IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

ITA No.319/CTK/2017
Assessment Year : 2009-10

DCIT, Circle-4(1), Bhubaneswar.	Vs.	The Orissa State Co-op.Milk Producers Federation Ltd., D-2, Sahid Nagar, Bhubaneswar.
PAN/GIR No.AABTT 3220 G		
(Appellant)	..	(**Respondent**)

Assessee by : Shri B.K.Mahapatra, CA
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 21 /9/2022
Date of Pronouncement : 21/9/2022

O R D E R

Per Bench

This is an appeal filed by the revenue against the order of the ld CIT(A)-2, Bhubaneswar dated 31.5.2017 in Appeal No.0251/2015-16 for the assessment year 2009-2010.

2. Shri M.K.Gautam, ld CIT DR appeared for the revenue and Shri B.K.Mahapatra, ld AR appeared for the assessee.

3. The revenue has raised the following grounds:

> "1. On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in law as well as on facts in deleting the addition of Rs.49,25,896/- made by the AO adducing fresh evidence

violating the provisions of Rule 46A of the IT Rules, 1962 on account of unpaid Entry Tax, when the assessee could not furnish any evidence in support of the payment made by the date of filing of return.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in law as well as on facts in deleting the addition of Rs.2,56,24,179/- made by the AO booked under provision for salary, when the provision of liability is just anticipated and not actually arisen or not accrued.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) is not justified in law as well as on facts in deleting the addition of Rs.45,98,415/- made by the AO booked under provision for agent commission, when the provision of liability is just anticipated and not actually arisen or not accrued."

4. At the outset, ld CIT DR filed a written submission in regard to appeal filed by the revenue, which is as under:

"a) As regards the first ground of disallowance of Rs.49,25,896/- u/s.43B on account of unpaid entry tax, As seen from the appellate order of Id. CIT(Appeals), fresh evidences have been taken on record by him without recording any reasons for the same. It is a settled law that a litigant has to demonstrate that it was prevented by sufficient cause to lead such evidence before the A.O. i.e. Whether the AO refused to take such evidence or the assessee failed to submit these for sufficient reasons or the AO did not provide him sufficient opportunity. As per sub-rule 1, 2 and 3 of Rule-46A, firstly the CIT(A) has to record his reasons for taking such evidences on record. Secondly reasonable opportunity has to be given to the AO to verify/refute such evidences. In this regard, reliance is placed on following decisions:

1) **Hon'ble Gauhati High Court in the case of CIT vs. Ranjit Kumar Choudhury (288 ITR 179).**

2) Hon'ble Kerala High Court in the case of C. Unnikrisnan vs. CIT (233 ITR 485)

3) Hon'ble Mumbai High Court in the case of Prabhavati S. Shah vs. CIT (231 ITR 1)

Therefore in the present case, there has been gross violation of principles of Natural Justice as the Id. CIT(A) has not allowed any opportunity to the AO to verify such evidences. Rule-46A(3) is mandatory and indispensable and noncompliance of same will require re-adjudication of the matter by the CIT(A). In this regard, reliance is placed on following decisions:

1) Hon'ble Himachal Pradesh High Court in the case of CIT vs. Shree Kangra Steel (P) Ltd. (320 ITR 691) (para-8)
2) Hon'ble Madras High Court in the case of CIT vs. Subbu Shashank (327 ITR 577)(para-6)
3) Hon'ble Delhi High Court in the case of CIT vs. United Towers (P) Ltd. (296 ITR 106)
4) Hon'ble Delhi High Court in the case of Manish Build Well (P) Ltd. (16 taxmann.com 27)
In view of above facts and circumstances, the matter is required to be remitted back to the A.O. to verify these fresh evidences.

b) As regards the disallowance of **provision for arrears of salary as per sixth Pay commission and provision of agents commission, the findings of** Id. CIT(A) are erroneous for the following reasons:

i.) The provisions can't be allowed as deduction u/s.37(l) of the Income Tax Act.

ii.) Though the formation of committee had been approved on 17.02.2009 (page-71 of the paper book) yet it had not submitted its report till 31.03.2009. In fact, the report of committee was received on 04.05.2009 after the close of accounting period. The said expenditure was purely a provision against unascertained liability and said provision could not be claimed as expenditure for the year under reference. Neither the liability in question had accrued nor crystallized during the year under consideration. The accounts for the year under consideration were from 01.04.2008 to 31.3.2009 and got closed on 31.3.2009. As per the recommendations of the committee and final approval by the MD, the assessee should have claimed such expenses of revised pay of its employees only in the assessment year 2010-11. It is clear that the Pay Revision Committee had not completed its deliberations before the end of the FY 2008-09 and was yet to submit its report at the time when the FY 2008-09 came

to an end and the pay revision was finally implemented in the subsequent years. Under these facts and circumstances, the liability for arrears of pay revision had not accrued during the relevant FY i.e. 2008-09 (AY 2009-10). Merely because Pay Revision Committee was constituted during the year, it could not be said that liability towards pay revision had accrued during the year, since the Pay Revision Committee had not completed its deliberations before the end of the FY 2008-09. **Even if there was a liability, it was purely a contingent liability which is not deductible for income tax purposes.**

It was held in State Bank of Travancore vs. CIT (158 ITR 102) (SC) that considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity. Also, the observation that "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied."

iii.) **In the case of Bharat Electronics Ltd. vs. DCIT** (59 **ITD 116),** the assessee was a Government company. It claimed allowance of the amount of executive wages payable. This was provision for revision of executive wages made in the accounts which also included certain amount relating to prior period. It was contended by the assessee that the provision had been made on the basis of the Cabinet Note dated 26-9-1989. The Assessing Officer, however, observed that till the last date of the accounting period, i.e., 31-3-1990 no Cabinet approval was actually received which was given in the next year when the amount was actually paid. In fact, on the basis of 'Cabinet Note' dated 26-9-1989 and the letter dated 4-4-1990 of Bureau of Public Enterprises, Ministry of Industry, the assessee had submitted its own proposals suggesting certain pay-scales for its employees by communication dated 30-4-1990. The proposal was approved with some alterations by the Ministry of Defence as per its communication dated 22-2-1991, addressed to the assessee. The Assessing Officer, thus, held that the amount was nothing but of the nature of contingent liability as on 31-3-1990 since the revision was based on the Cabinet approval which did not take place during the course of accounting year 1989-90. He, therefore, disallowed the expenditure. On appeal, the Commissioner (Appeals) affirmed the view of the Assessing Officer. On second appeal, the Hon'ble Bangalore ITAT held that a liability which had not actually accrued but was only a contingent liability, could not be allowed The contingent liability when at a future point of time, became an actual

and accrued liability, would, however, be allowable at that future point of time. In the instant case, the claim of the assessee was merely based on certain expectations and not on the basis of any definite material. The approval of the Government of India may not be a statutory requirement in the instant case but at the same time, for all practical purposes, the said approval was very much necessary for giving effect to a proposal for upward revision of the pay scales. The draft note for the Cabinet, as prepared by the Ministry of Industry, Bureau of Public Enterprises, dated 26-9-1989 was merely a secret note prepared in the Government Department. Para 5 of the said note referred to an earlier Cabinet Note dated 23-6-1989 submitted on the HPPC Report containing one of the proposals for consideration of the Cabinet to revise the pay-scales of executives with a view to maintain the relativity between the emoluments of the executives and workers leaving the DA issue to be decided by the Government on the recommendations of the tripartite DA committee. It was clearly stated there in that the Cabinet had not taken any decision on that proposal. Finally, however, the revision of pay scales was declared under the communication dated 22-2-1991 by the Ministry of Defence wherein the pay scales prescribed were somewhat different from those suggested in the earlier proposal. Hence, the liability accrued and became an ascertained liability to the assessee only on 22-2-1991 when the said communication was made and not before that, what was taken into consideration in the accounts of the assessee was merely a provision based on certain proposals put forward by the assessee. It was, therefore, to be held that the entire liability of assessee did accrue on 22-2-1991. So far as the year under consideration was concerned, no portion of the liability could be allowed as the liability was merely of the nature of a contingent liability till the end of the relevant accounting period.

iv.) **The Hon'ble Madras High Court in the case of CIT vs. Forbes Campbell Finance Ltd.** (352 **ITR 602)** on similar facts confirmed the disallowance of a provision made in respect of service charges. It was held that it was not made on scientific basis. It was an ad-hoc provision and major amount remained unpaid after 2 years from the end of relevant previous year. Hence it was held that same could not be allowed.

Considering the above facts, it is requested that the order of Id. CIT(A) be reversed and that of the A.O. be restored."

