IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 370 of 2014
Date of decision: 10.8.2015

The Commissioner of Income Tax, Panchkula

……Appellant.

M/s Haryana Financial Corporation

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.Tejinder K.Joshi, Advocate for the appellant.

Ms. Radhika Suri, Sr. Advocate with Ms.Rinku Dahiya, Advocate for the respondent.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.51 of 2015, 370 and 399 of 2014 as learned counsel for the parties are agreed that the issue involved in all these appeals is identical. However, the facts are being extracted from ITA No.370 of 2014.

2. ITA No.370 of 2014 has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 27.3.2014, Annexure A.III passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'B', Chandigarh (in short, "the Tribunal") in ITA No.785/Chd/2011 for the assessment year 2002-03, claiming following

substantial questions of law:-

> "i) Whether on facts and in the circumstances of the case, the Tribunal was justified in holding that the expenditure incurred on payments made to the pensioners is allowable in the hands of the assessee as revenue despite the facts that the Tribunal in its order held that the expenditure is allowable on actual payment basis for assessment year 2002-03 and in the assessment year 2003-04 on the basis of total contribution to the unrecognized Pension Fund, therefore, the decision of Hon'ble ITAT is self contradictory?
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> ii) Whether on facts and in the circumstances of the case, the Tribunal was justified in holding that the amount actually disbursed to the pensioners is allowable as revenue expenditure notwithstanding the fact that the said amount was not an allowable deduction under section 36(1)(iv) and (v) of the Income Tax Act, 1961?"

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.370 of 2014 may be noticed. Original assessment in this case was completed vide order dated 13.12.2004 under Section 143(3) of the Act assessing the total loss of the assessee at ₹ 7,85,04,010/- including brought forward loss of ₹ 1,90,72,362/-. During the assessment proceedings, the Assessing Officer noted that the assessee had claimed deduction on account of contribution to unrecognized pension fund amounting to ₹ 22,89,137/- for the assessment year 2002-03 and ₹ 56,33,188/- for the assessment year 2003-04. The deduction claimed by the assessee was disallowed under Section 36 of the Act by the Assessing Officer. The Commissioner of Income Tax (Appeals) [CIT(A)] upheld the order passed by the Assessing Officer. The assessee filed appeal before the Tribunal. Vide order dated 30.9.2008, the Tribunal referred the matter to the

Assessing Officer with the observation that since the matter had not been examined in its true perspective with regard to subsequent development of the pension scheme being scrapped and amounts having been transferred to the PF scheme, the issue was required to be examined afresh. In the second round also, the Assessing officer disallowed the deduction claimed by the assessee on account of contribution to unrecognized pension fund and passed assessment order dated 30.12.2009, Annexure A.1. It was held that the case of the assessee was covered by judgment of the Delhi High Court in the case of ***Sony India P. Limited vs. Commissioner of Income Tax*** (2006) 285 ITR 213 (Del.). The assessee filed appeal before the CIT(A). The CIT (A) held that contribution to unrecognized pension funds was not allowable in view of provisions of Section 36(1)(iv) and (v) of the Act and dismissed the appeal vide order dated 16.5.2011, Annexure A.II. The assessee filed appeal before the Tribunal. The Tribunal vide order dated 27.3.2014, Annexure A.III held that the expenditure incurred on payment basis in the hands of the assessee was revenue expenditure amounting to ₹ 22,89,137/- which was actually disbursed to the pensioners in assessment year 2002-03 out of total contribution to the pension fund of ₹ 1.22 crores. Similarly, for the assessment year 2003-04, the total contribution to the pension fund was ₹ 32,07,989/- and the payment by the assessee to the pensioners was ₹ 56,33,188/-. The Tribunal restricted the expenditure to ₹ 32,07,889/- on the basis of the contribution to the pension fund. Hence the instant appeals by the revenue.

4. We have heard learned counsel for the parties.

5. Learned counsel for the revenue submitted that the Provident

Fund and the gratuity fund were unrecognized and therefore, no expenditure could be allowed as deduction under Section 36(1)(iv) and (v) of the Act. It was urged that what was not allowed directly could not have been indirectly allowed even under section 37(1) of the Act. Learned counsel relied upon judgment of the Delhi High Court in ***Sony India P. Limited***'s case (supra).

