

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।
**IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI**

श्री जॉर्ज माथन, न्यायिक सदस्य एवं
श्री एस जयरामन, लेखा सदस्य के समक्ष
**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.3165, 3166 & 3167/Chny/2017
निर्धारण वर्ष /Assessment Years: 2008-09, 2010-11 & 2014-15

M/s.TVS InfoTech Ltd.,
98 A, 7th Floor,
Dr. Radhakrishnan Salai,
Mylapore,
Chennai-600 004.

Vs. The Asst. Commissioner of
Income Tax,
Corporate Circle-3(1),
Chennai-600 034.

[PAN: AAACS 7746 L]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Mr.R.Vijayaraghavan, Adv.
: Mr.Srinivasa Rao, CIT

सुनवाई की तारीख/Date of Hearing
घोषणा की तारीख /
Date of Pronouncement

: 30.05.2018
: 30.05.2018

आदेश / O R D E R

PER BENCH:

The assessee filed these appeals against the orders of the Commissioner of Income Tax (Appeals)-9,Chennai, in ITA Nos.415(2013-14), 647(2013-14) and 296(2016-17) /CIT(A)- 11 dated 29.09.2017 for the AYs 2008-09, 2010-11 & 2014-15, respectively.

2. M/s. TVS Infotech Ltd., the assessee is in the business of software development and SAP implementation services. While making the assessments for the AYs 2008-09, 2010-11 & 2014-15, the AO found that the assessee claimed provision for leave salary as business expenditure relying on the decision of the Hon'ble Kolkata High Court in the case of M/s.Exide Industries Ltd. & Anr. Vs. Union of India & Ors. reported in (2008) 292 ITR 470. He disallowed such claim u/s.43B on the ground that the said expenditure is in the nature of contingent liability and the actual payment was not made during the respective Assessment Years.

3. Aggrieved, the assessee filed appeals for these Assessment Years, on this issue before the Ld.CIT(A). The Ld.CIT(A) confirmed the disallowance made in the respective Assessment Years.

4. Aggrieved, against the orders of the Ld.CIT(A), the assessee filed these appeals. Since the appeal grounds are common in all the appeals, the grounds related to the AY 2008-09 are extracted as under:

"1. The order of the Commissioner of Income Tax (Appeals) is contrary to Law, facts and circumstances of the case.

2. The Commissioner of Income Tax (Appeals) erred in confirming the disallowance of provision of Rs.5,25,000/- made towards Leave encashment for the year ended 31st March 2008.

2.1 The Commissioner of Income Tax (Appeals) ought to have appreciated that the provision of leave encashment of Rs.5,25,000/- was created based on actuarial valuation as per report obtained from consulting Actuary and that provision of Leave encashment was created in the books in line with AS-15 of employees benefits prescribed by ICAI.

2.2 The Commissioner of Income Tax (Appeals) ought to have followed the decision of the Chennai Tribunal in the case of Indian Overseas bank Vs. DCIT in ITA Nos.1803 and 1815/Mds/2011 dated 02.04.2013 (n para 6 at Page 11)

3. The Appellant craves Leave to adduce additional grounds at the time of hearing.

5. At the time of hearing, the Ld.AR invited our attention to the following portion of the order of the Ld.CIT(A):

7.2.3 I have carefully considered the observation of the AO and the submissions of the appellant. The decision of ITAT, Chennai in the case of Indian Overseas Bank, cited supra, is not applicable because in that case the Tribunal followed the Kolkata High Court decision in the case of Exide Industries Ltd, 292 ITR 470, whereas the Supreme Court stayed the order of the Calcutta High Court in Exide Industries Ltd., cited supra, vide petitions(s) for special leave to Appeal (Civil) No(s).22889/2008 dated 08.05.2009, which is reproduced 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.”

7.2.4 The Supreme Court though restrained the department from the recovery of the interest and the penalty but had made 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. Subsequently, the Kerala High Court in the case of Smith Indian Bank Ltd., 45 taxmann.com 428 held that the said payment must be allowed on actual payment basis and the relevant portion is reproduced as under:

“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 Excide 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.”

7.2.5 Since the Honourable Chennai Tribunal in the case of Indian Overseas Bank followed the decision of Calcutta High Court in the case of Exide Industries Ltd., which decision was stayed by the Hon'ble Supreme Court, the provisions of Section 43B(f) is in Statute and as held by the Kerala High Court in the case of South Indian Bank Ltd., cited supra, the sums have to be allowed only on actual payment basis and no provision which was not paid cannot be allowed, The decision of Bharat Earth Movers, 112 taxman 61, dated 09,08.2000 is also not applicable because the clause (f) of Section 43B was inserted subsequent to the said Supreme Court judgment. Therefore, disallowance of provision for leave encashment of Rs.9,41,721/- is hereby confirmed.”

and submitted that since the final disposal of the Civil Appeal in the case of M/s.Exide Industries Ltd. & Anr. Vs. Union of India & Ors. is pending before the Hon'ble Apex Court, this issue may be remitted back to the AO with the

same condition imposed by the Hon'ble Supreme Court in the case of M/s.Exide Industries Ltd. & Anr. Vs. Union of India & Ors. and when the decision on the question of law in that case becomes final, it shall be applied to the assessee's case.

7. We heard the rival submissions.

8. The AO/assessee shall follow the directions issued by the Hon'ble Supreme Court in the case of M/s.Exide Industries Ltd. & Anr. Vs. Union of India & Ors. in Appeal (Civil) No(s).22889/2008 dated 08.05.2009 as extracted, supra. When the question of law in the case of M/s.Exide Industries Ltd. & Anr. Vs. Union of India & Ors. becomes final, the AO shall amend the impugned orders conformably to such decisions as per Sec.158A of the Income Tax Act, 1961.

9. In the result, the above appeals filed by the assessee are treated as partly allowed for statistical purposes.

Order pronounced in the Open Court on May 30, 2018, at Chennai.

(जॉर्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य/JUDICIAL MEMBER

(एस. जयरामन)

(S. JAYARAMAN)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,

दिनांक/Dated: May 30, 2018.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF