessee relied on the decisions in the cases of *Prakash Cotton Mills Pvt Ltd v CIT* 201 ITR 684 (SC); *CIT v RD Sharam & Co.* 137 ITR 333 (Bom) and *Jamna Auto Industries v CIT* 299 ITR 92 (P & H). However, the Assessing Officer held that the claim of the assessee is in the nature of contingent liability as the contractual liability crystallizes only when the assessee agrees to pay. During the course of appeal before the Id. Commissioner of Income Tax (Appeals), the assessee submitted that it was not a provision for anticipated future liability, but was for a loss actually suffered by the assessee. The provision is nothing but short recoveries and no amounts have been received against the short deduction. The

disallowance of the claim of the assessee was confirmed by the Id. Commissioner of Income Tax (Appeals) for want of satisfaction of the requirement u/s. 36(2) of the Act.

4. On this amount, penalty u/s. 271(1)(c) of the Act was levied.

5. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) deleted the same by observing as under:

According to the appellant it made a bonafide claim as it had received short payment from Delhi Government. The claim of the appellant was based on judicial pronouncements. From the above discussion it is evident that there is no case for concealment of income or of furnishing inaccurate particulars of the same. The disallowance has been made only on the technical grounds. Hence levy of penalty in relation to this disallowance is not called for.

6. Against the above order, the Revenue is in appeal before us.

7. We have heard both the counsels and perused the records. We find that in the quantum appeal, this Tribunal vide order dated 06.10.2016 in M/s. Aptech Limited (in ITA No. 946 and other) has already deleted the quantum addition. Hence, when the quantum addition has already been deleted, the penalty levied thereon does not survive. Hence, we uphold the order of the Id. Commissioner of Income Tax (Appeals).

Apropos the issue of penalty of provision for leave encashment:

8. Brief facts on the issue are that in its accounts, the assessee made the provision for leave salary on the basis of the actuarial valuation. In this regard the assessee relied upon the judgment of Hon'ble Supreme Court in *Bharat Earth Movers Ltd. V*

CIT 245 ITR 428 (SC). It was the further contention of the assessee that clause (b) of Section 43B covers only the amount of leave salary due and payable to the employees retired/ resigned during the relevant previous year in respect of leave at the credit of such employees at the time of retirement/ resignation. The Assessing Officer placed reliance on clause (f) to section 43B to hold that any sum payable by the assessee as an employer, in lieu of any leave at the credit of his employees, shall be allowed only if it is actually paid. The assessee placed reliance on the decision of the Calcutta High Court in the case of *Exide Industries Ltd* 292 ITR 470 (Cal.) wherein it has been held that sub-section (f) is ultra vires the Constitution. The Id. Commissioner of Income Tax (Appeals) partly upheld the disallowance to the extent of Rs.19,00,417/- on the ground that the provision is a contingent liability and not ascertained and allowed the claim of the assessee to the extent of Rs.21,70,952/- only being the amount actually paid during the year. On this amount penalty was levied.

9. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) deleted the penalty by observing as under:

7.5.2 From the above facts it is seen that the appellant made a bonafide claim supported by the decision of Hon'ble Supreme Court in the case of *Bharat Earth Movers* and the provision relied upon by the Assessing Officer had been struck down by Hon'ble Calcutta High Court. From the above discussion it is evident that there is no case for concealment of income or of furnishing inaccurate particulars of the same as the disallowance in question has arisen entirely on account of a bonafide difference of opinion on this issue between the appellant company and the Assessing Officer.

10. Against the above order, the Revenue is in appeal before us.

11. We find that in the quantum appeal in assessee's own case as mentioned above, the Tribunal has restored this matter to the file of the Assessing Officer by observing as under:

27. We have carefully considered the rival submissions and perused the material placed before. We find that in the case of "Exide Industries Ltd" the Hon'ble Supreme Court has admitted the Special Leave Petition on the identical issue vide its order dated 8.5.2009 in SLP" (Civil No.22889/2008) allowing to file appeal by the revenue. We further find that the co-ordinate bench of the Tribunal in ITA No.5457/Mum/2013 (supra) following the decision of the Hon'ble Apex Court directed the AO to keep recovery of tax and interest in abeyance till the decision of the Supreme Court in SLP" (Civil No.22889/2008) of the department in the case of "Exide Industries Ltd" and it was further ruled by the Co-ordinate Bench that it would be open to the department to recover the outstanding demands in case the appeal of the department is allowed by the Apex Court. The operative part of the decision is reproduced below :

"9. In view of the observations of the Hon'ble Supreme Court, in our view, it will be proper to dispose of this appeal in the light of the order of the Hon'ble Supreme Court dated 08.05.2009 passed in the case of "CIT vs. Exide Industries Ltd." (supra). We therefore dispose of the present appeal with a direction that the assessee will pay the tax as if section 43B(f) is on the statute book, however, till the decision of the Hon'ble Supreme Court in the case of "CIT vs. Exide Industries Ltd." (supra), the Revenue will not recover the penalty and interest which may accrue till the decision of the appeal by the Hon'ble Supreme Court in the case of "Exide Industries Ltd." It would be open to the Department to recover the outstanding interest demand in case the Civil Appeal of the Department in the case of "Exide Industries Ltd." (supra) is allowed by the Hon'ble Supreme Court. Subject to our above observations, the matter is restored to the file of the AO to be adjudicated afresh as per the decision of the Hon'ble Supreme Court in the case of "Exide Industries Ltd." (supra)"

We find that the facts of the case before us is identical as decided by the coordinate bench in the decisions(supra) and therefore by following the decision of the bench respectfully , we restore the matter back to the file of the AO by setting aside the order of CIT(A) and decide the issue accordingly. The ground raised by the assessee is allowed for statistical purposes.

12. Since in the quantum appeal, the addition has been restored to the file of the Assessing Officer for fresh consideration, this penalty levied u/s. 271(1)(c) of the Act does not survive. Since the matter has already been remitted to the Assessing Officer, the issue of the penalty matter also stands remitted to the file of the Assessing Officer.

13. In the result, this appeal filed by the Revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 01.03.2018

Sd/-

Sd/-

(Ram Lal Negi)

(Shamim Yahya)

न्यायिक सदस्य / Judicial Member

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 01.03.2018

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai