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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 17.01.2018

+ ITA 57/2018

ORIENTAL BANK OF COMMERCE Appellant
Through Mr. Rajat Navet, Adv.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX.... Respondent
Through Mr. Rahul Chaudhary and
Ms.Vibhooti Malhotra, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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CM APPL. 1856/2018 (for exemption)

Allowed, subject to just exceptions

ITA 57/2018

Admit.

1. The following questions of law arise :

- (i) *Whether in the facts and circumstance of the case, the Tribunal was correct in law in remanding the issue relating to interest on overdue deposits back to the file of the Assessing Officer?*

- (ii) *Whether in the facts and circumstances of the case, the Tribunal was correct in law in holding that the claim of the Appellant with respect to provision made for interest on overdue deposits was not acceptable until it is ascertained that the actual payment of the provision has been made to the customers or not?*

2. Ms. Vibhooti Malhotra accepts notice of appeal. With the consent of counsel for parties, the appeal was heard finally.

3. The question of law sought to be urged by the assessee is that the ITAT was correct in remitting the issues with respect to the claim for accrued for ascertain liability of interest on overdue deposits claimed by it.

4. The assessee - a scheduled bank had in its return claimed an ascertained liability of Rs.17 crores towards the interest on overdue deposits. The AO was of the opinion that the liability was not in present time and had not crystallized or arisen and therefore, had to be disallowed. The CIT(A) allowed the appeal filed in the light of the previous year's observations which are extracted below :

"5.5.4 There is no dispute that interest is liable to be paid by the appellant to the depositors on these time deposits. Therefore, it is clear that above liabilities are definite liabilities. The appellant submitted that it has accounted for interest on overdue deposits at the rate of savings bank deposits and the balance overdue interest is accounted for at the time of renewal as per the RBI Circular.

Therefore, it is clear that the above liabilities at the rate of savings bank deposits are ascertained liabilities crystallized during the relevant previous year as on the closure of account on 31/03/2009. Actual interest on time deposits are much higher than savings account deposits. Therefore, the liability debited in the accounts at the rate of savings account deposits cannot be lower than the liability at the time of renewal.

5.5.5 The assessee is a nationalized bank and governed by Banking Regulations Act, 1974. The assessee is bound to act as per RBI Circular. The RBI Circular No. DBOD No. Leg. BC.34/ 09.07.005/2008-09 dated 22.08.2008 in Para 2 (xi) says:-

"(xi) Interest on savings bank accounts should be credited on regular basis whether the account is operative or not. If a Fixed Deposit Receipt matures and proceeds are unpaid, the amount left unclaimed with the bank will attract savings bank rate of interest."

Further, the above RBI circular is neither inconsistent nor contrary to the provisions of the Income Tax Act. There is no dispute that the appellant debited the liability on account of overdue deposits at the rate of savings bank deposits as per RBI Circular in a bonafide manner. It is also fact that there is no change in the method of accounting but only change in accounting policy as guided by the RBI.

5.5.6 Hon'ble Supreme Court of India in Bharat Earth Movers Ltd. Vs CIT [245 ITR 428] held that if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date.

What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied, the liability is not a contingent one. The liability is in present though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain. The above principle was also followed by Hon'ble Supreme Court in Metal Box Co. of India Ltd. Vs Their workmen [73 ITR 53] and Calcutta Co. Ltd. Vs CIT [37 ITR 1]. In view of the above factual and legal position as the liability determined as per RBI Circular are definite and ascertained liability, therefore, allowable under the provisions of the Act. As such this ground is decided in favour of the appellant."

5. The ITAT, in the impugned judgment was of the opinion that the expenditure was unascertained and the liability, uncrystallized. The ITAT without recording its own conclusions on this aspect, remitted the matter to the AO. The assessee is therefore, aggrieved.

6. The assessee relies upon the decision of the Supreme Court in *Bharat Earth Movers Ltd. Vs CIT*, (2000) 245 ITR 428 (SC); *Calcutta Co. Ltd. Vs CIT* (1959) 37 ITR 1; and, *Kedarnath Jute Mfg. Co. Ltd Vs Addl. Commissioner Of Income Tax*, (1971) 82 ITR 363. It is submitted that an identical question was urged and the assessee's contention accepted by

this court in *Aggarwal and Modi Enterprise (Cinema Project) Co. (P) Ltd. Vs. CIT*, (2016) 381 ITR 469 (Del.).

