

IN THE INCOME TAX APPELLATE TRIBUNAL  
Mumbai "A" Bench, Mumbai.

Before Smt. Beena Pillai (JM) & Shri Omkareshwar Chidara (AM)

I.T.A. No. 2949/Mum/2024 (A.Y. 2017-18)

Ampro Form Pvt. Ltd. 501 A, Vaibhav Apartment, Jambly Gully, Borivali West Mumbai-400 092.  PAN : AADCA4479K  (Appellant)	Vs.	ITO-12(1)(1) Room No. 19A 1 <sup>st</sup> Floor Aayakar Bhavan M.K. Road Chuchgate Mumbai-400 020.  (Respondent)
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Assessee by	Shri Rahul Hakani
Department by	Shri Ram Krishn Kedia
Date of Hearing	30.09.2024
Date of Pronouncement	11.11.2024

ORDER

Per Omkareshwar Chidara (AM) :-

The sole issue to be adjudicated in this case is whether the claim of gratuity of the appellant is in order.

2. The appellant claims that there is payment of gratuity to the extent of Rs. 12,66,553/- to the staff during the assessment year 2017-18 and hence it should be allowed as business expenditure. In the assessment order, the learned Assessing Officer (AO for short) has mentioned that the case was selected for scrutiny because of excess contribution of gratuity fund by the employer. In this regard, the Ld. AO explained that the profit and loss account of the appellant was verified and the found that the appellant claimed gratuity to staff of Rs. 12,66,553/- but no salary expenses was claimed. Hence, the appellant was asked to file the details of the name, address, PAN etc. of persons to whom gratuity have been paid. In reply, the appellant submitted a list of 13 persons with their name, address etc.

alongwith date of joining, date of resignation and date of settlement and the amount of gratuity. After getting these details, the Ld. AO issued notice u/s. 142(1) of the Income Tax Act (Act for short) and requested the appellant to file following details also :-

- a. Copies of appointment letters of these employees.
- b. Please furnish bank account details with account number, MICR/IFSC, where salary has been paid.
- c. Copies of identity proof and residence proof received from these 13 employees at the time of their appointment.
- d. Please furnish copy of PF returns/forms filed for these employees with EPFO with proof of copies of PF paid.
- e. Copies of ESIC paid for these employees.
- f. Copies of your bank account statement reflecting payment of their monthly salary from their joining to their resignation.

3. The appellant did not submit these details and hence reminder was also issued. Hence, the appellant submitted details vide letter dated 4.11.2019 as follows :-

“ 3.2 In reply the assessee did not submitted any details. Hence, reminder letter was issued. Thereafter, the assessee submitted various details vide letter dated 04/11/2019. The portion of this letter is produced below—

The assessee had shut business from 31/03/2013. All 13 employees were shifted to a proprietorship (Express Forms) of one of the Director (Mr. Dinesh M. Jain) of the company from 01/04/2013. Then these 13 employees quit job at Express Forms on 17/03/2017. Accordingly, all were paid proportionate gratuity by the assessee.

1. Copies of appointment letters - not mentioned.
2. Bank details of Employees not available as assessee issued cheques to the employee and employee would deposit that cheque in his/her bank account.
3. Attached herewith, Forms that all employees had to fill and sign at the time of joining.
4. PF not applicable to the assessee.
5. ESIC not applicable to the assessee.
6. Attached herewith copy of bank statement highlighting payment of salary made to the said 13 employees.”

4. After perusing the details, the Ld. AO observed that the appellant has paid gratuity of 13 employees who left the appellant company in March, 2013 and with regard to genuineness of the claim of gratuity, the appellant submitted seven Forms filled by the employees at the time of appointment and submitted bank statement from January to March, 2012 claiming salary payment details of these employees. The appellant has submitted that the liability of gratuity arose to the appellant as on 31.3.2017 when those employees left the company. In this regard no claim was made by the appellant company. During A.Y. 2013-14, as the liability was not paid, it should have been reflected in Form 3CD as liability in the balance sheet of the company as on 31.3.2013. In view of the same, the appellant was given another show-cause notice dated 8.11.2019 to explain why the payment of Rs. 12,66,553/- should not be disallowed as the appellant has failed to prove that this was gratuity payment. In reply to this show-cause notice, the appellant has submitted vide letter dated 8.11.2019 that the appellant had no business from 1.4.2013 and all these 13 employees were shifted to a proprietorship concern of one of the Director of the company from 1.4.2013 and these 13 employees had quit the job in the proprietary concern on 17.3.2017 and accordingly these employees were paid proportionate gratuity by the appellant company as well as proprietary concern. As far as rising the liability in the books is concerned, it was inadvertently not shown in the books for A.Y. 2013-14 and even if it was claimed, it would not be eligible for deduction as the same was not paid during that assessment year. As the gratuity was paid only during March, 2017 and hence the same was rightly claimed on payment basis as envisaged in section 43B of the Act. After perusing the letter of Ld. AR of the appellant, the Ld. AO disallowed the gratuity expenses by saying that the contention of the appellant is not acceptable for the following reasons :-

“3.5 The contention of the assessee is not acceptable on the following reasons-

(i) The assessee has claimed to have paid gratuity to 13 persons. Hence, these employees/persons are covered under gratuity act. As per gratuity

Act, a person is eligible to receive gratuity only if he has completed minimum five years of service with an organization. In this regard, the assessee has failed submit any details/documentary evidence, which would say that these persons were in service for five year or more.

(ii) The employees have left the company in 2013 and at the time of payment of gratuity these persons were not the employees of the assessee company for last four years.

(iii) The gratuity is required to calculate as per fixed method of gratuity Act. But, the assessee also failed to submit how the gratuity paid was calculated.

(iv) If the persons after leaving the company, joined some other entity even if it is related concern, gratuity liability cannot be shifted to assessee company.

(iii) The assessee has accepted that the liability of payment of gratuity pertains of AY 2013-14, which was inadvertently not shown in the books of accounts. This fact clearly shows that there was no liability in AY 2013-14.

The assessee has failed to submit appointment letters and other details which will show that these 13 person were regular employees at least for five years till 2013 and regularly paid over the years.

3.6 In view of the above facts, the assessee has failed to prove that the amount of Rs. 1266553/- paid to 13 persons is gratuity payment. Hence, this amount of gratuity of Rs. 1266553/- is disallowed. Penalty proceeding u/s 270A is initiated for misreporting of expenses.

5. Aggrieved by the disallowance of gratuity expenses, appellant filed an appeal before the Ld. CIT(A) and the same was disposed of by the Additional Commissioner of Income Tax (Appeals)-2, Ludhiana [Addl.CIT(A) for short] on 29.3.2024. Before the Ld. Addl.CIT(A), the appellant has stated that the appellant has claimed the gratuity on payment basis as per law, all the employees were in employment for more than five years and not raising liability to pay gratuity in the books is not a ground for disallowance of gratuity paid to the employees and finally it was submitted that before the first appellate authority that the gratuity has not been shifted to any other related company of the appellant. The first appellate authority went through the grounds of appeal taken by the appellant and posted the case for

hearing. Three opportunities were given to the appellant and the third opportunity was mentioned as final opportunity but there is no compliance by the appellant, as mentioned by the appellate authority at page No. 3 of the appeal order. As the appellant did not respond to the notices, the Ld. Addl.CIT(A) has confirmed the disallowance made by the Ld. AO by adjudicating that the appellant has not submitted any concrete evidence with regard to the tenure of the employment of these 13 employees with the appellant company and no further evidence was submitted in addition to the papers filed before the Ld. AO. It was held that the Ld. AO has arrived at the conclusion after in depth analysis of all facts and submission, disallowance made by the Ld. AO was confirmed.

6. Aggrieved by the confirmation of the disallowance made by the Ld. AO, appellant filed an appeal before the ITAT with almost similar grounds. The appellant has filed an additional ground of appeal that the expenditure of Rs. 12,66,553/- is allowable alternately as business expenditure under section 37 of the Act even if the same is not classified as a gratuity payment.

7. Grounds of appeal as well as additional ground filed by the appellant were taken into consideration. The Ld. AR of the appellant filed a paper book, which contains details of profit and loss account, balance-sheet, submission before the Ld. AO, show-cause notice issued by the Ld. AO, submission before the Addl.CIT(A), a chart giving details of 13 employees and their last drawn salary, forms filled by the employees and bank statement showing payment of salary to employees. The Ld. AR of the appellant has repeated the arguments taken before the lower authorities in the ITAT also during the hearing proceedings. At page 12 of the paper book filed, it is observed that the proportionate gratuity was paid by the appellant company as well as proprietary concern. As far as raising liability in books and showing it in Form 3CD is concerned, it was mentioned that inadvertently the same was not shown in the books for A.Y. 2013-14. It was further pleaded that even if the gratuity payment was shown in the concerned

assessment year, the same would not have been eligible as deduction because the same was not paid during the concerned assessment year and this gratuity was paid only in March, 2017 and hence the appellant company rightly claimed the same on payment basis as envisaged in section 43B of the Act. The Ld. AR has further argued that the genuineness of the payment was not questioned by either the Ld. AO or Addl.CIT(A) and hence the same should have been allowed as business expenditure.

8. During the hearing proceedings, Ld. DR relied on the orders of the lower authorities and argued that this expenditure cannot be claimed as business expenditure in the current year as claimed in the additional ground because there is no business in this company from 2013 onwards and any business expenditure should be allowed against income of the business. Since there is no business at all, expenditure should not be allowed, it was argued by Ld. DR.

9. After perusal of the orders of the lower authorities and the paper book, it is decided to remand the issue back to the file of the Ld. AO to find out whether really these 13 employees were shifted to the proprietary concern of the directors of the company from 1.4.2013 and the totally quit the job from the proprietary concern also on 17.3.2017. The Ld. CIT(A) has adjudicated that the details were not filed before him despite three opportunities were given. The Ld. AO is directed to verify the alternate claim taken before the ITAT that the same should be allowed as business expenditure.

10. The appeal of the appellant is allowed for statistical purposes.

Order pronounced in the open court on 11<sup>th</sup> November, 2024.

Sd/-  
(Beena Pillai)  
Judicial Member

Sd/-  
(Omkareshwar Chidara)  
Accountant Member

Mumbai : 11.11.2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

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BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai