

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.294/Coch/2017 : Asst.Year 2009-2010

ITA No.295/Coch/2017 : Asst.Year 2010-2011

ITA No.296/Coch/2017 : Asst.Year 2011-2012

M/s.The Nilambur Co-op. Urban Bank Limited HO. P.B.No.10, PO Nilambur Malapuram – 679 329 PAN : AAATT2863N.	Vs.	The Asst.Commissioner of Income-tax, Circle 2(2) Tirur.
(Appellant)		(Respondent)

Appellant by : Sri.Rajakannan

Respondent by : Smt.A.S.Bindhu, Sr.DR

Date of Hearing : 22.01.2019	Date of Pronouncement : 22.01.2019
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ORDER

Per George George K. (JM)

These appeals at the instance of the assessee are directed against three orders of the CIT(A), all dated 31.03.2017. The relevant assessment years are 2009-2010, 2010-2011 and 2011-2012.

2. Since common issue is raised in these appeals, they were heard together and are being disposed off by this consolidated order.

3. The solitary issue that is raised in these appeals is whether the CIT(A) is justified in confirming the disallowance of provisions made in the accounts for leave salary payable?

4. The brief facts of the case are as follows:-

4.1 The assessee is a Co-operative Society, engaged in the business of Banking. For the assessment year 2009-2010, return of income was filed on 14.05.2010 declaring Rs.1,77,95,992. The assessment u/s 143(3) of the I.T.Act was completed vide order dated 29.11.2011 at a total income of Rs.1,84,61,910. Subsequently, the assessment was set aside by the Commissioner of Income-tax u/s 263 of the I.T.Act for the reason that the Assessing Officer had allowed deduction u/s 36(1)(viiia) of the I.T.Act and also omission to disallow a sum of Rs.8,15,566 claimed as provision for leave salary. In pursuant to the revisionary order u/s 263 of the I.T.Act, the Assessing Officer completed order u/s 143 r.w.s. 263 of the I.T.Act vide order dated 27.03.2014 arriving at an income of Rs.2,07,85,970.

4.2 Similarly for assessment year 2010-2011 the original assessment order was set aside u/s 263 of the I.T.Act for the reason that there was an omission to disallow a sum of Rs.11,90,576 claimed as provision for leave salary. Consequent to the order passed u/s 263 of the I.T.Act, the assessment order was completed u/s 143 r.w.s. 263 of the I.T.Act vide order dated 30.03.2014.

4.3 For the assessment year 2011-2012 the assessment was completed u/s 143 of the I.T.Act vide order dated 27.03.2014 arriving at a total income of Rs.2,70,78,080. In the said assessment completed u/s 143 of the I.T.Act, the Assessing

Officer had disallowed provision for leave salary amounting to Rs.33,30,581.

5. Aggrieved by the above assessment orders for the assessment years 2009-2010, 2010-2011 and 2011-2012, the assessee preferred appeals to the first appellate authority. The CIT(A) passed three separate orders confirming the view taken by the Assessing Officer. In doing so, the CIT(A) followed the judgment of the Hon'ble jurisdictional High Court in the case of *South Indian Bank Ltd. v. CIT [(2014) 49 Taxmann.com 100 (Ker.)]*.

6. Aggrieved by the orders of the CIT(A), the assessee has filed the present appeals before the Tribunal. The learned AR reiterated the submissions made before the Income-tax Authorities. The learned Departmental Representative, on the other hand, supported the assessment orders and the orders of the CIT(A).

7. We have heard the rival submissions and perused the record. We find an identical issue had come up for consideration before this Tribunal in the case of Muthoot Vehicles and Asset Finance Ltd vs. ACIT in ITA No.623/Coch/2013 dated 6.12.2013 wherein it was held as under:

"3. We have heard the rival contentions on this issue. We notice that this bench of Tribunal has considered an identical issue in the case of M/s Kerala Feeds Ltd (ITA No. 179 & 180/Coch/2013) and the

Tribunal, vide its order dated 27-09-2013, has set aside this issue to the file of the AO with the following observations:-

7. We have heard the rival contentions and perused the record With regard to the claim of "Provision for leave encashment"; the Ld Counsel placed reliance on the decision of Hon'ble Kerala High Court in the case of Hindustan Latex Ltd (supra) and also on the decision rendered by Hon 'ble Rajasthan High Court in the case of CIT Vs. Raj. State Bride and Construction Corporation Ltd (2012)(346 ITR 53). We notice that the Rajasthan High Court, in the above cited case, has considered the claim of deduction of 'Provision for leave encashment' for assessment year 2000-01. However, the provisions of see. 43B(f) was inserted into the Act by Finance Act, 2001 w.e.f. 1.4.2002, which could not have been considered by Hon'ble Rajasthan High Court Hence, reliance placed by the assessee on the said decision may not be useful for the year under consideration.

8. We have also carefully gone through the decision rendered by the jurisdictional Kerala High Court in the case of Hindustan Latex Ltd (supra) and notice that the High Court has allowed the claim of the assessee on two grounds viz;

(a) The Honble Kerala High Court, in para 5 of its order, has concurred with the view expressed by the Hon'ble Calcutta High Court in the case of Exide Industries Ltd (supra) that Clause (f) of Section 43B is unconstitutional.

(b) The decision rendered by the Hon'ble Calcutta High Court has not been challenged

before the Supreme Court. (Para 5 and 8). Accordingly, the Hon 'ble Kerala High Court, by following the decision rendered by the Hon'ble Supreme Court in the case of Berger Paints Ltd Vs. CIT (266 ITR 99), has further held that the Revenue having not challenged the correctness of the law laid down by the Calcutta High Court, it is not open to the Revenue to challenge its correctness in the case of another assessee.

9. However, we notice that the department has challenged the decision rendered by the Hon'ble Calcutta High Court in the case of Exide Industries Ltd, by filing appeal before Hon'ble Supreme Court and the Hon'ble Apex Court has stayed the judgment of the Hon'ble Calcutta High Court. In fact, the Hon'ble Apex Court has passed two interim orders in this regard, which are detailed below:-

(a) The first order was passed on 08-09-2008 in the petition for Special Leave to Appeal (Civil)... CC 12060/2008 in the case of CIT Vs. Exide Industries Ltd (from the judgment and order dated 27-6-2007 in APO No.301/2005 of The High Court of Calcutta). The order reads as under:-

"Upon hearing counsel the Court made the following ORDER

Issue notice.

In the meantime, there shall be stay of the impugned judgment, until further orders".

(b) The second order was passed on 08-05-2009 in the petition for Special Leave to Appeal (Civil) No(s) 22889/2008 (from the very same judgment of the High Court of Calcutta). The order reads as under:-

"Pending hearing and final disposal of the Civil Appeal, Department is restrained from recovering penalty and interest which has accrued till date. It is made clear that as far as the outstanding interest demand as of date is concerned, it would be open to the Department to recover that amount in case Civil Appeal of the Department is allowed.

We further make it clear that the assessee would, during the pendency of this Civil Appeal, pay tax as if Section 43B(f) is on the Statute Book but at the same time it would be entitled to make a claim in its returns",

Thus, it is noticed that the Hon'ble Apex Court has not only stayed the operation of the Hon'ble Calcutta High Court in the case of Exide Industries Ltd (supra), but also observed that the assessee would, during the pendency of this Civil Appeal, pay tax as if Section 43B(f) is on the Statute Book. Though the interim orders were passed by the Hon'ble Apex Court in the years 2008/2009, it was not brought to the notice of Hon'ble jurisdictional High Court. We further notice that the Hon'ble Supreme Court has modified the decision rendered in the case of Berger Paints (supra) in its subsequent decision in the case of Gangadharan (304 ITR 61). The operative part of the said decision reads as under:-

"In answering the reference, we hold that merely because in some cases the Revenue has not preferred appeal that does not operate as a bar for the Revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher court when divergent views are expressed by the Tribunals or the High Courts. "

10. We also notice that the Calcutta Bench of Tribunal has considered an identical issue in the case of S.R Batliboy & Co. in ITA No.1598/Ko/j2011 and the Tribunal, vide its

decision dated 13-03-2012, has set aside the matter to the file of the AO with the direction to consider the issue afresh as per the decision of Hon'ble Apex Court in the case of Exide Industries Ltd (supra). Accordingly, we set aside the orders of Ld CIT(A) on this issue in both the years under consideration and restore them to the file of the AO with the direction to examine the issue afresh in the light of discussions made supra. "

4. Consistent with the view taken in the case of Kerala Feeds Ltd (supra), we set aside the order of Ld CIT(A) on this issue and restore the same to the file of the assessing officer with the direction to examine this issue afresh in accordance with the decision rendered by Hon'ble Supreme Court in the case of M/s Exide Industries Ltd (supra).

5. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes. "

8. In view of the above order of the Tribunal, we remit this issue to the file of the AO with similar direction. Accordingly, the assessee's appeals are allowed for statistical purposes.

9. In the result, the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced on this 22nd day of January, 2019.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 22nd January, 2019.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT (Appeals)-II, Kochi
4. The Pr.CIT Calicut.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin