
(1989) 12 KL CK 0040

In the High Court Of Kerala

Case No : Income Tax Reference No. 135 of 1986

Commissioner of Income Tax

APPELLANT

Vs

Kerala Spinners Ltd.

RESPONDENT

Date of Decision : 01-12-1989

Acts Referred:

Income Tax Act, 1961 — Section 36(1)

Citation : (1990) 184 ITR 383 : (1991) 1 LLJ 257

Hon'ble Judges : Varghese Kalliat, J;K.S. Paripoornan, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; C.N. Ramachandran Nair, for the Respondent

Judgement

Varghese Kalliat, J.—At the instance of the Commissioner of Income Tax, Kerala, the Income Tax Appellate Tribunal (for short, "the Tribunal"), Cochin Bench, has referred the following question for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in coming to the conclusion that the excess payment of Rs.1,22,995 cannot be disallowed either u/s 36(1)(ii), first proviso, or otherwise, even though the Payment of Bonus Act is applicable to the assessee and hence first proviso to Section 36(1)(ii) alone is applicable?"

2. The assessee is a company. It manufactures staple fibre yarn and polyester viscose yarn. The Commissioner of Income Tax, exercising his power u/s 263 of the Income Tax Act (for short, "the Act") revised the order of assessment passed by the Income Tax Officer for the reason that the Income Tax Officer had not disallowed the bonus paid in excess of the amount stipulated as payable under the Payment of Bonus Act. The Commissioner held that the payment of Rs. 1,22,995 was in excess of the amount of bonus payable under the Payment of Bonus Act and that the said amount has to be disallowed as per the provisions of the Act, The Commissioner also found that when the said amount is disallowable in terms of the first proviso to Section 36(1)(ii) of the Act, the question of

allowing the same in terms of the second proviso to Section 36(1)(ii) would not arise. The Commissioner directed the Income Tax Officer to amend the assessment by disallowing the excess amount of Rs. 1,22,995 paid as bonus in terms of the first proviso to Section 36(1)(ii) of the Act.

3. The assessee filed an appeal before the Tribunal. The Tribunal did not agree with the Commissioner. It followed the decision of the Supreme Court in *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai*. (1976-II-LLJ-186). The Tribunal also referred to the decision in *Hukum-chand Jute Mills Ltd. v. Second Industrial Tribunal*, (1979-I-LLJ-461). According to the Tribunal, contractual bonus tails outside the pale of the Payment of Bonus Act and once it tails outside the scope of the Payment of Bonus Act. the limits prescribed under the Payment of Bonus Act or the application of the Payment of Bonus Act under the first proviso to Section 36(1)(ii) of the Act can have no application. The Revenue is aggrieved by the order of the Tribunal and wanted the Tribunal to refer the question referred to in the first paragraph of this judgment.

4. We heard counsel on both sides. The question has to be answered with reference to the relevant provisions of the Act, viz., Section 36(1)(ii) of the Act. It reads thus:

"36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in Section 28--

(i) the amount of any premium paid in respect of insurance against risk of damage or destruction of stocks or stores used for the purposes of the business or profession;

(ii) any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission:

Provided that the deduction in respect of bonus paid to an employee employed in a factory or other establishment to which the provisions of the Payment of Bonus Act, 1965 (21 of 1965), apply shall not exceed the amount of bonus payable under that Act:

Provided further that the amount of the bonus (not being bonus referred to in the first proviso) or commission is reasonable with reference to--

(a) the pay of the employee and the conditions of his service;

(b) the profits of the business or profession for the previous year in question; and

(c) the general practice in similar business or profession;".

5. The Supreme Court in *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai*, (supra) observed thus: (pp.200, 193):

"The conclusion seems to be fairly clear unless the court strains judicial

sympathy contrarywise, that the Bonus Act dealt with only profit bonus and matters connected therewith and did not govern customary, traditional or contractual bonus. The omission to mention the name of a festival as a matter of pleading does not detract from the claim of customary bonus."

This aspect of the matter has been reiterated by the Supreme Court in *Hukumchand Jute Mills*" case, (supra). The Supreme Court observed thus (p. 463):

"The long title of the Act as substituted by the Amending Act purports to provide specifically for the payment of bonus "on the basis of profits or on the basis of production or productivity and for matters connected therewith". The emphatic inference flows therefrom that customary or contractual bonus goes beyond the pale of the Amending Act which modifies the previous one by bringing within its range bonus on the basis of production or productivity also. Section 17 has been left intact. That Section in express terms refers to *puja* bonus and other customary bonus as available for deduction from the bonus payable under the Act, thus making a clear distinction between the bonus payable under the Act and "*puja* bonus or other customary bonus". So long as this Section remains without amendment, the inference is clear that the categories covered by the Act, as amended, did not deal with customary bonus."

6. It is not correct to say that, in all cases where the first proviso to Section 36(1) (ii) as no application, the payment of bonus cannot be allowed at all u/s 36(1) (ii). The question whether the second proviso is applicable or not has to be examined. The assessee can make a valid claim under the second proviso to Section 36(1)(ii) of the Act. In this case, the Tribunal has held so. In applying the second proviso to Section 36(1)(ii) of the Act, the assessing authority should keep in mind the guidelines given by the statutory provision itself under clauses (a) to (c). In *Commissioner of Income Tax Vs. P. Alikunju, M.A. Nazir, Cashew Industries*, and in *Commissioner of Income Tax Vs. P. Balakrishna Pillai, International Cashew Traders*, (I.T.R. No. 185 of 1985) and *Commissioner of Income Tax Vs. Kumar Industries*, (I.T.R. No. 399 of 1985), this court had occasion to explain the importance of the statutory guidelines envisaged in clauses (a) to (c) of the second proviso to Section 36(1)(ii) of the Act.

7. On a careful perusal of the order of the Tribunal, we feel that the Tribunal has not kept in mind the guidelines given by the statutory provisions, particularly clauses (a) to (c) of the second proviso to Section 36(1)(ii) of the Act as explained by this court in *P. Alikunju* s case (supra), *CIT v. P. Balakrishna Pillai* (supra) and *CIT v. Kumar Industries* (supra). Therefore, we feel that the Tribunal should consider the question afresh on the materials and evidence before it and in the light of the observations in the decision in *P. Alikunju*"s case (supra) and the decisions in *P. Balakrishna Pillai* (supra) and *Kumar Industries*" case (supra).

8. We make it clear that we are of the opinion that the bonus paid in the circumstances of the case requires to be examined to ascertain whether it will

stand the test specified in the second proviso to Section 36(1)(ii) of the Act. Since we have taken the above view, we decline to answer the question. However, we direct the Tribunal to consider the matter afresh in the light of the decisions of this Court in P. Alikunju's case (supra) P. Balakrishna Pillai's case (supra) and Kumar Industries" case (supra).

9. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, forthwith.