

(1997) 09 KAR CK 0029
In the Karnataka High Court
Case No : IT Refd. Case No. 87 of 1990

Commissioner of Income Tax

APPELLANT

Vs

M.D. Patil

RESPONDENT

Date of Decision : 19-09-1997

Acts Referred:

Income Tax Act, 1961 — Section 16 (i), 256 (1)
Life Insurance Corporation Act, 1956 — Section 23, 3, 49

Citation : (1997) ILR (Kar) 2922 : (1998) 229 ITR 71

Hon'ble Judges : V. Gopala Gowda, J; P. Vishwanatha Shetty, J; G.C. Bharuka, J

Bench : Full Bench

Advocate : Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

G.C. Bharuka, J.—The assessee is a Development Officer employed with the Life Insurance Corporation of India ("Corporation" for short). During the previous year pertaining to the asst. yr. 1983-84, he, apart from his other emoluments, had received a sum of Rs. 40,094 as incentive commission from the Corporation. At the time of assessment, he claimed 40 per cent. thereof, being Rs. 16,038, as permissible deduction. But the same was disallowed by the ITO on the ground that since incentive commission received by the assessee not being an income derived either from business or profession, no deduction, as claimed, is permissible therefrom. Accordingly, he added the incentive commission to his salary income and allowed only the standard deduction as contemplated under S. 16(i) of the IT Act, 1961 (In short, "Act").

2. Against the said assessment order, the assessee went in appeal before the AAC and succeeded in getting deduction of 40 per cent. as claimed. Aggrieved by the said order, the ITO went in appeal to the Tribunal, but it was in vain, since the Tribunal held that the assessee had received incentive commission in respect of the business canvassed by him and therefore, even if the said commission is held to be a part of his salary, only the met amount arrived at by allowing permissible deduction can be added to the income.

3. Under the aforesaid facts and circumstance, the Tribunal, pursuant to a reference application filed by the Revenue under S. 256(1) of the Act, has referred the following two questions of law seeking opinion of this Court :

"(i) Whether, on the facts and in the circumstances of the case, the income received by the assessee from the LIC as incentive bonus or commission should be taxed under the head "income from business or profession or vocation" ?"

(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was right in allowing a deduction of 40 per cent. from the gross receipt of incentive bonus or commission, as expenditure incurred by the assessee for earning that income ?"

4. Though, answer to the said questions of law appears to be covered by an earlier unreported Bench decision of this Court in the case of CIT vs. K. S. Patil (ITRC 2/89, dt. 3rd April, 1992), but despite the same, the present case has been referred to the Full Bench for decision since one of the learned judges forming the Bench could not subscribe to the view taken in the earlier decision.

5. For answering the questions referred to us, we find it desirable first to ascertain the provisions and the purpose for which the incentive commissions/ bonus is paid to the Development Officers.

6. The Corporation has been established and incorporated under S. 3 of the LIC Act, 1956, (hereinafter "the LIC Act"). Sec. 23 of the Act provides that for the purpose of enabling the corporation to discharge its functions under the Act it may employ such number of persons as it thinks fit. Sec. 49 of the LIC Act empowers the Corporation to make regulations inter alia, to provide for the method of recruitment of its employees and the terms and conditions of their service.

7. Accordingly, pursuant to the abovesaid provisions, the Corporation framed regulations called "Life Insurance Corporation of India (Staff) Regulations, 1960" (in short the "Regulations"). Regulation 5 of the said Regulations sets out the classes of its staff and class II thereunder comprises of Development Officers.

8. Regulation 51(1A) of the Regulations contemplates that the basic pay and other allowances admissible from time to time to an employee belonging to Class II shall be regulated in accordance with the provisions contained in Sch. III. Further regulation 59 deals with ad hoc grants and bonus commission. It reads thus :

Reg. 59 : The Corporation may sanction ad hoc grants where the circumstances require it. The Corporation may also sanction bonus commission to its Development Officers depending upon business. The Corporation may also sanction merit awards and incentive payments to employees in accordance with such schemes as it may approve from time to time.

9. Sch. III to the Regulations contain special provisions relating to Development

Officers. Clause (8) of the Schedule envisages for incentive to the Development Officers by way of giving bonus on fulfilling of appraisal conditions. It runs thus :

"8. Incentives - (1) Incentive bonus under any scheme approved by the Corporation may be allowed to a Development Officer for a preceding year in respect of appraisal dates falling due on or after 1st January, 1978 if his annual remuneration in the relevant appraisal year does not exceed 20 per cent. of the eligible premium of that year."

10. In accordance with the abovesaid provision, the Corporation framed a scheme called "Scheme of Incentive Bonus to Development Officers of the LIC of India, 1978" (hereinafter "the Scheme"). Clauses (4) and (5) of the scheme are relevant for the present purposes, which read thus :

4. Eligibility : A Development Officer whose cost ratio (i.e., ratio of his annual remuneration in an appraisal year to the eligible premium in that year) did not exceed 20 per cent. in an appraisal year shall only become eligible for grant of incentive bonus in respect of that appraisal year in accordance with the scheme.

5. Formula for determining Basic Incentive Bonus : Basic Incentive Bonus shall be determined as per formula shown below :

Stipulation Basic Incentive Bonus (a) "Net eligible premium" in 6 per cent. of such the appraisal year in excess, plus excess of five times the annual remuneration of the Development Officer in that year. (b) "Net eligible premium" in 4 per cent. of such the appraisal year in excess, plus excess of seven times the annual remuneration of the Development Officer in that year (c) "Net eligible premium" 2 per cent. of such in the appraisal year in excess excess of nine times the annual remuneration of the Development Officer in that year

11. It is not at all in dispute that a Development Officer is a whole time salaried employee of the Corporation belonging to class II. One of the duties and obligations assigned to a Development Officer is to ensure development and increase in the production of life insurance business in a planned way as far as may be practicable in the area that may be allotted to him or in which he is allowed to work from time to time through the agents placed under his supervision by the Corporation and in accordance with the objectives of the Corporation. It is also borne out from Sch. III of the Regulations that apart from the salary admissible to him, he is also eligible to get incentive bonus as per the provisions noticed above. It also clearly bears out from the provisions noticed above that the incentive bonus/commission is a performance-linked payment made by the Corporation to its employees as a measure of incentive to ensure higher business. This aspect is abundantly clear from Regulation 59, which provides that "the Corporation may also sanction bonus commission to its Development Officers depending upon business."

12. Therefore, in our considered opinion, incentive bonus/commission, is a

production/business oriented payment/income and it is not an allowance granted to meet any expense incurred by the Development Officer in the performance of his duties in that capacity. This inference of ours stands substantiated by the other provisions of Third Schedule to the Regulations which apart from incentive commission ensures payments or reimbursement to a Development Officer of the amount spent in respect of travelling, residential telephone, insurance premium and taxes on motor vehicles.

13. In the said backdrop of facts and statutorily spelt out terms and conditions of employment of the Development Officers working under the Corporation, now we proceed to examine the questions referred to us by the Tribunal in the context of the respective statutory provisions contained in the Act.

14. The first question is as to whether the incentive bonus or commission paid by the Corporation to its Development Officers can be held as falling under the head "income from business or profession or vocation".

15. The Tribunal in its appellate order, while accepting the plea of the assessee that the incentive commission, even if it forms part of his salary, only to the extent of 60 per cent. thereof can be brought to tax under the said head. For coming to the said conclusion, the Tribunal has relied upon Board's Circular No. E. 14/65-IT(A1), dt. 22nd September, 1965. We do not wish to comment upon the wisdom of the learned members of the Tribunal, who at one hand have treated the receipts by way of incentive commission as falling under the head "income from salary" but on the other hand, at the same stretch have conceded to deduction at the rate of 40 per cent. as if it was income from "business" or "profession". We only wish that the members of the Tribunal who are supposed to have some expertise on the provisions of the Act ought to have been more careful and a bit meticulous in deciding the issues raised before them instead of trying to dispose of the appeals in slipshod manner.

15A. Chapter No. IV of the Act sets out the provisions for computation of total income, which contains Ss. 14 to 59. Sec. 14 enumerates the heads of income and inter alia provides that save otherwise provided by the Act, all income shall for the purposes of charge of Income Tax and computation of total income, be classified under heads "A" to "F". Heads "A" and "D" respectively deal with "Salaries" and "Profits and gains of business or profession".

16. Sec. 15 of the Act provides for the income chargeable under the head "Salaries" and S. 16 thereof make provisions for standard deduction from the said income for computing the taxable income. Sec. 17 of the Act defines salary for the purposes of Ss. 15 and 16 to inter alia, include "any fees, commission, perquisites or profits in lieu of or in addition to any salary or wages [see cl. (iv)].

