

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&**

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 7TH DAY OF JUNE 2012/17TH JYAISHTA 1934

ITA.No. 64 of 2012 ()

IN ITA.147/COCH/2009 of I.T.A.TRIBUNAL,COCHIN BENCH

APPELLANT(S):

THE COMMISSIONER OF INCOME TAX, THIRUVANANTHAPURAM

BY ADV. SRLJOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S):

M/S.HINDUSTAN LATEX LTD., THIRUVANANTHAPURAM

**THIS INCOME TAX APPEAL HAVING COME UP FOR ADMISSION ON
07-06-2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

LSN

ITA.No. 64 of 2012 ()

ANNEXURE

PETITIONER'S ANNEXURE:

ANNX A: COPY OF THE ASSESSMENT ORDER DATED 21.12.2007.

ANNX B: COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX DATED 11.02.2009.

ANNX C: COPY OF THE ORDER OF THE TRIBUNAL DATED 25.11.2011.

RESPONDENT'S ANNEXURE: NIL

//TRUE COPY//

P.A. TO JUDGE

LSN

**Thottathil B Radhakrishnan &
K. Vinod Chandran, JJ**

I.T A No. 64 of 2012

Dated this the 7th day of June, 2012

J U D G M E N T

K. Vinod Chandran, J

The Revenue is in appeal and the respondent is a Government Company. The assessment of the company for the year 2005-06 was completed by Annexure A order. Inter alia, the assessee's claim with respect to the payment of premium to Life Insurance Corporation for the policy under Group Leave Encashment Scheme was claimed as a deduction under Section 37 of the Income Tax Act, 1961(hereinafter referred to as 'the Act'). The claim was allowed treating the same as an expenditure exclusively incurred for the purpose of business. Subsequently, the Commissioner of Income Tax issued notice under Section 263 of the Act and after hearing the objections held that leave encashment is an allowable deduction under Section 43B(f) only and the same can be availed of only with respect to payments made on that account in the previous year.

2. The assessee was before the Tribunal challenging the revision under Section 263 mainly on two grounds (i) being the scope of powers under Section 263 and (ii) Section 43 B(f) being no longer available for the Revenue in view of the judgment of the Calcutta High Court striking down the same. Primarily the assessee contended that the exercise of jurisdiction under Section 263 in the above case could not be sustained for the reason that the finding of the Commissioner with respect to the claim falling under Section 43B(f) would only constitute a mere change of opinion. While conceding the position that the provision conferring powers on the Commissioner to revise orders prejudicial to the interest of the Revenue could be invoked in the event of incorrect appreciation of the facts or incorrect application of law; it has to be noticed that the same cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. The provision made in the accounts for disbursement of leave encashment facility; which is to be disbursed at a future point of time, may not be permissible as a deduction under Section 43B(f). However in the case of the assessee who

has taken insurance policy to cover such liability there is absolutely no question of future disbursal of the liability since such payments/disbursal will be made only by the insurer and the assessee cannot claim any deduction towards such payments made by the insurer. The payments made on account of premium, the assessee contended, was allowable as a deduction under Section 37 and the revisional order of the Commissioner could only amount to a change of opinion. The allowance of the claim by the Assessing Officer cannot be said to be on an incorrect appreciation of facts or on an incorrect application of law. It was also contended that in any event Section 43B(f) has been held to be unconstitutional by the Calcutta High Court as per the decision reported in **2007 (292) ITR 470 Exide Industries Ltd. And another**. The Tribunal accepted both the contentions of the assessee and set aside the impugned order passed by the Commissioner under Section 263 of the Act.

3. Revenue has raised the following questions of law:-

- A. The decision of the Tribunal is not correct and against the facts of the case.
- B. The Tribunal without considering the case on merit held that there are two possible

views in this case.

- C. The Tribunal ought to have gone into the merits of the case and observed that the decision made by the CIT is on the basis of the provisions contained in the relevant section of Income Tax Act and that the view expressed by the assessee is not correct.
- D. The Tribunal has failed to appreciate that the CIT had discussed the relevant facts in detail in the order and had also considered the objections that had been raised by the assessee.
- E. The Tribunal should have found that the only possible view is the one taken by the Commissioner.

4. Section 43 B was introduced by the Finance Act 1983 with effect from 1.4.1984 and clause (f) was inserted by the Finance Act 2001 with effect from 1.4.2002. The introduction of Clause (f) was purportedly to restrict deduction allowable in computing income referred to in Section 28 for the previous year, to that amounts actually paid in lieu of leave encashment in the previous year itself. Section 43B itself was introduced to dissuade tax payers from claiming deduction on the basis of provisions made for discharging statutory liabilities without having actually discharged the same. The

object of Section 43 B was to prevent assesseees from making provisions for statutory liabilities without actually discharging the same and maintaining it as a provision in the Books of Accounts while avoiding actual payment by invoking legal remedies or otherwise. It is to be noticed that leave encashment is not a statutory liability and even in the case of provisions being made the deduction was allowed as a business expenditure; when the liability was not actually incurred in the previous year. In fact the above position was so declared by the decision of the Hon'ble Supreme Court in **Bharat Earth Movers V. Commissioner of Income Tax (2000(245) ITR 428)**. Purportedly to overcome the said decision, the Parliament had brought in an amendment in the year 2001 to deny such deduction in the event of the same being not incurred in the previous year by introduction of Clause (f) to Section 43 B.

5. The above provision, specifically Clause (f) of Section 43 B came up for consideration before the Calcutta High Court wherein the amendment brought in introducing the said clause was challenged as ultra vires and inconsistent with the

object disclosed while inserting the original Section 43 B. The Calcutta High Court in the decision reported in **Exide Industries Ltd. And another v. Union of India and others 2007 292 ITR 470** held Clause (f) of Section 43 B to be unconstitutional. The provision was found to be arbitrary, unsustainable and de hors the Supreme Court decision in the case of **Bharat Earth Movers**. In effect the amendment was held to be incompetent and the law declared by the Supreme Court in Bharat Earth Movers remained as such. Obviously, there is no challenge made to the Supreme Court from the aforesaid decision, by the department; as there is nothing mentioned about any such challenge in the appeal memorandum. We are also in respectful agreement of the reasoning in **Exide Industries** case(Supra).

6. In any event what was intended by introduction of clause (f) was to deny the deduction of liabilities not actually incurred or in other words to exclude the provisions being made as against future liabilities, from being granted a deduction. In the instant case it was not a provision for future liability which was claimed as a deduction. The assessee, a

Government Company had insured itself against the liabilities that may arise on account of the claims made by the employees towards leave encashment. The assessee being covered by a valid insurance policy and premium being regularly paid, incurs no liability towards leave encashment. The liability; being covered by a valid insurance policy, is solely that of the insurer. Even if Section 43 B(f) stands, in the case of the assessee, where the liability is borne by the insurer, there can be no situation wherein assessee could make a valid claim for deduction under Section 43B(f) since the actual liability is not incurred in any of the years. However, it cannot be doubted for a moment that the premium paid towards the renewal and continued validity of the insurance policy necessarily becomes business expenditure wholly and exclusively incurred for the business purpose and allowable as a deduction under Section 37.

7. In the said circumstance, the order of the Assessing officer allowing the claim of deduction cannot at all be assailed. The same cannot be said to be an incorrect assumption of fact or incorrect application of law. The view

taken by the Assessing Officer cannot be said to be unsustainable in law. The only reason quoted by the Commissioner to initiate and conclude proceedings under Section 263 was that the amounts paid in lieu of leave as 'leave encashment' to employees, could only be claimed as a deduction on the actual liability being suffered in the previous year as per Section 43 B (f). The said view cannot be sustained. The finding of the Tribunal is that the proceedings taken under Section 263 of the Act to revise the order of the Assessing Officer on grounds of the same being prejudicial to the Revenue cannot be sustained on the principles laid down by the Supreme Court in **Malabar Industries v. Commissioner of Income Tax**(2000 243 ITR 83) and reiterated in **Commissioner of Income Tax v. Max India Limited (2007 295 ITR 283)**. Section 263 cannot evidently be invoked when an Assessing Officer adopts one of the two courses permissible in law which may result in loss of revenue or where two views are possible and the Assessing Officer takes a view with which the Commissioner does not agree. In such circumstances, it has been clearly laid down in the above

cited decisions that an order so passed cannot be treated as erroneous order prejudicial to the interest of the Revenue. Further it was not a provision which was disallowed, but an actual liability towards premium paid on insurance policy and the liability was allowable as a deduction under Section 37 being an expenditure incurred for the purpose of the business. The Commissioner proceeded on a totally wrong premise in finding the claim to be only under Section 43B(f) and then disallowing it.

8. One other circumstance is the Calcutta High Court decision in **Exide Industries** case (supra). The Calcutta High Court held that leave encashment is neither a statutory liability nor a contingent liability and it is a provision to be made for the entitlement of an employee achieved in a particular financial year. Testing clause (f) with the objects sought to be achieved by the introduction of Section 43 B, it was held that the same could not have any nexus with the object sought to be achieved by the original enactment. Section 43 B, it was held, was originally inserted to plug evasion of statutory liabilities and the introduction of clause (f)

was found to be inconsistent with the said object. The learned Judges held that the amendment brought in could not have nullified the dictum laid down in **Bharat Earth Movers case (Supra)**. As noticed earlier there is nothing in the appeal memorandum to indicate that the Revenue has challenged the said decision before the Supreme Court. In the circumstances of 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. The Supreme Court in **AIR 2004 1743 SC Berger Paints India Ltd. v. Commissioner of Income Tax** reiterated that “if the Revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the Revenue to challenge its correctness in the case of other assessee, without just cause” is squarely applicable herein.

9. The order of the Assessing Officer allowing deduction to the assessee in the case of premium paid towards the valid insurance policy, ensuring the satisfaction of liability for leave encashment by the insurer cannot be held to be erroneous and

is not liable to be revised under Section 263 for the reason of being prejudicial to the Revenue. The Revenue having accepted the decision of the Calcutta High Court also cannot press into service Section 43 B(f).

Hence, the questions of law are answered against the Revenue and in favour of the assessee. Income Tax appeal is rejected in limine.

Sd/-
Thottathil B Radhakrishnan
(Judge)

Sd/-
K. Vinod Chandran
(Judge)

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