
(1991) 11 DEL CK 0034

In the Delhi High Court

Case No : Civil Writ Appeal No. 2468 of 1990

Aero Leather (P) Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-11-1991

Acts Referred:

Income Tax Act, 1961 — Section 2(24)

Citation : (1992) ILR Delhi 731 : (1992) 194 ITR 7 : (1993) 67 TAXMAN 486

Hon'ble Judges : B.N. Kirpal, J;Arun Kumar, J

Bench : Division Bench

Advocate : G.C. Sharma, J.B. Dadachandji, S. Ganesh, Vivek Dholakia, B. Gupta, R.K. Chaufla and D.C. Taneja, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) The challenge in this writ petition is to the validity of Section 28(iib) and Section 2(24)(vb) of the Income Tax Act with retrospective effect by the Finance Act of 1990.

(2) Briefly stated the facts are that the petitioner is an exporter and pursuant to the policy of the Government of India it received Cash Compensatory Support (hereinafter referred to as CCS). The present writ petition pertains to the assessment year 1987-88. The petitioner had filed a return declaring "Nil" income and it claimed that Ccs was not taxable. The Deputy Commissioner of Income Tax, however, on 13th October, 1989 held that this receipt was taxable and assessed the petitioner at a net income of Rs. 1,53,33,927. Further appeal to the Commissioner of Income Tax (Appeals) was also unsuccessful and the same was dismissed on 16th March, 1990.

(3) On 23rd May, 1990, the Assessing Officer demanded tax and interest from the petitioner. The total amount demanded was Rs. 43,53,369, inclusive of interest. It seems that the petitioner had filed an appeal to the Income Tax Appellate Tribunal but vide order dated 22nd June, 1990 the application for stay

of realisation of the tax was refused. On 25th June, 1990 the Assessing Officer rejected the petitioner's application for waiver of interest u/s 139(8.) and Section 215 of the Act. Thereafter on 25th June, 1990 an application u/s 264 had been filed before the Commissioner of Income Tax for waiver of interest.

(4) As already indicated hereinabove, by the Finance Act, 1990 two amendments were made in the Income Tax Act which adversely affected the interest of the petitioner. In Section 28, clause (iiib) was inserted w.e.f. 1st April, 1967. According to this the cash assistance (by whatever name called) received or receiveable by any person against exports made under any scheme of the Government of India shall be chargeable to Income Tax under the head "Profits and Gains of Business or Profession". In Section 2 sub-section 24, clause (vb) was inserted which meant that the word Income" included any sum chargeable to Income Tax under clause (iiib) of Section 28.

(5) It is not in dispute that there was divergence of opinion amongst the different benches of the Income Tax Tribunal as to whether the Ccs which is received was taxable or not prior to the Finance Act, 1990. To resolve this difference of opinion a Full Bench of the Income Tax Tribunal was constituted who vide their order dated 4th February, 1988 came to the conclusion that the sum so received was a capital receipt and will not be liable to tax. At the same time there were atleast two High Courts who came to the conclusion that the amount so received was taxable, the cases being that of Jeewanlal (1929) Ltd. Vs. Commissioner of Income Tax, and Kesaria Tea Co. Ltd. Vs. Commissioner of Income Tax, . We are informed that pursuant to the Full Bench decision of the Income Tax Tribunal reference application has been filed by the Department whose contention all along has been that the Ccs which is received is a revenue income taxable u/s 28 even prior to its amendment by Finance Act, 1990.

(6) In the memorandum explaining the provisions in the Finance Bill of 1990, with reference to the insertion of the clause in Section 2(24) and Section 28 it was indicated that the amendment which was being made was clarificatory in nature. The relevant portion of the memorandum appears at 182 Itr 336 and reads as follows :

"MEASURES FOR Simplification And Rationalisation

PROVISIONS clarifying the taxability of certain export incentives.

19. At present, exporters are given export incentives by way of cash compensatory support (CCS), drawback of duty and import entitlement licenses. The taxation of Ccs has been a subject matter of litigation. The Department's view all along has been that Ccs or any other subsidy received by an exporter as an export incentive, is a revenue receipt and hence taxable. To give finality to this view and to end all judicial controversies, it has been proposed that Ccs or any other subsidy received by an exporter for exports be included in the definition of income and be taxed under the head "Profits and gains of business or profession".

AS regards drawback of duty and profit on sale of import entitlement licenses, there are many court decisions in favor of the Department's stand that these are revenue receipts and liable to tax. To put an end to any litigation which may arise regarding the taxability of these two incentives received by exporters, it has been proposed, that they too shall be taxed as revenue receipts under the head "Profits and gains of business or profession".

THESE amendments will take effect retrospectively, co-terminus with the dates of availability of these export incentives, i.e., profit on sale of import entitlement licenses from 1st April, 1962, cash assistance from 1st April, 1967, and drawback of duty from 1st April, 1972, and will, accordingly, apply in relation to the assessment years 1962-63, 1967-68 and 1972-73 and subsequent years respectively."

(7) It is contended by the learned counsel for the petitioner that the said amendments are liable to be struck down for two reasons. Firstly it is submitted that the said amendments are outside the purview of Entry 82 of List I of the 7th Schedule to the Constitution. The submission of the learned counsel is that Ccs is a subsidy which is received and it is not income and, Therefore, it could not be regarded as an income within the meaning of that expression in the Income Tax Act. The Parliament, it was submitted, had no legislative competence to treat this receipt as income. The second submission made was that the introduction of these two provisions amounted to levying tax for the first time and this could not be done with retrospective effect.

(8) In our opinion there is no merit in any of the two contentions. We need not go into the controversy as to whether the Ccs was a capital receipt or a revenue receipt. We will proceed on the assumption that the said receipt was capital in nature as held by the Full Bench of the Income-tax Tribunal. We may here observe that there is a serious contention raised by the learned counsel for the respondents that the view of the Tribunal in the said case is incorrect but as we have already indicated it is not necessary for us to go into this controversy because in our opinion the impugned provisions do not suffer from any infirmity even while assuming that the receipt is capital in nature.

(9) It has been held time and again by various courts that the various entries in the Lists in Schedule Seven should have a wide interpretation. Shri Sharma has sought to rely upon the decision of the Supreme Court in the case of Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, in an effort to submit that if any receipt was not income within Item 82 of the List it did not empower the Parliament to refer the said receipt as being income. In our opinion this case is of little assistance to the learned counsel. While construing Entry 82 of List I, the Court referred to its earlier decision in the case of "Navinrandra Mafatlal v. Commissioner of Income Tax, 26 Itr 7584 and approved the approach of Das, J. who had observed "that the word "income" used in the said entry must be given its ordinary, natural and grammatical meaning and that was, income is a thing that comes in". In Mafatlal's case

capital gain was regarded as having been validly subjected to tax. in Entry 82. In Navnit Lal's case (supra) applying the same ratio, the Supreme Court upheld the validity of Section 2,(6A)(e) of the Indian Income Tax Act, 1922 which inter alia, provided that a loan taken by a share holder of a Private Limited company would be deemed to be a dividend. The Court held that the Parliament was competent to regard such loan as being income of the shareholder. In the present case also we find that it is a receipt of money in the hands of the petitioner as a result of the petitioner's business transactions. It is by virtue of the exports which are made that the money is received by the petitioner not only from its purchasers but also from the Government in the shape of Ccs This receipt is in-extricably linked with the business of export of the petitioner and the same cannot partake of any character except that of income. It is only the Income Tax Act which may designate a category of receipt which is income in nature. as capital or revenue. The decision of the Income Tax Tribunal, on which reliance was placed by Mr. Sharma had regarded this receipt as capital income. What has now happened is that as a result of the impugned legislation this receipt s clearly categorised as a revenue receipt subject to tux u/s 28 of the Act. In our opinion Entry 82 of List I of the Seventh Schedule empowered the Parliament to enact such a piece of legislation.

(10) While submitting that retrospective operation could not have been given to the impugned provisions the learned counsel relied upon a decision of a Division Bench of the Bombay High Court in Commissioner of Income Tax Vs. Mico Products Pvt. Ltd., . That case was not concerning Ccs but related to the validity of Section 35(2)(4) pertaining to depreciation en account cf the assets which had been ceased to be used for scientific research. The Bombay High Court concluded that the retrospective enactment had the effect of levying tax for the first time and the said amendment was not clarificatory in nature. Without going into the corremess of the said decision the in-escapable conclusion in the present case, however, is that the amendment which has been made is clarificatory in nature. This is evident from the memorandum explaining provisions in Finance Bill, 1990. relevant portion of which has been extracted hereinabove. The heading of this paragraph itself states that these are provisions clarifying the taxability of certain export incentives. Furthermore there was clearly a difference of judicial opinion with regard to the taxability of this receipt by an exporter. This difference of judicial opinion or judicial controversy was sought to be set at rest by enactment of the two impugned provisions. We, are Therefore, clearly of the opinion that the amendments made were clarificatory in nature. Infact even if they were not clanficatory in nature, we are not convinced that the Parliament had no legislative competence to enact such provision with retrospective effect. The power of retrospective legislation has been upheld by the Supreme Court in a catena of authorities. Two of the latest decisions being that of Ujagar Prints v. Union of India, 179 Itr 317(6) and Lohia Machines Ltd. v. Union of India, 152 Itr 308(7) and we are unable to agree with the learned counsel for the petitioner that the impugned provisions amount to a fresh levy.

(11) From the aforesaid it will follow that the Parliament has validly enacted the impugned provisions and no relief in this behalf can be given to the petitioner.

(12) It was justly contended by Shri Sharma that in respect to the assessment year 1987-88 the position of law, at least in Delhi, was that the Ccs which was received was not being regarded as a revenue income. This was by virtue of the decision of the Tribunal firstly in Gadours Tools case in 1985 and thereafter by the Full Bench in 1988. It was submitted that the Department ought not to take any proceedings for imposing the penalty or for levying any interest. It is not in dispute that the matter is still alive inasmuch as petition u/s 264 is pending before the Commissioner of Income Tax. While we would not like to interfere with the case at this stage we do feel that in such case a sympathetic view should be adopted when there is a retrospective piece of legislation and it cannot be said that the view which the assesses was taking in 1987 was without any foundation. We do not expect that any injustice would be done to the petitioner and the Commissioner of Income Tax, will, we are sure, pass a fair and judicious order.

(13) For the aforesaid reasons, this writ petition is dismissed. Interim orders are vacated.