

(1990) 08 CAL CK 0052

In the Calcutta High Court

Case No : Income-tax Reference No. 92 of 1987

Commissioner of Income Tax

APPELLANT

Vs

Anderson Wright and Co.

RESPONDENT

Date of Decision : 29-08-1990

Acts Referred:

Income Tax Act, 1961 — Section 256(2)

Citation : (1993) 200 ITR 596

Hon'ble Judges : Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : A.C. Moitra and Sunil Mukherjee, N.K. Poddar, Amicus Curiae, for the Appellant;

Judgement

Ajit K. Sengupta, J.—In this reference at the instance of the Commissioner of Income Tax u/s 256(2) of the Income Tax Act, 1961, the following question of law has been referred to this court for the assessment year 1977-78 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the sum of Rs. 2 (two) lakhs received by the assessee was a capital receipt and not chargeable to tax ?"

2. The facts of the case, in brief, are that the assessee, during the relevant previous year, received Rs. 2 lakhs as "salami" for giving the third floor of premises No. 7, Red Cross Place, on leave and licence basis to Ramnagar Cane and Sugar Company Ltd. According to the Income Tax Officer, it was not a lease on long-term basis nor was the agreement registered, it was merely an agreement of leave and licence which was for less than 20 years (5 years only in the present case). He observed that the provisions of the West Bengal Premises Tenancy Act, 1956, would apply, and the receipt cannot be treated as capital in nature. He held that the assessee could not show that the rent charged per sq. ft. was the normal rate at the relevant time and that no evidence was shown that the Rent Control Authorities had fixed the rent or held the same to be excessive. Accordingly, he treated the above sum as a revenue receipt.

3. The assessee took up the matter before the Commissioner of Income Tax (Appeals) contending that, on termination of the managing agency agreement, the right of occupation by the tenant ceased to exist and, therefore, the leave and licence agreement was executed. It was urged that the authorities below never wanted the assessee to establish that the rent charged at Rs. 2.50 per sq. ft. was fair and normal at the relevant time. It was also urged that the salami or the premium was not taxable being a capital receipt, relying on the decision of the Bombay High Court in the case of Commissioner of Income Tax, Bombay City-III Vs. Ratilal Tarachand Mehta, and also on the decision of the Supreme Court in the case of Durga Das Khanna Vs. The Commissioner of Income Tax, Calcutta, . The Commissioner of Income Tax (Appeals) considered the facts of the case and the ratio of the above decisions and agreed with the contention made on behalf of the assessee. His finding was that the authorities below had not established that the rent of Rs. 2.50 per sq. ft. was less than the market rate and that the Income Tax Officer had not discharged this burden. He also found that the Income Tax Officer had not established that the amount received was in the nature of advance rent and that no evidence was led to show that the rent charged was low. He observed that, on the other hand, prima facie, it was seen that the rent per month agreed in the year 1977 could not be said to be low compared to the general rates prevailing in Calcutta at that time. He therefore, accepted the appeal by the assessee, following the decision in the case of Durga Das Khanna Vs. The Commissioner of Income Tax, Calcutta, .

4. Against the order of the Commissioner of Income Tax (Appeals), the Revenue came up in appeal before the Tribunal. The Tribunal dismissed the Revenue's appeal by observing that the Commissioner of Income Tax (Appeals) has given a finding that the rent charged was reasonable and this finding remains uncontroverted.. The Tribunal was also of the view that there was no finding of the Income Tax Officer that the premium received was in the nature of advance rent.

5. At the hearing, Mr. Moitra, learned counsel, has contended that the Income Tax Officer held that the rent paid was low and that the premium in fact represents the advance rent and, accordingly, it should be treated as a revenue receipt. He has also urged that in the event this court holds that the premium or salami was a capital receipt, the Tribunal should be directed to consider whether it was liable to tax as capital gains or not.

6. No one appeared on behalf of the assessee in spite of service of the paper book. However, Mr. N. K. Poddar, advocate, has assisted the court in this case and this court records its appreciation for the assistance rendered by him.

7. Mr. Poddar has drawn our attention to the Supreme Court decision in the case of Durga Das Khanna Vs. The Commissioner of Income Tax, Calcutta, . He has also referred to the decision of a Division Bench of this court in Commissioner of Income Tax Vs. Purnendu Mullick, . He has submitted that, in view of the finding of the Tribunal that the rent was reasonable and that it was premium, there was

no escape from the conclusion that it was a capital receipt. He has, however, submitted that no contention was urged before the Tribunal to the effect that, if it was a capital receipt, it should be taxed as a capital gain.