5. It was submitted by ld CIT DR that the assessee is a Co-operative Society doing the business of manufacturing, trading and distribution of milk, milk products and cattle feed. It was the submission that in the course of assessment, the Assessing Officer had made an addition of Rs.49,25,896/- on account of non-payment of 'entry tax' within due date of filing of return by invoking the provisions of section 43B of the Act. It was the submission that the ld CIT(A) had deleted the addition by holding that he has verified the payment. It was the submission that there was violation of Rule 46A insofar as the evidences were not produced before the Assessing Officer.

6. It was fairly agreed by ld AR that he has no objection if the issue is restored to the file of the Assessing Officer and the assessee would produce the said evidences before the AO.

7. We have considered the rival submissions. As it is noticed that the ld CIT(A) has not called for a remand report from the Assessing Officer in respect of payment of entry tax of Rs.49,25,896/-, therefore, the issue is restored to the file of the AO. The Assessing officer shall after giving an opportunity to the assessee, examine whether the entry tax has been paid in full before the filing of the return. Once the assessee is able to prove that the entry tax has been paid before the due date of filing the return, the addition as deleted by the ld CIT(A) would stand confirmed. In the event, the assessee is unable to prove that the entry tax has not been paid before

the due date of filing of return in the relevant assessment year, to such an extent the addition shall be restored in view of the provisions of section 43B of the Act. Consequently, Ground No.1 of revenue stands allowed for statistical purposes.

8. In respect of ground No.2, ld CIT DR submitted that the issue is against the action of the ld CIT(A) in deleting the addition of Rs.2,56,24,179/- made by the AO on account of provision for salary.

9. It was the submission by ld CIT DR that the assessee, co-operative society had made the provision in the books of account for the arrear salary on the basis of revised pay scale approved in the VIth pay commission. It was the submission that a Committee had been constituted only on 16.2.2009 and the report of the Committee was obtained only on 4.5.2009 by which date the account of the assessee had been closed for the relevant assessment year. It was the submission that the amount had not crystalised and the revised pay scale having been approved by the Committee only on 4.5.2009, the amount shown as provision in the assessee's account was nothing but a contingent liability. It was the submission that in view of the decision of the Co-ordinate Bench of Bangalore ITAT in the case of **Bharat Electronics Ltd. vs. DCIT** (59 **ITD 116),** the addition is liable to be confirmed and the order of the ld CIT(A) reversed.

10. In reply, ld AR submitted that the provisions for salary has been made on the basis of VIth pay Commission report. The calculation provided therein itself was a foundation for making the provision and consequently, a scientific approach had been done and the issue was no more a contingent liability. It was the submission that in view of the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers vs CIT, 245 ITR 428 (SC), the issue was liable to be held in the favour of the assessee. Ld AR also relied on the decision of the Hon'ble Delhi High Court in the case of Housing & Urban Development Corporation Ltd., vs ACIT (2020) 115 taxmann.com 166 (Del)to support his contention.

11. We have considered the rival submissions. We find that the issue is covered by the decision of the Hon'ble Delhi High Court in the case of Housing & Urban Development Corporation Ltd., vs ACIT (2020) 115 taxmann.com 166 (Del), wherein in para 19, it has been held as follows:

> "19. The position in the current case is that the liability had already arisen with certainty. The committee was constituted for the purpose of wage revision. That the wages would be revised was a foregone conclusion. Merely because the making of the report and implementation thereof took time, it could not be said that there was no basis for making the provision. In view of the above, we hold that the IT AT and CIT (A) have fell in error by disallowing the expenditure of Rs. 1.60 crores on account of anticipated pay revision in Assessment Year 2007-08. The first and second questions of law are thus answered in favour of the appellant. Accordingly, it is directed that the revenue shall now pass consequential orders accepting the deduction of Rs. 1.60 crores."

12. Further, the issue is also settled now by the principles laid down by Hon'ble Supreme Court in the case of Bharat Earth Movers vs CIT, 245 ITR 428 (SC), wherein, the Hon'ble Supreme Court has held as follows:

> "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. Applying the above-said settled principles to the facts of the case at hand we are satisfied that provision made by the appellant company for meeting the liability incurred by it under the leave encashment scheme proportionate with the entitlement earned by employees of the company, inclusive of the officers and the staff, subject to the ceiling on accumulation as applicable on the relevant date, is entitled to deduction out of the gross receipts for the accounting year during which the provision is made for the liability. The liability is not a contingent liability. The High Court was not right in taking the view to the contrary.

'In Metal Box Company of India Ltd. Vs. Their Workmen (1969) 73 ITR 53 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 P&L 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 employees 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 paid; permissible only in case of amounts actually expended or

(ii) Just as receipts, though not actual receipts but accrued due are brought in for 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 fulfillment 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;

(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. So is the view taken in Calcutta Co. Ltd. Vs. Commissioner of Income-Tax, West Bengal (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."

13. The assessee is under the administrative control of the Govt. of Odisha, Department of Fishery and Animal Husbandry and following the mercantile system, of accounting. Accordingly, the assessee has charged the provision in the profit and loss account under "salary' pending finalization of revision of wage/salary of its employees as per VIth pay commission. A committee was constituted by the assessee to revise the salary of the employee on the basis of VIth pay commission and on the basis of the committee report, the arrear salary was paid to the employees of the assessee. A perusal of the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers (supra), the Hon'ble Supreme Court has categorically held that " 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.".

14. In assessee's case, the calculation sheets are available. Therefore, the scientific method of calculation is done and the pay revision has also been approved. Thus, applying the principles laid down by the Hon'ble Supreme Court in the case of Bharat Earth Movers (supra), it cannot be held that the provision for the pay revision is an unascertained liability nor the liability does not crystalise. This being so, we are of the view that the assessee is entitled to the expenditure in respect of pay revision as claimed. Consequently, the addition deleted by the ld CIT(A) stands upheld.

15. In respect of next ground, the ld CIT DR submitted that this issue was against the action of the ld CIT(A) in deleting the addition of Rs.45,98,415/- representing commission paid to the agents.

16. It was the submission by ld CIT DR that the commission @ 0.05 paise per liter of milk was being paid to agents as commission. It was the submission that on the year end, the provision has been made. The assessee has not been able to show how much commission was paid in the subsequent year or whether the amount remained unpaid. Ld CIT DR drew our attention to pages 49 to 69 of APB to submit that the said details gave names and amount of the persons to whom the commission has been paid. At the outset, a question was raised whether the commission can be paid to a private individual by the Co-operative Society. It was the submission that the quantity of milk sold was not available against the specified name. He submitted that the order of the ld CIT(A) in deleting the addition is not

based on a reasonable finding. It was the prayer that the order of the ld CIT(A) may be reversed and that of the AO restored.

17. In reply, ld AR submitted that the accounts of the assessee are audited by the Controller of Co-operative Societies. It was the submission that the amount had been paid in subsequent years. It was also the submission that the sales during the relevant assessment was nearly Rs.269.75 crores on which, the said commission fo Rs.45,98,415/- has been paid. It was the submission that the Assessing Officer in the assessment order has disallowed the same only on the ground that the commission to the agents was shown as a provision. It was the submission that none of the details have been verified by the AO and issues now raised by the ld CIT DR are the fresh issues, which are beyond the issues raised by the AO. It was the submission that the ld CIT(A) has deleted the addition by considering the fact that the assessee is following mercantile system of accounting and the commission had accrued to the agents. It was the submission that the order of the ld CIT(A) be liable to be upheld.

18. We have considered the rival submissions. A perusal of the assessment order clearly shows that the Assessing Officer has not questioned the genuineness of the payment of commission. He has only questioned the allowability of the same on account of commission being shown as provision in the accounts of the assessee. The methodology of the computation of commission is also available at 0.05 paise per litre. This

is also not a disputed fact. In these circumstances, in view of the principles laid down by the Hon'ble Supreme Court in the case of Bharat Earth Movers (supra), as the liability has crystalised, the same cannot be treated as contingent liability. In these circumstances, we are of the view that the findings of the ld CIT(A) are on right footing, which does not call for any interference. This ground stands dismissed.

19. In the result, appeal of the revenue is partly allowed for statistical purposes.

Order dictated and pronounced in the open court on 21/9/2022.

Sd/-	sd/-
(Arun Khodpia)	**(George Mathan)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 21/9/2022
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : DCIT, Circle-4(1), Bhubaneswar.
2. The Respondent: The Orissa State Co-op.Milk Producers Federation Ltd., D-2, Sahid Nagar, Bhubaneswar
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT—2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack