

(2010) 01 KL CK 0145
In the High Court Of Kerala
Case No : IT Appeal No. 140 of 2009

Commissioner of Income Tax

APPELLANT

Vs

G. Soman

RESPONDENT

Date of Decision : 05-01-2010

Acts Referred:

Income Tax Act, 1961 — Section 43B

Kerala Abkari Shops (Disposal in Auction) Rules, 1974 — Rule 5(10)

Citation : (2011) 241 CTR 82 : (2011) 196 TAXMAN 251

Hon'ble Judges : V.K. Mohanan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Jose Joseph, for the Appellant; T.M. Sreedharan and V.P. Narayanan, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The question raised in the appeal filed by the revenue is whether licence fee payable by the Respondent under the Abkari Laws for obtaining the right to carry on business in toddy flails within the description of tax, duty, cess or fee referred to in Section 43B(a) of the income tax Act, 1961 (for short "the Act") which entitles the Assessee for deduction of the expenditure only if payment is made in the previous year.

2. We have heard Standing Counsel appearing for the Appellant and Advocate Sri T.M. Sreedharan appearing for the Respondent.

3. The Respondent/Assessee participated in the auction conducted by the State Excise Department for sale of toddy in Kottarakkara and Pathanapuram ranges during the previous year relevant for the assessment year 1999-2000. Even though the Assessee paid full rental/licence fee in the accounting year itself for auction purchase of toddy shops in Pathanapuram range, he withheld payment of Rs. 71,04,010 being part of Rs. 1.72 crores payable for the Kottarakkara range. Consequent upon the non-payment of the rental/licence fee of Rs. 71,04,010 by the due date, i.e., 31-3-1999, the Assessing Officer made disallowance. When

the Assessee filed appeal, the first appellate authority following the decision of the Karnataka High Court in Commissioner of Income Tax Vs. Sri Balaji and Co., D. Dasappa, Renukasri and Co., S.S.B. Gowdaiah and Sons, Tirumal Traders, Sri Rajeshwari Enterprises, Anjanappa and Co. and P.K. Shankaranarayana and Co., allowed the case which was confirmed by the Tribunal in second appeal filed by the revenue. It is against the order of the Tribunal, the revenue has filed this appeal, challenging the correctness of the findings of the Tribunal.

4. Standing Counsel appearing for the revenue submitted that the Karnataka decision does not lay down the correct law and the Supreme Court has in fact admitted the SLP against the said judgment. He further submitted that there has been amendment of Section 43B by the Finance Act, 1988 with effect from 1-4-1989 which has brought in cess and fee along with tax and duty originally covered by Section 43B of the Act. The case decided by the Karnataka High Court pertains to the assessment year 1988-89, i.e., for the period prior to the amendment by the Finance Act, 1988 when Section 43B covered only tax and duty within its scope. However, the assessment involved in this case is in the year 1999-2000, i.e., much after amendment and the amended provision applicable to the Assessee is the following :

43B. Certain deductions to be only on actual payment.--Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of :

(a) any sum payable by the Assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or

(b) to (f) ** ** shall be allowed irrespective of the previous year in which the liability to pay such sum was incurred by the Assessee according to the method of accounting regularly employed by him only in computing the income referred to in Section 28 of that previous year in which such sum is actually paid by him.

According to the Standing Counsel, the kist/rental or licence fee payable in this case is nothing, but statutory fee payable under the Abkari Act and therefore, it is squarely covered by Section 43B(a) after the amendment and therefore, the Karnataka decision was wrongly applied by the appellate authorities in allowing the Assessee's claim. Counsel appearing for the Assessee, on the other hand, by relying on the decisions of the Supreme Court in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, and State of Uttar Pradesh v. Sheopat Rai AIR 1994 SC 813 and the recent decision of the Supreme Court in Commissioner of Income Tax, Udaipur Rajasthan Vs. McDowell and Co. Ltd., , contended that kist or licence fee payable is, in substance, a consideration received by the State for granting its exclusive privilege or right to vend toddy in the shops of the locality and so much so, it does not bear the character of a fee as referred to in Section 43B of the Act.

5. After hearing both sides, we are of the view that the Karnataka decision relied on by the Commissioner of income tax (A) and by the Tribunal has no application

to the facts of this case because the High Court in that case was considering the scope of pre-amended provision which covers only tax and duty. The court found that the rental or licence fee collected for granting the privilege to vend liquor, is not in the nature of excise duty and so much so, Section 43B has no application. Even though we find that the provisions of the Abkari Act of Kerala treat the toddy also as a product of manufacture and excise duty is leviable on the same, but for the exemption granted, we do not think, there is any need for us to consider the scope of these provisions of the Abkari Act because the amended provisions of Section 43B take in not only tax and duty, but "cess" and "fee" also. In our view, after the amendment, all the statutory levies viz., tax, duty, cess and fee are covered by Section 43B(a) of the Act. Further any levy in the nature of tax, duty, cess and fee by whatever name called are also covered by Section 43B of the Act. When the statutory levy itself is under the head "tax, duty, fee or cess", there is no scope for enquiry as to whether such levies are in substance, tax, duty, cess or fee as understood under the Act. In other words, only when a levy is under some other name, there is scope for enquiry to find out whether the same in substance represents tax, duty, cess or fee attracting Section 43B of the Act. In this case, we notice that Rule 5(10) of the Abkari Shops (Disposal in Auction) Rules, 1974 providing general conditions applicable to sale of toddy shops styles the annual rental fee fixed as "licence fee" for the shop. However, we are unable to uphold the contention of the revenue that licence fee payable under the Abkari Act for grant of privilege to sell toddy is covered by Section 43B(a) of the Act because of the clear findings of the Supreme Court in the two decisions referred above that in substance, the licence fee granted is consideration payable to the Government for granting privilege or right to sell liquor. Even though the decision of the Supreme Court in McDowell & Co. Ltd.'s case (supra) is from a judgment of the Rajasthan High Court in Commissioner of Income Tax Vs. Udaipur Distillery Co. Ltd., which is decided following the decision of the Karnataka High Court which we found inapplicable to this case, still, in view of the finding of the Supreme Court in other two decisions referred above that rental payable for the grant of privilege to sell toddy is not a fee, we reject the contention of the revenue and uphold the order of the Tribunal.

The income tax Appeal is accordingly dismissed.