

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.391/Kol/2019
Assessment Year: 2014-15**

Twinnings Private Ltd., C/o Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suite 213, 2 nd floor, Kolkata-700069. (PAN: AABCT2275N)	Vs.	DCIT, Central -4(2), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Siddharth Agarwal, Advocate
Respondent by : Shri B. K. Singh, JCIT, Sr. DR

Hearing concluded on : 04.01.2024
Date of Pronouncement : 08.01.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A)-18, Kolkata vide order no. CIT(A), Kolkata-18/10794/16-17/Circle-4(2)/18-19 dated 26.12.2018 passed against the assessment order by DCIT, Circle-4(2), Kolkata u/s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 29.12.2016, for AY 2014-15.

2. Assessee is in appeal challenging the disallowance of Rs.12,14,720/- on account of contribution made by it to LIC Group Gratuity Scheme (in short "LICGGS") u/s. 36(1)(v) of the Act. In the alternate, assessee has claimed a deduction for this contribution as allowable u/s. 37(1) of the Act.

3. Brief facts of the case are that assessee is engaged in the business of purchasing, blending, packing and selling tea. It filed its return of income on 29.11.2014 reporting loss of Rs.2,23,56,292/-. In the course of assessment, Ld. AO noted that assessee had contributed a sum of Rs.12,14,720/- to gratuity fund carried in the name of Twinings Private Ltd. group gratuity fund. Ld. AO observed from the tax audit report in Form 3CD at column 21(e) that the auditor has reported that the said fund is yet to receive approval of the concerned Commissioner of Income Tax. Accordingly, since the contribution has been made to unapproved gratuity fund, Ld. AO disallowed the claim u/s. 36(1)(v) of the Act. Aggrieved, assessee went in appeal before the Ld. CIT(A).

4. Assessee made a detailed submission before the Ld. CIT(A) and contended that assessee made payment of contribution to gratuity fund through LIC for which it has submitted copy of Master Agreement along with proof of payment. Master policy No. GG(CA)210547 is dated 12.01.2004 effective from 01.11.2002. According to assessee, it had no control over the fund contribution to the LIC towards gratuity. Assessee receives the gratuity payment from the LIC as per the scheme which is paid directly to the employees as and when the occasion arises. According to the assessee, even if the deduction is not allowable u/s. 36(1)(v) but is a permissible deduction u/s. 37(1) of the Act as on the fund maintained by LIC, assessee has no control and the fund is credited exclusively for the benefits of its employees.

4.1. After considering the submissions made by the assessee, Ld. CIT(A) noted that assessee had not provided any proof regarding the approval given by the Administrative Commissioner

of Income Tax to the gratuity fund which availed the group gratuity scheme of LIC. In the absence of evidence of having approval of the prescribed authority, it was held that the gratuity fund of the assessee is not an approved one. He thus, confirmed the disallowance made by the Ld. AO u/s. 36(1)(v). On the alternate claim made by the assessee that it is an allowable deduction u/s. 37(1), Ld. CIT(A) referred to several judicial precedents to dislodge the claim of the assessee. He placed reliance on the decision of the jurisdictional High Court of Calcutta in the case of Brook Bond India Ltd. Vs. JCIT in ITA No. 139 of 1999 dated 01.03.2011 wherein it was categorically held that a deduction allowable has to invariably satisfy the necessary conditions prescribed therein and further, such expenditures of the nature allowable as deduction under sections 30 to 36 of the Act cannot be claimed and allowed under the section 37(1) of the Act in the name of the residuary provision. Thus, based on the decision by the jurisdictional High Court of Calcutta, alternate plea of the assessee was also dismissed. Aggrieved, assessee is in appeal before the Tribunal.

5. Before us, in the course of hearing, Ld. Counsel for the assessee submitted that assessee had filed an application with the Ld. CIT (Administration) for obtaining approval of gratuity fund. He referred to the copy of the said application placed in the paper book at page 50 to demonstrate that the said application was furnished on 10.12.2002 and has been pending since then for the reasons best known to the concerned authority. For such prolonged pendency, the assessee should not be made to suffer. A direction was given by the Bench to furnish the current status of the subjected approval against the application so made by the assessee. In compliance to the direction,

an order granting approval to Twinings Pvt. Ltd. employees' gratuity fund constituted under the Trust Deed dated 08.12.2022 as an approved gratuity fund which shall take effect from 03.01.2023 was placed on record. The said order is passed by Ld. Pr. CIT, Kolkata which is dated 04.10.2023. Ld. Counsel also submitted that payment made to the LIC towards group gratuity scheme is not in doubt and is undisputed. To corroborate the same, he referred to the receipts issued by LIC for the payments made by the assessee, copies of which are placed in the paper book. Ld. Counsel placed reliance on the decision of Hon'ble Supreme Court in the case of CIT Vs. Textool Co. Ltd. (2013) 35 taxmann.com 639 (SC). He also placed reliance on the decision of Coordinate Bench of ITAT, Vizag in the case of the District Cooperative Central Bank Vs. ITO in ITA No. 78/Vizag/2012 dated 25.01.2018.

6. Per contra, Ld. Sr. DR asserted that there is a specific condition stated u/s. 36(1)(v) regarding the fund to be approved by the competent authority for the purpose of claiming deduction. He also submitted that the approval which has been granted now cannot be back dated since the approval granted vide order dated 04.10.2023 is prospective which takes effect from 03.01.2023 and cannot be considered for the purpose of allowing the claim in the impugned assessment year 2014-15. He placed strong reliance on the decision of the Hon'ble jurisdiction High Court of Calcutta in the case of Brook Bond India Ltd. (supra) which squarely covered the case of the assessee against it.

7. We have heard rival contentions and perused the material available on record. It is a fact on record that assessee had made an application for approval of gratuity fund long back i.e. on 10.12.2002. Assessee had also entered into an agreement with LIC by obtaining Master Policy as stated above which was effective from 01.11.2002.

Payment made to LIC towards group gratuity scheme are also not in dispute. Order granting approval to the gratuity fund issued by the office of Ld. Pr. CIT is dated 04.10.2023 wherein it is stated that the approval takes effect from 03.01.2023.

7.1. We fail to understand for such a prolonged delay in disposing the application of the assessee without any fault at its end in granting the said approval. During all these years, assessee had been making payments to the LIC towards group gratuity scheme and claimed it as deduction. Its employees have also received payments from LIC for their gratuity as and when the occasion arose. Similar claim has been allowed by Ld. CIT(A) in AY 2011-12 not contended by the Department before the Tribunal. We take note of the observations and findings given by the Hon'ble Supreme Court in the case of Textool Co. Ltd. (supra) on which Ld. Counsel for the assessee has placed his strong reliance. Relevant para 8 from the said judgment is extracted below:

“8. Having considered the matter in the light of the background facts, we are of the opinion that there is no merit in the appeal. True that a fiscal statute is to be construed strictly and nothing should be added or subtracted to the language employed in the Section, yet a strict construction of a provision does not rule out the application of the principles of reasonable construction to give effect to the purpose and intention of any particular provision of the Act. (See : Shree Sajjan Mills Ltd. v. CIT [1985] 156 ITR 585/23 Taxman 37 (SC). From a bare reading of Section 36(1)(v) of the Act, it is manifest that the real intention behind the provision is that the employer should not have any control over the funds of the irrevocable trust created exclusively for the benefit of the employees. In the instant case, it is evident from the findings recorded by the Commissioner and affirmed by the Tribunal that the assessee had absolutely no control over the fund created by the LIC for the benefit of the employees of the assessee and further all the contribution made by the assessee in the said fund ultimately came back to the Textool Employees Gratuity Fund, approved by the Commissioner with effect from the following previous year. Thus, the conditions stipulated in Section 36(1)(v) of the Act were satisfied. Having regard to the facts found by the Commissioner and affirmed by the Tribunal, no fault can be found with the opinion expressed by the High Court, warranting our interference.”

7.2. In terms of the judgment referred above, for applying the principles of reasonable construction to give effect to the purpose and intention of the provision contained in sec. 36(1)(v) and sec. 37(1) of

the Act, we delve into the provisions contained in the Act. The relevant provisions and rules are extracted below:

- (i) Sec. 2(5) which defines approved gratuity fund. The said section is reproduced as under:

“(5) ‘‘approved gratuity fund’’ means a gratuity fund has been and continues to be approved by the [Principal Chief Commissioner or] Chief Commissioner of [Principal Commissioner or] Commissioner] in accordance with the rules contained in Part C of the Fourth Schedule.”

