(2000) 06 BOM CK 0072

In the Bombay High Court

Case No : Income-tax Appeal No. 342 of 2000

Commissioner of Income Tax APPELLANT

Vs

L.A. Rosemann RESPONDENT

Date of Decision : 06-06-2000

Acts Referred:
Income Tax Act, 1961 — Section 10(14), 2(24)

Citation : (2000) 4 ALLMR 709 : (2000) 245 ITR 716

Hon'ble Judges : S.H. Kapadia, J;R.M.S. Khandeparkar, J

Bench : Division Bench

Advocate : R.V. Desai and P.S. Jetley, for the Appellant; S.E. Dastoor and J.D. Mistry, instructed by Crawford Bayley and Co., for the Respondent

Judgement

S.H. Kapadia, J.—The short point which arises for consideration in this appeal is : whether living allowance paid to a foreign technician constituted income of the assessee ?

2. The assessee was a German citizen. He was a regular employee of a German company. The German company had entered into a technical assistance agreement with Tata Electric Company, Bombay. Pursuant to the said agreement, the assessee was deputed to India to do the work of commissioning of cables. This was during the period April 2, 1987, to June 17, 1987, and also during the period October 8, 1987, to March 31, 1988. During this period in Bombay, he stayed in a hotel. His total expenses, amounting to Rs. 3.30 lakhs, were reimbursed by Tata Electric Company. The question before us, therefore, is : whether the said amount is taxable as income of the assessee under the Act. The Assessing Officer held that the assessee was a regular employee of Tata Electric Company. That, during the aforestated period, the place of his duty was in India and not West Germany. That, he was given accommodation in a hotel in India under the terms of his deputation and, therefore, the place where he ordinarily resided was in India and not West Germany and as the reimbursement of hotel expenses was granted to meet his personal expenses at the place where the

duties of his office were performed, the Explanation to Section 10(14) stood attracted and the amount, therefore, was taxable as income. The Assessing Officer further found that the said amount was also taxable as profit in lieu of salary. Being aggrieved by the decision, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals). The appellate authority came to the conclusion that the said reimbursement was not a salary nor did it constitute profit in lieu of salary. The, appellate authority also-found on the facts that the assessee was not an employee of Tata Electric Company. That, under the contract, the assessee was entitled to reimbursement of boarding and lodging expenses which were borne by Tata Electric Company which, in any event, was not the employer of the assessee. Accordingly, the appellate authority directed the Assessing'' Officer to delete the said reimbursement from the taxable salary of the assessee. This decision has been confirmed by the Tribunal. Hence, this appeal.

3. Mr. Desai, learned senior counsel appearing on behalf of the Department, contended that in view of Section 2(24){iiia) and in view of Section 2(24)(iiib), any special allowance granted to the assessee to meet expenses only for the performance of the duties of an office or any other allowance granted to the assessee to meet his personal expenses at the place where the duties of his office are performed, would constitute "income". On the other hand, it has been contended on behalf of the assessee that by no stretch of imagination, an amount paid by way of reimbursement could ever constitute an allowance. It was urged that the assessee came to India on a special assignment. That he was reimbursed to the extent of meeting hotel expenses. That, as correctly found by the Commissioner of Income Tax (Appeals) and the Tribunal, the assessee was not an employee of Tata Electric Company. That, in terms of the contract, the assessee was to be reimbursed by Tata Electric Company, subject to the maximum limit. That, even according to the Assessing Officer, it was a case of reimbursement. In the circumstances, it was urged that such a reimbursement cannot constitute an income in the hands of the assessee. It was not a salary. Therefore, it cannot be brought to tax as salary or as profit in lieu of salary.

4. We find merit in the contentions advanced on behalf of the assessee. The present matter concerns the assessment year 1988-89. In the present matter, Tata Electric Company had entered into an agreement with a German company. The assessee was an employee of the German company. His salary was paid by the German company. His boarding and lodging expenses, subject to the maximum limit, was paid by Tata Electric Company as the assessee was required to stay in Bombay in a hotel. The Assessing Officer erred in coming to the conclusion that the assessee was a regular employee of Tata Electric Company and that during his stay in India, the place of his employment was India and, therefore, the aforestated amount constituted his income. The assessee was given a special assignment by the German company. For that, he came to Bombay. During the said period, he resided in a hotel in Bombay. There is nothing to indicate that the place of his duty or employment was India. In the

circumstances, the provisions of Section 2(24) are not attracted. In the case of Commissioner of Income Tax Vs. Goslino Mario and Others, the facts were similar to the present case. In that matter, the assessees were technicians who came to India to work with the Fertilizer Corporation of India Limited at Assam. The services of the assessees were obtained by the FCI under an agreement with an Italian firm. Under the agreement, the salaries were to be paid by the FCI in Italian Lire, but the daily allowances were to be paid directly in Indian rupees. One of the questions which arose before the High Court was : whether the daily allowance paid to the assessees was taxable as salary. It was held that in view of Section 10(14) of the Income Tax Act, any special allowance granted to meet expenses incurred for the purpose of the duties of an office or employment was exempt from tax to the extent that such expenses were actually incurred for that purpose. It was also held thai the word "perquisite" would also not apply to reimbursement of necessary disbursement. It was also held that if an amount was paid by way of reimbursement of an expenditure incurred in the performance of the duties, the same would not be liable to be taxed as salary. It was held that as these assessees were foreign technicians and as they were required to stay away from their homes, the daily allowance given to them was relatable lo the extra expenditure which the assessees were required to pay on food, etc., which was necessary for the performance of duties and such reimbursement stood excluded from the purview of the Act. This decision of the High Court has been upheld by the Supreme Court in the case of Commissioner of Income Tax Vs. Gosline Mario and Others, . .

5. Accordingly, the appeal is dismissed.