6. On the other hand, learned counsel for the assessee did not dispute that in the light of contribution to unrecognized provident fund, superannuation fund and gratuity fund, certain deductions were not admissible under Section 36(iv) and (v) of the Act. It was contended that the Tribunal has only allowed actual expenditure disbursed to the pensioners for the assessment year 2002-03 whereas it was restricted to the amount contributed towards the pension fund as it was less than the actual disbursement for the assessment year 2003-04 which was legally permissible.

7. After hearing learned counsel for the parties, we find substance in the submissions of learned counsel for the assessee. It would be expedient to reproduce Sections 36(1)(iv) and (v) of the Act which is in following terms:-

> "36 (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28-
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> xx xx xx xx xx xx xx xx
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> (iv) any sum paid by the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognising the provident

fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head" Salaries" or to the contributions or to the number of members of the fund;

(v) any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust".

An analysis of the provisions of section 36(1)(iv) of the Act shows that any sum which is paid by the assessee as an employer to a recognised provident fund or an approved superannuation fund is admissible as deduction thereunder. Under Clause (v) of Section 36(1) of the Act, deduction is allowed in respect of any sum paid by the assessee as an employer as contribution to an approved gratuity fund created by the employer for the exclusive benefit of the employees under an irrevocable trust.

8. Admittedly, in the present case, the contributions were towards the unrecognised pension/superannuation fund and gratuity fund. Thus, the assessee was not entitled to any deduction in respect of the said amounts either under Section 36(1)(iv) or Section 36(1)(v) of the Act. Therefore, the said amount also could not be allowed as deduction under Section 37(1) of the Act as held by the Delhi High Court in ***Sony India P. Limited's*** case (supra).

9. Now another issue that arises for consideration relates to the deduction on account of actual payment made to the pensioners totalling ₹ 22,89,137/- for the assessment year 2002-03 and restricting to ₹ 32,07,989/-

for the assessment year 2003-04 against actual payment of ₹ 56,33,188/- under Section 37(1) of the Act. In so far as actual payment made to the pensioners is concerned, the same has been held to be admissible to the assessee on the principle that where an expenditure which is wholly and exclusively expended for the purposes of the business or profession of the assessee is permissible to be deducted from the income under Section 37 of the Act. There was no error in the approach of the Tribunal in allowing the aforesaid expenditure as deduction under Section 37 of the Act.

10. The Supreme Court in ***Shree Sajjan Mills Limited vs. Commissioner of Income Tax, MP Bhopal and another,*** AIR 1986 SC 484 held as under:-

> "24. The right to receive the payment accrued to the employees on their retirement or termination of their services and the liability to pay gratuity became the accrued liability of the assessee when the employees retired or their services, were terminated. Until then the right to receive gratuity is a contingent right and the liability to pay gratuity continues to be a contingent ability qua the employer. An employer might pay gratuity when the employee retires or his service is terminated and claim the payment made as an expenditure incurred for the purpose of business under section 37. He might, if he followed the mercantile system, provide for the payment of gratuity which became payable during the previous year and claim it as an expenditure on the accrued basis under section 37 of the said Act. Since the amount of gratuity payable in any given year would be a variable amount depending upon the number of employees who would be entitled to receive the payment during the year, the amount being a large one in one year and a small one in another year, the employer often finds it desirable and/or convenient to set apart for future use a sum every year to meet

the contingent liability as a provision for gratuity or a fund for gratuity. He might create an approved gratuity fund for the exclusive benefit of his employees under an irrevocable trust and make contributions to such fund every year. Contingent liabilities do not constitute expenditure and can not be the subject matter of deduction even under the mercantile system of accounting. Expenditure which was deductible for income tax purposes is towards a liability actually existing at the time but setting apart money which might become expenditure on the happening of an event is not expenditure. (See in this connection the observations of this Court in **Indian molasses Co. (P) Ltd., v. Commissioner of Income-tax, West Bengal)**, 37 I.T.R. 66 at pages 76 & 80. A distinction is often made between an actual liability in praesenti and a liability de futuro, which for the time being is only contingent. The former is deductible but not the latter."

11. Similarly in ***W.T.Suren and Co. Limited vs. Commissioner of Income Tax***, (1998) 230 ITR 643 (SC), it was held thus:-

"xxxxxxxx Gratuity is, thus, payable on the termination of employment of the employee on any account except dismissal and calculated on the basis of number of years of service and at the rate prescribed in the scheme. In the present case, the amount of gratuity which was paid to Rallis India Ltd. on behalf of the employees was not on account of transfer of the distribution unit to the assessee but on account of stopping of that business and the employees working in that unit becoming surplus resulting in termination of their services. Other business of the assessee, as held by the Tribunal, continued. Payment of gratuity amount to Rallis India Ltd. was not made by the assessee of its own but at the instance and on behalf of the employees whose services though terminated in the assessee company were taken over by Rallis India Ltd. with the promise of continuity of service in Rallis India Ltd. As far as the assessee is concerned, it was bound to make payment of gratuity to the employees whose services were terminated and, in fact, as noticed above, the employees who did not join Rallis India Ltd. were directly paid gratuity. Assessee was obliged to pay gratuity to those employees who had joined Rallis India Ltd. Instead of those employees getting the gratuity amount directly, got that amount in trust in a separate account for the exclusive use of the transferred employees and payable to them after their services in Rallis India Ltd. terminated including the gratuity due on account of service rendered in Rallis India Ltd. as per the scheme relating to gratuity of that company. Payment of amount of gratuity to Rallis India Ltd. was made as per the scheme of the assessee and it was not an ex-gratia or some isolated payment. It was never disputed and, in fact, no question raised if the service of the employees of the assessee were not terminated and that being the position, the obligation of the assessee to make payment of gratuity to its employees was an obligation in praesenti. Payment of gratuity amount to Rallis India was with the consent of the employees transferred there. We are, thus, of the view that payment of gratuity awarded by the assessee to Rallis India Ltd. in the circumstances of the case was an expenditure wholly laid or expended for the purpose of the business of the assessee and was allowable deduction. It cannot certainly be said that it was an expenditure incurred much ahead of time as the service of the employees with the assessee were terminated. Tribunal also found that the assessee was a going concern and only one of its department was closed. The assessee had not wound up all of its affairs. Only a part of its business was closed and transferred to Rallis India Ltd. In these circumstances, in our view, Tribunal was right in holding that the payment of gratuity amount was not on account of closing the business of the assessee but for the purpose of business of the assessee and, thus, entitled to deduction under clause (xv) of sub-section (2) of Section 10 of 1922 Act corresponding to Section 37(1) of the 1961 Act. We, therefore, hold that the assessee, the appellant herein, is entitled to the payment of gratuity amount of Rs. 4,08,622/- made to Rallis India Ltd. as an allowable deduction.

12. In ***Commissioner of Income Tax, Bombay City III vs. Herbertsons P.Limited,*** (1980) 124 ITR 613 (Bombay), it was observed:-

> "xxxxxxxx It appears to be some benefit provided to an employee who was expecting such benefit. It was certainly for his long and faithful services to the company. But that would not by itself disentitle the payment being allowed as a deduction in the year under consideration. There was an earlier instance of such pension benefit being provided to another employee, and the other employees who were in the regular service of the company in 1957 would be thenceforward covered by the gratuity scheme adopted in that year. It would appear that the facts are not at all similar to the facts considered by the Supreme Court in ***Gordon Woodroffe Leather Manufacturing Co.'s*** case [1962] 44 ITR 551(SC) and no compelling circumstance has been brought to our notice which would induce us to differ from the approach or conclusion of the Tribunal.

13. In view of the above, no substantial question of law arises for consideration in these appeals and the same are hereby dismissed.

(Ajay Kumar Mittal)
Judge

August 10, 2015

(Ramendra Jain)
Judge

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