

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 6579/MUM/2018 (A. Y: 2013-14)

M/s. Aditya Birla Sun Life AMC Limited {formerly known as M/s. Birla Sunlife Asset Management Company Ltd.,} One Indiabulls Centre, Tower-1 17 th Floor, Jupiter Mill Compound 841, S.B. Marg, Eliphinstone Road Mumbai – 400 013 PAN: AUMBO5956G	v.	Dy. Commissioner of Income-tax – 6(1)(2) Room No. 502, 5 th Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020
(Assessee)		(Respondent)

**Assessee by : Ms Manshi Padhiar &
Ms Aditi Gosalia**

Department by : Shri S. Michael Jerald

Date of Hearing : 14.11.2019

Date of Pronouncement : 22.11.2019

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals) – 12, Mumbai [hereinafter in short "Ld.CIT(A)"] dated for the A.Y. 2013-14.
2. Assessee has raised following ground in its appeal: -

“On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the action of the Assessing Officer of disallowing provision for leave encashment of ₹.51,41,483/- on the alleged ground that provisions of section 43B(f) of the Act are applicable and not ultra vires.”

3. At the outset, Ld. Counsel for the assessee submits that identical issue came up for consideration before the Tribunal in M/s. Aditya Birla Nuvo Ltd. v. ACIT in ITA.No. 659 & 615/Mum/2009 dated 30.06.2014 which is a sister concern of assessee for the A.Y. 2002-03 wherein the Tribunal decided the issue in its favour by allowing the claim of provisions for leave salary by following various case laws. Ld. Counsel for the assessee submits that facts being identical this year, the same may be followed. Ld. Counsel for the assessee further submits that the Tribunal in assessee's own case in ITA.Nos. 5457/Mum/2013 & 3027/Mum/2015 dated 30.06.2015 & 17.01.2017 for the A.Ys. 2010-11 & 2011-12 respectively set-aside this matter to the file of the Assessing Officer to decide the issue afresh after the decision of the Hon'ble Supreme Court in the case of Exide Industries Ltd. Copy of the orders are placed on record.

4. Ld. DR vehemently supported the orders of the Authorities below.

5. We have heard the rival submissions and perused the orders of the authorities below. On a perusal of the order of the Tribunal in ITA.No.

5457/Mum/2013 dated 30.06.2015, we find that identical issue came up before the Tribunal in assessee's own case for the A.Y. 2010-11 and the Tribunal decided the issue observing as under: -

"6. We have considered the rival submissions. It is correct that the decision of the Hon'ble Kolkata High Court in the case of "Exide Industries Ltd." (supra) has been stayed by the Hon'ble Supreme Court vide order dated 08.09.08 passed in SLP to Appeal (Civil) ...CC 12060/2008 wherein the Hon'ble Supreme Court has made the following observations:

"UPON hearing counsel the Court made the following ORDER

Issue notice.

In the meantime, there shall be stay of the impugned judgment, until further order."

7. We further find that the Hon'ble Supreme Court vide order dated 08.05.2009, passed in SLP (Civil No.22889/2008) while granting the leave to file appeal, has made the following observations:

"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."

8. A perusal of the above observations reveals that while accepting the petition for leave to file the appeal vide order dated 08.05.2009, the Hon'ble Supreme Court has directed that pending the hearing and disposal of the Civil Appeal, the Department is restrained from recovering penalty and interest which has accrued till date. It has also been made clear that it would be open to Department to recover the amount of outstanding interest demand in case the appeal of the Department is allowed. It has also been directed that during the pendency of the Civil Appeal, the assessee will pay tax as if section 43B(f) is on statute book but at the same time the assessee would be entitled to make a claim in this respect in its returns.

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).

6. Similarly, the Tribunal in ITA.No. 3027/Mum/2015 dated 17.01.2017 for the A.Y. 2011-12 following its earlier order for the A.Y. 2010-11 restored this matter to the file of the Assessing Officer with similar directions. Thus, following the earlier year order of this Tribunal we restore this issue to the file of the Assessing Officer with similar directions for the assessment year under consideration i.e. A.Y. 2013-14.

7. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on the 22nd November 2019

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Mumbai / Dated 22/11/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum