

आयकर अपीलीय अधिकरण, मुंबई “एफ” खंडपीठ

Income-tax Appellate Tribunal “F” Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं रविश सूद, न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & Ravish Sood, Judicial Member

आयकर अपील सं./I.T.A./4350/Mum/2016, निर्धारण वर्ष /Assessment Year: 2009-10

Contfreight Shipping Agency(I) Pvt.Ltd. Unit No.801, Godrej Coliseum, C-Wing Off Somaiya Hospital Road, Sion Mumbai-400 022. PAN:AAACC 1594 L	Vs.	The DCIT Central Circle-6(4), Room No.1925, 19 th Floor,Air India Building, Nariman Point, Mumbai-400 021.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Tufail Ahmed Khan-DR

Assessee by: Shri Harsh Shah-AR

सुनवाई की तारीख / Date of Hearing: 31/08/2017

घोषणा की तारीख / Date of Pronouncement: 27/09/2017

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार /PER Rajendra, AM-

Challenging the order,dated 01.04.2016,of the CIT (A)-54, Mumbai the assessee has filed the present appeal.Assessee-company,functioning as a sub-agent of M/s. Hanjin Shipping India Pvt.Ltd.,filed its return of income,on 29/09/2009,declaring total income at Rs.Nil.The Assessing Officer(AO)completed the assessment u/s.143(3)of the Act,on 28/12/2011, determining its income at Rs.(-)88,24,967/-.During the course of hearing before us,the Authorised Representative(AR)stated that considering the smallness of tax effect the assessee would not like to press Grounds no.2-4 for the year under consideration.Hence, same stand dismissed.

3.Effective Ground of appeal is about disallowance of contribution of Rs.19.30 lakhs towards Gratuity Fund(GF)maintained by Life Insurance Corporation (LIC).During the assessment proceedings,the AO found that expenses amounting to Rs.19,30,895/-were claimed on account of contribution made towards GF.He directed the assessee to explain as to whether the GF was approved and also to justify the allowability of deduction as per the provisions of section 40A(7) of the Act.As per the AO,the assessee did not bring anything on record to show that the GF was a recognised fund within the meaning of section 40A(7) of the Act. He held that deduction claimed by the assessee for a sum of Rs.19.30 lakhs had to be disallowed.

4.Aggrieved by the order of the AO,the assessee filed an appeal before the First Appellate Authority(FAA)and stated that it had subscribed to Employees’ Group cum Life Assurance Scheme with LIC,that it had duly executed a trust deed,that the annual subscription were

made to GF based on the contribution request received from LIC, that the above scheme was filed with the CIT-Central-III, Mumbai for approval.

After considering the assessment order and submission order, the FAA held that till the date of disposal of the appeal the GF had not been approved by the CIT concerned, though the assessee had filed an application for approval. He referred to section 36(1) (v), 40A(7) and 2(5) of the Act and held that any GF could be treated as approved GF only when same had been approved by the PCCIT/CCIT/PCIT/CIT, that the assessee had submitted an application for approval of its GF, that mere filing of application would not meet the requirement as stipulated u/s. 2(5) of the Act. Finally, he upheld the order of the AO.

5. Before us, the AR argued that the assessee had already made an application, that the granting of approval was beyond its control, that payment was paid to LIC as directed by it, that there was no doubt about incurring of expenditure towards GF. He relied upon the cases of Bitoni Lamps Ltd. (277 ITR 396) and Baroda Gujarat Gramin Bank (ITA/1479/Ahd./2010-AY.06-07) Dtd 6.8.2010. The Departmental Representative (DR) supported the order of the FAA.

6. We have heard the rival submissions and perused the material before us. We find that the assessee was making payment to LIC towards Employees Group cum Life Assurance Scheme after creating a trust deed, that it had made an application to the CIT for approval. Thus, there is no doubt that payments had been made by the assessee to LIC in a particular Scheme. The granting of approval for a GF is not in the hands of the assessee. It could only make an application and deposit the money. We find that in the case of Baroda Gujarat Gramin Bank similar issue had arisen and the Tribunal referring to the case of Bitoni Lamps Ltd. (supra), had decided the issue in favour of the assessee. We are reproducing the relevant portion of the order of the Tribunal and it reads as under :-

“This appeal by the Revenue is directed against the order of the CIT(A)-VI, Baroda dated 08-01-2010 for assessment year 2006-07 on the following ground:

“1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of contribution made to group gratuity scheme of LIC of India, being an unapproved fund u/s 40A(7) of the Act.

2. The AO observed that contribution towards gratuity of LIC of Rs.26,53,000/- was claimed u/s 40 A(7) of the IT Act. It was stated by the assessee that application for recognition of group gratuity scheme was pending for approval before the Income Tax Authorities. Accordingly, claim of payment of Rs.26,53,000/- to LIC was not allowable u/s 40A (7) of the IT Act. It was submitted that contribution to LIC towards gratuity was allowable in the light of the decision of Hon'ble Punjab & Haryana High Court in the case of CIT Vs Bitoni Lamps Ltd. 277 ITR 396. The AO however, held that gratuity liability cannot be allowed when the assessee did not have any approved gratuity fund. The claim was accordingly disallowed. Same submissions were made before the learned CIT(A). The learned CIT(A) considering the order of ITAT Ahmedabad Bench in the case of Crystal Solvent Pvt. Ltd. (ITA No.655/ Ahd/

2005) allowed the appeal of the assessee in which it was held that disallowance u/s 40 A(7) of the IT Act cannot be made on the ground of absence of approval of gratuity fund as the deduction was not claimed on account of any provision.

3. The learned DR relied upon the order of the AO and submitted that approval of the Commissioner of Income Tax was not obtained. Therefore, contribution towards gratuity cannot be allowed as deduction u/s 40A (7) of the IT Act. On the other hand, the learned Counsel for the assessee reiterated the submissions made before the authorities below and also relied upon the order of ITAT Ahmedabad Bench in the case of New Bharat Engineering Works (Jam) Ltd. Vs ITO 44 TTJ (Ahd) 522. The learned Counsel for the assessee further submitted that the assessee made a claim on actual expenses incurred under the head gratuity contribution. Therefore, provisions of section 40A (7) of the Act would not apply in the matter.

4. We have considered the rival submissions and material available on record. Section 40A (7) of the IT Act provides that subject to provision of clause (b), no deduction shall be allowed in respect of any provision made by the assessee for payment of gratuity to his employer on their retirement or on termination of their employment for any reason. It is clear from the above provision that section 40A (7) of the IT Act would apply in respect of the provision only. However, in the case of the assessee, the assessee claimed deduction of the expenditure on account of actual expenses claimed under the head gratuity contribution. ITAT Ahmedabad Bench in the case of New Bharat Engineering Works (Jam) Ltd. (supra) held "Disallowance under s. 40A(7) – Gratuity – Actual payment of funds to LIC and not mere provision – Not hit by s. 40A(7) – CIT vs Gujarat Machine Tools (ITA 666/Ahd/1985) followed". Hon'ble Punjab & Haryana High Court in the case of CIT Vs Bitoni Lamps Ltd. 144 Taxman 33 held that "Section 40A(7) of the Income-tax Act, 1961 – Business disallowance – Gratuity – Assessment year 1979-80 – Assessee-company claimed deduction under section 40A(7) (b) (i) on account of gratuity actually deposited in fund created by it – Whether such a claim could only have been disallowed if it had been proved that gratuity, in respect of which said payment had been made, had not become payable during previous year – Held, yes – Whether in absence of such a case made out by revenue, Tribunal was right in holding that grant of approval of gratuity fund was not relevant for purpose of instant case as said deduction was not being claimed on account of any provision and amount of gratuity was an allowable deduction – Held, yes".

5. Considering the above aspects, we do not find any infirmity in the order of the learned CIT(A) in deleting the addition. There is no merit in the departmental appeal. Same is accordingly dismissed. 6. As a result, the departmental appeal is dismissed."

In the case of Bitoni (supra) the Hon'ble Punjab & Haryana High Court had held that if payments towards funds were made no disallowance should be made even if approval was pending. Considering the above and respectfully following the above referred two cases we decide Ground 4-6 in favour of the assessee.

As a result, appeal filed by the assessee stands partly allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 27th September, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 27 सितंबर, 2017 को की गई।

Sd/-

(रविश सूद /Ravish Sood)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated : 27.09 .2017.

Jv.Sr.PS.

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

1.Appellant /अपीलार्थी

Sd/-

(राजेन्द्र / RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

2. Respondent /प्रत्यर्थी

- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
5.DR “ F ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**