- (ii) Application for approval of gratuity fund is prescribed in Rule 109 of the Income Tax Rules, 1962 (hereinafter referred to as the ‘‘Rules’’), the same is extracted as under:

‘‘Application for approval.

109. (1) The application for approval of a gratuity fund under sub-rule (1) of rule 4 of Part C of the Fourth Schedule shall contain the following information :—

- (a) *Name of employer and address, his business, profession, etc., also his principal place of business.*
- (b) *Classes and number of employees entitled to admission to the fund—*
- (i) *in India ;*
- (ii) *outside India.*
- (c) *Place where the accounts of the fund are or will be maintained.*
- (d) *If the fund is already in existence, the details of investment of the fund.*
- (2) *A verification in the following form shall be annexed to the application :—*

FORM OF VERIFICATION

We/I, the trustee(s) of the abovenamed fund, do declare that what is stated in the above application is true to the best of our/my information and belief, and that the documents sent herewith are the originals or true copies thereof.”

- (iii) Rule 109 referred above deals with Rule 4(1) of Part C of the 4th Schedule. Part C of the 4th Schedule in respect of approved gratuity fund is extracted below:

‘PART C

APPROVED GRATUITY FUND

[See sections 2(5), 10(25)(iv), 17(1)(iii), 36(1)(v)]

Definitions.—

1. *In this Part, unless the context otherwise requires ‘‘employer’’, ‘‘employee’’, ‘‘contribution’’ and ‘‘salary’’ have, in relation to gratuity*

funds, the meanings assigned to those expressions in rule 2 of Part A in relation to provident funds.

Approval and withdrawal of approval.

2. (1) *The 1 [2 [Principal Chief Commissioner or Chief Commissioner] or 3 [Principal Commissioner or Commissioner]] may accord approval to any gratuity fund which, in his opinion, complies with the requirements of rule 3 and may at any time withdraw such approval if, in his opinion, the circumstances of the fund cease to warrant the continuance of the approval.*

(2) The 1 [2 [Principal Chief Commissioner or Chief Commissioner] or 3 [Principal Commissioner or Commissioner]] shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect and where the approval is granted subject to conditions, those conditions.

(3) The 1 [2 [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner]] shall communicate in writing to the trustees of the fund any withdrawal of approval with the reasons for such withdrawal and the date on which the withdrawal is to take effect.

(4) The [Principal Chief Commissioner or Chief Commissioner] or 3 [Principal Commissioner or Commissioner]] shall neither refuse nor withdraw approval to any gratuity fund unless he has given the trustees of that fund a reasonable opportunity of being heard in the matter.

Conditions for approval.

3. In order that a gratuity fund may receive and retain approval, it shall satisfy the conditions set out below and any other conditions which the Board may, by rules, prescribe—

(a) the fund shall be a fund established under an irrevocable trust in connection with a trade or undertaking carried on in India, and not less than ninety per cent of the employees shall be employed in India ;

(b) the fund shall have for its sole purpose the provision of a gratuity to employees in the trade or undertaking on their retirement at or after a specified age or on their becoming incapacitated prior to such retirement or on termination of their employment after a minimum period of service specified in the rules of the fund or to the widows, children or dependants of such employees on their death ;

(c) the employer in the trade or undertaking shall be a contributor to the fund ; and

(d) all benefits granted by the fund shall be payable only in India.

Application for approval.—

4.(1) An application for approval of a gratuity fund shall be made in writing by the trustees of the fund to the 4 [Assessing Officer], by whom the employer is assessable and shall be accompanied by a copy of the instrument under which the fund is established and by two copies of the rules 5 [and, where the fund has been in existence during any year or years prior to the financial year in which the application for approval is made, also two copies of the accounts of the fund relating to such prior year or years (not being more than three years immediately preceding the year in which the said application is made) for which such accounts have been made up], but the 1 [2 [Principal Chief Commissioner or Chief Commissioner] or 3 [Principal Commissioner or Commissioner]] may require such further information to be supplied as he thinks proper.

