

आयकर अपीलीय अधीकरण, न्यायपीठ – “D” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH: KOLKATA
 (समक्ष) श्री ए. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. Nos. 584 & 585/Kol/2017
Assessment Years: 2011-12 & 2012-13

Integrated Coal Mining Ltd. (PAN: AAACI5584L)	Vs.	Deputy Commissioner of Income-tax, Circle-6(1), Kolkata.
Appellant		Respondent

Date of Hearing	18.04.2018
Date of Pronouncement	26.04.2018
For the Appellant	S/Shri Bikash Chanda & Alok Goenka, ACAs
For the Respondent	Shri Arindam Bhattacharjee, Addl. CIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

Both these appeals filed by the assessee are against the order of Ld. CIT(A)-6, Kolkata dated 24.01.2017 and 24.02.2017 for AY 2011-12 and 2012-13 respectively. Since issues are common and facts are identical, we dispose of both these appeals by this consolidated order for the sake of convenience taking the lead case for AY 2011-12.

2. The sole ground to be decided in both the appeals is as to whether provision for leave encashment which has been debited in the P&L Account based on actuarial valuation to the tune of Rs.7,81,769/- and Rs. 4,71,454/- for AY 2011-12 and 2012-13 respectively would come under the ambit of provisions of sec. 43B of the Act.

3. The brief facts of this issue is that assessee debited a sum of Rs. 7,81,769/- in its profit and loss account towards provision for leave encashment based on actuarial valuation. The AO invoked the provisions of section 43B of the Act and sought to disallow the said provision as according to him, the same would be allowed as deduction only in the year in which the same is paid. On first appeal, the Learned CITA confirmed the action of the AO. Aggrieved, the assessee is in appeal before us.

4. The Learned AR relied on the decision of the Jurisdictional High Court in the case of Exide Industries Ltd. vs Union of India reported in 292 ITR 470 (Cal) wherein the provisions of section 43B (f) of the Act has been struck down as arbitrary. However he fairly conceded that the Hon'ble Apex Court though had stayed the operation of the judgement of Calcutta High Court initially but later, it had directed the assesses to comply with the provisions of section 43B(f) of the Act and pay taxes thereon but parallely claim deduction for leave encashment on provision basis, as an interim measure till the disposal of the civil appeal by the apex court. In response to this, the Learned DR vehemently supported the order of the lower authorities.

5. We have heard the rival submissions and gone through the fact and circumstances of the case. We find that it is relevant to get into the operative portion of the decision of the Calcutta High Court in the case of Exide Industries Ltd vs Union of India reported in 492 ITR 470. It was held as below:-

“11. In this regard the observation of the apex Court in the case of Bharat Earth Movers (supra) is quoted below:

The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain

Applying the abovesaid 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.

13. The appeal succeeds and is allowed. Section 43B(f) is struck down being arbitrary, unconscionable and de hors the apex Court decision in the case of Bharat Earth Movers (supra)".

It is observed that the revenue had preferred Special Leave Petition (SLP) before the Hon'ble Supreme Court against the judgement of Hon'ble Calcutta High Court. The Hon'ble Apex Court in SLP proceedings in CC 12060/2008 dated 8.9.2008 had held as under.-

*"The petition was called on for hearing today.
Upon hearing counsel the court made the following Order.
Issue Notice.
In the meantime, there shall be stay of the impugned judgement, until further orders."*

Later the Hon'ble Supreme Court in CC 22889 / 2008 dated 8.5.2009 had held as under:-

*"The petition was called on for hearing today.

Upon hearing counsel the court made the following Order

Delay condoned.

Leave granted.

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."*

In the aforesaid circumstances, we deem it fit and appropriate, in the interest of justice and fair play, to set aside this issue to the file of the AO to pass orders based on the outcome of the main appeal on merits by the Hon'ble Supreme Court as stated supra. Accordingly, the ground of appeals of assessee for both the years are allowed for statistical purposes.

6. In the result, both the appeals of assessee are allowed for statistical purposes.

Order is pronounced in the open court on 26.04.2018

Sd/-
(Dr. A. L. Saini)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 26th April, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Integrated Coal Mining Ltd., 6, Church Lane, Kolkata-700 001. .
2. Respondent – DCIT, Circle-6(1), Kolkata.
3. The CIT(A) Kolkata.
4. CIT Kolkata
5. DR, ITAT, Kolkata.

/True Copy,

By order,

Sr. Pvt. Secretary