
(1985) 02 CAL CK 0044

In the Calcutta High Court

Case No : Income-tax Reference No. 402 of 1980

Commissioner of Income Tax

APPELLANT

Vs

Agarpara Co. Ltd.

RESPONDENT

Date of Decision : 18-02-1985

Acts Referred:

Income Tax Act, 1961 — Section 36(1), 41(1)

Citation : (1985) 02 CAL CK 0044

Hon'ble Judges : Dipak Kumar Sen, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Advocate : A.C. Maitra, for the Appellant;K. Ray and R.N. Dutt, for the Respondent

Judgement

Ajit Kumar Sengupta, J.—In this reference u/s 256(1) of the Income Tax Act, 1961, the following question has been referred to this court by the Tribunal for the assessment year 1971-72 :

"Whether, on the facts and in the circumstances of the case, the sum of Rs. 50,061 representing the amount of unpaid bonus written back in the accounts could be assessed u/s 41(1) of the Income Tax Act, 1961, in the assessment year 1971-72?"

2. During the previous year relevant to the assessment year 1971-72, the assessee wrote off liabilities totalling to Rs. 84,508.40 including unpaid bonus amounting to Rs. 50,061.61 made up of the following items :

Unpaid bonus Amount

Rs.

31-3-1965 13,318.64

31-3-1966 26,557.40

31-3-1967 10,185.57

50,061.61

The Income Tax Officer in the above assessment year added the said amount of Rs. 50,061 in respect of unpaid bonus to the total income of the assessee without any discussion. The assessee, accordingly, took up the matter in its objection to the draft assessment order u/s 144B with the Inspecting Assistant Commissioner of Income Tax. It was stated that the above amount of Rs. 50,061 represented unclaimed bonus due by the assessee to its workers. Although the said amount had been written back in the accounts, it could not be said that the liability of the company in that behalf had been extinguished. In the present case, there was neither remission nor cessation of the said liability in terms of Section 41(1) of the Act and as such the obligation of the assessee to pay unclaimed bonus to its workers, when they claimed the same, exists in law. The said amount cannot represent the income of the assessee.

3. The said stand of the assessee had, however, been negated by the Income Tax Officer in the final order, as according to him, after the above amount had been credited to the profit and loss account, the assessee had no liability in the matter of payment of bonus totalling Rs. 50,061 which was claimed in the earlier years as revenue expenditure. The assessee went on appeal before the Commissioner of Income Tax (Appeals) who observed as follows :

"It is admitted by the assessee that this amount of unpaid bonus remains unpaid till today. It is, therefore, reasonable for the Income Tax Officer to assume that this liability to pay bonus has ceased for all practical purposes. The assessee's treating it as part of the profits of this year by writing it back to the profit and loss account confirms this assumption. The assessment of this amount as income u/s 41(1) is, therefore, justified."

4. On further appeal to the Tribunal, the Tribunal upheld the stand of the assessee by observing as under:

"The liability involved is that of the payment of bonus for which a dispute can be raised under the Industrial Disputes Act. In that sense, the decisions relied upon by the Commissioner of Income Tax (Appeals) are distinguishable. The said liability in the matter of payment of bonus has neither in law ceased nor can the said liability be said to have been remitted in terms of Section 41(1) of the Act. The liability to pay the bonus by the assessee to its workers exists in law. As such, Section 41(1) of the Act is not attracted in the present case. The decisions relied upon by the assessee before the Commissioner of Income Tax (Appeals) apply in the present case."

5. The learned advocate appearing for the Commissioner has submitted that in view of the provisions of the Bonus Act, the liability for bonus has ceased after the expiry of the period prescribed under the Bonus Act for recovery of such unpaid bonus. He has submitted that it is not a case of debtor and creditor and as such the principles which govern the cases of debtor and creditor will not apply in the instant case. He has relied on two decisions, one in the case of

Commissioner of Income Tax, Gujarat Vs. Hides and Leather Products Pvt. Ltd., and the other in the case of Pioneer Consolidated Company of India Ltd. Vs. Commissioner of Income Tax, .

6. On the other hand, Mr. Kalyan Ray, the learned counsel appearing for the assessee, has submitted that the point in issue has been fully concluded by the decision of this court in the case of Commissioner of Income Tax Vs. Sugauli Sugar Works P. Ltd., .

