

**INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'A' BENCH, MUMBAI**

**[Coram: Pramod Kumar, Vice President
and, Kavitha Rajagopal, Judicial Member]**

ITA No.: 1820/Mum/2020
Assessment year: 2015-16

Lotus Labs Pvt Ltd **Appellant**
*10th floor, D Wing, Tower II, Seawoods Grand Central
Plot No. R-1, Sector 40, Seawoods Railway Station
Navi Mumbai 400 706 [PAN: AAACL5328D]*

Vs.

Deputy Commissioner of Income Tax **Respondent**
Circle 4(1)(1), Mumbai

Appearances:

Jay Bhansali *for the appellant*
Mehul Jain *for the respondent*

Date of concluding the hearing : 27/05/22
Date of pronouncing the order : 26/08/22

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee-appellant has challenged the correctness of the order dated 22nd November 2018 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2015-16.

2. There is a delay of 596 days in the filing of this appeal inasmuch as while the learned CIT(A)'s order was served on the assessee on 19th December 2018, and the due date of filing the appeal before us, therefore, was 17th February 2019, the appeal was filed only on 5th October 2020. However, so far as the period from 15th March 2019 to 5th October 2020 is concerned, the same is required to be excluded in the light of the spirit of the provisions of the Taxation and Other Laws (Relaxations and Amendments of Certain Provisions) Act 2020 read with Hon'ble Supreme Court's *suo motu* judgment providing for relaxation of time limits etc. That leaves us with the period of 17th February 2019 to 15th March 2019, which has been explained, duly supported by an affidavit, on account of the shifting of the office and change of consultant, as also non-receipt of a signed copy of the learned CIT(A)'s order. On a perusal of the petition, and having heard the parties on the same, we are satisfied with the bonafides and reasons of delay in filing of the appeal. We, therefore, condone the delay, and proceed to decide the matter on merits.

3. Grievance raised by the assessee-appellant is as follows:

1. The Commissioner of Income Tax (Appeals) [hereinafter referred to as "the CIT(A)] erred in upholding the action of the Assessing Officer [hereinafter referred to as "the AO"] in disallowing provision for expenses of Rs. 9,73,500/- as being contingent in nature. The reasons given are wrong, contrary to the facts and circumstances of the case and against the provisions of law.

4. Briefly stated, the relevant material facts are as follows. During the course of the scrutiny assessment proceedings, the Assessing Officer disallowed a provision of Rs 9,73,500 towards legal and professional charges on the basis of the following reasons:

3.1 During the course of the scrutiny proceedings, it was seen that the assessee had claimed expenses towards provision for expenses under "Legal and Professional charges" amounting to Rs.9,73,500/-. The Authorized Representative was asked to substantiate why such provisions should not be disallowed as the invoices were not even raised during the year. The Authorised Representative has submitted his reply vide letter dated 13/09/2017 which is reproduced as under:

"We wish to submit following as per the Notice issued by your goodself for the subject AY under section 142(1)

- Why provision made for Legal & professional charges should not be disallowed

We had created a provision of Rs.973,500/- for the below mentioned expenses under the head Legal and Professional charges' during the AY 2015-16 and the same had been claimed as deduction under section 37 of the Act.

Sl No	Nature of Expenses	Particulars	Service Provider	Amount of provision
1	X-Ray Technician	X-Ray Charges	Dr Suresh	3,500
2	Tax Audit	Audit Ending Mar 2015	MGB & CO	2,50,000
3	DRP Proceeding	DRP Proceeding AY 2011-12	Ernst & Young	4,20,000
4	Transfer Pricing- Proceeding	TPO AY 2012-13	Ernst & Young	3,00,000
	Total Professional Charges			9,73,500

We wish to submit that it follows mercantile system of accounting and provides for all expenses incurred during the subject AY 2015-16. We also wish to mention that provision or the above expenses has been created on the basis that the Company has incurred such expenditure during the AY 2015-16 and the same is also in accordance with the applicable Accounting Standards being consistently followed by the Company.

Based on the above, we wish to submit that the above provision or Legal & professional charges is not an ad-hoc provision but is a provision pertaining to AY 2015-16 and hence allowable as deduction during such AY."

3.2 The submissions of the assessee have been examined and the assessment is concluded as follows. The assessee has booked the provisions towards the expenses mentioned above during the year although the invoices for the same have not been raised. It is not ascertainable how the assessee has arrived at such an exact' expense even in the absence of an invoice. In other words, the assessee have arrived at an estimate and the provisions arrived at cannot be an ascertainable expense. In the present case, there is absence of an invoice, hence the exact amount cannot be ascertained and it becomes contingent in nature. In the light of the above, the provisions are hereby disallowed. Therefore, amount of Rs. 9,73,500/- is disallowed and added back to the income returned.

(Disallowance: Rs. 9,73,500/-)

Since the above disallowance, attracts penal provisions, penalty proceedings u/s 271(1)(c) of the income-tax: Act, 1961 is initiated separately for concealment of income and furnishing inaccurate particulars of income.

5. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) but without any success. Learned CIT(A) also confirmed the action of the Assessing Officer, and, while doing so, observed as follows:

7. I have considered the grounds of appeal, statement of facts, written submissions filed during the course of hearing and also perused the assessment order. The assessing officer has observed that the provisions booked towards the expenses during the year although the invoices for the same have not been raised are not ascertainable and questioned how the assessee has arrived at such an 'exact' expenses even in the absence of an invoice. The appellant had arrived at an estimate the provisions which cannot be an ascertainable expenses. Therefore, in the absence of an invoice, the exact amount cannot be ascertained and it becomes contingent in nature. I have carefully considered the submission made by the appellant and also perused the case laws relied on by the appellant. The appellant submitted that it had created the above mentioned provision on the basis of agreement/ expenses incurred in the earlier years and the services received from the service providers, and has received the invoices from the service providers in subsequent years. Further, submitted that it has availed services from the above mentioned service providers even in the previous years and hence provision was made during the subject AY on best estimate basis as per the accrual/ mercantile basis of accounting followed by the Appellant and based on the agreement entered with the service providers. No doubt that the estimate made by the appellant for creating the provision for payment of certain expenses has to be reasonable and to the possible extent to the reality and can be created as per accounting standards. However, the assessing officer observation that though the provision was created for certain expenses which are not ascertainable and not incurred in order to claim under u/s 37 of the Ac. Therefore, the AO has treated such expenses as contingent liability since there was no invoice raised and the provision created was not a expenses which ascertainable and incurred. Whereas, the AR of the appellant submitted that on the best estimate the provision was created in accordance with accounting standards. When AR was asked as to where and when the services received in the year under consideration and as to why you should be treated as not pertaining to this year, he took me to submissions page 6 para 2.1.2 explaining the requirement of accounting standard and provisions of section 37 which provides that the expenses related to the relevant year has to be accounted in the books in that year itself irrespective of the invoice received or services received. Further the appellant has put-forth an alternate argument that if the provision is not allowed in this year at least it should allowed in the subsequent year in which the invoices are received. When the AR was asked if the subsequent payment is less than the provisions created what would be the treatment, he explained that the excess provision would be reversed. As the appellant itself has been

admitting that the invoices not raised for such expenses shown as provision created clearly indicate that they are not ascertain that therefore the unascertained liability cannot be allowed as expenses incurred during the under consideration, Therefore, the expenses claimed have been rightly disallowed by the assessing officer and the AO's action is hereby upheld. The ground No. 4 is treated as dismissed.

6 The assessee is not satisfied with the stand so taken by the learned CIT(A) and is in further appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

8. We may begin with reproducing the following observations made by Hon'ble Supreme Court in the case of **Bharat Earth Movers Ltd Vs CIT [(2000) 245 ITR 428 (SC)]**:

4. 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.

5. In Metal Box Co. of India Ltd. v. Their Workmen [1969] 73 ITR 53 (SC), the appellant-company estimated its liability under two gratuity schemes framed by the company and the amount of liability was deducted from the gross receipts in the profit and loss account. The company had worked out on an actuarial valuation its estimated liability and made provision for such liability not all at once but spread over a number of years. The practice followed by the company was that every year the company worked out the additional liability incurred by it on the employees putting in every additional year of service. The gratuity was payable on the termination of an employee's service either due to retirement, death or termination of service - the exact time of occurrence of the latter two events being not determinable with exactitude before hand. A few principles were laid down by this Court, the relevant of which for our purpose are extracted and reproduced as under :

(i) For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid;

(ii) Just as receipts, though not actual receipts but accrued due are brought in for the income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;

(iii) A condition subsequent, the fulfilment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability; and

(iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactorily estimated.

6. So is the view taken in *Calcutta Co. Ltd. v. CIT* [1959] 37 ITR 1, wherein this Court has held that the liability on the assessee having been imported, the liability would be an accrued liability and would not convert into a conditional one merely because the liability was to be discharged at a future date. There may be some difficulty in the estimation thereof but that would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case.

9. Quite clearly, therefore, the authorities below have proceeded on the erroneous assumption that in the absence of liability accrued being exactly quantified, as in the absence of an invoice in this case, a reasonable provision for such liability cannot be allowed as a deduction. The observations of Hon'ble Supreme Court to the effect that “**What should be certain is the incurring of the liability**” and that “**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**” are the antithesis of the approach adopted by the authorities below. The mere fact that invoices have not been raised by the vendors in the relevant period cannot be reason enough to hold that the liability is a contingent liability, but that is precisely what has been done by the authorities below, and that is the only justification for the impugned disallowance. This approach is clearly unsustainable in law.

10. In view of these discussions, and bearing in mind the entirety of the case, we uphold the plea of the assessee, and hereby direct the Assessing Officer to vacate the impugned disallowance of Rs 9,73,500. The assessee gets the relief accordingly.

11. In the result, the appeal is allowed. Pronounced in the open court today on the 26th day of August 2022.

Sd/-
Kavitha Rajagopal
(Judicial Member)
Mumbai, dated the 26th day of August, 2021

Sd/-
Pramod Kumar
(Vice President)

Copies to: (1) *The appellant* (2) *The respondent*
 (3) *CIT* (4) *CIT(A)*
 (5) *DR* (6) *Guard File*

By order

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai