

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH KOLKATA

आयकर अपीलीय अधीकरण, न्यायपीठ “C” कोलकाता,

**BEFORE SHRI SONJOY SHARMA, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.2590/Kol/2019
Assessment Year: 2016-17**

M/s. S. R. Batliboi & Associates LLP 22, Camac Street, 3 rd Floor, Block-B, Kolkata-700016 (PAN: ACHFS9118A)	Vs.	Deputy Commissioner of Income-tax, Circle-22, Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Debobrata Ghosh, AR
Respondent by : Smt. Ranu Biswas, Addl. CIT

Date of Hearing : 28.09.2022
Date of Pronouncement : 20.10.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A)-6, Kolkata vide Appeal No. CIT(A), Kolkata-6/10402/2018-19 dated 25.11.2019 passed against the assessment order by the ACIT, Circle-22, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 04.07.2018.

2. Brief facts of the case are that assessee is a limited liability partnership and is a firm of Chartered Accountant. Registered office of the assessee is located at Kolkata. Return of income was originally filed on 28.11.2016 (wrongly mentioned as 29.11.2016 in the assessment order) reporting a total income of Rs.68,00,00,370/- (wrongly mentioned as Rs.29,74,61,920/- in the assessment order though correctly mentioned in the computation sheet). Subsequently, a revised

return was filed on 21.03.2018 (wrongly mentioned as 19.03.2018 in the assessment order) reporting total income of Rs.68,00,00,370/- (wrongly mentioned as Rs.29,44,61,920/- in the assessment order (though correctly mentioned in the computation sheet). While concluding the assessment, Ld. AO made a disallowance of Rs.31,23,339/- (wrongly mentioned as Rs.12,51,063/- in the assessment order though correctly considered in the computation sheet) being provision for leave encashment claimed as allowable expenses in view of the decision of Hon'ble jurisdictional High Court of Calcutta in the case of Exide Industries Ltd. Vs. Union of India 292 ITR 470 wherein the Hon'ble High Court had struck down section 43B(f) of the Act as being arbitrary and unconstitutional.

3. Before us, Shri Debobrata Ghosh, AR represented the assessee and Smt. Ranu Biswas, Addl. CIT represented the department.

4. At the outset, Ld. Counsel for the assessee fairly submitted that the issue is covered against the assessee by the decision of Hon'ble Supreme Court in the case of Union of India & Ors. Vs. Exide Industries Ltd. in Civil Appeal No. 3545/2009 dated 24.04.2020 wherein the judgment of Division Bench of Hon'ble High Court of Calcutta relied on by the assessee has been reversed and clause (f) in section 43B of the Act has been held to be constitutionally valid and operative for all purposes. The relevant extract of the judgment of Hon'ble Supreme Court on the issue before us is given below:

“39. Reverting to the true effect of the reported judgment under consideration, it was rendered in light of general dispensation of autonomy of the assessee to follow cash or mercantile system of accounting prevailing at the relevant time, in absence of an express statutory provision to do so differently. It is an authority on the nature of the liability of leave encashment in terms of the earlier dispensation. In absence of any such provision, the sole operative provision was [Section 145\(1\)](#) of the 1961 Act that allowed complete autonomy to the assessee to follow the mercantile system. Now a limited change has been brought about by the insertion of clause (f) in [Section 43B](#) and nothing more. It

applies prospectively. Merely because a liability has been held to be a present liability qualifying for instant deduction in terms of the applicable provisions at the relevant time does not ipso facto signify that deduction against such liability cannot be regulated by a law made by Parliament prospectively. In matter of statutory deductions, it is open to the legislature to withdraw the same prospectively. In other words, once the [Finance Act, 2001](#) was duly passed by the Parliament inserting clause (f) in [Section 43B](#) with prospective effect, the deduction against the liability of leave encashment stood regulated in the manner so prescribed. Be it noted that the amendment does not reverse the nature of the liability nor has it taken away the deduction as such. The liability of leave encashment continues to be a present liability as per the mercantile system of accounting. Further, the insertion of clause (f) has not extinguished the autonomy of the assessee to follow the mercantile system. It merely defers the benefit of deduction to be availed by the assessee for the purpose of computing his taxable income and links it to the date of actual payment thereof to the employee concerned. Thus, the only effect of the insertion of clause (f) is to regulate the stated deduction by putting it in a special provision.

40. Notably, this regulatory measure is in sync with other deductions specified in [Section 43B](#), which are also present and accrued liabilities. To wit, the liability in lieu of tax, duty, cess, bonus, commission etc. also arise in the present as per the mercantile system, but assessee used to defer payment thereof despite claiming deductions thereagainst under the guise of mercantile system of accounting. Resultantly, irrespective of the category of liability, such deductions were regulated by law under the aegis of [Section 43B](#), keeping in mind the peculiar exigencies of fiscal affairs and underlying concerns of public revenue. A priori, merely because a certain liability has been declared to be a present liability by the Court as per the prevailing enactment, it does not follow that legislature is denuded of its power to correct the mischief with prospective effect, including to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to new regulatory measures. Strictly speaking, the Court cannot venture into hypothetical spheres while adjudging constitutionality of a duly enacted provision and unfounded limitations cannot be read into the process of judicial review. A priori, the plea that clause (f) has been enacted with the sole purpose to defeat the judgment of this Court is misconceived.

41. The position of law discussed above leaves no manner of doubt as regards the legitimacy of enacting clause (f). The respondents have neither made a case of nonexistence of competence nor demonstrated any constitutional infirmity in clause (f).

42. In view of the clear legal position explicated above, this appeal deserves to be allowed. Accordingly, the impugned judgment of the Division Bench of the High Court is reversed and clause (f) in [Section 43B](#) of the 1961 Act is held to be constitutionally valid and operative for all purposes. No order as to costs. Pending interlocutory applications, if any, shall stand disposed of."

5. Respectfully following the decision of Hon'ble Supreme Court in the case of Exide Industries Ltd. (supra) and the fair acceptance of the

Ld. Counsel on the issue raised in appeal, the ground raised by the assessee in the present appeal is dismissed.

6. In the result, appeal of the assessee is dismissed.

Order is pronounced in the open court on 20th October, 2022.

Sd/-

Sd/-

(SONJOY SARMA)
JUDICIAL MEMBER

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 20.10.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:.
3. The CIT(A)-6, Kolkata
4. The CIT , Kolkata.
5. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata