

**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI**  
**BEFORE SHRI B.R. BASKARAN, AM AND SHRI RAM LAL NEGI, JM**

आयकर अपील सं./ I.T.A. No. 2967/Mum/2014  
(निर्धारण वर्ष / Assessment Year: 2008-09)

Bank of India 8 <sup>th</sup> Floor, Star House, Taxation Department, Bandra-Kurla Complex, Bandra (East) Mumbai-400 051.	<b>बनाम/ Vs.</b>	Assistant Commissioner of Income Tax 2(1), Aayakar Bhavan, Mumbai-400 020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.		AAACB 0472C
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri C. Naresh
प्रत्यर्थी की ओर से/Respondent by	:	Shri Shishir Dhamija

सुनवाई की तारीख / Date of Hearing	:	20/06/2016
घोषणा की तारीख / Date of Pronouncement	:	20/06/2016

**आदेश / ORDER**

**Per B.R. BASKARAN, ACCOUNTANT MEMBER:**

The appeal filed by the assessee is directed against the order dated 12-02-2014 passed by Ld CIT(A)-4, Mumbai against the order passed by the assessing officer u/s 154 of the Act and it relates to the assessment year 2008-09

2. The assessee is aggrieved by the decision of Ld CIT(A) in upholding the validity of rectification proceeding initiated by the AO.

3. The AO passed the assessment order for assessment year 2008-09 u/s 143(3) of the Income Tax Act on 31/12/2010 and later a rectification order dated 22.2.2011 was passed u/s 154 of the Act. Subsequently the AO again noticed that following mistakes apparent from record remained un-rectified and hence he passed the impugned rectification order dated 23.4.2012:-

- a. Brought forward loss pertaining to AY 2005-06 and 2006-07 was erroneously allowed.
- b. Provision for leave encashment was erroneously not disallowed u/s 43B of the Act.
- c. Deduction u/s 36(1)(viiia) of the Act relating to "Provision for bad and doubtful debts" was allowed in excess of the amount actually provided for by the assessee.

The assessee was not satisfied with the rectification order passed by AO in respect of issues stated as (b) and (c) above and hence the assessee filed an appeal before the Id. CIT(A). However, the contentions of the assessee did not find favour with Id. CIT(A) and hence he dismissed the appeal filed by the assessee. Aggrieved, the assessee has filed an appeal before us.

4. The first issue relates to the disallowance of provision for leave encashment made u/s 43B of the Act. The Id. AR submitted that the Hon'ble Calcutta High Court in the case of Exide Industries Limited vs. UOI 292 ITR 470 has held that the provision of section 43B(f) relating to disallowance of "provision for leave encashment" is arbitrary, un-conscionable. Id. AR further submitted the same view was expressed by Hon'ble Kerala High Court in another decision. Accordingly Id. AR submitted that the disallowance required to be made in respect of provision for leave encashment u/s 43B (f) of Act was subject to

various legal disputes. Accordingly he submitted that this issue is a debatable one hence it falls beyond the scope of rectification u/s 154 of the Act.

5. On the contrary, the Id. DR submitted that the decision rendered by Hon'ble Calcutta High Court in the case Exide Industries Ltd.(supra) has since been stayed by Hon'ble Supreme Court in the case of CIT vs. Exide Industries Ltd. in SLP No.CC 12060008 dated 08.09.2008. Subsequently Hon'ble Supreme Court in SLP CC No.22889/2008 dated 27.06.2007 in the case of CIT vs. Exide Industries Ltd. has held that, during the pendency of appeal, the assessee has to pay tax as if section 43B (f) is on the statute book. Accordingly, the Id. DR submitted that the disallowance of provision for leave encashment is required to be made u/s 43B(f) of the Act. Since the original order was passed by the AO without complying statutory provisions, he has passed the impugned rectification order disallowing the provision leave encashment and the same is in accordance with the decision rendered by the Hon'ble Supreme Court.

6. We heard the parties on this issue and perused the record. As submitted by Id. DR, the Hon'ble Supreme Court, in the case of Exide Industries Ltd., (referred supra) has stayed the decision rendered by Hon'ble Calcutta High Court and further held that the disallowance should be made in terms of sec. 43B of the Act, during the pendency of appeal, as if section 43(B)(f) is in the statute book. Hence the provision for leave encashment is required to be disallowed in terms of section 43B(f) of the Act if it has not been paid on or before the due date prescribed for furnished return of income u/s 139(1) of the Act. In the instant case, the AO has passed the original assessment order without making disallowance, as mandated by sec. 43B(f) of the Act and the same, in our view,

constitutes mistake apparent from record. Hence, we are of the view that the Id. CIT(A) was justified in upholding the order passed by AO in respect of this issue.

7. The next issue relates to restricting the deduction of "provision for bad and doubtful debts" claimed by the assessee u/s 36(1)(viiia) of the Act to the amount actually provided for. The said provision allows deduction of amount created towards "provision for bad and doubtful debt" to the maximum extent prescribed in that section. The AO noticed that the assessee has claimed deduction to the maximum extent prescribed in 36(1)(viiia), even though the provision was made for a lesser amount. Since the claim was initially allowed without verifying the actual amount of provision created by the assessee, the AO rectified the same u/s 154 of the Act. The Ld CIT(A) also confirmed the same.

8. The Id. AR submitted that the matter relating to deduction u/s 36(1)(viiia) was always in dispute and hence the same was debatable one. Accordingly he submitted that the rectification made by the AO is beyond the scope of provision of section 154 of the Act. The Ld. AR further submitted that the Hon'ble Cochin Bench of Tribunal in the case of Kannur Distt. Co-op Bank Ltd vs ACIT (2012) 20 taxmann.com 667 (Coch.) has held that the deduction u/s 36(1)(viiia) should be allowed on the gross amount of provision made in the books of account.

9. On the contrary, Id. DR submitted that the AO has allowed the deduction claimed by the assessee u/s 36(1)(viiia) in the original assessment proceeding, without verifying the amount actually provided for. Since the amount provided by the assessee was less than the maximum limit prescribed u/s 36(1)(viiia) of the Act, the deduction should be restricted to the amount actually provided for.

Hence the deduction originally allowed by the AO was a mistake apparent from record and hence the same was rectified u/s 154 of the Act.

10. We heard the parties on the issue. There is no dispute with regard to the fact that deduction under section 36(1)(viiia) shall be allowed to the amount actually provided for subject to the limits prescribed in that section. In the instant case, the amount actually provided for was less than the maximum limit prescribed in that section. The assessee has claimed the maximum amount prescribed in that section, even though the amount actually provided for was lesser amount. In the original order, the AO has also allowed the claim without verifying the actual amount provided for in the books of account. Since the deduction was allowed by the AO without complying with the mandate of provisions of sec. 36(1)(viiia) of the Act, we are of the view that the same has resulted in a mistake apparent from record and hence he was justified in rectifying the mistake in the order passed by him u/s 154 of the Act. Accordingly, we are of the view that the Id. CIT(A) was justified in confirming the order of the AO on this issue.

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

*Order pronounced in the open court on 20<sup>th</sup> June, 2016*

Sd/-  
(Ram Lal Negi )

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 20.06.2016

*Ps. Ashwini*

Sd/-  
(B.R. Baskaran)

लेखा सदस्य / Accountant Member

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**