IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI

BEFORE SHRI MAHAVIR SINGH (VICE PRESIDENT) AND
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)

ITA No. 1642/MUM/2020
Assessment Year: 2016-17

Bank of India, 8th floor, Taxation Department, Star House, C-5, G Block, Bandra-Kurla Complex, Bandra (East), Mumbai-400051. **PAN No. AAACB 0472 C** **Appellant**	**Vs.**	The Pr. Commissioner of Income Tax-2, Room No. 344, 3rd floor, Aayakar Bhavan, M.K. Road, Mumbai-400020. **Respondent**

Assessee by	:	Mr. C. Naresh, AR
Revenue by	:	Mr. Rahul Raman, CIT-DR

Date of Hearing	:	31/08/2021
Date of pronouncement	:	22/11/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

This is an appeal filed by the assessee for the assessment year is 2016-17. The appeal is directed against the order u/s 263 of the Income Tax Act 1961, (the 'Act') passed by the Pr. Commissioner of Income Tax-2, Mumbai [in short 'Pr. CIT'].

2. Brief facts of the case are, the assessee filed its return of income for assessment year 2016-17 on 30.11.2016 declaring total income of Rs.844.77 crores. Thereafter, the assessee filed revised return of income on 31.03.2016 declaring loss of Rs.505.48 crores. The assessment u/s 143(3) of the Income Tax Act, 1961 (in short 'Act') was completed on 14.03.2019 determining total income at Rs.6532.98 crores.

2.1 In the process of examination of the assessment records, the Pr. CIT-2, Mumbai observed that assessment order dated 14.03.2019 passed by the Assessing Officer was erroneous as so far as it was prejudicial to the interest of the Revenue and according to him it required revision. Accordingly, the show cause notice dated 24.01.2020 were issued and served on the assessee. The Ld. Pr. CIT raised the following reasons for revisions in the show cause notice :

> *(i) From the Tax Audit Report clause 21(f), an amount of ₹1421,52,71,424/- paid by the assessee an employer was qualified as not allowable u/s 40(A)(9) of the Act. The Tax Auditor has stated that during the year under consideration the assessee Bank has debited Rs 1833, 10,62,361/- crores to the Profit and Loss Account towards contribution to approved Superannuation Fund (Pension Fund) which includes Rs 1378,39,00,000 on account of change in mortality table 10 1ALM 2006-08 to LIC 1994-96 in the course of actuarial valuation. The Tax Audit also qualitied that in the absence of employee wise data on contribution the amount in excess of 27% has been worked out on overall salary and contribution to pension fund for all the employees including employees who have already superannuated, which works out to ₹1421.53 crores. Further, in the Annual Report, the Managing Director and CEO in his statement mentioned that the Bank has switched from the old LIC table(94-96) to LAM 2006-08 which considers higher life expectancy. The net one time annual impact of this movement to the ILAM table is Rs 1412 crores during the year under consideration. This expenditure was stated to be non-recurring in nature. In Schedule 18(6.2) to Annual Accounts, disclosure on the same has been made. Thus considering the Tax Auditors specific qualification, disclosures made in the Annual Report and also considering the method of accounting (i.e. mercantile system of accounting), an amount of Rs 1421.53 crores was required to be disallowed. However, the assessee has not disallowed the same while computing the income. The assessment records also show that no such details are available on record. This has rendered the assessment order u/s 143(3) dated 14.3.2019 as erroneous in so far as it is prejudicial to the interests of the revenue.*
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> *(ii) In the Tax Audit Report under clause 26 (i) (B)(b), an amount of ₹21,69,48,914/- towards provision for bonus was stated not paid on or before the due date for furnishing the return of income u/s 139(1). Hence qualified as not allowable us 43B. Accordingly, the assessee has added this amount to the business income. It is observed that in the same clause, an amount of ₹47,92,48,882/- on account of provision for Leave Encashment was qualified as not allowable us 43B. However, this amount was not found to be added to the business income of the assessee thereby rendering the assessment order u/s 143(3) dated 14.03.2019 as erroneous in so far as it is prejudicial to the interests of the revenue."*

3. In response, the AR of the assessee attended the proceedings and made the following submissions on allowability of contribution to approved superannuation fund and provision for leave encashment:

