(1999) 12 GUJ CK 0068

In the Gujarat High Court

Case No : IT Ref. No. 310 of 1984

Commissioner of Income Tax — APPELLANT

Vs

H. Link — RESPONDENT

Date of Decision : 20-12-1999

Acts Referred:
Income Tax Act, 1961 — Section 17, 17(2), 9(1)

Citation : (2000) 161 CTR 109 : (2000) 244 ITR 93 : (2000) 112 TAXMAN 94

Hon'ble Judges : K.M. Mehta, J;B.C. Patel, J

Bench : Division Bench

Advocate : Manish R. Bhatt, for the Appellant; J.P. Shah, for the Respondent

Judgement

B.C. Patel, J.—The CIT, Baroda moved the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") for making reference under the provisions contained under the IT Act, 1961 (hereinafter referred to as "the Act"). The question of law referred are as under :

1. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income computable under the head "salaries" had not been earned in India as contemplated under s. 9(1)(ii) of the IT Act ?"

2. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the living allowance did not form part of the salary under s. 17 of the IT Act, and therefore, exempt from tax ?"

3. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the value of rent-free accommodation would not constitute a perquisite within the meaning of s. 17(2) of the IT Act, 1961 ?"

2. The assessee, a foreign technician, was serving at the relevant time with Gujarat Narmada Valley Fertilisers Ltd. Broach. He was paid salary in foreign currency abroad and was allowed daily allowance, rent-free accommodation

during his stay in India. The assessee claimed that his entire income was exempt from tax. The ITO assessed the total income as Rs. 92,660. The AAC allowed the appeal partly following the decision of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat-III Vs. Nathalal Dahyabhai, . The ITO preferred an appeal before the Tribunal. The Tribunal by its order, dt. 17th February, 1984, confirmed the order passed by the AAC and rejected the appeal. It is against this order, the CIT has filed the application before the Tribunal and the Tribunal has referred the above referred three questions.

3. The Division Bench of this Court in the case of CIT vs. S. G. Pgnatale (supra) had considered identical situation. In that case the assessee was an employee of a French company which had entered into an agreement with an Indian company for rendering certain services in Europe and providing back-up service and other assistance in installing a plant in India. The Indian company agreed to pay a lump sum for all these services. The India company agreed to pay living allowance to foreign specialists. The allowance was likely to be reduced or increased depending upon various factors like the place where the services were to be rendered, whether free accommodation or free road transport was allowed, etc. The Court held that the living allowance was given to the assessee as a reimbursement rather than as personal advantage and hence was not a "perquisite". So far as the assessee is concerned the Division Bench of this Court in the case of CIT vs. H. Fink (IT Ref. No. 294/1982, decided on 11th July, 1985) considered the question, i.e., of retention remuneration, living allowances and rent-free accommodation as salary or perquisite. Considering the provisions of the Act and on the facts of the case the Court held that retention remuneration was not salary earned in India within the meaning of s. 9(1)(ii) and similarly living allowance cannot be said to be personal advantage and, therefore, would not constitute perquisite which can be subjected to tax. The Court further held that the perquisite which can be taxed under s. 17(2) of the Act which may be in the nature of rent-free accommodation can be only those perquisites which are provided by the employer to his employee and inasmuch as the assessee was found to be an employee of Linde, A.G. West Germany, and the employee was deputed to India with Gujarat Narmada Valley Fertilizer Co. Ltd., Broach which provided the rent-free accommodation to him, it cannot be said that it would constitute perquisite within the meaning of s. 17(2) of the Act. Thus, the Court answered the question in favour of the assessee and against the Revenue. Accordingly, in this case also answer must be in favour of assessee and against the Revenue and answered accordingly, i.e., in favour of assessee and against the Revenue. No order as to costs.

