

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
(DELHI BENCH 'E' : NEW DELHI)
BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 3574/Del/2017
(Assessment Year : 2009-10)

Addl. CIT Special Range-6, Room No. 352, C.R.Building, I.P.Estate New Delhi (APPELLANT)	Vs.	M/s. MMTC Ltd. Core-1, Scope Complex, Lodhi Road, New Delhi PAN : AAACM1433E (RESPONDENT)
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Assessee by	Sh. Rohit Jain, Adv. Ms. Deepashree Rao, Ca Sh. Hardeep Singh Chawla, Adv. Sh. Samarth Singh Dhumal, Adv.
Revenue by	Ms. Kirti Sankratyayan, Sr. DR

Date of hearing:	10.05.2023
Date of Pronouncement:	24.05.2023

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been preferred by the Revenue against the order dated 27.03.2017 of CIT(A)-6, Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No. 04/2016-17 arising out of an appeal before it against the order dated 31.03.2016 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the DCIT, Circle-16(2), New Delhi (hereinafter referred as the Ld. AO).

2. The facts in brief are that the assessee is a Government of India Enterprise and is engaged in business of manufacturing of medallions and jewelry, soya oil and DOC, mica paper and powder and trading in minerals, non-ferrous metals, fertilizers, agro products, gems, jewellery and precious metals, coal, hydrocarbons and general trade. Return of income for assessment year 2009-10 was filed declaring total income of Rs.80,95,27,323 (as per revised return of income). Regular assessment was completed vide order dated 20.03.2013, passed under section 143(3) of the Act assessing total income at Rs.255,09,50,210, after making various disallowances/additions. Thereafter, the assessing officer initiated rectification proceedings under section 154 of the Act for assessment year 2009-10 on the alleged ground that 'provision for leave earned' to the extent of Rs.6.18 crores remained to be added back to the income of the assessee in the original assessment order, which was a mistake apparent from record. In response to the aforesaid notice, the assessee, vide reply dated 07.01.2014, submitted that the proceedings initiated under section 154 of the Act was beyond jurisdiction and bad in law in so far as the issue of allowability of provision in respect of leave encashment was a debatable issue and there were conflicting decisions of Courts/Tribunals. However, the assessing officer, proceeded to pass rectification order dated 31.03.2016, under section 154 of the Act, after making disallowance of Rs.6,18,20,000 in respect provision for leave earned. On further appeal, the CIT(A), vide order dated 27.03.2017, held that the rectification proceedings initiated under section 154 of the Act in the case of the assessee was without jurisdiction and void-ab-initio in so far as the issue of allowability of provision for leave encashment was a debatable issue, which fell beyond the scope of rectification as contemplated under that section. The Revenue is now in appeal against the order passed by the CIT(A), raising following grounds :-

1. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in holdings that incorrect

deduction of provisions of earned leave of Rs. 6,18,20,000/- by the Assessing Officer (the AO) by overlooking Annexure-IX of Tax Audit Report in Form 3CD as well as provisions of section 43B(f) of the Income Tax Act, 1961 (the Act) was not mistake apparent from record u/s 154 of the Act?

2. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in holding that incorrect disallowance of provisions of earned leave of Rs. 6,18,20,000/- by the AO overlooking provisions of section 43B (f) of the Act and Tax Audit Report was a disputed issue which cannot be rectified u/s 154 of the Act by ignoring clear provisions of section 43B (f) and judgment of Hon'ble Supreme Court in case of CIT vs Exide Industries Limited (2009) (CC 12060/2008) dated 08.05.2009 on the issue?

3. That the appellant craves leave to add, alter, amend or forego any ground(s) of the appeal raised above at the time of the hearing.

3. Heard and perused the record.

4. It was submitted by the Ld. DR that the Ld. CIT(A) has fallen in error in not considering the fact that the operation of judgment of Hon'ble Kolkata High Court in the case Exide Industries Limited 292 ITR 470 was stayed by Hon'ble Supreme Court and there was no reason to follow the same when there were categorical provisions of Section 43B(f). It was further submitted that subsequently, Hon'ble Supreme Court has reversed the decision of Hon'ble Kolkata High Court and thus Ld. AO was right in exercise of the jurisdiction u/s 154 of the Act, as on the date of the assessment order 20.03.2013 there was in existence the Supreme Court order staying the Hon'ble Kolkata High Court judgement which was left out of consideration.

5. On the other hand Ld. Counsel for the assessee submitted that the issue of allowability of provision for leave encashment has been a debatable issue for long till the time the judgment of Hon'ble Supreme Court arrived in the case of Exide

Industries Limited in the year 2020 wherein the Constitutional validity of provisions of Section 43B(f) of the Act was upheld. It was submitted that the scope of Section 154 is the limited and only patent mistake appearing from the record can be corrected. It was submitted that interpretation of provisions of Section 43B(f) of the Act did not fall within the scope of Section 154 of the Act and Id. CIT had rightly exercised its appellate power in setting aside the order of Ld. AO. It was also submitted that the jurisdiction has to be considered on the basis of state of legal affairs at the time of invoking provisions of Section 154 and subsequent facts/ decisions cannot be invoked to improve the assessment order. It was submitted that the relevant time for considering whether an issue is debatable or not is the time when such jurisdiction is sought to be exercised and consequently, the subsequent event, be it then subsequent decision of the Supreme Court or even the retrospective amendment in law, shall not validate an order which was invalid at the time the same was passed. Therefore, in the present case, the fact that the Constitutional validity stood affirmed in the case of Exide India (Supra) does not in any manner validate the impugned order dated 31.03.2016, which was invalid on that date.

5.1 In support of the contentions that a decision on a debatable point of law is not a mistake apparent from the record, the Ld. Counsel relied the judgments in *T.s.Balaram, ITO v. Volkart Brothers 82 ITR 50(SC) and CIT v. Hero Cycles P. ltd. 228 ITR 463 (SC), Travancore Rayons Ltd. v. ITO 109 ITR 43 (Ker), Maharana Mills Pvt. Limited v. ITO 36 ITR 350 (SC, CIT v. Delhi Cement Stockists 81 ITR 515 (Del.) and Nirmal Udyog v. CIT 232 ITR 493 (MP). Bombay High Court in the case of Universal Medicare (P) Ltd.: 324 ITR 263.*

5.2 He submitted that the co-ordinate bench of Delhi in the case of Integrated Databases India Ltd. vs. ITO, ITA No. 5055/Del/2016 has considered a similar issue and decided in favor of assessee.

6. Now giving thoughtful consideration to the matter on record, the submission and the law cited, the bench is of considered view that the Co-ordinate Bench decision in Integrated Databases India Ltd. case (Supra) supports the order of Ld. CIT(A). It will be appropriate to reproduce the observations of Co-ordinate Bench in para 3, 4 and 5 as follows :-

"3. Ld. AR argued that the details of expenses on account of the claim for provision of leave encashment were shown during the course of assessment and there was no mistake apparent on the face of record in this respect. He further submitted that it is a debatable issue which cannot be subjected to rectification u/s 154 of the Act. He placed on record order of the Hon'ble Jurisdictional High Court in the case of Universal Medicare (P) Ltd., 324 ITR 263, wherein the Hon'ble High Court has accepted substantial question of law on the issue of leave Encashment

4. We have considered the rival contentions and found from record that original assessment was completed u/s 143(3) vide order dated 24.01.2014. Thereafter provision made for leave encashment of Rs.5,68,304/- was disallowed u/s 154 of the Act. The assessee had claimed deduction on account of provision for leave encashment relying upon the decision of the Hon'ble Calcutta High Court in the case of Exide Industries Ltd. 292 ITR 4 70, wherein the Hon 'ble Court struck down the provisions of Section 438(f), holding the same as arbitrary in nature, unconscionable and de hors the Apex Court's decision in the case of Bharat Earth Movers 245 ITR 428. It was not a mistake apparent from record and further the issue in dispute is still pending for adjudication before the Hon'ble Apex Court and hence it is not a case falling within the purview of Section 154 of the Act, in view of various judicial pronouncements. It is well settled proposition of law that debatable issue and the issue requiring Ions deliberation cannot be subjected to rectification u/s 154 of the Act.

5. Similar view has also been accepted by the Hon'ble Bombay High Court as substantial question of law, therefore, the same cannot be rectified u/s 154 of the Act.

6. Accordingly, we set aside the order of lower authorities on this issue, passed u/s 154 of the Income Tax Act. ” (emphasis supplied)”

7. Thus the Bench is of considered opinion that whatever had been the state of affairs at the time of assessment with regard to the proposition of law of claim of expenses on account of the claim for provision of leave encashment, once the Ld. AO had taken a view and passed order under section 143(3) of the Act, then atleast he cannot consider his order to be suffering from a mistake apparent from record and invoke Section 154 of the Act. A mistake cannot be said to be apparent from record, when the application of mind requires revisiting the issue on facts and the issue arising out of those facts already stands concluded by way of assessment order. There is no error in the findings of Ld. CIT(A) requiring interference. The grounds raised have no substance. **Consequently, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 24th May, 2023.

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

Dated :24/05/2023

Binita

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

**Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER**

By Order
Assistant Registrar,
ITAT, Delhi