(2001) 03 GAU CK 0020

In the Gauhati High Court

Case No : IT Reference No. 5 of 1998 21 March 2001 & Income Tax Reference No. 5 of 1998

Commissioner of Income Tax		APPELLANT
	Vs	
Assam Frontier Tea Ltd.		RESPONDENT

Date of Decision : 21-03-2001

Acts Referred:
Income Tax Act, 1961 — Section 256, 30, 31, 32, 33

Citation : (2001) 249 ITR 469

Hon'ble Judges : P.G. Agarwal, J;H.K. Sema, J

Bench : Full Bench

Advocate : G. K. Joshi, with U. Bhuyan, for the Revenue Dr. Ashok Saraf, K. K Gupta and S. K Agarwal, for the Assessee, for the Appellant;

Judgement

H. K. Sema, J.

The revenue has referred the following questions u/s 256(1) of the Income Tax Act, 1961, before the Income Tax Appellate Tribunal :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was not in error in law and in facts in holding that the Commissioner was justified in holding the bona fides of the change in the method of valuation of closing stock and in that view of the matter in deleting the addition of Rs. 1,29,43,042 ?

2. Whether, on the facts and in the circumstances of the case and in view of the first proviso of clause (ii) of sub-section (1) of section 36 of the Income Tax Act, 1961, as existed during the relevant assessment year, the Tribunal has not erred in law and in facts in upholding the Commissioner (Appeals) order deleting disallowances of Rs. 26,29,657 on account of ex gratia payment paid in excess of the Payment of Bonus Act, 1965, on the ground that the payment has been made wholly and exclusively for the purpose of the business ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal did not err in admitting the ground regarding deduction of sur-tax in computing the

taxable income when such ground did not arise from the order of the Commissioner?

4. Without prejudice to question No. 3 above whether in view of the provisions of clause (ii) of sub-section (a) of section 40 of the Income Tax Act, 1961, the Tribunal did not err in law in directing the assessing officer to allow deduction of sur-tax payable from the taxable income of the assessee ?"

2. The Appellate Tribunal was of the view that questions Nos. 1, 3 and 4 are not relatable to questions of law and declined to refer the same before this court. However, the Tribunal was of the opinion that although the order of the Commissioner was upheld, since no decision of the jurisdictional High Court in so far with regard to question No. 2 is concerned, thereby referred question No. 2 before this court for opinion.

3. Mr. G. K. Joshi, learned counsel for the revenue , and Dr. Ashok Saraf, counsel for the assessee, therefore, confined their argument on reference No. 2. The substantial question of law raised in reference No. 2 is reproduced again :

"2. Whether, on the facts and in the circumstances of the case and in view of the first proviso of clause (ii) of sub-section (1) of section 36 of the Income Tax Act, 1961, as existed during the relevant assessment year, the Tribunal has not erred in law and in facts in upholding the Commissioner (Appeals) order deleting disallowances of Rs. 26,29,657 on account of ex gratia payment paid in excess of the Payment of Bonus Act, 1965, on the ground that the payment has been made wholly and exclusively for the purpose of the business ?"

4. Before we answer the reference, the basic facts strictly for the purpose of answering the reference may be noted. The assessee, Assam Frontier Tea Ltd. is a company registered under the Companies Act. For the assessment year ending 31-3-1984, the company has declared 14.95 per cent. bonus under the Payment of Bonus Act and 5.05 per cent as ex gratia payment to workers and staff eligible for payment amounting to Rs. 26,29,657 and on appeal by the revenue the Deputy Commissioner disallowed the deduction of Rs. 26,29,657. On appeal, the Commissioner (Appeals) allowed the deduction of Rs. 26,29,657 on account of ex gratia payment and hence the reference.

5. Mr. G. K. Joshi, learned counsel, submits that ex gratia payment is not bonus and not deductible u/s 36(1)(ii) of the Act and such payment cannot also be deductible u/s 37 of the Act as this expenditure may be allowed u/s 37 of the Act only when these are not the subject-matter of deduction under sections 30 to 36 of the Act. On the other hand, it is contended by Mr. Ashok Saraf, learned counsel for the assessee, that ex gratia is not a bonus but it was in the nature of customary bonus. In the case in hand the assessee-company paid the bonus to the labourers for the period ending 30-6-1985, on the basis of the Payment of Bonus Act, 1965. Subsequent to the payment of bonus to the labourers under the Bonus Act, 1965, the Assam Chah Mazdoor Sangha representing the welfare of the tea garden labourers by its letter dated 21-8-1984, addressed to the

owners of the tea industries to enhance the bonus payable to employees to 20 per cent. After receipt of the aforesaid letter, the assessee-company passed a resolution by resolving to declare 14.95 per cent. bonus under the Payment of Bonus Act, 1965, and 5.05 per cent as ex gratia payment extended to all workers and other eligible labourers and staff. The aforesaid resolution was communicated to all the managers of the companies vide Circular No. 183, dated 11-9-1984. It is obvious that this was done with an eye to buy industrial peace and to save the industries from strike or lock out. This has also been done keeping in view the customary bonus in consonance with the practice followed by commercial and business establishments.

6. Admittedly, the ex gratia payment made by the assessee-company to the labourers and staff for the period under reference does not come within the mischief of the Payment of Bonus Act, 1965. Section 37 of the Income Tax Act, allowed deduction of expenses wholly and exclusively for the purpose of the business or profession other than the expenditure prescribed in sections 30 to 36 of the Act. We have already held that the payment of the ex gratia payment made by the assessee-company to its labourers and staff with a view to buy industrial peace and save industries from strike and lock out and to keep a customary practice adopted in business and commercial establishment, thereby improve production for the company and increase the revenue for the State. In the instant case, as already pointed out, the company has considered the letter of the Secretary, Assam Chah Mazdoor Sangha, dated 21-8-1984, and passed a resolution declaring 14.95 per cent bonus under the Payment of Bonus Act and 5.05 per cent as ex gratia to labourers and staff eligible for payment and the said resolution was communicated to all the managers vide Circular No. 183, dated 11-9-1984. The assessee-company is running an industry and the industry cannot survive unless there is a cordial relationship between the employer and the employees. The ex gratia amount was paid to the labourers and staff for labourers'' peace. The ex gratia amount has been paid by the assessee exclusively and for the purpose of business of the assessee and hence such expenditure is permissible to be considered u/s 37 of the Income Tax Act, 1961.

7. Dr. Ashok Saraf, learned counsel appearing for the assessee, submits that the issue is no more res integra. Counsel has referred to the following decisions :

(a) In Commissioner of Income Tax Vs. Shaw Wallace and Co. Ltd., the Calcutta High Court held that the payment of Rs. 74,206 by way of ex gratia calculated at 8.17 per cent. made by the assessee in terms of the memorandum of settlement wholly and exclusively for the purposes of business and was, therefore, allowable as a business deduction u/s 36(1)(ii) of the Income Tax Act, 1961.

(b) In Commissioner of Income Tax Vs. D. Mohamed Ismail, , the Madras High Court had held that the customary bonus paid to the employees as a matter of practice satisfied the conditions prescribed under the second proviso to section 36(1)(ii) of the Income Tax Act, 1961.

(c) In Commissioner of Income Tax Vs. Thiagarajar Mills Ltd., , the Madras High Court was considering whether the payment of incentive bonus in excess of the bonus payable under the Payment of Bonus Act is an allowable deduction notwithstanding section 36(1)(ii) and held that it is allowable under the provisions of section 37 of the Act.

(d) In Kumaran Mills Limited Vs. Commissioner of Income Tax, , the Madras High Court was examining as to whether the payment made over and above the statutory maximum made by the employers to the labourers pursuant to an agreement under the Industrial Disputes Act was deductible u/s 37 of the Income Tax Act, 1961, and held that such payment for the purpose of commercial expediency and business or profession is allowable u/s 37 of the Act.

8. Following the aforesaid decisions, we are of the opinion that the additional amount in the form of ex gratia payment by the assessee-company to the labourers and staff was expended wholly and exclusively for the purpose of the business and profession to keep the labourers satisfied and to buy the industrial peace and to avoid strike and lock out and, therefore, such expenditure paid in excess of bonus in the nature of ex gratia payment is allowable as business expenditure u/s 37 of the Income Tax Act, 1961. We accordingly answer the reference in favour of the assessee and against the revenue . No costs.