
(1996) 06 KL CK 0053

In the High Court Of Kerala

Case No : Income-tax Reference No's. 75 and 76 of 1989

Commissioner of Income Tax

APPELLANT

Vs

Muthootu Mini Chitty Fund

RESPONDENT

Date of Decision : 25-06-1996

Acts Referred:

Citation : (1997) 227 ITR 197

Hon'ble Judges : V.V. Kamat, J;P.A. Mohammed, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; P.C. Chacko, Senior Advocate, Roy Chacko, C. Kochunni Nair, M.A. Firoz and Dale P. Kurien, for the Respondent

Judgement

V.V. Kamat, J.—These references relate to the assessment years 1979-80 and 1980-81, respectively. They relate to the assessee which is a firm in the name and style of Muthootu Mini Chitty Funds, Kozhencherry. The only question for our consideration is with regard to the nature and description of the two amounts involved therein. In the first reference, the amount is Rs. 2,08,400 and in the second reference it is Rs. 1,10,087. The question is whether it could be understood as the business income of the assessee-firm and consequently as to whether the Income Tax Appellate Tribunal was justified in directing the Income Tax Officer to exclude these amounts from the income of the assessee. To be precise the questions are as follows :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the Income Tax Officer was not justified in including the amount of Rs. 2,08,400 as the business income of the assessee and was the Tribunal right in law in directing the Income Tax Officer to exclude this amount from the income of the assessee ?

2. Whether, on the facts and in the circumstances of the case, the contribution to Muthoottu Charitable Trust made by the assessee,

(i) was as per the terms of the talavaryola ?

(ii) is not the income of the assessee ?"

2. The firm carries on activity known as thalavaryola (chitty agreement). The very name of the firm would show that the activity is chitty fund.

3. The English translation of the form of agreement is available at annexure B of the paper book at page 8 onwards. The firm had several series of chit funds functioning simultaneously. The agreements are entered into between the fund and the subscribers who are participants in the series of chitty funds. The chitties are of durations and its commencement is also specified in connection thereto. It would be seen that the payment of the first instalment by the subscribers to these series becomes the property of the assessee which is described in the talavariola as the foreman of the series. With regard to the balance of the monthly payments or contributions or subscriptions, the provision is that there would be auction every month and with reference thereto the successful bidder would be one who forgoes the largest margin of discount. It is this margin of the successful bidder or successful member that comes up for distribution amongst all the members of the series. It is this margin of discount, for the purpose of distribution, that forms the subject-matter of the controversy with regard to the amount as to whether it is the income of the firm or not. Clause 6 of the talavaryola which is determinative is as follows :

" From the amount forgone by the successful bidder five per cent, will be set apart to meet the chitty expenses and from the balance amount, 25 per cent, will be given to Muthuttu Charitable Trust and the remaining amount will be distributed among all the subscribers."

4. A bare reading of the said Clause would show that from and out of the amount -- the margin of discount -- forgone by the successful bidder or subscriber, five per cent, is set apart to meet the chitty expenses, 25 per cent, from the remaining balance is to be given to the Muthuttu Charitable Trust leaving the remaining balance for distribution amongst all the members, commonly known in common parlance as the bonus or commission of the subscriber. The question is whether this 25 per cent, from the balance of the amount leaving aside five per cent, set apart, as shown above according to Clause 6 would be the income of the firm or not.

5. With regard to both the years the Income Tax Officer (annexures C-1 and C-2) took the view that a close scrutiny of the thalavariyola would reveal that the subscribers do not have a say in the matter. 25 per cent, has to be set apart, leaving five per cent, at the inception and only the balance amount shall be divided as veethapalisa (discount). It is observed as a consequence, that the right to claim veethapalisa is curtailed by the foreman who will have a say in the matter. It is further observed that the subscribers (chittals) could not be understood to have voluntarily contributed this amount of 25 per cent, to the trust in question. The Income Tax Officer took the view that it would be the

income of the assessee. The first appellate authority considered the question in the light of the decision of the Supreme Court in *Commissioner of Income Tax (Central), New Delhi Vs. Bijli Cotton Mills (P.) Ltd.*, , relied upon by the Punjab and Haryana High Court as well as the Bombay High Court. The Supreme Court in *Commissioner of Income Tax (Central), New Delhi Vs. Bijli Cotton Mills (P.) Ltd.*, , was concerned with the amount described as "Dharmada" by the assessee private company carrying on the business of manufacturing and selling yarn. The amounts were collected from the customers on sale of yarn and cotton at the rate of one anna per bundle of 10 pounds of yarn and cotton and two annas per bale of cotton, being particular in seeing that the collection was set apart separately in an account also described as "Dharmada". The first appellate authority considered the position in the light of certain positions declared by the Supreme Court in regard to this process of realisation of the amount on account of "Dharmada". Some of the factors taken into consideration by the Supreme Court show that the payments were earmarked for charity right from the inception of the receipt thereof. The other aspect revealed that the payments could not be regarded as part of the price or a surcharge on the price of goods purchased by the customers and payments were undoubtedly in addition to the price, emphasizing that purchase of goods would have to be understood as an occasion and not consideration for the contribution. The Dharmada amount could only be considered as payment for the specific purpose of being spent on charitable purposes.

6. After referring to the decision of the Supreme Court in its application to the factual matrix the first appellate authority observed that the amount to be distributed and the method of distribution of the discount is purely a matter of contract and in regard thereto the subscribers could not claim any particular amount as a matter of right. The agreement has been analysed. However, the first appellate authority observed that when the assessee collected the instalment or any part thereof it was not specifically collected for the purpose of charity. The decision of the Supreme Court (see *Commissioner of Income Tax (Central), New Delhi Vs. Bijli Cotton Mills (P.) Ltd.*,) was attempted to be justified by particularising . the factual peculiarities that when the subscribers contributed their money it was contributed towards the chitty run by the assessee-foreman. It was further observed that this percentage of contribution or condition of setting apart in regard thereto was not known either to the foreman-assessee or to the subscribers of the chitty schemes. It was emphasised that the subscription paid by the members of a series was as a part of the business dealings with the assessee and not by way of contribution to the chitty. It is in this process that the first appellate authority justified the decision of the Income Tax Officer to the effect that the amounts would have to be understood as the income of the firm.

7. However, the question was considered by the Income Tax Appellate Tribunal in a different way altogether. The Tribunal has observed that when the subscribers of the chitties pay their instalments to the assessee-firm they are not paying any

part of such instalments towards charity but subscribers" payment towards charity is reflected in the reduction of the discount--veethapalisa (by 25 per cent, of the discount forgone by the successful subscriber). The Tribunal observed that Clause 6 of the agreement (thalavariyola) imposed an obligation on the subscribers (successful subscribers in the context) to forgo 25 per cent, from the margin or discount amount, after setting apart 5 per cent, towards commission to the assessee-firm. The Tribunal observed that after deducting 5 per cent, for expenses, 25 per cent, to be given to the trust, only the remaining amount could be understood as the discount (veethapalisa). The Tribunal further observed in the process that an obligation arose out of the agreement where under the subscribers imposed an obligation of the foreman-assessee-firm to pay 25 per cent, of the amount to the trust. Appreciating the agreement, the Tribunal observed that the agreement creates a legal obligation and in that regard 25 per cent, of the amount would have to be understood as being held in trust for the Muthoottu Charitable Trust.

8. In the process of reasoning, the Tribunal found the decision of the Supreme Court in Commissioner of Income Tax (Central), New Delhi Vs. Bijli Cotton Mills (P.) Ltd., would be direct on the point. The Tribunal found that right from the inception it is made clear by Clause 6 under consideration that the concerned part of the discount is forgone by the successful subscriber under the terms and conditions of the agreement itself. The said Clause would create an obligation making it abundantly clear that the successful bidder would be only entitled to the balance of the amount remaining after setting apart of 5 per cent, and 25 per cent, as specified in the context. The Tribunal, therefore, observed that the concerned amounts of Rs. 2,08,400 and Rs. 1,10,087 would have to be directed to be excluded from the income of the assessee, with a direction of modification of the assessment in accordance therewith.

9. In our judgment, the relations of the concerned parties get governed by the terms and conditions of the agreement. The agreement is more than specific. It emphasises that the first instalment, full amount without reduction of interest would become the property of the foreman, i.e., assessee-firm. The agreement is also more than specific that with regard to auction proceedings amongst the members of the concerned series, only the successful bidder with regard to the amounts becomes the concern of the source of obligation in regard thereto. 5 per cent, gets set apart for chitty expenses and 25 per cent, for Muthuttu Charitable Trust and it is only the remaining amount that comes up for distribution amongst all the members of the series, distribution being known as discount or bonus in common parlance. The terms and conditions of the agreement make it abundantly clear that the subscribers will have to be understood as voluntary participants in the series in question. The terms and conditions of the agreement would further emphasise that all parties thereto would have to be understood as voluntary parties concerned with the obligations flowing from the agreements in question. It cannot be said that there is any dent to the voluntary character of the parties concerned with regard to the amount in question. Additionally,

reading the agreement it cannot be understood by any stretch, even of a liberal character, that the amount in question is the income of the assessee-firm in any way. The agreement is crystal clear that the amount in question which relates to the above 25 per cent, to be given to the trust in question cannot be considered as the income of the assessee-firm in any manner, because from the inception it gets set apart for the purpose of the Muthuttu Charitable Trust and any kind of relationship with the assessee-firm gets snapped from its inception, the moment it becomes the amount of the successful bidder from which the said successful bidder has to forgo the stated percentages. In our judgment, the view taken by the Tribunal is sustainable not only being in consonance with the decision of the apex court but in addition on the basis of the terms and conditions of the agreement in question wherein the parties thereto have voluntarily agreed upon the terms and conditions thereof. For the above reasons, the two questions are answered in the affirmative, against the Revenue and in favour of the assessee.

10. A copy of this judgment under the seal of this court and the signature of the Registrar shall be sent to the Income Tax Appellate Tribunal, Cochin Bench, for passing consequential orders.