7. We are concerned with the interpretation of Section 41(1) of the Income Tax Act, 1961, which reads as follows :

"41(1). Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee, and subsequently during any previous year the assessee has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him or the value of benefit accruing to him, shall be deemed to be profits and gains of business or profession and accordingly chargeable to Income Tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not."

8. Thus, the provisions of Section 41(1) have application only if,--

(i) an allowance or deduction had been made, in the computation of profits and gains of a business or profession, in the assessment for any year in respect of loss, expenditure or trading liability Incurred by the assessee, and

(ii) subsequently during any previous year the assessee had obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof.

9. It follows, therefore, that after the assessee had obtained any allowance or deduction of a trading liability in its assessment and subsequently if the assessee had obtained any benefit in respect of such trading liability by way of remission or cessation thereof, the value of the benefit accruing to the assessee would be taxed as income. In other words, Section 41 enables the Revenue to take back what it has already allowed if certain conditions are satisfied and the assessee recouped something for which an allowance had already been made and deducted from his business income. The question in this case is whether having regard to the aforesaid provisions of the Act, the unpaid bonus written back in the accounts could be assessed u/s 41(1). When the assessee follows the mercantile system of accounting, its liability, accrued during the relevant previous year, is allowed as a deduction in computing the profits and gains of the business. The payment of bonus under the Payment of Bonus Act, 1965 (hereinafter referred to as the Bonus Act), is one of such liabilities which an

assessee takes into account in computing the profits and gains of the business. Section 19 of the Bonus Act provides for a time-limit for payment of bonus under the said Bonus Act. It reads as follows :

"19. All amounts payable to an employee by way of bonus under this Act shall be paid in cash by his employer-

(a) where there is a dispute regarding payment of bonus pending before any authority u/s 22, within a month from the date on which the award becomes enforceable or the settlement comes into operation, in respect of such dispute ;

(b) in any other case, within a period of eight months from the close of the accounting year :

Provided that the appropriate Government or such authority as the appropriate Government may specify in this behalf may, upon an application made to it by the employer and for sufficient reasons, by order, extend the said period of eight months to such further period or periods as it thinks fit; so, however, that the total period so extended shall not in any case exceed two years."

10. Unless there is a pending dispute regarding the payment of bonus, bonus has to be paid within the period of eight months from the close of the accounting year. However, upon an application being made to the appropriate Government, the period of eight months may be extended, but the total period so extended, shall not, in any case, exceed two years. In this case, bonus remained unpaid for several years. It is not the case of the assessee that any dispute is pending as regards the payment of bonus. It is not also the case of the assessee that upon an application being made to the appropriate Government, time to pay bonus has been extended. Section 21 of the Bonus Act provides the mode of recovery of bonus due from an employer.

11. Where any money is due as bonus from an employer, the employee may make an application to the appropriate Government for the recovery of the money due to him. The amount of bonus may be payable under a settlement or an award or an agreement. If the appropriate Government is satisfied that the money claimed is due to the employee, it shall issue a certificate for that amount to the Collector who shall recover that amount as arrears of land revenue. Every application for the recovery of the bonus has to be made within one year from the date on which the money became due from the employer. But the appropriate Government may condone the delay if satisfied that the applicant had sufficient cause for not making the application within one year. The mode prescribed u/s 21 for recovery of bonus due from an employer is available only if the bonus sought to be recovered is under a settlement or an award or an agreement. It appears that Section 21 does not cover a case of recovery of bonus payable under the Payment of Bonus Act. If the bonus payable under the Bonus Act is not paid to the employee or if the employer disputes his liability to pay the bonus, such a dispute should be deemed to be an industrial dispute within the meaning of Section 22 of the Bonus Act. Therefore, in such a case,

only after the dispute is settled, the bonus will be recoverable either by settlement or agreement or award. The bonus will be enforceable either u/s 21 of the Act or under the Industrial Disputes Act. It appears to us that in view of the provisions contained in Sections 21 and 22, a civil suit by the employee for the recovery of the bonus will not be maintainable. Unless it is shown that there is any dispute pending as regards the payment of bonus, the bonus has to be paid in accordance with the provisions of the Bonus Act. The liability to pay the bonus cannot continue indefinitely. The liability for bonus accrues from year to year and if an employee does not claim any bonus nor raises any dispute as regards payment of bonus, it cannot be said that the statutory liability for payment of bonus in respect of such employee still exists. When there is a dispute raised as regards payment of bonus, a prudent businessman always provides for the amount involved in the dispute as a provision, but in this case, the employer has treated that it has no liability at all and the unpaid bonus had been written back to the profit and loss account of the previous year relevant to the assessment year in question. The assessee, therefore, no longer acknowledges any liability for the unpaid bonus.

12. The question, however, is whether the liability has ceased to exist. It was contended by Mr. Ray on the strength of the decision of this court in the case of Commissioner of Income Tax Vs. Sugauli Sugar Works P. Ltd., , that recovery may have been barred but the liability still exists. It is, therefore, necessary to consider the decision of this court. In that case, the assessee transferred Rs. 3,45,000 out of the suspense account running from 1946-47 to 1948-49 to its capital reserve account. The Income Tax Officer found that out of the above sum, an amount of Rs. 2,56,529 represented liabilities for expenses which had been allowed in the earlier years. By applying Section 41 of the Act, he included this amount in the total income of the assessee. The Appellate Assistant Commissioner confirmed the view taken by the Income Tax Officer. The assessee came up in further appeal to the Tribunal. The Tribunal was of the opinion that the liabilities for expenses arose for 1948-49 and these amounts became barred by limitation. When the liability became barred by limitation, there was neither a remission nor a cessation of the liabilities. The liabilities are not extinguished. The Tribunal, therefore, held that the amount in question cannot be taxed u/s 41(1) of the Act. This court considered the decision in the case of Kohinoor Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City I, , where the decision of the Supreme Court in the case of Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, , was considered. This court also considered the decision of the Bombay High Court in the case of J.K. Chemicals Ltd. Vs. Commissioner of Income Tax, Bombay City-II, . This court reproduced in extenso from the decision in the case of J.K. Chemicals Ltd. The following passage at page 41 of 62 ITR was relied on:

" The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his liability. Remission has to be granted by

the creditor. It is not in dispute, and it indeed cannot be disputed, that it is not a case of remission of liability. Similarly, a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the operation of law, i.e., on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to honour his liability when payment is demanded by the creditor, or a contract between the parties, or by discharge of the debt--the debtor making payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability."

13. Sudhindra Mohan Guha J., speaking for the court, observed thus (p. 292 of 140 ITR):

"These are the best reasonings to which we are most respectfully in agreement. Again, this decision was also followed in a recent case, viz., Commissioner of Income Tax, Bombay City-VI Vs. Sadabhakti Prakashan Printing Press (P.) Ltd., .

It has been pointed out earlier that it was found by the Allahabad High Court that the reversal of the entries on the part of the assessee in its profit and loss account would have the effect of showing the amount as income and, thus, there would be a "remission or cessation" of the liability. We are unable, with due respect, to accept the view taken by the Allahabad High Court in the cases referred to above.

In view of the discussions made above, we are of the opinion that there can be a cessation only on the bilateral acts by both the creditor and the debtor or by a refusal of the debtor to honour his liability when pressed for the dues or by a discharge of the debt by making payment of dues. In no case, a debtor can bring the liability to an end on his own volition. Thus, we are of the opinion that the Tribunal was right in holding that there was neither a remission nor cessation of the trading liabilities in this case and, thus, the provisions of Section 41(1) of the Act would not be attracted. "

14. In the case of Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, , the Supreme Court was considering the provisions of the Bombay Labour Welfare Fund Act, 1953. In that case, constitutional validity of the provision of Section 3 of the said Act was the main point for determination by the Supreme Court. Under the provisions of the said Act, "unpaid accumulations" being "all payments due to the employees but not made to them within a period of three years from the date on which they became due whether before or after the commencement of this Act including the wages and gratuity legally payable "shall be paid into the fund called the Bombay Labour Welfare Fund notwithstanding anything contained in any other law for the time being in force. It was contended that the said Act merely substitutes the Board as the creditor in place of the employer. The Supreme Court held that the effect of the relevant provisions of the Act is to transfer to the Board the debts due by the employer to its employees free from the bar of limitation. In dealing with the said contention,

the Supreme Court observed as follows (at pp. 334 and 335).

