
(2001) 07 P&H CK 0017
In the Punjab And Haryana At Chandigarh
Case No : Income Tax R. No. 16 of 1986

Commissioner of Income Tax	Vs	APPELLANT
Balabus Birla and Co.		RESPONDENT

Date of Decision : 19-07-2001

Acts Referred:

Income Tax Act, 1961 — Section 147, 148, 41(1)

Citation : (2001) 252 ITR 372

Hon'ble Judges : Jawahar Lal Gupta, J; Ashutosh Mohunta, J

Bench : Division Bench

Advocate : R.P. Sawhney and Rajesh Bindal, for the Appellant; Sanjay Bansal, for the Respondent

Judgement

Jawahar Lal Gupta, J.—On a direction by the court, the Tribunal has referred the following question :

Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the sum of Rs. 90,279 cannot be assessed to

Income Tax during the assessment year 1970-71 u/s 41(1) of the Income Tax Act, 1961 ?

2. First the facts.

3. The respondent-assessee was supplying cotton to various mills. It charged sales tax from the customers at two per cent, during the assessment

years from 1964-65 to 1967-68. The amount was shown separately in the bills. It was credited in the books of account under a separate head--

General Sales Tax Account"". The amount deposited with the Government was ""debited to this account and the unpaid amount was retained in the

books of account"". It was ""not shown in the profit and loss account of the respective years"". The assessee had claimed that the Government was

not entitled to charge sales tax on "combing waste". Its claim was ultimately accepted. After the receipt of the sales tax assessment order during the period ending September 12, 1969, relevant to the assessment year 1970-71, the assessee "transferred the unpaid amount of sales tax" amounting to Rs. 90,279 to its profit and loss account.

4. While deciding the assessee's case for the assessment year 1970-71, the Income Tax Officer included the amount of Rs. 90,279 in the total

income of the assessee. The assessee objected, It was claimed that the amount was not a trading receipt. The amount separately realised by the

assessee by way of sales tax and credited to the sales tax account was by way of deposit from the customers and the assessee was holding these

amounts only as deposit". It was further submitted that the "conduct of the assessee in transferring the unpaid amount of sales tax to its profit and

loss account would not change the character of the receipt as a trading receipt, since the initial character of the receipt was in the nature of a

trading liability and not a trading receipt". The assessee submitted that the sales tax had been realised. However, it was ultimately not found

payable to the Government. It was still refundable to the customers and did not become the income of the assessee merely by transfer of the said

amount to its profit and loss account.

5. The assessee's contention was not accepted by the Income Tax Officer. It was held that "the sales tax collected by the assessee in the ordinary

course of its business was a trading receipt and hence was liable to be charged to Income Tax when the assessee transferred the said amount to its

profit and loss account". It was observed that "the sales tax paid to the Government would constitute a trade expenditure and the ultimate refund of

such sales tax would amount to remission of liability or expenditure and would fall within the purview of Section 41(1) of the Income Tax Act,

1961". Thus, the amount of Rs. 90,279 was treated as the assessee's income chargeable to tax in the assessment year 1970-71.

6. The appeal was dismissed by the Appellate Assistant Commissioner, inter alia, with the finding that "the sales tax realised along with sale price is

thus nothing but a trading receipt and the posting of the same in the ledger in different accounts would not make any difference so far as the original

character of the receipt was concerned. The Income Tax Officer was, therefore,

right in saying that the sales tax paid constituted a trading expenditure and the ultimate refund of sales tax amounted to remission of liability or expenditure". The assessee filed a second appeal before the Tribunal. After consideration of the matter, the Tribunal accepted the claim of the assessee. Its decision as mentioned in paragraph 5 of the statement of the case may be noticed. It is as under :

... the amount of sales tax realised by the assessee initially was in the nature of a trading receipt and hence was liable to be taxed in the various years in which such realisations were made ... the amount in question, i.e., Rs. 90,279 was not liable to be assessed during the assessment year 1970-71 when the said amount was credited by the assessee in its profit and loss account as a result of the assessment orders passed by the sales tax authorities, but was liable to be taxed during the years in which the sales tax was actually received or realised by the assessee.

7. The Tribunal also took the view that the provisions of Section 41(1) of the Income Tax Act were not attracted in this case as the assessee had not claimed the amount of sales tax paid as a deduction by way of trading expenditure in the earlier years nor was it allowed as such by the Department. Thus, the ultimate non-payment of sales tax of Rs. 90,279 did not amount to the remission of liability or expenditure within the meaning of Section 41(1) of the Act.

8. Aggrieved by the order of the Tribunal, the Revenue claimed that the case be referred to the High Court for its opinion. This claim having been accepted by the court vide judgment dated May 9, 1985, in Income Tax Case No. 110 of 1977 Commissioner of Income Tax Vs. Balabux Birla and Co., , the question as noticed at the outset has been referred to this court for its opinion.

9. Mr. R.P. Sawhney, counsel for the Revenue, contended that the view taken by the Tribunal is contrary to the decision of this court in Commissioner of Income Tax Vs. Saraswati Industrial Syndicate Ltd., . He further submitted that it was the assessee's own case that it had charged the amount from its customers. The refund was not given to the ""mills as these were not claimed by them. The amounts represent unclaimed balances which the assessee appropriated as income during the period from August 26, 1968 to September 12, 1969"". He further

pointed out that before the Assessing Officer, the assessee had specifically pleaded that the amounts were not initially taxable. They could not be

subsequently taxed "despite the magnitude of the accumulation and despite its appropriation by the assessee to his own credit". This being the

factual position, Mr. Sawhney contended that the Tribunal had erred in accepting the claim of the assessee and in holding that the amount of Rs.

90,279 was not income chargeable to tax in the assessment year 1970-71. He also submitted that the Tribunal had erred in holding that Section

41(1) was not applicable. Counsel referred to certain decisions which shall be noticed at the appropriate stage.

10. On the other hand, Mr. Sanjay Bansal, submitted that the assessee was following the mercantile system of accounting. The tax realised by the

assessee being a trading receipt on the Department's own showing, it could be taxed in the years of its collection and not subsequently when the

assessee adjusted it in its profit and loss account. He further submitted that the provisions of Section 41(1) are not applicable to the facts of the

present case. Thus, he submitted that the question posed by the Tribunal should be answered in favour of the assessee.

11. At first bhush, the position that emerges is that the assessee collected sales tax from its customers. It did not pay the collected amount to the

Government. The assessee transferred this amount of Rs. 90,279 to its profits and loss account during the assessment year 1970-71. By virtue of

the order of the Tribunal, the assessee has not even paid the Income Tax on the amount. Resultantly, the assessee does not pay the amount

collected by way of sales tax from the customers to the Government. It does not refund the amount to the customers. It escapes even payment of

Income Tax. Is it equitable and legal ? At the lowest, it seems to be unfair. Are tax and equity total strangers ?

12. A well recognised principle of interpretation of the taxing statutes is that the citizen cannot be taxed till he falls within the letter of law. The plain

language of the provision has to be seen. In case of doubt, the court normally leans in favour of the assessee.

13. What is the position in the present case ?

14. It is admitted that the assessee was following the mercantile system of accounting. It was collecting sales tax "at the rate of two per cent, from

the customers while making the sales and this amount was shown separately in the bill and credited in the books of account under a separate account styled--General Sales Tax Account". The amount of sales tax paid to the Government in different years was debited to this account and was not shown in the profit and loss account of the respective years"". Thus, it is clear that the assessee was not showing the amount collected by way of sales tax as a part of the trading receipt or even including it in the profit and loss account. It claimed that the amount was a ""deposit"" or a trading liability"".

15. In this situation, it is evident that the amount was either a deposit or a liability. If it was a deposit, it could be refunded to the depositor. If a liability, it was to be tendered to the State. It could be exigible to the levy of Income Tax only when it was included by the assessee in its income. Till then, the Assessing Officer could not have treated the amount in the ""General Sales Tax Account"" as a part of the assessee's taxable income. It was only a subsisting liability. Thus, in the assessment years 1964-65 to 1967-68, it was treated as such. No tax was levied on it. The authority had committed no error in doing so.

16. Then came the crucial event. The assessee's challenge to the charge-ability of the sales tax on the ""combing waste"" was accepted. From the statement of the case, it is clear that the sales tax authority had passed the ""assessment order during the period ending September 12, 1969, relevant to the assessment year 1970-71 . . ."" On receipt of this order, the assessee had transferred the unpaid amount of sales tax amounting to Rs. 90,279 to its profit and loss account. Thus, it was during the assessment year 1970-71 that the liability in respect of the sales tax had ceased. It was not even a deposit. The amount had become a part of the assessee's income. Resultantly, tax was levied on it. The authority was perfectly right in doing so.

17. Mr. Bansal contended that the provisions of Section 41(1) are not attracted in, the present case. Is it so ?

18. Income Tax is levied on the taxable income earned by the assessee in an assessment year. Wherever necessary, the Legislature has made an exception. An instance is to be found in Section 41(1). At the relevant time, it, inter alia, provided that ""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..." Thus, whenever there is remission of an amount or cessation of a trading liability, the amount received in a previous year can

become assessable to tax in the subsequent year;

19. In the present case, the amount which had been kept by the assessee in a separate account was in the nature of a liability. There was cessation

of this trading liability during the assessment year 1970-71. Resultantly, the amount had been included by the assessee in its profit and loss account.

The amount was to be deemed to be the profit of business. Consequently, it was chargeable to Income Tax during the assessment year 1970-71.

20. The above view finds full support from the decision of this court in Commissioner of Income Tax Vs. Saraswati Industrial Syndicate Ltd., . In

this case, it was found that the assessee had recovered a sum of Rs. 4,155 from its customers as sales tax prior to 1956. In view of the decision of

the Supreme Court, the Department did not demand the payment of sales tax. The assessee transferred the amount to its profit and loss account

for the year 1963-64. The Tribunal held that the sum could be demanded by the persons who had paid it and thus deleted the amount of Rs. 4,155

from the taxable income. On a reference, the High Court held that there was no evidence to show that the amount in question had been received

by the assessee as a deposit. In any case, the assessee could claim deduction in case of refund. The amount having been included in the profit and

loss account was an integral component of the sale price. The assessee had treated the amount as a revenue receipt by transferring it to its profit

and loss account in a subsequent year. The amount was, therefore, assessable to Income Tax. The decision clearly supports the contention raised

on behalf of the Revenue.

21. Mr. Bansal relied upon the decision of the Supreme Court in Commissioner of

Income Tax, Calcutta Vs. Sugauli Sugar Works P. Ltd., to

contend that the unilateral entry of transfer in the accounts made by the assessee cannot enable the Department to apply the provisions of Section

41(1). It is undoubtedly so. However, in the present case, the transfer in the accounts is not a unilateral act of the assessee. In fact, the assessee

had contested its liability to pay the sales tax. Its claim was accepted by the competent authority.

22. Thereupon, the assessee had transferred the amount. In this behalf, it deserves notice that in para. 2 of the statement of the case, it has been

specifically observed that the assessee's claim with regard to the levy of sales tax on "combing waste" had ultimately "succeeded and in the sales

tax assessment, no sales tax was made payable by the assessee on this particular item". It was by obtaining this benefit that a cessation of the

liability had occurred. Thus, the amount was transferred by the assessee. In this situation, the assessee can derive no advantage from the decision.

23. It was also urged on behalf of the assessee that the Department could have only invoked power u/s 147 read with Section 148 during the

assessment year 1970-71. The question of income having escaped assessment does not, in our view, arise in this case.

24. Mr. Bansal submitted that the Department had treated the amount as a trading receipt. It was not a liability.

25. In the circumstances of the case as noticed above, we are unable to accept the contention. Even though, the Department has used the

expression "trading receipt", it is the assessee's own case that the amount was never treated by it as such. It was kept in a separate account. It was

never included in the profit and loss account. Thus, it was liable to be taxed when it was transferred to the "income" account. We may also say that

the expression used by the Department or the question framed by the Tribunal have not to be construed as a sacrosanct provision of a statute. The

court has to see the pith and substance of the case.

26. No other point was raised.

27. In view of the above, we hold that the assessee having kept the amount collected by it by way of sales tax in a separate account, had claimed it

as a trading liability. In pursuance of the order of the sales tax authority, a benefit had accrued to the assessee. There was cessation of liability.

Consequently, the amount transferred by the assessee to its profit and loss account was exigible to the levy of Income Tax. The Tribunal had erred in accepting the assessee's claim.

28. Resultantly, the question as posed at the outset is answered in favour of the Revenue and against the assessee. In the circumstances, we make no order as to costs.