8. It appears that the facts of the present case are very similar to the facts which were considered by the Supreme Court in *Durga Das Khanna Vs. The Commissioner of Income Tax, Calcutta*, and this court in *Commissioner of Income Tax Vs. Purnendu Mullick*, . In *Durga Das Khanna Vs. The Commissioner of Income Tax, Calcutta*, , the assessee had taken on lease premises for a term of 99 years with the right to assign the lease and alter the structure of the premises so as to convert it into a cinema house. After spending Rs. 35,000 on some alterations, the assessee executed a sub-lease by which the building was demised to the sub-lessees for 30 years. The sub-lessees agreed to pay to the assessee Rs. 55,200 towards the cost of erecting the cinema house and rent was agreed at Rs. 2,100 per month. On these facts, the Tribunal held that the said sum of Rs. 55,200 was received as advance payment of rent. The High Court confirmed the order of the Tribunal. On further appeal, the Supreme Court held that the Tribunal and the High Court were both in error in treating the said sum of Rs. 55,200 as advance payment of rent. It was observed by the Supreme Court that prima facie, premium or salami was not income and it would be for the Income Tax authorities to show that facts existed which would make it a revenue receipt. The sub-lease did not contain any condition or stipulation from which it could be inferred that the aforesaid amount was paid by way of advance rent. The Supreme Court had also considered the fact that the payment of the lump sum was of a nonrecurring nature.

9. In *Commissioner of Income Tax Vs. Purnendu Mullick*, , the assessee had executed a deed of lease in respect of premises in Old Court House Street, Calcutta, in favour of one Octavius Steel Co. Ltd. In consideration of the said lease, the assessee had received a lump sum of Rs. 50,000. The valuer's report submitted by the assessee recorded that the total area of the premises leased out was 9,825 sq. ft. Under Clause 2 of the deed, the rent of the premises was fixed at Rs. 1,500 per month for the first two years and, thereafter, at an increased rate of Rs. 100 per month after every nine years till the expiry of the lease, i.e., after 99 years. The Income Tax Officer rejected the assessee's claim that the said sum of Rs. 50,000 received as premium or salami constituted a capital receipt and was not taxable as income. On appeal, the Appellate Assistant Commissioner found that, even if payment of salami was influenced by the location of the property and the period of lease, it did not necessarily constitute an advance payment of rent. He held that, in any event, the difference between the fair market rent and the stipulated rent would not in fact be covered by payment of Rs. 50,000. The Appellate Assistant Commissioner accepted the contentions of the assessee and held that the receipt in question was a capital receipt. The Revenue came before the Tribunal and the Tribunal found that Rs. 50,000 had been paid by way of salami or premium and had been so recorded in the deed. The Tribunal also found that the other provisions in the deed justified

the low rate of rent. Accordingly, the Tribunal concluded that the said sum of Rs. 50,000 received by the assessee as salami was a capital receipt and not liable to tax. This view was approved by the High Court.

10. In the case before us, the assessee entered into a leave and licence agreement with M/s. Ramnuggar Cane and Sugar Company in respect of the premises in question for 5 years at a monthly rent of Rs. 10,000. The rent per sq. ft. worked out to Rs. 2.50 per month. Further, in terms of the said agreement, the assessee-firm received Rs. 2,00,000 on account of salami or premium. There is no fact to warrant the conclusion that the rent of Rs. 2.50 per sq. ft. as agreed to was less than the market rate. It is only when the premises are let out at a rate lower than the prevailing market rate, that it can be said that the lump sum amount was in the nature of advance rent. According to the Commissioner of Income Tax (Appeals), the onus to prove that the rent charged is less than the market rate is on the Income Tax Officer. In this case, this onus has not been discharged. This finding remains uncontroverted. M/s. Ramnuggar Cane and Sugar Company were occupying the premises through the assessee because the assessee was their managing agent. The previous rent paid by M/s. Ramnuggar Cane and Sugar Company was very low and nominal. With the cessation of the managing agency agreement, the right of M/s. Ramnuggar Cane and Sugar Company to occupy the premises also ceased, and that is why the aforesaid leave and licence agreement was entered into. The Commissioner also came to a definite finding that the rent of Rs. 2.50 per sq. ft. per month in 1977 could not be said to be low compared to the generally prevailing rates in Calcutta at the material time.

11. In our view, therefore, the principles laid down in the aforesaid decision of the Supreme Court in Durga Das Khanna Vs. The Commissioner of Income Tax, Calcutta, as applied by the court in Commissioner of Income Tax Vs. Purnendu Mullick, will govern the instant case. The premium or salami paid in this case is a capital receipt.

12. In that view of the matter, the question referred to this court is answered by saying that the Tribunal was justified in holding that the sum of Rs. 2 lakhs received by the assessee was a capital receipt. But the Tribunal did not consider whether the receipt, although capital in nature, was liable to tax as capital gains or not. Even if it is not taxable as a revenue receipt, the question still remains whether the capital receipt by way of salami or premium will be liable to tax as a capital gain in the hands of the assessee or not. The Tribunal will, therefore, deal with and dispose of the contention as to whether the receipt in question is chargeable to tax as a capital gain or not.

13. There will be no order as to costs.

Bhagabati Prasad Banerjee, J.

14. I agree.