> *"2.1 The Assessee Bank makes an annual contribution to an approved superannuation fund under a "defined benefit scheme" determined at the close of the year at the present value of the amount payable under the actuarial valuation technique. During the FY 2015-16, the Assessee Bank made a contribution to approved superannuation fund (pension tuna) of R 1833,10,67,361 which includes an additional amount on account of change in mortality table to IALM 2006-08 from LIC1994-96 in the course of actuarial valuation as per Accounting Standard 15 (AS-15) on Employee Benefits. A note to this effect was provided under Para 6.2(b) of the Notes to Accounts contained in the Annual Report for FY 2015-16.*
>
> *2.2 Section 36(1) (iv) of the Act provides that any sum paid as an employer by way of contribution to an approved superannuation fund subject to limits prescribed for approving the said fund shall be allowed as a deduction while computing income under the head Profits & Gains from Business/Profession (Business Income")*
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> *2.3 As per Rule 87, the ordinary annual contribution by an employer to a fund in respect of any particular employee shall not exceed 27% of his salary for the year as reduced by employer's contribution to any provident fund in respect of the same employee for that year.*
>
> *2.4 From a combined reading of Rule 87 and the definition of contribution, it may be inferred that Rule 87 seeks to limit only those contributions which are determined on an individual employee basis and credited to the individual account of each particular employee.*
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> *2.5 The Assessee Bank manages 2 types of schemes for the benefit of its employees: defined contribution scheme and defined benefit scheme. The contributions made by the Assessee Bank to employees who have opted for recognized provident fund (RPF) and national Pension Scheme (NPS) are under a defined contribution scheme" where the Bank makes a contribution of a defined % of the salary to the individual PF and/or NP'S accounts of the concerned employee. In such case, the quantum is certain and absolute. The approved superannuation fund managed by the Assessee bank is under a "defined benefit scheme".*
>
> *2.6 ... Thus, the Assessee Bank submits that the contribution to approved superannuation fund is credited to the account of the Fund and not to the individual account of the employee. As such, the Assessee Bank submits that provisions of Rule 87 limiting the ordinary annual contribution to the approved superannuation fund to the extent of 27% of salary of each employee does not apply in respect of contributions made by the Assessee*

Bank to its approved superannuation fund determined based on an actuarial valuation.

On the issue of allowability of provision for leave encashment:

3.6 In the instant case, the provision for leave salary is based on actuarial valuation, which is a scientific method of computing estimated liability towards leave encashment that the employees would be eligible to in future by considering various yardsticks. Since, this global provision is not "such sum payable in lieu of any leave at the credit of the employee" during the previous year, Section 43B(f) is not applicable in respect of such provision."

4. After considering the submissions of the assessee, the Pr. CIT rejected the contentions of the assessee by observing as under :

"8. The brief facts of the issue are that the assessee bank, in FY 2015-16 (AY 2016-17) contributed Rs. 1833 Crs. to its approved superannuation fund (Pension fund). It is submitted that this amount is arrived at on the basis of an actuarial valuation of pension liability as at 31.03.2016 and is as per Accounting Standard 15 (AS-15) on employee benefits. The mortality table used in such actuarial valuation was changed from LIC 94-96 to IALM 2006-08 resulting in an increase in the pension liability for the year. It is further submitted that this is a defined benefit obligation and is based upon actuarial valuation governed by AS-15. The assessee bank has charged this amount to the profit and loss account and indicated the same in notes to account at note no. 6.2 (b) as under :

> *The Bank has decided to adopt IALM 2006-08 table instead of LIC 1994-96 which was followed till last year in respect of employees benefits. The impact of such change in accounting estimates to the extent of actuarial gain or loss, due to change in mortality table, has resulted in increase in operating expenses by Rs. 1391.25 with consequential increase in net loss by Rs.909.77 (net of tax impact for the year.*

9. In the submissions filed by the assessee it is submitted that the claim of assessee is as per AS-15 and is allowable. Assessee has claimed that provisions of section 36(1) (iv) of the Act and Rule 87 of the Income Tax Rules are not applicable to them.

10. The assessee bank has submitted that provisions of section 36(1)(iv) and Rule 87 of the Act place restrictive limitations on the ordinary annual contributions to the individual accounts of the employees and do not apply to defined benefit schemes. It has placed reliance on the judgement of Hon'ble Bombay High Court in the case of CIT vs. Glaxo Smithkline Pharmaceuticals Ltd. (ITA No.2232/2011 dated 06.03.2013) as well as decision of TAT Hyderabad in the case of Andhra Bank (ITA No. 601 and 781). The submissions filed on behalf of the assessee along with the case laws relied upon are considered carefully. The facts about the issue are

narrated in the paras above. The assessee is required to prepare its books of account as per the applicable Accounting Standards and accordingly it has applied AS-15 to these transactions and worked out the amount to be charged to profit and loss account. However, the deductibility of different expenses is not determined as per Accounting Standards but as per the provisions of the income Tax Act, 1961. The section 36(1) (iv) of the Act read with Rule 87 of Income Tax Rules prescribe certain conditions for claim of deductions on account of contributions to the Approved Superannuation Fund. The provisions of Rule 87 are reproduced as under:

87. The ordinary annual contribution by the employer to a fund in respect of any particular employee shall not exceed 19/twenty-seven] per cent of his salary for each year as reduced by the employer's contribution, if any, to any provident fund (whether recognized or not) in respect of the same employee for that year.