"It will be observed that the definition of "unpaid accumulations" takes in only payments due to the employees remaining unpaid within a period of three years after they become due. The intention of the Legislature obviously was that claims of the employees which are within time should be left to be enforced by them in the ordinary course of law, and that it is only when they become time barred and useless to them that the State should step in and take them over. On this, the question arises for consideration whether a debt which is time-barred can be the subject of transfer, and if it can be, how it can benefit the board to take it over if it cannot be realised by process of law. Now, it is the settled law of this country that the statute of limitation only bars the remedy but does not extinguish the debt. Section 28 of the Limitation Act provides that when the period limited to a person for instituting a suit for possession of any property has expired, his right to such property is extinguished. And the authorities have held--and rightly, that when the property is incapable of possession, as for example, a debt, the section has no application, and lapse of time does not extinguish the right of a person thereto. u/s 25(3) of the Contract Act, a barred debt is good consideration for a fresh promise to pay the amount. When a debtor makes a payment without any direction as to how it is to be appropriated, the creditor has the right to appropriate it towards a barred debt, (vide Section 60 of the Contract Act). It has also been held that a creditor is entitled to recover the debt from the surety, even though a suit on it is barred against the principal debtor... And when a creditor has a lien over goods by way of security for a loan, he can enforce the lien for obtaining satisfaction of the debt, even though an action thereon would be time-barred....In American Jurisprudence, Vol. 34, page 314, the law is thus stated:

"A majority of the courts adhere to the view that a statute of limitations as distinguished from a statute which prescribes conditions precedent to a right of action, docs not go to the substance of a right, but only to the remedy. It does not extinguish the debt or preclude its enforcement, unless the debtor chooses to avail himself of the defence and specially pleads it. An indebtedness does not lose its character as such merely because it is barred, it still affords sufficient consideration to support a promise to pay, and gives a creditor an insurable interest."

In Corpus Juris Secundum, Vol. 53, page 922, we have the following statement of the law :

"The general rule, at least with respect to debts or money demands, is that a statute of limitation bars, or runs against, the remedy and does not discharge the debt or extinguish or impair the right, obligation or cause of action."

The position then is that under the law a debt subsists notwithstanding that its recovery is barred by limitation and no argument has been addressed to us by the appellant that the transfer of such a debt is invalid ; and indeed it could not

be, in view of the provisions in the impugned Act, which release the debts due to the employees from the bar of limitation. Section 3(1) provides that payment shall be made of the amounts specified in sub-clause (2) "notwithstanding anything contained in any other law for the time being in force". A similar provision is again enacted in the second proviso to Sub-section (2) of Section 5 that " unpaid accumulations " and fines shall be be paid to the Board " notwithstanding anything contained in the Payment of Wages Act, 1936, or any other law for the time being in force ". One of those laws is the law of limitation, and the effect of these provisions is to suspend limitation in respect of the claims to which Section 3(2) relates. "

15. The Supreme Court then proceeded to consider the question whether there has been a substitution of creditors and that (at p. 3357): "can only be, if the debt due to the employee is discharged and in its place there is substituted the debt in favour of the Board. If, however, the employer is not released from his liability to the employee, then the effect of Section 3(1) is only to create in the Board a statutory creditor in addition to the creditor under the contract of employment, and there can be no question of substitution". The Supreme Court held that the Act does not contain any provision to the effect that on payment of the amounts in accordance with Section 3(i) of the Act, the employer will get a discharge of his obligation to the employees in respect of wages due to them. The Supreme Court also held even where the claims of unpaid wages are barred by limitation, the impugned Act does not give discharge to the employer in respect of those claims. The effect of the bar of limitation is not to discharge the employer from his liabilities to the employees. In that context, the Supreme Court observed as follows (at p. 337 of 1958 AIR SC) :

"It has been already mentioned that when a debt becomes time-barred, it does not become extinguished but only unenforceable in a court of law. Indeed, it is on that footing that there can be a statutory transfer of the debts due to the employees, and that is how the Board gets title to them. If then a debt subsists even after it is barred by limitation, the employer does not get, in law, a discharge therefrom. The modes in which an obligation under a contract becomes discharged are well denned, and the bar of limitation is not one of them. The following passages in Anson's Law of Contract, 19th edition, page 383, are directly in point:

"At Common Law, lapse of time does not affect contractual rights. Such a right is of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it be limited in point of duration.

But though the right possesses this permanent character, the remedies arising from its violation are withdrawn after a certain lapse of time ; interest reipublicae ut si finis litium. The remedies are barred, though the right is not extinguished."

16. And if the law requires that a debtor should get a discharge before he can be compelled to pay, that requirement is not satisfied if he is merely told that in the

normal course he is not likely to be exposed to action by the creditor."

17. The Supreme Court also considered that even when a claim for wages falls within the purview of the Payment of Wages Act and an application u/s 15 of that Act would be barred, it can nevertheless give rise to an industrial dispute in respect of which a dispute can be taken under the provisions of the Industrial Disputes Act. The result, therefore, is that when an employer makes a payment u/s 3(1) of the Bombay Labour Welfare Fund Act, he gets no discharge from his obligation to the employees, even when the enforcement thereof is barred by limitation. The Supreme Court further observed that u/s 65 of the Contract Act, the employer is liable to make compensation to the employee for the work done by him, and that liability can be enforced against him in spite of the fact that he has paid the unclaimed wages to the Board u/s 3(1) of the Act.

18. This decision of the Supreme Court was relied on by Kohinoor Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City I, . There the amount of wages which had become due to the labourers and workmen, but which were not claimed by them, were added to the assessment by the Income Tax authorities on the ground that the liability to pay the amount to the labourers and workmen had ceased by reason of the expiry of the period of three years. The claim of the Income Tax authorities was founded on Section 10(2) of the Indian Income Tax Act, 1922. According to the assessee, the liability did not cease though the remedy to recover the amount of wages by the labourers and workmen may have become barred. The Tribunal did not accept this contention of the assessee but, on the other hand, held that in the hands of the assessee, the trading liability in respect of unclaimed wages could not be enforced by the workmen and as such there was a cessation of the trading liability within the meaning of Section 10(2A) of the Act. There, the Bombay High Court observed as follows (at p. 580):

" It is not in dispute before us that in view of the provisions of Section 10(2A), it is open to the Income Tax authorities to include in the income of the assessee the amount of the trading liability of the assessee, which had ceased to be its trading liability in the relevant accounting year. The question, however, is whether the trading liability to the extent of Rs. 30,190 representing the unclaimed wages, which was the trading liability of the assessee incurred in the year 1952, had ceased to be its trading liability in the year 1955 by reason of the expiry of three years, and thus barring the remedy of the labourers and workmen to recover that amount by way of suits. The answer to this question has been given by their Lordships of the Supreme Court in Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, , their Lordships observed :

"The position then is that, under the law, a debt subsists notwithstanding that its recovery is barred by limitation....."

That being the principle of law laid down by their Lordships, it is hardly possible

to sustain the view taken by the Tribunal that the trading liability incurred by the assessee in respect of the said amount of Rs. 30,190 had ceased to be its trading liability in the year 1955 by reason of the expiry of the period of three years."

19. The Bombay High Court in the case of J.K. Chemicals Ltd. Vs. Commissioner of Income Tax, Bombay City-II, , again considered the question. The assessee-company, which kept its accounts on the mercantile system, debited the accounts as and when it incurred any liability on account of wages, salary or bonus due to its employees even though the amounts were not disbursed in cash to the employees, and obtained deduction of the amounts so debited in the respective years in computing its total income. Certain portion of the wages, salary and bonus, so debited, was in fact not drawn by the employees. On June 30, 1957, a sum of Rs. 5,929 which had remained undrawn but had been allowed to be deducted during the accounting years 1945 to 1953 was credited to the profit and loss account of the said year. The Department included this amount in the total income of the accounting year on the ground that the trading liability in respect of which deduction had been allowed had ceased to exist, and u/s 10(2A), the amount in question should be deemed to be income.

20. The Bombay High Court held that, in order that an amount may be deemed to be income u/s 10(2A), there must be a remission or cessation of the liability in respect of that amount. The mere fact that more than three years had elapsed since the accrual of the liability and that the debts had become unenforceable against the assessee under the general law does not constitute cessation of the trading liability within the meaning of Section 10(2A). A mere entry of credit in the accounts in respect of the amount would also not bring about a remission or cessation of the liability. Section 10(2A) was not, therefore, applicable and the amount was not liable to be assessed as income of the accounting year in which the credit entry was made.

21. It appears that the correctness of the decision in the case of Kohinoor Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City I, , was not disputed. It was contended that the said decision is distinguishable on facts inasmuch as the entries made in respect of the accrued liabilities in the books of Kohinoor Mills, which was maintaining its accounts on mercantile basis, had continued to show the said amounts in its books of account as a liability. The Kohinoor Mills had not reversed the entries and transferred the amount to the credit of its profit and loss account in the year of assessment. What was formerly shown as a liability is now no more shown in the year of account as a liability of the company. The company has transferred this amount to the credit of its profit and loss account and that makes all the difference.

22. The Bombay High Court, dealing with the said contention, held as follows (at pp. 40 & 41 of [1966] 62 ITR):

"The question to be considered is whether in the account year relevant to the assessment year, with which we are concerned here, the assessee has received

any benefit by way of remission or cessation in respect of the said amount of Rs. 5,929. The more fact that more than three years have elapsed since the accrual of the liability and that the debts have become unenforceable against the assessee under the general law does not constitute cessation of the trading liability within the meaning of Section 10(2A), We have taken this view in Kohinoor Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City I, . The ratio of this case has been well summarised in its placitum in the following terms :

"Where wages are payable but they are unclaimed and their recovery is barred by limitation, the position in law is that the debt subsists, notwithstanding that its recovery is barred by limitation. There is in such a case no " cessation of trading liability " within the meaning of Section 10(2 A) and the amount of such wages cannot be added to the income."

As already stated, Mr. Joshi does not dispute the correctness of this decision. He, however, contends that the decision has no application where the assessee has himself failed to show the trading liability and has transferred the said liability to the credit of its profit and loss account, and that transfer of the entries in the aforesaid manner brings about remission or cessation of the trading liability. This also appears to be the view taken by the Tribunal. The question to be considered is whether the transfer of these entries brings about a remission or cessation of its liability. The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his liability. Remission has to be granted by the creditor. It is not in dispute, and it indeed cannot be disputed, that it is not a case of remission of liability. Similarly, a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the operation of law, i.e., on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to honour his liability when payment is demanded by the creditor, or a contract between the parties, or by discharge of the debt--the debtor making payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability. We have already held in Kohinoor Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City I, that the mere fact of the expiry of the period of limitation to enforce it, does not by itself constitute cessation of the liability. In the instant case, the liability being one relating to wages, salaries and bonus due by an employer to his employees in an industry, the provisions of the Industrial Disputes Act also are attracted and for the recovery of the dues from the employer, u/s 33C(2) of the Industrial Disputes Act, no bar of limitation comes in the way of the employees: Bombay Gas Co. Ltd. Vs. Gopal Bhiva and Others, ."

23. We have already indicated that this court in Commissioner of Income Tax Vs. Sugauli Sugar Works P. Ltd., approved the aforesaid reasoning of the Bombay High Court. In the case of Commissioner of Income Tax, Gujarat Vs. Hides and

Leather Products Pvt. Ltd., , the Gujarat High Court has held that the omission to take any legal steps against the debtor by the creditor for the recovery of the amount due for a period of nearly five years would lead to the inference that there was a cessation of liability.

24. In the case of Pioneer Consolidated Company of India Ltd. Vs. Commissioner of Income Tax, , the Allahabad High Court has taken the view that though the excess amount collected for payment of customs and other dues was not income when it was realised, yet when it was not claimed by the customers and the assessee chose to treat the item as his income, it cannot be said that the Income Tax authorities committed an error in accepting the statement of the assessee. The Allahabad High Court in the case of Pioneer Consolidated Co. of India Ltd. Vs. Commissioner of Income Tax, , held that money due by the assessee company to its constituents, but not claimed by them and transferred to the profit and loss account of the company was the income of the assessee in the accounting year in which it was so transferred. The same view was taken by the Allahabad High Court subsequently in the case of the same assessee: Pioneer Consolidated Company of India Ltd. Vs. Commissioner of Income Tax, .

25. In Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, , the Supreme Court held that the Bombay Labour Welfare Fund Act, 1953, did not discharge the employer from his liability to pay the employees unclaimed wages even though the employer makes over the unclaimed wages to the fund constituted under the said Act. In Kohinoor Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay City I, , the assessee did not credit in its accounts any unclaimed wages because of the provisions of the said Bombay Labour Welfare Fund Act under which the unclaimed wages were directed to be paid to the Bombay Labour Welfare Fund constituted under the said Act. The Income Tax Officer, however, treated in that year, the unclaimed wages amounting to Rs. 9,314 as the assessee's income for the assessment year 1955-56 and the assessee acquiesced thereto. For the relevant assessment year, that is, 1956-57, the Income Tax Officer added a sum of Rs. 30,190 being unclaimed wages of 1952 as profits of the assessee for the said assessment year 1956-57 and levied Income Tax thereon. In view of the provisions of the said Act, the liability of the employer in respect of the unclaimed wages was subsisting at that time. When the Tribunal heard the appeal, the decision of the Supreme Court in Bombay Dyeing and Manufacturing Co. Ltd. Vs. The State of Bombay and Others, , came out but the Tribunal held that in the hands of the assessee, the trading liability in respect of the unclaimed wages could not be enforced by the workers and as such there was a cessation of the trading liability. As indicated earlier, there was a lacuna in the said Act, inasmuch as there is no provision in the Act granting a discharge to the employer in respect of its liability to its employees on payment of the amount to the Board and, therefore, the amount had remained unpaid. The lacuna was made good by the amending Act of 1961. The Bombay High Court in J.K. Chemicals Ltd. Vs. Commissioner of Income Tax, Bombay City-II, took note of the said amendment to the Bombay

Labour Welfare Fund Act and held that the assessee was required to transfer the said unpaid balance to the Board. The Bombay High Court observed at page 42 of 62 ITR thus : "The scheme envisaged by this Act then is that if the accumulated balance is not paid to the employees for a period of three years since its accrual, it became payable to the fund and on the amount having been paid to the fund, the employer was discharged of his liability towards his employees. Looking at the case from this point of view also, it becomes apparent that in the assessment year there was no cessation of liability within the meaning of Section 10(2A)." It is, therefore, clear that in view of the provision of the said Act, the employer had the liability to pay the time-barred claims of the employees in respect of the wages to the fund and there could not be any cessation of liability. Although the Bombay High Court laid down the general principles as regards the cessation of liability, in view of the provisions of the Bombay Labour Welfare Fund Act, the liability of the employer as regards the time-barred claims for wages did not cease unless such accumulated balance was paid to the fund constituted under the said Act. It does not appear from the facts narrated in the judgment in Commissioner of Income Tax Vs. Sugauli Sugar Works P. Ltd., , what is the nature of the "liability for expenses". It appears, however, that one of the "liabilities" was in respect of the unsecured loan. Accordingly, the general principle that a statute of limitation bars or runs against the remedy and does not discharge the debt was applied on the facts of that case.

26. Whether a trading liability that was once incurred ceases to exist for the purpose of Section 41(1) has to be decided in the light of the provisions of the Income Tax Act, 1961, and the statute, if any, governing such liability. The assessee who maintains his accounts on the mercantile basis would be entitled to a deduction in respect of bonus in the year in which a liability arises under the statute, or the employees' claim for bonus is admitted by the assessee or is settled by an agreement between the parties or is adjudicated upon by an award. u/s 36(1)(ii) of the Income Tax Act, 1961, payment of bonus to the employees is an allowable deduction. Under the Payment of Bonus Act, 1965, liability to pay bonus has become a statutory obligation imposed upon the employer covered by the said Act. Under the Bonus Act bonus is payable within a period of eight months from the close of the accounting year unless there is a dispute regarding such payment, in which case it is payable within a month from the date of the award becoming enforceable. Contravention of any of the provisions of the Bonus Act or the Rules made thereunder is punishable with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 1,000 or with both. As the liability for bonus became a statutory one, a provision made therefore or even where no provision is made, in the mercantile accounting, the amount payable is allowable if the same is in accordance with the law about the payment of bonus. Any provision over and above that payable under the Bonus Act shall not be allowable to the extent of such excess. It is not the case of the assessee before us that time to pay bonus was extended or any dispute as

regards payment of bonus has been raised. The assessee has provided for bonus for its employees but a part of the bonus so provided for three several years remained unclaimed. Once bonus has been offered by the employer, but remains undrawn, it cannot be said that the liability subsists even after the expiry of the time prescribed by the statute, particularly when there is no dispute pending regarding the payment of bonus. In the context of such facts and circumstances, it may be inferred that unclaimed or unpaid bonus is an excess of the requirement of the assessee and, therefore, to that extent, in any event, the liability has ceased. Assuming that there can be a cessation only on bilateral act by both the creditor and debtor, such acts may be inferred from the conduct of the debtor and the creditor. It need not be a positive act or a positive conduct. It can be inferred from the surrounding circumstances that there has been a cessation or remission of the liability of the assessee. In this case, a portion of the bonus for several years remained undrawn by the employees for about 5--7 years. Bonus is payable in each year. In the absence of any dispute, it cannot be said, a liability to pay bonus not claimed by the employees subsists. The assessee has written back in the accounts the amount representing the unclaimed bonus. The assessee by its aforesaid act and conduct has declared that there is no liability in respect of that portion of the bonus not claimed by the employees. The persons who are entitled to claim such bonus, by not claiming it for years together, should be deemed to have abandoned their claims, if any. It is difficult to appreciate that when the bonus is paid annually, why such bonus, unless there is a dispute, should remain unclaimed by the concerned employees. The principle that a statute of limitation bars only the remedy but does not extinguish the debt may not strictly apply in Income Tax proceedings in deciding whether there has been cessation or remission of a statutory liability. When the assessee claims a statutory liability as a deduction on "due basis", such deduction is allowed in computing its total income even though such liability was not actually paid. This benefit is given to the assessee only because of the provisions of the Income Tax Act. Therefore, when the unclaimed bonus is no longer shown as a liability and the amount representing such unclaimed bonus is transferred to the profit and loss account; it cannot be said that there has been no remission or cessation of liability of the assessee under the provisions of the Income Tax Act. When the employer incurs liability on account of bonus that became due to us employees it claims allowance or deduction in respect of such a trading liability even though the amount remained actually unpaid during the relevant accounting year. For this purpose, the assessee makes entries in its books of account. In. the Income Tax assessment, the assessee claims deduction on account of such bonus on the ground that it had incurred liability in respect of bonus whether actually paid or not, inasmuch as the assessee has been following the mercantile system of accounting. A certain portion of such bonus claimed on accrual basis in an accounting year, remained undrawn or unpaid to the employees in the said accounting year to which such bonus relates and such portion of the unpaid bonus is carried forward to the following year and so on. If unclaimed bonus being a portion of bonus allowed as deduction in computing the

income of the assessee is carried forward from year to year and thereafter written back in the account and no tax is levied thereon, the assessee would be getting a benefit which it was not entitled to. Once this amount is taxed u/s 41(1) and afterwards a dispute is raised or claim is made by any concerned employee regarding unclaimed bonus, the assessee will be entitled to get deduction in the year when such dispute would be settled or payment is made on the ground that a fresh liability has accrued to the assessee. Therefore, from the point of view of the assessee, it does not stand to lose. The Tribunal has not adverted to the relevant facts. The Tribunal solely proceeded on the view that the liability involved is that of the payment of bonus for which dispute can be raised under the Industrial Disputes Act and as such there is no cessation of liability. This approach of the Tribunal is erroneous. Liability to pay bonus by the assessee to its employees cannot continue indefinitely. Since the assessee provided for payment of bonus, the liability under the statute has been discharged by the assessee. If for any reason the concerned employees do not claim the bonus even after a lapse of 5 to 7 years, it cannot be said that the employer has still the liability for payment of such bonus. The Tribunal should have investigated whether unclaimed bonus represents the excess of the requirement for payment of bonus to the employees and the reasons why the bonus had not been claimed by the employees for all those years. The Tribunal was, therefore, not right in holding that the liability in the matter of payment of bonus has neither ceased nor remitted in terms of Section 41(1) of the Act. The Tribunal has neither found out the facts necessary for determination of the question nor applied the correct legal principles. We, therefore, decline to answer the question. The Tribunal will dispose of the case in the light of the principles laid down in this judgment. While disposing of the case u/s 260 of the Act, the Tribunal will be entitled to take additional evidence.

27. There will be no order as to costs.

Dipak Kumar Sen, J.

28. I agree.