

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITA/95/2018

PRINCIPAL COMMISSIONER OF INCOME TAX-1, KOLKATA
VS
M/S. EXIDE INDUSTRIES LIMITED

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
A N D
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 22nd September, 2022.

Appearance:
Mr. Tilak Mitra, Adv.
...for the appellant

Mr. J.P. Khaitan, Sr. Adv.
Mrs. Nilanjana Banerjee Pal, Adv.
...for the respondent

The Court:- This appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the order dated June 15, 2016 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (in short the 'Tribunal') in M.A. No. 38/Kol/2016 arising out of I.T.A. No. 1414/Kol/2007 for the Assessment Year 2004-2005. The appeal was admitted to decide the following substantial question of law:-

".....The legal issue that arises is since the initial contribution is permitted to be deducted from the income and annual contribution to a pension fund may also be deducted from the income of the employer, would an ad hoc or lump sum interim contribution, in such circumstances, be also eligible for deduction."

We have heard Mr. Tilak Mitra, learned standing counsel appearing for the appellant and Mr. J.P. Khaitan, learned senior advocate assisted by Mrs. Nilanjana Banerjee Pal, learned advocate appearing for the respondents.

The issue involved in this appeal pertains to the disallowance of a sum of Rs.9,14,70,000/- being contribution to the approved pension fund. The deduction scheme of the respondent/assessee was rejected by the Assessing Officer and the ground that the allowability of deduction towards contribution to superannuation fund is governed by Section 36(1)(iv) of the Act read with Rules 87 and 88 of the Income Tax Rules, 1962 ('the Rule') which deal with normal and annual contribution. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) -I, Kolkata (CITA) contending that under Rule 87 of the said Rules normal and annual contribution by the employer shall not exceed 27% of the salary of the employee for each year as reduced by the employer's contribution to the provident fund in respect of the same employee for the year. In terms of Rule 88, the limit is 25% of the employee's salary of each year up to 21.9.1997 and 27% of the employee's salary for each year after 21.9.1997. The assessee contended that Rules 87 and 88 refer to initial contribution and regular contribution and the lump sum contribution made by the assessee is neither ordinary contribution nor initial contribution and the limits prescribed in Rule 87 and Rule 88 shall not apply to such lump sum contribution. The CITA did not aggrieve with the assessee and by order dated 28.3.2007 dismissed the appeal. Aggrieved by the same the assessee had preferred appeal before the learned Tribunal. The Tribunal by the impugned order aggrieved by the contention raised by the assessee and after taking note of the decision of the Co-ordinate Bench of the Tribunal in the case

of Asst. Commissioner of Income Tax, Cir. 6(3) Vs. Glaxo Smithkline Pharmaceuticals, Mumbai, 2011 (1) TMI 1530 – ITAT Mumbai allowed the assessee’s appeal.

We have carefully considered the submissions of either side and perused the materials on record. Section 36 of the Act deals with other deductions. Sub-Section (1) of Section 36 states that deduction provided for in the clause enumerated thereunder shall be allowed in respect of matters dealt with therein in computing the income referred to Section 28. Claus-(iv) is under Section 36(1) would be relevant for our case which is quoted hereinbelow:

“Other deductions.

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-*

(i)

(ii)

(iii)

(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;”*

In Part-B of the Fourth Schedule to the Income Tax Act, the subject dealt with is approved superannuation fund. In Clause-(iii) thereunder, the

conditions for approval have been given and Clause-(iv) deals with provisions relating to Rules. In terms of the said power, the Board may make rules for limiting the ordinary annual contribution and any other contribution to an approved superannuation funds by an employee. In exercise of such power rules have been framed which are found in Part-XIII of the Income Tax Rules, 1962 and Rules 87 and 88 thereto would be relevant for our case.

“Ordinary annual contributions.

87. *The ordinary annual contribution by the employer to a fund in respect of any particular employee shall not exceed [twenty-seven] per cent of his salary for each year as reduced by the employer’s contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year.*

Initial contributions.

88. *Subject to any condition which the Board may think fit to specify under clause (iv) of sub-Section (1) of Section 36, the amount to be allowed as a deduction on account of an initial contribution which an employer may make in respect of the past services of an employee admitted to the benefits of a fund shall not exceed twenty-five per cent of the employee’s salary for each year [up to the employee’s salary for each year] of his past service with the employer as reduced by the employer’s contribution, if any, to any provident fund (whether recognised or not) in respect of that employee for each such year.”*

In terms of the above rules, what is required to be seen is whether there is any ceiling fixed in respect of the contribution which have been made by the respondent/assessee and whether it was towards an ordinary annual contribution or whether it was towards an initial contribution. The factual position is not in dispute which have been noted not only by the learned Tribunal but also by the CIT(A). In terms of the above rules, a contribution to an approved superannuation fund is deductible as long as the quantum of the contribution does not exceed the prescribed limit. As noticed from the rules, the

limitations have been prescribed only for the initial contribution and ordinary annual contribution to the funds. Thus, the consequence that would follow is that any other contribution made other than initial contribution or an ordinary annual contribution, would not be covered under the rules and no ceiling has been fixed with regard to the amount of such contribution. This has not been disputed by the revenue that the amount paid by the respondent/assessee in excess of 27% of the salaries of the employees are neither towards ordinary annual contribution nor towards initial contribution and the payment was necessitated due to short-fall discovered in the course of actuarial valuation of the funds which is in exceptional circumstances and has been made to ensure that the superannuation funds will be able to discharge its obligation to the employees. The learned Tribunal bearing the above principle in mind and also taking note of the decision of the co-ordinate bench of the Tribunal in Glaxo Smithkline Pharmaceuticals (*supra*) allowed the assessee's appeal. The revenue had challenged the order passed by the learned tribunal in the case of Glaxo Smithkline Pharmaceuticals before the High Court of Judicature at Bombay in Income Tax Appeal No.2232 of 2011 which was dismissed by judgment dated 6th March, 2013.

However, we are conscious of the fact that the Hon'ble Division Bench while dismissing the appeal had made an observation that even if the expenditure as claimed is not allowable under Section 36(1)(iv) of the Act, the same is allowable under Section 37 of the Act. However, on this aspect there are other decisions of the Hon'ble Supreme Court which have decided otherwise. Therefore, we do not wish to trade into the said territory. We are satisfied that the amount which was remitted by the respondent/assessee is neither towards

an initial contribution nor towards an ordinary annual contribution and, therefore, the ceiling fixed under the rules will not apply to such a contribution. That apart, this contribution had to be made considering the peculiar circumstances and it was a one-time payment, therefore we are of the view that the learned Tribunal rightly allowed the appeal filed by the assessee. That apart the decision in the case of Glaxo Smithkline Pharmaceuticals (*supra*) has been affirmed by the High Court of Judicature at Bombay.

For the above reasons, we find there are no ground to interfere with the order passed by the learned Tribunal. Accordingly, the appeal filed by the revenue (ITA/95/2018) is dismissed and the substantial question of law is answered against the revenue.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)