7. Ms. Vibhooti Malhotra, learned counsel for Revenue urges that order impugned is merely one of remission and in no case, acts prejudicially against the appellant. It is argued that besides circumstances that the assessee is aware of the likely liability and is able to crystallize, it *per se* would not mean that it is an ascertained one having regard to the fact that further payments would have to be made and the likelihood of the depositors renewing fixed deposits.

8. This Court is of the opinion that the questions urged in this case, need to be answered in favour of the assessee in the light of the decision in *Aggarwal and Modi's case (supra)*, the relevant discussion in that judgment, on this aspect, is, as follows:

“39. The question as to when a liability can be said to be ascertained one has arisen in the context of both a statutory liability and a contractual liability. An example of a statutory liability is the case of Kedarnath Jute Manufacturing Co. Ltd. (supra). There the Assessee followed the mercantile system of accounting. The relevant A.Y. was 1955-56. The Assessee had in the calendar year 1954, i.e., the relevant previous year, incurred a liability of Rs. 1,49,776/- on account of sales tax determined as payable by the Sales Tax Authorities on the sales made by it. The sales tax demand had already been raised. The Assessee had contested the sales

tax liability by filing an appeal. It had also not made any provision in its books as regards payment of the said amount. On these two grounds, the AO rejected the Assessee's claim for deduction. Holding for the Assessee, the Supreme Court held that although the sales tax liability could not be enforced till the quantification was effected in the assessment proceedings, since the Assessee had followed the mercantile system of accounting it was entitled to deduct from the profits and gains of the business such liability which had accrued during the period for which the profits and gains were being computed. It was held that the liability did not cease to be a liability only because the Assessee had challenged it in the higher forum. Also the fact that the Assessee had failed to debit the liability in its books of accounts did not prevent it to claim the said sum as deduction either under Section 10(1) or under Section 10(2)(xv) of the Income Tax Act, 1922. It was held "whether the Assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the Assessee might take of his rights; nor can the existence or absence of entries in his books of account be decisive or conclusive in the matter."

40. This was in line with the earlier decision in Calcutta Co. Ltd. v. Commissioner of Income Tax, West Bengal MANU/SC/0098/1959 : (1959) 37 ITR 1 (SC) where the Supreme Court explained that an Assessee following the mercantile system of accounting could claim a deduction of an estimated expenditure towards development of plots purchased by it even before actually incurring the expenditure. This was not a statutory liability but a contractual one. The Assessee in that case was a developer dealing in land and property. The

Supreme Court noted that the relevant clauses of the sale deed spelt out the undertaking of the Assessee "to carry out the developments within six months from the date of the sale." It was noted that although the entire sale consideration was not received during the relevant AY, the Assessee had nevertheless entered it into the credit side of its books of accounts. Likewise it debited the estimated sum of expenditure towards development although "no part of that amount represented any expenditure actually made during that year." Explaining the mercantile system of accounting, the Court referred to an earlier decision in *Keshav Mills Ltd. v. Commissioner of Income Tax, Bombay* MANU/SC/0038/1953 : (1953) 23 ITR 230 (SC) in which it was described as under:

"That system brings into credit what is due, immediately it becomes legally due and before it is actually received and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed."

41. The Supreme Court in *Calcutta Co. Ltd. v. Commissioner of Income Tax, West Bengal* (supra) proceeded to hold as under:

"Inasmuch as the liability which had thus accrued during the accounting year was to be discharged at a future date the amount to be expended in the discharge of that liability would have to be estimated in order that under the mercantile system of accounting the amount could be debited before it was actually disbursed."

The difficulty in the estimation thereof again would not convert an accrued liability into a conditional

one, because it is always open to the Income-tax authorities concerned to arrive at a proper estimate thereof having regard to all the circumstances of the case."

42. *The Supreme Court Calcutta Co. Ltd. v. Commissioner of Income Tax, West Bengal (supra) also explained that since the Assessee was being assessed in respect of the profits and gains of its business, the same could not be determined "unless and until the expenses of the obligations which have been incurred are set off against the receipts." It was observed as under:*

"The expression profits and gains has to be understood in its commercial sense and there can be no computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipts is deducted therefrom-whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future date. As was observed by Lord Herschell in Bussell v. Town and County Bank, Ltd. (1888) 13 App. Cas. 418:

"The duty is to be charged upon 'a sum not less than the full amount of the balance of the profits or gains of the trade, manufacture, adventure, or concern'; and it appears to me that that language implies that for the purpose of arriving at the balance of profits all that expenditure which is necessary for the purposes of earning the receipts must be deducted, otherwise you do not arrive at the balance of profits, indeed, otherwise you do not ascertain, and cannot ascertain, whether there is

such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. That seems to me to be the meaning of the word "profits" in relation to any trade or business. Unless and until you have ascertained that there is such a balance, nothing exists to which the name 'profits' can properly be applied."

43. *In Bharat Earth Movers v. Commission of Income Tax (supra), the Supreme Court had an occasion to explain the distinction between accrued and contingent liability. There the Assessee Company had two sets of employees - one covered by the Employees State Insurance Scheme (described as 'staff') and the other not so covered (termed as 'officers'). The Assessee had floated beneficial schemes for its employees for encashment of leave in terms of which the officers were entitled to thirty days earned leave whereas the staff were entitled to eighteen days vacation leave. While the earned leave could be accumulated up to 240 days, the vacation leave could be accumulated up to 126 days. Either leave could be encashed subject to the ceiling on accumulation. There was an option to avail the accumulated leave or in lieu thereof to apply for encashment whereupon the staff or the officer concerned would be paid salary for the period of leave earned but not availed. A fund was created by the Assessee for meeting this liability and during the A.Y. 1978-79, a sum of Rs. 62,25,483/- was set apart for the purpose of encashment of the leave. Although the ITAT held the Assessee to be entitled to claim the said sum as deduction, the High Court was of*

the view that it was not. The Supreme Court explained as under:

"The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in present though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain."

44. The Supreme Court referred to an earlier decision in *Metal Box Company of India Ltd. v. Their Workmen* MANU/SC/0120/1968 : (1969) 73 ITR 53 (SC) in which inter alia it was explained as under:

"(i) For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid;

(ii) Just as receipts, though not actual receipts but accrued due are brought in for income-tax assessment, so also liabilities accrued due would be

taken into account while working out the profits and gains of the business;

(iii) A condition subsequent, the fulfillment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability;

(iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactorily estimated."

45. *The Supreme Court in Bharat Earth Movers v. Commission of Income Tax (supra) held that the provision made by the*

Assessee for meeting its liability under the leave encashment scheme would entitle it to deduction since it was not a contingent liability.

46. *The above dictum was followed by this Court in R.C. Gupta v. Commissioner of Income Tax (supra). In that case the AO on scrutiny of the Assessee's trading account noticed that a sum of Rs. 50,761/- stood debited to the raw material account. The Assessee explained that this was payable to Hindustan Steel Limited (HSL) for purchases made on 22nd October, 1975 but in respect of which the Assessee had disputed its liability. A suit for recovery had been filed by the HSL against the Assessee. The AO disallowed the claim on the ground that the amount did not relate to any purchases made during the previous year relevant to the A.Y. in question. While the CIT(A) allowed the Assessee's appeal holding that the liability had accrued during the accounting year ending*

31st March, 1979, the ITAT reversed the CIT(A). Allowing the Assessee's appeal this Court explained that the liability was capable of being estimated with reasonable certainty where a recovery suit was filed by HSL. "Merely because the liability was not a statutory one it could not be said that the liability that was not an ascertained one but a contingent one."

47. A conspectus of the above decisions reveals that whether a liability is ascertained or contingent is dependent on the facts of each case. Merely because a liability may be contractual or non-statutory would not make it incapable of being ascertained. Where an Assessee follows the mercantile system of accounting it is not necessary that the liability must have actually been incurred during the A.Y. in question to enable the Assessee to claim it as an expense or deduction as the case may be. The crux of the matter is the reasonable certainty with which the liability can be ascertained.

48. Coming to the facts of the present case it is not as if the Assessee has disputed its liability to pay licence fee. In other words during the A.Ys. in question it continued to pay the annual licence fee to the NDMC and in those years it was protected in terms of an interim order. What was being disputed by the Assessee in the suit initiated by it against the NDMC was the reasonableness of the enhancement of the licence fee at the stage of renewal of the licence. There is a distinction, therefore, to be drawn between disputing the liability as such and disputing the reasonableness of the enhancement of the licence fee."

9. In this case, there can be no doubt that the assessee/bank was not only aware of its liability on the particular aspect, but,

in fact, was able to crystallize it and set it out expeditiously in its returns. The possibility of likelihood of the depositor renewing the overdue deposit or for that matter, the payment being made later, in no way deflects from the reality that the assessee is able to identify its liability at the time, when it filed its returns. In that sense-for the reasons spelt out in detail in Aggarwal and Modi's case (supra), the liability was ascertained and not unascertained. Consequently, the question of law is answered in favour of the assessee and against the Revenue. The appeal is therefore, allowed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JANUARY 17, 2018

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