(2) If any alteration in the rules, constitution, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the fund shall forthwith communicate such alterations to the 4 [Assessing Officer] mentioned in sub-rule (1), and in default of such communication, any approval given shall, unless the 1 [2 [Principal Chief Commissioner or Chief Commissioner] or 3 [Principal Commissioner or Commissioner]] otherwise orders, be deemed to have been withdrawn from the date on which the alteration took effect.

Gratuity deemed to be salary.—

5. Where any gratuity is paid to an employee during his lifetime, the gratuity shall be treated as salary paid to the employee for the purposes of this Act.

Liability of trustees on cessation of approval.—

6. If a gratuity fund for any reason ceases to be an approved gratuity fund, the trustees of the fund shall nevertheless remain liable to tax on any gratuity paid to any employee.

contributions by employer, when deemed to be income of employer.—

7. Where any contributions by an employer (including the interest thereon, if any) are repaid to the employer, the amount so repaid shall be deemed for the purposes of income-tax 1 *** to be the income of the employer of the previous year in which they are so repaid.

Appeals.—

8.(1) An employer objecting to an order of the 2 [3 [Principal Chief Commissioner or Chief Commissioner] or 4 [Principal Commissioner or Commissioner]] refusing to accord approval to a gratuity fund or an order withdrawing such approval may appeal, within sixty days of such order, to the Board.

(2) The appeal shall be in such form and shall be verified in such manner and shall be subject to the payment of such fee as may be prescribed.

Particulars to be furnished in respect of gratuity funds.—

8A. The trustees of an approved gratuity fund and any employer who contributes to an approved gratuity fund shall, when required by notice from the 6 [Assessing Officer], furnish within such period, not being less than twenty-one days from the date of the notice, as may be specified in the notice, such return, statement, particulars or information, as the 6 [Assessing Officer] may require.]

Provisions relating to rules.—

9.(1) In addition to any power conferred in this Part, the Board may make rules—

(a) prescribing the statements and other information to be submitted along with an application for approval;

(b) limiting the ordinary annual and other contributions of an employer to the fund;

[(bb) regulating the investment or deposit of the moneys of an approved gratuity fund:

Provided that no rule made under this clause shall require the investment of more than fifty per cent of the moneys of such fund in Government securities as defined in section 2 of the Public Debt Act, 1944 (18 of 1944);]

(c) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of, or the creation of a charge upon, his beneficial interest in an approved gratuity fund;

(d) providing for the withdrawal of the approval in the case of a fund which ceases to satisfy the requirements of this Part or the rules made thereunder; and

(e) generally, to carry out the purposes of this Part and to secure such further control over the approval of gratuity funds and the administration of gratuity funds as it may deem requisite.

(2) All rules made under this Part shall be subject to the provisions of section 296."

7.3. From the above extracted Part C of the 4th Schedule relating to Approved Gratuity Fund, we note that Rule 5 provides for treating gratuity fund to an employee during his lifetime as salary paid to the employee for the purpose of this Act.

8. It is an undisputed fact that assessee had applied for the approval of the Gratuity Fund in the year 2002 which remained pending by the Department without any justifiable reasons. The approval has been granted by the Ld. Pr. CIT recently vide order dated 04.10.2023 which also states that the approval takes effect from 03.01.2023. The assessee cannot be put to an adverse situation when it has taken all the required steps for the compliance prescribed under the Act and the Rules. LIC has paid gratuity fund to the employees of the assessee in the past. We also note that in the preceding AY 2011-12, Id. CIT(A) has dealt with the same issue in para 4.1 in its order and has allowed the claim of the assessee. Copy of the said order dated 16.10.2019 is placed in the paper book at pages 53 to 57.

8.1. Accordingly, considering the facts of the case, applying principles of reasonable construction for giving effect to the purpose and intention of the provisions of the Act as enunciated by the Hon'ble Supreme Court in the decision of Textool Co. Ltd. (supra) coupled with Rule 5 of Part C of the 4th Schedule wherein gratuity is treated as salary which is an allowable expenses u/s. 37(1) of the Act, we find it proper to allow the claim of the assessee. Accordingly, grounds taken by the assessee on this issue are allowed.

9. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 8th January, 2024

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 8th January, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), Kolkata-18, Kolkata
 4. CIT
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata