

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं /I.T.A. No.1643/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2020-21)

Aditya Birla Fashion and Retail Ltd. Piramal Agastya Corporate Park, Building A, 4 th & 5 th Floor, L.B.S. Road, Kurla-Mumbai-400070.	बनाम / Vs.	ACIT, CPC, Bengaluru, Karnataka-560500.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AA ECP2371C		
(अपीलार्थी/ Appellant)	..	(प्रत्यर्थी/ Respondent)

Assessee by:	Shri Yogesh Thar
Revenue by:	Shri S.S. Alam, CIT-DR

सुनवाई की तारीख / Date of Hearing: 16/08/2023
घोषणा की तारीख /Date of Pronouncement: 25/10/2023

आदेश / ORDER

PER ABY T VARKEY, J.M:

This is an appeal preferred by the assessee-company against the order of Ld. Commissioner of Income Tax, Appeals/NFAC [hereinafter referred to as 'the CIT(A)'] dated 15.03.2023 for the Assessment Year (AY) 2020-21.

2. At the outset, the Ld. Authorized Representative (AR) of the assessee does not press ground no. 2 which is against the action of the Ld. CIT(A) upholding the disallowance of an amount of Rs. 29,96,545/- u/s 36(1)(va) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for delayed deposit of Employees Contribution to Provident Fund (PF). According to the Ld. AR, this issue is covered against the assessee by the decision of the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd v/s. Commissioner of Income Tax (448 ITR 518 (SC)), therefore, this issue is not being pressed, so it is dismissed.

3. Coming to the only other ground no.1 which is against the action of the CIT(A) confirming the disallowance of the provisions made for leave encashment amounting

to Rs. 14,70,00,661/- without appreciating that such provision was made on the basis of actuarial valuation carried out by the assessee and that leave encasement was not a statutory liability for the assessee.

4. Brief facts as noted by the Ld. CIT(A) is that the CPC by intimation dated 10.12.2021 made an addition of Rs. 14,99,97,206/- *inter-alia* by disallowing provision for leave encashment u/s. 43B of the Act to the tune of Rs. 14,70,00,661/- as well as disallowing the Employees Contribution towards PF for late deposit under section 36(1)(va) of the Act to the tune of Rs. 29,96,545/-. By doing so, the losses claimed by the assessee has been determined by the CPC at Rs. 69,27,83,643/- as against Rs. 84,27,80,849/- claimed in the return of income by the assessee. The Ld. CIT(A) took note of the issue raised by the assessee regarding the claim of deduction in respect of the provision made for the leave encashment to the tune of Rs. 14,70,00,661/- and noted that the assessee brought to his notice that the said provision was made on the basis of actuarial valuation which is a scientific method and was used for computing the estimated liability by considering various yardsticks and allowable as per the decision of the Hon'ble Supreme Court in the case of Bharat Earth movers Ltd. Vs. CIT [245 ITR 428 (SC)]. The assessee also referred to the decision of the Hon'ble Andhra Pradesh High Court in the case of Srikakollu Shubbarao & Co. (173 ITR 708), wherein the Hon'ble High Court has held that section 43B of the Act applies to statutory payments which are payable; and the Ld. AR also referred to the decision of this Tribunal in assessee's predecessor-company for A.Y. 2008-09 (ITA No. 3178/Mum/2012) wherein the Tribunal had held that leave salary provision is not disallowable u/s. 43B(f) as it is not statutory liability relying on the decision of the Srikakollu Shubbarao & CO. (supra), and that the decision of the Tribunal in assessee's predecessor company (supra) has not been contested by the department in the Hon'ble High Court meaning, the Department has accepted the decision of the Tribunal on this issue; and the assessee also prayed before the Ld. CIT(A) that even if the disallowance of

the provision is confirmed for leave encashment under section 43B of the Act, then in such an event, the assessee may be allowed to claim deduction of the leave encashment that has been actually paid before the date of filing of the return of income for the relevant AY i.e. AY 2020-21. The Ld. CIT(A) has partly allowed the appeal of the assessee by holding as under:

“6. Ground No. 1 of the appeal is regarding addition u/s 43B(f) of the Act the appellant has relied on various decisions but the facts of the present case are different. As per section 43B(f) any sum payable by the appellant as an employer in lieu of any leave at credit to his employee has to be allowed only on actual payment. Further, as per proviso the payments can be done on or before the due date of filing of return u/s 139(1) of the Act. In this case, original return has been filed on 01/02/2021 as against extended due date of 15/02/2021. As per alternate plea the appellant has requested that leave encashment that has been actually paid before the date of filing of return of income may be allowed as deduction. In view of these facts of the case the AO is directed to allow amount of leave encashment paid upto the date of filing of return of income. The ground of appeal is 'Partly Allowed'.

5. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.

6. We have heard both the parties and perused the record. According to the Ld. AR, leave encashment / leave salary has not become payable during the year under consideration and therefore, not disallowable u/s. 43B of the Act and relied on the following decisions:

1. DCIT V. Ultratech Cements Ltd. (ITA No0. 4385/Mum/2017 (AY 2010-11)
2. Aditya Birla Nuvo Ltd. V. ACIT (ITA No. 4220/Mum/2015 (AY 2010-11)
3. Aditya Birla Nuvo Ltd. V. ACIT (ITA No. 2525/Mum/2014 (AY 2009-10)
4. DCIT V. GBTL [2021] 189 ITD 704 (Mum.)
5. S. Subba Rao & Co. V. UOI [1998] 173 ITR 708 (Andhra Pradesh HC)
6. CIT V. Hindustan Construction Co. Ltd. [2015] 374 ITR 101 (Bombay HC)

7. According to Ld. AR, the return of income filed by the assessee has been processed u/s. 143(1)(a) of the Act by the CPC which disallowed the deduction claimed for the provision made for leave encashment / leave salary to the tune of Rs. 14,70,00,661/-, which adjustment according to the Ld. AR ought not to have been made. According to Ld. AR, the provision regarding leave salary has been made on the basis of actuarial valuation which is an accepted scientific method of computing estimated liability and since the Hon'ble Supreme Court in the case of Bharat Earth Movers Ltd. Vs. CIT (supra) had answered the question of law raised before it in favour of assessee by reversing the decision of Hon'ble Karnataka High Court and the question of law was viz. *“whether on facts and in the circumstances of the case, the provision for meeting the liability for encashment of earned leave by the Employee is an admissible deduction and the Hon'ble Supreme Court answered the question of law as under:*

“Shri S.E. Dastur, the learned senior advocate for the appellant company has submitted that the liability is a certainty. Provision is made for meeting the liability to the extent of entitlement of the officers and staff to accumulate earned/vacation leave subject to the ceiling limit of 240/126 days as may be applicable. Having accumulated leave in a particular year, in the succeeding year the employee may either avail the leave or apply for its encashment. If he avails the leave then additional provision for encashment is not made in the reserve account. However, if he does not avail the leave and instead chooses to encash his entitlement, he becomes entitled to an additional number of days as accumulated leave. For example, having rendered service for 365 days in the year “A” an officer becomes entitled to avail leave for 30 days in the succeeding year “B”, the provision in the leave reserve account is made in the year “A” for payment of an amount equivalent to 30 days’ salary so as to meet the claim for encashment. If he chooses to encash the leave and renders service for full 365 days in the year “B”, then the amount transferred to reserve is paid to him and in view of his having earned again the next entitlement for 30 days leave, provision is made therefore by transferring the appropriate amount in the reserve account. If he avails the leave then he is paid the leave salary. The leave salary is paid from the reserve. Whether the amount is paid as salary by drawing upon from the current years P&L Account or from the reserve, it would not make any difference in practice as there would be no double payment and hence no double claim for deduction.

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.

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;*
- (ii) 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) (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.

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.

The appeal is allowed. The judgment under appeal is set aside. The question referred by the Tribunal to the High Court is answered in the affirmative, i.e. in favour of the assessee and against the Revenue.

8. Thus, according to the Ld. AR, in the light of the Hon'ble Supreme Court decision in Bharat Earth movers Ltd. Vs. CIT (supra), the provision made by the assessee-company for meeting the liability incurred by it under the leave encashment scheme proportionate to the entitlement earned by the Employees, subject to the ceiling on accumulation as applicable on the relevant date was entitled to deduction out of gross receipts of the Accounting Year during which the deduction has been made in respect of the liability. Moreover, according to Ld. AR, the provision is made on the basis of actuarial valuation, so it is allowable deduction. Thus according to the Ld. AR, the provision made by the assessee for leave encashment is an allowable expenditure and that leave encasement has not become "payable during the year under consideration", therefore, no disallowance under section 43B of the Act ought to have been made by Ld. CIT(A).

9. Per contra, Ld. DR supporting the action of the CPC/Ld. CIT(A) submitted that the Parliament in order to overcome the ratio/outcome of the Hon'ble Supreme Court decision in the case of Bharat Earth movers Ltd. Vs. CIT (supra) introduced

a new Clause under section 43B of the Act i.e. Clause (f). According to him, by insertion of clause (f), the provision for leave encashment will be allowed only on the basis of actual payment. According to him, this Clause (f) has been inserted by the Finance Act, 2001 w.e.f. 01.04.2002 i.e. from AY 2002-03 onwards. Therefore, according to him even though deduction were allowed regarding provision made in the Accounts (*leave encashment*) upto AY 2001-02 but would be allowed as deduction only on the basis of actual payment from AY 2002-03 onwards. Therefore, according to him, the Ld. CIT(A) has correctly disallowed the provision for leave encashment and directed the AO to allow the actual payment made (leave encashment) for the year under consideration after verification. According to him, the Parliaments action of introducing clause (f) u/s 43B of the Act has to be seen while interpreting claim of assessee and submitted that the intent of the law-makers should be given purposive construction and should use the principle of “*Mischief Rule*” Therefore, he does not want us to interfere with the impugned action of Ld. CIT(A) and prays for dismissal of this ground of appeal.

10. We have heard both the parties and perused the records. We note that the assessee has claimed deduction of provision for leave encashment amounting to Rs. 14,70,00,661/- which has been disallowed by the CPC u/s. 43B of the Act. On appeal, the Ld. CIT(A) has confirmed the action of the CPC. Since, the issue is regarding disallowance made u/s. 43B of the Act in respect of the provision for leave encashment, let us have a look at section 43B(f) of the Act (relevant part only) which reads as under: -

“Certain deductions to be only on actual payment.

43B. *Notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act in respect of—*

(a).....

(b).....

(c).....

(d).....

(e).....

(f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,

(g)

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:

Provided that nothing contained in this section shall apply in relation to any sum "[*] which is actually paid" by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return".

Explanation 3B - For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (f) of this section is allowed in computing the income, referred to in section 28, of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 2001, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.]”

11. Section 43B of the Act, is an overriding section and states that even if a deduction is allowable under this Act, but for computing the income u/s 28 of the Act, deduction shall be allowed in the year in which such sum is actually paid. Clause (f) of section 43B of the Act, specifically deals with sum payable to the employee in lieu of any leave at his credit. Therefore, per-se the impugned action of Ld. CIT(A) is legally sustainable view. The assessee’s reliance in the case of Srikalollu Shubbarao & Co. (supra) of Hon’ble Andhra Pradesh High Court for claiming the deduction (*provision for leave encashment*) cannot be accepted for the reason that firstly before the Hon’ble High Court that assessee had filed a Writ Petition (*in respect of assessment year 1984-85*) challenging the vires of section 43B of the Act wherein at that given point of time there was only two clauses (a) &

(b) u/s. 43B of the Act i.e. (a) any sum of tax/duty/cess or fee; and (b) any sum payable by employer by way of contribution to any Provident Fund or gratuity fund which would be allowed as deduction only if the same were actually paid by assessee. In that case, the Hon'ble High Court upheld the Constitutionality of the Clause (a) & (b) u/s. 43B of the Act and since there was only Clause (a) & (b) u/s. 43B of the Act which came in the teeth of that section, and which were statutory liabilities, the Hon'ble High Court has made such an observation to the effect that the disallowance was in respect of *unpaid statutory liability* and repelled the challenge of un-constitutionality of Clause (a) & (b) u/s. 43B of the Act being violative of Article-14 of the Constitution of India. Further, it is noted several amendments/insertion of clauses have taken place in section 43B of the Act, [from Finance Act, 1987 onwards] and *inter-alia*, clause (f) has been inserted by Finance Act, 2001 w.e.f 01.04.2002 after the Hon'ble Supreme Court decision in *Bharat Earth Movers (supra)*. Therefore, per-se such an observation made by the Hon'ble High Court in *Srikalollu Shubbarao & Co. (supra)* cannot come to the aid of the assessee in respect of Clause (f) u/s 43B of the Act.

12. It is true that "*provision made by assessee for leave encashment*" is allowable u/s. 37 of the Act as per the ratio laid by Hon'ble Supreme Court in *Bharat Earth Movers (supra)*, but if it has to be allowed as deduction for computing the income of assessee u/s. 28 of the Act, then it will be allowed only to the extent actual payment has been made by the assessee to the employee. Section 43B of the Act doesn't put any fetter on the claim of deduction in the previous year any sum paid by assessee/employer in lieu of leave entitlement to an employee and is an allowable deduction in the previous year when payment is made to the employee. The assessee is entitled to deduction of any such on this account subject to payment. Section 43B of the Act as noted is an overriding provision which allows deduction for the purpose of computing income u/s 28 of the Act only if actual payment has been made. The Parliament has inserted clause (f) after the judgment

of the Hon'ble Supreme Court in Bharat Earth Movers (supra) to eschew the mischief of claim of deduction (leave salary) without making actual payment. Mischief Rule/Heydon's Rule is really a sub-rule of '*Purposive Construction Rule*'. It is well accepted canon of statutory construction that it is the duty of the court to further Parliament's aim of providing a remedy for the mischief against which the enactment is directed and the court should prefer a construction which advances this object rather than one which attempts to find some way of circumventing it. (Refer RBI Vs. Peerless General Finance AIR 1996 SC 646). Even if we apply the purposive construction and look at the purpose of introducing clause (f) in section 43B of the Act with effect from 01.04.2002 (by Finance Act, 2001) after the Hon'ble Supreme Court decision in Bharat Earth Movers Ltd., the Legislative intent is clear that in computing the income of an assessee in a previous year u/s 28 of the Act, the assessee be allowed deduction of any sum which is actually paid; and clause (f) read with Explanation 3B makes it clear that Post 01.04.2001, deduction of any sum on account of payment towards employees leave encashment would be allowed only in the previous year when assessee makes actual payment. A literal interpretation of relevant section 43B of the Act also supports the view of Ld CIT(A), therefore, the action of Ld. CIT(A) is legally sustainable and so it is upheld.

13. In the result, appeal of assessee stands dismissed.

Order pronounced in the open court on 25/10/2023.

Sd/-

(AMARJIT SINGH)

ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 25/10/2023

SK, Sr.PS

Sd/-

(ABY T VARKEY)

JUDICIAL MEMBER

Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai