

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : "A", BANGALORE**

**BEFORE SHRI A.K.GARODIA, ACCOUNTANT MEMBER
AND
SMT.BEENA PILLAI, JUDICIAL MEMBER**

**ITA No.2983(Bang)/2018
(Assessment Year : 2012-13)**

M/s Ador Fontech Ltd.
BEL View,
7, Haudin Road,
Bangalore-560 042
PANNo.AABCA1724H

Appellant

Vs

The Dy. Commissioner Income tax,
Circle-1(1)(1),
Bangalore

Respondent

**Appellant by : Shri V.K.Gurunathan, Advocate
Revenue by : Shri C.H.Sundar Rao, CIT**

Date of hearing : 25-06-2019

Date of pronouncement :

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER :

Present appeal has been filed by assessee against order dated 05/07/18 passed by Ld. CIT (A)-1, Bengaluru for assessment year 2012-13, on following grounds of appeal:

- 1) The learned CIT (A) erred on facts and in law in upholding the denial of deduction under Section 36(1)(iv)*

of the Act of the contribution made to the approved superannuation fund by name Cosmics Employees' Superannuation Fund by the Appellant.

2) The learned CIT (A) erred in upholding the disallowance of contribution made by the Appellant to the superannuation fund without appreciating that the said superannuation fund was constituted vide an irrevocable trust deed dated 24.12.1981 for the benefit of the employees of the Appellant-company and without appreciating that the Appellant-company did not have any control over the fund.

3) The learned CIT (A) erred in upholding the disallowance of contribution made to the approved superannuation fund without appreciating that the said superannuation fund was approved by the Commissioner of Income-tax, Bombay City-V, Bombay on 02.12.1986 with effect from 24. 12.1981.

4) The learned CIT (A) erred in upholding the disallowance of deduction under Section 36(1)(iv) in respect of the superannuation fund on the ground that no prior approval was sought for the amendments made to the deed of trust of the superannuation fund without considering that Rule 4(2) under Part B of Schedule IV of the Act only stipulates communication of the amendments to the AO

5) The learned CIT (A) erred in upholding the rejection of deduction under Section 36(1)(iv) without appreciating that the changes made in the superannuation trust deed were not material in nature and were made as per the direction of the CIT vide letter DT. B.C.T.IV/261/6/82-83 dated 23.07.1993.

6) The learned CIT (A) erred on facts and in law in upholding the denial of deduction under Section 36(1)(v) of the Act of the contribution made to the approved

gratuity fund by name Cosmics Employees' Gratuity Fund by the Appellant.

7) The learned CIT (A) erred in upholding the disallowance of contribution made by the Appellant to the gratuity fund without appreciating that the said gratuity fund was constituted vide an irrevocable trust deed dated 24.09.1981 (with effect from 01.01.1981) for the benefit of the employees of the Appellant- company and without appreciating that the Appellant-company did not have any control over the fund.

8) The learned CIT (A) erred in upholding the disallowance of contribution made to the approved gratuity fund without appreciating that the said gratuity fund was approved by the Commissioner of Income-tax, Bombay City-V, Bombay on 02.12. 1986 with effect from 01.01.1981.

9) The learned CIT (A) erred in upholding the disallowance of deduction under Section 36(1)(v) in respect of the gratuity fund on the ground that no prior approval was sought for the amendments made in the gratuity fund without considering that Rule 4(2) under Part C of Schedule IV of the Act only stipulates communication of the amendment to the AO.

10) The learned CIT (A) erred in upholding the disallowance in respect of contribution made to the above approved superannuation and gratuity funds without appreciating that in the scrutiny assessments of the Appellant-company for the earlier years from assessment year 2006-07 to 2010-11 (except asst.year 2007-08) the said contributions were allowed as deductions under Section 36(1)(iv) and 36(1)(v) of the Act respectively.

11) The learned CIT (A) erred in upholding the denial of deduction under Section 36(1)(iv) and 36(1)(v) by invoking the provisions of Section 40A(7) of the Act even though the Appellant had filed intimations of changes in

the deeds of trust deed to the jurisdictional Office in Bombay and made frequent requests for transfer of files of the funds from Bombay to Bangalore which have not been acted upon by the erstwhile jurisdictional Office at Bombay.

The learned CIT (A) erred in upholding the denial of deduction to the contributions made to the above approved superannuation and gratuity funds under Section 36(1)(iv) and 36(1)(v) respectively even though the AO has not denied categorically that the Appellant had not made any intimation of variations to the deeds of trusts of the superannuation and gratuity funds to the erstwhile jurisdictional AO/CIT.

For these and such other grounds that may be urged at the time of hearing, the Appellant prays that the appeal may be allowed”.

2. Brief facts of the case are as under:

Assessee is a company and filed return of income for A.Y 2012-13 on 28/09/2012, declaring total income of Rs.28,90,37,627/-.

The case was selected for scrutiny and notice under section under section 143 (2) was issued subsequently notice under section 142 (1) of the IT Act, 1961 along with questionnaire. In response to statutory notices, representative of assessee appeared and filed necessary details.

3. During course of assessee assessment proceedings, the Ld.AO noted that the assessee debited an amount of Rs.30,00,000/- and Rs.88,00,000/- as contribution towards recognized gratuity

fund and superannuation fund respectively. Assessee was accordingly asked to produce documentary evidence in respect of approvals of said gratuity and superannuation funds. Assessee in reply summarized as under:

Particulars	Gratuity fund	Superannuation fund
24.09.1981	Cosmic Employees gratuity fund created	Cosmic Employees Super-annuation fund created
20.10.1986	Supplementary Deed execu amending certain Rules and Regulation	Supplementary Deed executed amending certain Rules and Regulations
02.12.1986	Approval granted to the fund 01.01.1981 vide CIT, Bombay Bombay in F.No.BCTII/256/6/82 dated 02.12.1986	Approval granted to the fund 24.12.1981 Vide CIT, Bombay-V, Bombay in F.No.T.II/261/6/81-82 dated 02.12.1986.
31.03.1989	-do-	Second Deed of variation executed
05.08.1994	-do-	Third Deed of variation executed
30.12.1994	Second deed of variation	-do-
10.01.1997	A letter issued from ACIT, Trust Circle-3(1), Bangalore to furnish information u/s 133(6) about employees welfare fund managed by the assessee.	A letter issued from ACIT, Trust Circle-3(1), Bangalore to furnish information u/s 133(6) about employees welfare fund managed by the assessee.
03.02.1997	The assessee submits reply before ACIT, Trust Circle-3(12), Bangalore	The assessee submits reply before ACIT, Trust Circle-3(12), Bangalore
16.03.2004	A letter filed by assessee before CIT, Mumbai-V, Mumbai requesting to transfer this fund to Bangalore	A letter filed by assessee before CIT, Mumbai-V, Mumbai requesting to transfer this fund to Bangalore

4. It was submitted by assessee that subsequent to Commissioner's approval dated 02/12/1986, Assessee shifted its registered office to Karnataka and a fresh certificate of incorporation was issued by ROC Karnataka, consequent upon

change of name of assessee company from Cosmic Fontech Ltd., to Ador Fontech Ltd.,

5. Ld.AO observed that assessee made alterations to the rules, and Constitution, objects of trust, and same has not been intimated neither to assessing officer nor any approval has been taken from Commissioner.

6. The Ld. AO noticed that assessee had obtained approval of original trust deed dated 24/09/81 from CIT, Bombay on 02/12/1986 along with supplementary trust deed dated 20/10/86. Ld.AO observed that subsequent to this approval, been there has been two deeds of variation executed for gratuity fund and three deeds of Variation in superannuation fund, for which, no approval has been taken from prescribed authorities.

Ld.AO thus concluded that changes have been made to the fund deeds, for which no approval has been sought by assessee, and thus Ld.AO withdrew the approvals granted originally dated 02/12/1986. Ld.AO thus disallowed contributions made by assessee to Gratuity and Superannuation funds u/s.40 A(7) of the Act.

7. Aggrieved by addition made by Ld.AO, assessee preferred appeal before Ld.CIT(A), who upheld the addition made by Ld.AO.

8. Aggrieved by the order of Ld.CIT(A), assessee is in appeal before us now.

9. Ld.AR submitted that the appellant is a listed public limited company, manufacturing welding electrodes, accessories and equipments as also trading in specialized equipment. The appellant was initially registered as with the Registrar of Companies, Maharashtra. The appellant was operating as Cosmic Fontech Limited. The appellant has created a gratuity trust and Superannuation trust for its employees, as Cosmic Employees Gratuity Fund and Cosmic Employees Superannuation Fund, respectively, and approval for the same received from the Commissioner of Income tax, Bombay-V. The related copies of the approvals of the respective trusts are attached. The appellant changed its name to ADOR FONTECH LIMITED as also shifted its registered office to Bangalore and obtained necessary approvals from the concerned regulators. The appellant's income tax files were shifted from Mumbai to Bangalore, where it has been assessed for over the last decade

10. It has been vehemently submitted by assessee that Commissioner of Income tax, had vide his letter No. B.C.T.IV/261/6/82-83 dated 23.07.1993 required certain

amendments to be made to the Rules of the Fund, which was duly complied with by the Appellant. The Assessing Officer ought to understand that these amendments were effected at the directions of the Commissioner of Income tax and adherence to the terms and conditions of approval of the Trust. As per Rule 110 of Income Tax Rules, 1962 any changes to Terms and Conditions of Gratuity Fund can be made only with the prior approval of Id.CCIT and as these changes as has been requested by Id.CCIT, there is an understandable presumption that these changes are automatically stood approved by CCIT, unless a disapproval is intimated by Id.CCIT. Similarly as per Rule 94 of Income Tax Rules, 1962 any changes to Terms and Conditions of Superannuation Fund can be made only with the prior approval of Id.CCIT and as these changes are requested by Id.CCIT, there is an understandable presumption that these changes are approved by CIT. Income Tax Rule 83 mentions that application to CCIT shall be made by the Superannuation Trust as per Rule 95 read with Fourth Schedule of the Income Tax Act, 1961 and does not mention any time period with-in which the Application should be disposed off. Also there is no deeming provision in the Forth

Schedule and Income Tax Rules, which allows Assessing Officer to consider the Trust as Unrecognized till the application is disposed off.

On the Gratuity Trust, it was approved and during the course of renewal the application for name change and certain modifications in the Trust Deed was sought under Income Tax Rule 110. These changes can be effected only after the approval of Id.CCIT and there is no provision in the Act or Rules, which mentions that unless specifically Id.CCIT approved the Changes the Trust's Recognition is withdrawn. Ld. AR also submitted that it is only in case of PE Trust's Recognition can be withdrawn by CCIT under Income Tax Rule 79; however there is no such provision for Superannuation Trust and Gratuity Trust and hence the recognition once given cannot be withdrawn by keeping approval of Amendment of Trust Deed in abeyance.

Moreover, the Trust's Income Tax Returns are duly filed with the Status Approved" and has been processed by the Income Tax Department and hence the same cannot be deemed to be unrecognized Trusts.

11. Ld. AR contended that assessee complied with all requirements of the Statute, and hence the Assessing officer

has erred in disallowing the contributions made to the Employees Gratuity Fund and Superannuation Fund for the year ended March 31, 2012. Placing reliance to letter dated 03.02.1997, Ld. AR submitted that assessee vide its letter dated even date, requested Ld.CCIT, to accord approval for the changes in the names of the Employees trust funds and also for shift of the IT files to Bangalore and that necessary action is awaited from the Ld.CCII, Mumbai in this respect. On perusal of records placed before us, there is nothing on record to assume that the Commissioner of Income tax has withdrawn the recognition of the Gratuity and Superannuation trusts and therefore, in our view, Ld. AO erred in holding that view. Ld. AR submitted that in preceding assessment years, no such disallowance has been made by Ld.AO while passing assessment ordered, copies of which are enclosed in paper book at pages 80-92. Ld.AR submitted that assessment has been carried out in subsequent assessment years and therefore, of consistency, must be followed unless the approval originally granted is expressly revoked . Ld. AR thus submitted that changes made were submitted for approval vide letter dated 03.02.1997, which was awaited.

12. On the contrary, Ld. SR submitted that, it is mandatory to get approval of any amendments or changes that is made to fund deeds, from competent authority, failing which disallowance has to be made by Ld.AO. Referring to amendments made to fund deeds, Ld.SR.DR submitted that, changes made are substantial in nature, which require approval of Commissioner.

13. We have perused submissions advanced by both sides in light of records placed before us.

13.1 Facts in the present case that need be stressed in this behalf are that it was in 1986 that Commissioner of Income-tax Bombay, granted recognition to Gratuity and Superannuation funds maintained by assessee under relevant rules Income Tax rules. Subsequently in 1993, Commissioner Bombay suggested certain changes in trust deeds to the Funds, which was duly complied with by assessee as has been submitted before us. At this stage of assessee do not have a copy of the letter referred to herein above, wherein Ld.CIT suggested changes to be made in Trust deeds. Due to shift of office from Mumbai to Bangalore records has been misplaced. However, we are of considered opinion that the same, would be available in records with the revenue, and Ld.AO can verify the amendments made by assessee.

14. Ld. AR contended that, once recognition was granted by Commissioner of Income –tax to Gratuity and Superannuation Fund maintained by assessee under relevant rule and that such recognition was in force during relevant assessment years,

revenue authorities could not have disallowed deductions claimed, without there be an express revocation/cancelation by Ld.CIT(E).

15. He contends that, Rule 3 of Part C of Fourth Schedule of Rules 1963, is a complete code by itself and once Commissioner applied his mind and accorded permission for constitution of Gratuity fund and Superannuation Fund, so long as it is not revoked, it is conclusive and is binding on assessing authority and is bound to allow entire contribution made by assessee. In case assessing authority feels that recognition granted is not in accordance with Rules, only course open to it is to make reference to Commissioner to take appropriate action. In this case, assessing authority has not made any reference and, therefore, it is not open to go behind approval accorded by Commissioner, on the premise that amendment to Trust Deed under which the Funds have been created was not subject to approval of competent authority, being the jurisdictional Commissioner. Since there is no express written revocation of funds maintained by assessee for gratuity as well as superannuation, we are of the considered opinion that ratio laid down by *Hon'ble Supreme Court* in case of *Gestentner duplicators private limited vs CIT* reported in (1979) 1 *Taxman* 1. *Hon'ble Supreme Court* held therein that;

“12. Dealing next with the second question it seems to us clear that having regard to our view on the proper construction of the expression 'salary' occurring in rule 2(h) of Part A of the Fourth Schedule to the Act it must be held that the Tribunal was right in holding that the provident fund maintained by the assessee

satisfied the condition laid down in rule 4(c) of Part A of the Fourth Schedule and that question also must be answered in favour of the assessee and against the Revenue. However, we would like to make some observations with regard to the true impact of the recognition granted by the Commissioner of Income-tax to a provident fund maintained by an assessee. The facts in the present case that need be stressed in this behalf are that it was as far back as 1937 that the Commissioner of Income-tax had granted recognition to the provident fund maintained by the assessee under the relevant rules under 1922 Act, that such recognition had been granted after the true nature of the commission payable by the assessee to its salesmen under their contracts of employment had been brought to the notice of the Commissioner and that said recognition had continued to remain in operation during the relevant assessment years in question; the last fact in particular clearly implied that the provident fund of the assessee did satisfy all the conditions laid down in rule 4 of Part A of the Fourth Schedule to the Act even during the relevant assessment years. In that situation we do not think that it was open to the taxing authorities to question the recognition in any of the relevant years on the ground that the assessee's provident fund did not satisfy any particular condition mentioned in rule 4. It would be conducive to judicial discipline and the maintaining of certainty and uniformity in administering the law that the taxing authorities should proceed on the basis that the recognition granted and available for the particular assessment year implies that the provident fund satisfies all the conditions under rule 4 of Part A of the Fourth Schedule to the Act and not sit in judgment over it. There is ample power conferred upon the Commissioner under rule 3 of Part A of the Fourth Schedule to withdraw at any time the recognition already granted if, in

his opinion, the provident fund contravenes any of the conditions required to be satisfied for its recognition and if during assessment proceedings for any particular assessment year the taxing authority finds that the provident fund maintained by an assessee has contravened any of the conditions of recognition, he may refer the question of withdrawal of recognition to the Commissioner but until the Commissioner acting under the powers reserved to him withdraws such recognition the taxing authority must proceed on the basis that the provident fund has satisfied all the requisite conditions for its recognition for that year; any other course is bound to result in chaos and uncertainty which has to be avoided.”

16. In the light of the aforestated decision, we are inclined to set aside this issue to Ld. AO for due verification of the details regarding the amendment being suggested by Ld. CIT himself as per the letter referred to herein above from the records available with the revenue. Ld. AO shall 1st refer the case to Ld. CIT who shall carry out proper investigation in regards to the same and shall consider amendments carried out by assessee to the Fund deeds as per law.

17. Ld. AO shall then pass the assessment order considering the claim of assessee as per law. **Accordingly, grounds raised by assessee stands allowed for statistical purposes.**

In the result appeal filed by assessee stands allowed for statistical purposes

Order pronounced in the open court on

(A.K.GARODIA)
ACCOUNTANT MEMBER

(BEENA PILLAI)
JUDICIAL MEMBER

Dated: the

***am**

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

By Order

Asstt.Registrar