17. Keeping in view the definition of "salary" contained in S. 17 of the Act, it is clear that any commission, or profits received by an employee in addition to his salary or wages as per his service conditions, are to be brought to tax under the Act, treating said receipts as falling under the head of "income from salaries"

and the only deductions admissible therefrom for the purpose of computing Income Tax can be provided for under S. 16 of the Act and no less or no more.

18. In *Gestetner Duplicators Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal*, , Supreme Court has held that "if under the terms and conditions of employment remuneration or recompense for the services rendered by the employee is determined at a fixed percentage of turnover achieved by him, then such remuneration or recompense will partake the character of salary, the percentage basis being the measure of the salary and, therefore, such remuneration or recompense must fall within the expression "salary" as defined in r. 2(h) of Part A of the Fourth Schedule to the Act".

19. Now, coming back to the facts of the present case, keeping in view the aforesaid discussion, since a Development Officer receives the incentive bonus/ commission based on the insurance business promoted by him but in addition to the salary payable to him, therefore, the additional income so derived by the Development Officer during the course of and pursuant to the terms and conditions of his employment can be brought to tax only under the head of income "salary" and not under the head "profits and gains of business or profession" and further that the only deductions permissible under the provisions of the Act are to be those as specified in S. 16 of the Act.

19A. The above view of ours is squarely substantiated by the decisions in the cases of *Commissioner of Income Tax Vs. B. Chinnaiah and Others*, , *CIT vs. Govind Chandra Pani* (1995) : (1995) 213 ITR 783 : TC 58R.281, *K.A. Choudary Vs. Commissioner of Income Tax and Others*, , *M. Krishna Murthy and Others Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad and Others*, , *Commissioner of Income Tax Vs. Hind Lamps Ltd.*, and in the case of *Commissioner of Income Tax Vs. Shiv Raj Bhatia*, .

20. Shri Chandrakumar, learned senior counsel appearing for the assessee, has brought to our notice two judgments of the Bombay High Court in the cases of *Commissioner of Income Tax Vs. N.C. Shah*, and *Commissioner of Income Tax Vs. A.A. Baniyan*, . In both these cases, the High Court has taken the view that since the income by way of incentive bonus was held by the Tribunal to be one from business and profession and the same being the finding of fact and in latter case that having not been challenged by the Revenue, deduction at 40 per cent. was permissible. We find ourselves unable to subscribe to the said view. It is so because the inference as to under what head of income the incentive bonus/ commission received by a Development Officer will fall is required to be inferred on a construction of the terms of employment and therefore, it cannot be regarded as a question of fact simplicitor. Moreover the Bombay High Court has not at all examined the provisions of the LIC Act, and the statutory Regulations and the scheme framed thereunder, whereby the incentive bonus/commission has been made admissible to the Development Officer of the Corporation.

21. Sri Chandrakumar also wanted of us to remit the case to the Tribunal for

restoring the appeal to itself and to re-determine the issues after hearing the parties. In support of the said prayer, reliance has been placed on the judgment of the Kerala High Court in the case of Commissioner of Income Tax Vs. Varghese Mathew and K.I. Kuriakose, and that of the Orissa High Court in the case of Commissioner of Income Tax Vs. Sarat Ch. Sahu, . We are afraid, keeping in view the limits of advisory jurisdiction conferred on a High Court under S. 256 r/w S. 260, it can at all adopt any such course. Under the Act no power has been conferred on the High Courts to set aside an order of the Tribunal and it is quite obvious that unless the appellate order is rendered non est either in entirety or partially, it cannot be competent for the Tribunal to review its order on merits. [See Commissioner of Income Tax, Madras Vs. M. Ganapathi Mudaliar, and BIRLA GWALIOR PRIVATE LTD. Vs. COMMISSIONER OF Income Tax, M.P., . This is apart from the fact that the present case does not necessitate the adoption of any such course.

22. Sri Chandrakumar for the assessee and Sri Sarangan, learned senior counsel appearing as amicus curie supporting the assessee's case then sought to invoke cl. (14) of S. 10 of the Act to justify the deduction granted by the Tribunal by submitting that to the extent of 40 per cent. of the incentive bonus/commission, it has to be treated as an income not includible in total income since, as held by the Tribunal, the said part of the income was spent by the assessee wholly, necessarily and exclusively in the performance of the duties of his employment of profit. This, according to them, is a finding of fact.

23. Clause (14) of S. 10, as it read prior to its substitution by Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, and is relevant for the present purposes, was to the following effect :

"10(14) : Any special allowance or benefit, not being in the nature of an entertainment allowance or other perquisite within the meaning of cl. (2) of S. 17, specifically granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, to the extent to which such expenses are actually incurred for that purpose."

Explanation : xxxxx xxxxx xxxxx

24. The above quoted provision had its precursor in cl. (vi) of S. 4(3) of the 1922 Act which was as under :

"(vi) Any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit."

25. Dealing with the said provision, the Supreme Court in the case of Commissioner of Income Tax, Gujarat Vs. `Kharawalla Ltd., , has held as follows :

"To qualify for the exemption under S. 4(3)(vi), the allowance must be granted to meet expenses incurred or to be incurred wholly and necessarily in the performance of the duties of an office or employment of profit. But the purpose

for which the allowance is granted is alone not determinative of the claim to exemption. Any surplus remaining in the hands of the grantee after meeting the expenses does not bear the character of the allowance for meeting expenses but for performing the duties of the office or employment, and would be taxable. This would be so even if the employer has disabled himself from demanding refund of the amount not expended for meeting the expenses incurred in the performance of the duties of an office or employment of profit, and the surplus remaining in the hands of the grantee acquires for the purpose of the IT Act, the character of additional remuneration."

26. It cannot be disputed that the law enunciated by the Supreme Court by construing the provisions of S. 4(3)(vi) of the old Act will apply equally with respect to S. 10(14) of the Act as well. Therefore, for enabling an assessee to take benefit of S. 10(14) of the Act, it is imperative on his part to show that the special allowance, benefit or perquisite in respect of which the claim is made, had been granted to him to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of his office or employment of profit. The question as to determination of as to how much of such allowance will qualify for exemption as having been actually spent for that purpose can arise only on fulfilment of the first condition.

27. In present case, as found above, the incentive bonus/commission was not granted by the Corporation for the purpose as set out in S. 10(14) and therefore, the assessee cannot claim sustenance of 40 per cent. deduction by taking shelter under S. 10(14) of the Act. Similar view has been expressed in the earlier Bench decision of this Court in CIT vs. K. C. Patil (supra) wherein it was held that -

"Mr. Sarangan, learned counsel who assisted the Court, since the assessee was not present before us, referred to S. 10(14) of the Act to contend that the assessee was entitled to claim some deduction as the incentive commission was earned by the assessee by spending towards the same in the course of earning the same. But S. 10(14) certainly is not attracted to the instant case because the incentive commission or incentive bonus is not any special allowance or benefit specifically granted to meet the expenses as envisaged by the said provision. The incentive commission is paid here depending upon the business earned and not depending upon the expenses incurred and therefore, it cannot be said that it was paid for the purpose of meeting the expenses specifically."

28. We further find that the Tribunal had allowed the deduction of 40 per cent. out of the incentive bonus/commission, as claimed by the assessee, by relying on the Board's Circular No. E. 14/65-IT(A1), dt. 22nd September, 1965. But admittedly that circular was issued for assessing the income of the insurance agents of the Corporation on an estimated basis in case regular books of accounts are not found to have been maintained. Admittedly, agents are not the employees/staff of the Corporation and their income, by way of commission, derived out of premiums paid by the insured, are taxable under the head "profits and gains of business or profession". Therefore, the Tribunal has wholly

misdirected itself in extending the benefit of deduction to the present assessee by relying on the said circular of the Board.

29. Sri Chandrakumar, learned counsel for the assessee, has also brought to our notice the letter dt. 19th December, 1996 purported to have been written on behalf of the Board to the Chairman of the Corporation having bearing on the questions at hand. We do not propose to express any opinion of ours on the said communication except putting on record the observations of the Supreme Court made in the case of M/s. Wilh, Wilhelmsen Vs. Commissioner of Income Tax, West Bengal-1, wherein in the context of powers of the Board under S. 5(8) of the old Act (S. 119 of the present Act) to issue orders, instructions and directions it has been held that -

"The provision is clear. It requires no elaboration. It is, however, evident that the power so conferred on Central Board of Revenue has to be exercised for the purposes of and within the four corners of the Act."

30. Keeping in view the foregoing discussions and the reasons, both the questions referred to us are answered in the negative and against the assessee. However, there will be no order as to costs.