11. However, the contributions made by the assessee to the approved superannuation funds have exceeded this limit by about ₹ 1421,52,71,424/- as pointed out by the Auditor in Tax Audit Report in form 3CD referred above. The qualifying remarks of the Auditor in the Audit Report are reproduced as under

> *"In the absence of employee-wise data on contribution, the amount in excess of 27% has been worked out on overall salary and contribution to pension fund for all the employees including employees who have already superannuated which works out to R$.1421,52,71,424/- In the opinion of the management no disallowance is called for on the basis of the decision of Hon'ble Bombay High Court in the case of CIT vs. Glaxo Smithkline Pharmaceuticals Ltd. (ITA No. 2232/2011 dated 06.03.2013) as well as decision of ITAT Hyderabad in the case of Andhra Bank (ITA No. 601 and 781).*

12. The assessee has submitted that it is not possible for it to allocate the contributions to the individual account of each of the employee and the Assessee Bank instead deposits the lump sum contribution to the approved superannuation fund. And the assessee has relied on the actuarial valuation to determine the amount of such contribution. Having held that the taxable income has to be computed as per the provisions of the Income Tax Act and Accounting Standards do not override the provisions of the Income Tax Act, it is again observed that actuarial valuation has served the purpose of determining the quantum of deposits to be made and not the amount to be claimed as deduction or not.

13. As per the remarks of the Auditor reproduced above, the Assessee Bank is claiming deduction principally on account of the judgement of Hon'ble Bombay High Court and decision of ITAT Hyderabad in the cases cited supra. The facts about the case of CIT vs. Glaxo Smithkline Pharmaceuticals Ltd are different from the facts of the case of the assessee. In the case cited, the Hon'ble Bombay High Court gave the decision in

favour of the assessee chiefly relying on and following their own decision in the case of CIT Vs Western India Paper and paperboard Private Limited (189 IT 309). In the latter case the facts are that the company paid contributions to the provident fund of the directors and claimed it as deduction u/s 36(1) (iv) of the Act. On appeal at the stage of High Court, it was held to be not allowable by the Hon'ble Bombay High Court in the decision reported in 137 ITR 525. Thereafter, the Tribunal referred the question of law to the Hon'ble High Court as to whether the said expenditure, if not allowable u/s 36(1)(iv) of the Act is allowable u/s 37 of the Act. To this question, the Hon'ble High Court affirmed in the affirmative as below:

> *5. We are inclined to accept the assessee's contention that the assessee's claim under section 37 requires to be considered in view of the fact that the question was specifically left open by our Court in Western India Paper & Board Mills' case (supra) and in the judgment for the assessment year 1970-71 this question was not brought to the notice of the Court. We need hardly mention that so far as the question of allowance of the claim under section 36(1)(iv) is concerned, our Court's judgment in Western India Paper & Board's case (supra) is binding on us, following which we hold that the assessee's claim under section 36(1) (iv) was rightly rejected. However, so far as the claim under section 37 is concerned, we find ourselves in agreement with the Tribunal that if the assessee's contribution towards provident fund in respect of salaries paid to the managing directors is not to be treated as provident fund contributions, it has to be treated as some kind of payment in addition to the salaries paid to the managing directors. The pertinent question, therefore, would be whether such a payment which will include salaries as well as the contributions towards provident fund, is a business expenditure incurred by the assessee wholly and exclusively for the purposes of his business. In view of the Tribunal's observations broadly reproduced by us earlier, with which we are in agreement, we have no difficulty in holding that the payments made herein were exclusively for the purposes of the assessee's business and, therefore, represented an allowable deduction.*

14. Thus, the Hon'ble Bombay High Court has allowed the said deduction claimed as contribution to provident fund as deduction on account of salary expenses. The facts in this case are clearly distinguishable from the ones in the case of assessee as below:

- *i. The expenses in the case of Assessee Bank are determined as per actuarial valuation and in such valuation there is an element of uncertainty and guesswork and hence cannot be treated as salary expenses which is a very certain liability*

ii. *In the case decided by Hon'ble High Court referred above, the amount was entirely claimed as deduction so this expenditure was not partly claimed u/s 36(1) (iv) and partly u/s 37 whereas the Assessee Bank is claiming the amount of Rs.1421.52 crores u/s 37 and rest of the amount u/s 36(1) (iv) of the Act.*

iii. *In case of assessee the Auditor himself is qualifying the amount as not allowable.*

In view of this, reliance of the Assessee Bank on the judgement cited by them is not correct.

15. Further, such expenses are allowed as deductions u/s 37 of the Act, nature of which is NOT described in sections 30 to 36. The nature of expenditure of assessee viz. contribution to approved superannuation fund is specifically dealt with in section 36(1) (iv) of the Act and assessee is also claiming a part of it (i.e which is excessive of the limits in Rule 87 discussed above) as deduction under the said section.

16. The facts of the case in ITAT Hyderabad in the case of Andhra Bank (ITA No. 601 and 781 also differ from the case of the Assessee Bank in that those cases relate to the issue of Fringe Benefits Tax and not the deductions u/d 36(1) (iv) of tine Act.

17. In view of the observations made above, the submissions of the assessee on the merits of issues involved are not acceptable and the assessment is held to be erroneous in so far as it is prejudicial to the interests of revenue within the meaning of section 263 of the Act. Deduction of provision for leave encashment.

18. It is observed that the Tax Audit Report contained the observation that an amount of R 47,92,48,882/- on account of provision for Leave Encashment was not allowable u/s 43B. However, this amount was not found to be added to the business income of the assessee in the computation of income and the Assessing Officer also has not made any enquiries in this regard. During the proceedings of revision, the assessee submitted that such an amount is claimed as deductions after actuarial valuations and it is correctly claimed.

19. The deductions claimed by the assessee are squarely covered by section 43B(f) of the Act. The assessee has not made the payments of such amounts but claimed the same as provisions. Clause (f) of section 43B of the Act was challenged and the Hon'ble Calcutta High Court had struck off the said section in the case of Exide Industries Ltd. Vs Uol 292 TR 470. However, subsequently the decision of Calcutta High Court is stayed by the Hon'ble Supreme Court and the law as contained in section 43B (f) stands. Therefore, the Assessing Officer was required to carry out enquiries into this issue which he has not done and hence the assessment is rendered erroneous in so far as it is prejudicial to the interests of revenue."

4.1 On the basis of above observation, the Ld. Pr. CIT held that the order passed by the AO u/s 143(3) is erroneous and in so far as it is prejudicial to the interest of the Revenue, within the meaning of the provisions of Explanation 2 to section 263 and accordingly, the order was set aside with the direction to pass a fresh assessment order after making due inquiries and verification.

5. Aggrieved, the assessee is in appeal before us raising following ground of appeal :

> *On the facts and in the circumstances of the case and in law, the Hon'ble Principal Commissioner of Income-tax - 2 ['PCIT"] has erred in invoking provisions of Section 263 of the Income-tax Act, 1961 ("the Act) and holding that order passed us. 143(3) dated March 14, 2019 is erroneous in so far as it is prejudicial to the interests of revenue. The Appellant Bank prays that the initiation of revision proceedings u/s. 263 is without jurisdiction and bad in law and the resultant order passed u/s. 263 dated March 12, 2020 be quashed accordingly.*

6. At the time of hearing, the Ld. AR of the assessee submitted that in the given case, there are two issues involved one relating to provision for pension and second provision for leave encashment. With regard to provision for pension, he brought to our notice page 5 of the Paper Book in which assessee has submitted notes to computation of income (Note No. 1.16) before the Assessing Officer and also assessee has submitted detailed submissions before AO in response to notice u/s 142(1) of the Act and he brought to our notice Annexure to such response submitted before AO and he specifically brought to our notice Annexure 12 of the provision for pension. He explained from the notes submitted before Assessing Officer that assessee has on regular basis followed LIC 94-96 mortality table to arrive at the actuarial valuation till financial year 2014-15 and for the financial year 2015-16, the assessee decided to adopt IALM 2006-08 table and accordingly as per the actuarial valuation of the pension for the year

has increased. The increased commitment is due to the fact that there is a short provision for the contribution to approved superannuation fund. The increase in liability is due to change in adopting new mortality table. The Ld. Pr. CIT cannot apply the restrictions specified u/s 36(1)(iv) r.w.s. 87 in the given case. Considering the fact that the specified restriction u/s 36(1)((iv) is for ordinary annual contribution, the assessee has made the superannuation payment based on the actuarial valuation report. Therefore, it is an admissible operative expenses for the assessee. For this purpose, he relied on the decision of ACIT v. Glaxo Smithkline Pharmaceuticals decision of the Co-ordinate Bench in ITA No. 6444/2007 dated 28.01.2011 and he brought to our notice page 34 of the Paper Book in which the jurisdictional High Court has upheld the decision of the ITAT. He also brought to our notice para 13 of the 263 order and submitted that Ld. Pr. CIT distinguished the Glaxo Smithkline Pharmaceuticals (supra) case with the observation that the amount was entirely claimed as deduction so this expenditure was not partly claimed u/s 36(1)(iv) and partly u/s 37 whereas the assessee-bank is claiming the amount u/s 37 and rest of the amount u/s 36(1)(iv) of the Act.

With regard to the provision for leave encashment, the Ld. AR made the similar submissions which he made for provision for pension and he relied on the decision of Aditya Birla Nuvo Limited. v. ACIT (4220/M/2015) and decision in the case of Bharat Earth Movers v. CIT 245 ITR 428 (SC).

7. On the other hand, the Ld. DR relied on the order passed by the Pr. CIT u/s 263 of the Act.

8. We considered the rival submissions and material placed on record. While verifying assessment records, the Ld. Pr. CIT came through the audit objections raised by the statutory auditors of the company in which

statutory auditors have flagged the expenditure claimed by the assessee on provisions of contribution to pension and provision of leave encashment. It is fact on record that the Assessing Officer has asked for several information through notice u/s 142(1) specifically on provision for pensions, the assessee has filed relevant information which was available on the published financial statement and assessee has specifically submitted a note on provision for pension explaining the necessity of creating the provisions based on the actuarial report. This has necessitated due to the fact that the assessee has moved from the existing LIC 94-96 mortality table to adopt IALM 2006-08 mortality table because of which the contribution to approved superannuation was short to the extent of Rs.1391.25 crores. Considering the fact on record, we observed that similar issue came up before Co-ordinate Bench of this Tribunal in Glaxo Smithkline Pharmaceuticals (supra) wherein, the Co-ordinate Bench held as under :

> *"++ that the only limitation for quantum of deduction under section 36(1) (iv) is towards initial contribution and for ordinary annual contribution. The amounts paid in excess of the 27% of salaries of the employees, are neither towards the ordinary annual contribution nor towards the initial contribution. It was paid due to shortfall discovered in the course of actuarial valuation of the fund, and is in the nature of a one-time exceptional payment to ensure that the superannuation fund is able to discharge its obligation. Limitations placed under rule 87 relevant for 'ordinary annual contribution', as have been invoked in this case, cannot be pressed into service in such a case. The disallowance under section 36(1) (iv) read with Rule 87 do not come into play in the case of a payment to make good the shortfall, on the basis of actuarial valuation, in the superannuation fund. Thus no disallowance can be made."*

8.1 Respectfully following the above decision, we noticed that even in the given case there was a shortage of contribution to the fund based on the actuarial valuation report and even assessee has contributed to the above fund based on the above said report. Therefore, the expenditure claimed by

the assessee is allowable under Income Tax Act u/s 37 of the Act. Hence, we are in agreement with the submissions of the Ld. AR on this aspect.

Coming to the next issue of provision for leave encashment, we observe that the assessee has claimed an amount of Rs.47.92 crores on account of provision for leave encashment. Based on the fact on record, we noticed that the assessee has not made the payment during this year and rightly statutory auditor has flagged this expenditure which is not allowable u/s 43B. We noticed that Ld. AR heavily relied on the case of Glaxo Smithkline Pharmaceuticals (supra) and we observed that the Hon'ble Supreme Court upheld the constitutional validity of section 43B(1) of the Act and wherein it has accepted the decision of Hon'ble Calcutta High Court. Therefore, as far as this issue is concerned which is against the assessee and the Assessing Officer should have verified the issue in detail. We do not see any submission or any inquiry made by the Assessing Officer on this aspect. Therefore, in our considered view, to the extent of this issue which is against the assessee, we uphold the observations of the Ld. Pr. CIT in this regard and the order passed by the Pr. CIT u/s 263 is stayed to this expenditure.

Accordingly, the grounds raised by the assessee against the order passed u/s 263 is partly allowed.

9. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open Court on 22/11/2021.

Sd/-	Sd/-
(MAHAVIR SINGH)	(S. RIFAUR RAHMAN)
VICE PRESIDENT	ACCOUNTANT MEMBER

Mumbai;

Dated: 22/11/2021
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :
1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai