O-102

ITA/471/2008

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

COMMISSIONER OF INCOME TAX,
KOLKATA-III

-Versus-

M/S. ERNST AND YOUNG PRIVATE LIMITED

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 5th January, 2023

Appearance :
Mr. Smarajit Roychowdhury, Adv.
...for the appellant.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Akhilesh Gupta, Adv.
Mr. Soham Sen, 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 16th November, 2007 passed by the Income Tax Appellate Tribunal, "E" Bench, Kolkata (the Tribunal) in ITA No.1750/Kol/2006 for the assessment year 2003-04.

The appeal was admitted on the following substantial questions of law:

(i) *Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in deleting the allowance under Section 40(a)(i) of the Income Tax Act, 1961 of Rs.2,58,26,000/- and erred in accepting the claim of the assessee that the amount only represented reimbursement and there was no element of income which is pre-requisite for application of Section 195 ?*

(ii) *Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in deleting the allowance of Rs.61,73,338/- and erred in not considering that the assessee failed to submit any evidence that the dates actually became bad in respect of RBI guidelines of due diligence in this regard ?*

(iii) *Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in deleting the addition on account of leave encashment due to the employees in view of the provision of Section 43(B)(f) of the Income Tax Act, 1961 relying on the decision of Exide Industries vs. Union of India by the Calcutta High Court striking down Section 43(B)(f) and erred in not considering that the department has filed Special Leave Petition on the issue before the Apex Court ?*

We have heard Mr. Smarajit Roychowdhury, learned standing counsel for the appellant/revenue and Mr. J. P.

Khaitan, learned senior counsel assisted by Mr. Akhilesh Gupta and Mr. Soham Sen, learned Advocates for the respondent/assessee.

The first substantial question of law is with regard to the deletion of the disallowance under Section 40(a)(i) of the Act. On perusal of the order passed by the learned Tribunal, we find that the Tribunal has recorded that there is no rebuttal from the side of the Income Tax Department that the expenses are not relating to reimbursement of expenses for supply of data as per the agreement made amongst the global firms to which the assessee is treated as one of the members. The Tribunal also took note of the decision if the case of *CIT vs. Dunlop India Ltd.* reported in 142 ITR 493 and decided the factual issue in favour of the assessee. Thus, we find that there is no error in the said decision for us to interfere. Accordingly, the substantial question of no.(a) is rejected.

Substantial question of law no.(b) relates to the deletion of the disallowance of Rs.61,73,338/- on the ground that they are bad debts. On this aspect the learned Tribunal, after elaborately hearing the submissions of the learned Advocates for the parties and examining the factual position, accepted the contention raised by the assessee because factually whatever could have been done, the assessee has done in its part of the job in the globalisation process when supply of data among the global firms and other services have become essential to the foreign concern through the foreign co-ordinator or partner. Further, the Tribunal noted Indian assessee has no other means except to pursue with its foreign counter-part which part appears to have been done properly by the assessee, and this factual aspect was not controverted by the revenue. Thus, we find that the findings rendered by the Tribunal cannot be said to be a perverse or untenable as it has been rendered on appreciation of the factual matrix. For such reasons, the substantial question of law (b) stands rejected.

So far as substantial question of law no.(c) is concerned, the question has to be decided in favour of the revenue and against the assessee in the light of the decision of the Hon'ble Supreme Court in the case of *Union of India & Ors. vs. Exide Industries Limited & Anr.* reported in [2020] 425 ITR 1(SC) wherein the Hon'ble Supreme Court had held that the liability of leave encashment continues to be a present liability as per the mercantile system of accounting. Further, the insertion of clause (f) has not extinguished the autonomy of the assessee to follow the mercantile system as it merely defers the benefit of deduction to be availed of by the assessee for the purpose of computing his taxable income and links it to the date of actual payment thereof to the employee concerned. Thus, it was held that the only effect of the insertion of clause (f) is to regulate the stated deduction by putting it in a special provision. In the light of the decision of the Hon'ble Supreme Court, the substantial question of law no.(c) is decided in favour of the revenue and against the assessee.

Needless to say that the assessing officer shall consider the legal position and allow the deduction of the amounts which have been actually paid.

In view of the above, the appeal filed by the revenue (ITA/471/2008) is partly allowed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.Das/As.