

(2007) 04 BOM CK 0107

In the Bombay High Court

Case No : Income-tax Appeals No's. 12, 19, 20, 23, 31, 32, 35, 36, 40, 41, 44, 46, 49 to 52, 54, 55, 58 to 62, 64 to 67, 70 to 74, 76 to 81, 90, 91 and 93 to 118 of 2007

Commissioner of Income Tax

APPELLANT

Vs

Nagesh Devidas Kulkarni

RESPONDENT

Date of Decision : 09-04-2007

Acts Referred:

Income Tax Act, 1961 — Section 10, 10(10C), 143(1), 143(3), 147
Income Tax Rules, 1962 — Rule 21A, 21AA, 21B
Institutes of Technology Act, 1961 — Section 3
University Grants Commission Act, 1956 — Section 3

Citation : (2007) 210 CTR 471 : (2007) 291 ITR 407

Hon'ble Judges : J.P. Devadhar, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : Anand Parchure, for the Appellant; M. Mani and K.P. Dewani, Amicus Curiae, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—These are a group of 66 appeals filed by the Revenue u/s 260A of the Income Tax Act, 1961 out of which 40 appeals are on board for admission and the remaining 26 appeals are taken for admission by consent of parties. Since the common issue is involved in all these appeals, they are heard together and disposed of by this common judgment.

2. In our opinion, orders passed by the Tribunal in all these appeals give rise to a substantial question of law and accordingly we admit all these appeals on the following common question of law:

Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the ex gratia payment received by the assesseees on voluntary retirement is compensation received on termination of employment and, hence, the assesseees are entitled to exemption u/s 10(10C) as well as relief

u/s 89(1) of the Income Tax Act, 1961 ?

3. By consent of counsel on both sides, all these appeals are taken up for final hearing.

4. Although the facts in all these cases are not in dispute, for the sake of convenience, we set out the facts in Appeal No. 12 of 2007. Counsel on both sides agree that the decision in Appeal No. 12 of 2007 would apply to all other appeals.

5. The respondent in Appeal No. 12 of 2007--Mr. Nagesh Kulkarni (hereinafter referred to as the "assessee") was employed with the Central Bank of India. During the financial year relevant to the assessment year 2002-03, the assessee opted for voluntary retirement as per the voluntary retirement scheme issued by the bank. As the assessee fulfilled the conditions of the scheme, he was permitted to retire and he was paid Rs. 10,28,296 on account of voluntary retirement.

6. The assessee filed his return of income in the status of an individual for the assessment year 2002-03 claiming that out of Rs. 10,28,296, a sum of Rs. 5,00,000 was exempt u/s 10(10C) of the Income Tax Act, 1961 ("the Act" for short) and paid tax on the balance amount after availing of rebate u/s 89(1) of the Act. The return was processed u/s 143(1) of the Act. Later on, the Assessing Officer issued notice u/s 148 of the Act and passed an order u/s 143(3) read with Section 147 of the Act disallowing the rebate u/s 89(1) of the Act. The Assessing Officer held that the voluntary retirement cannot be treated as termination of employment and the amount received under the voluntary retirement scheme ("VRS" for short) is ex gratia payment and not compensation for termination of employment. As Section 10(10C) of the Act specifically provides for total exemption of the amount received on voluntary retirement up to Rs. 5,00,000 the Assessing Officer held that the assessee is not entitled to claim relief u/s 89(1) over and above the exemption available u/s 10(10C) of the Act. Accordingly, the Assessing Officer disallowed relief u/s 89(1) of the Act.

7. On appeal filed by the assessee, the Commissioner of Income Tax (Appeals) held that Section 10(10C) speaks about total exemption from Income Tax from the compensation received on voluntary retirement up to Rs. 5,00,000. As the amount in excess of Rs. 5,00,000 is taxed in the hands of the assessee as profits in lieu of salary u/s 17(3) of the Act, the Commissioner of Income Tax (Appeals) held that in respect of the amount received in excess of Rs. 5,00,000 which is taxed as salary, the assessee is entitled to relief u/s 89 of the Act. The Commissioner of Income Tax (Appeals) further held that Section 10(10C) and Section 89(1) of the Act are mutually exclusive and the words used in these two sections neither overlap nor seek to deprive the benefits available under either of the two sections. Thus, the Commissioner of Income Tax (Appeals) reversed the order of the Assessing Officer and held that the assessee is entitled to exemption up to Rs. 5,00,000 u/s 10(10C) and rebate u/s 89(1) of the Act in respect of the

balance amount of compensation received on voluntary retirement. On appeal filed by the Revenue, the Tribunal by the impugned order upheld the orders passed by the Commissioner of Income Tax (Appeals). The Revenue being aggrieved by the order of the Tribunal in the case of the assessee as well as other respondents herein has filed these appeals u/s 260A of the Act.

8. Mr. Parchure, learned Counsel appearing on behalf of the Revenue while supporting the order of the Assessing Officer submitted that voluntary retirement cannot be treated as termination of employment because, it is the voluntary act of the employee to get retired and there is no termination from the side of the employer. Therefore, the amount given to an employee on voluntary retirement is ex gratia payment and not compensation for termination of employment. In respect of the ex gratia payment received on voluntary retirement specific exemption is granted u/s 10(10C) of the Act. Mr. Parchure submitted that relief u/s 89(1) of the Act is allowed when salary etc. is paid in arrears or in advance in any one financial year pertaining to more than twelve months. In the present case, the assessee has received one time ex gratia payment under the voluntary retirement scheme and, therefore, the ex gratia payment received by the assessee cannot be treated as salary and in such a case the benefit u/s 89(1) of the Act would not be admissible. Reference was made to the second proviso to Section 10(10C) of the Act wherein it is provided that once an exemption is allowed thereunder, the assessee shall not be allowed exemption u/s 10(10C) in any other assessment year. Accordingly, Mr. Parchure submitted that the Commissioner of Income Tax (Appeals) as well as the Tribunal were in error in holding that in addition to the exemption u/s 10(10C) of the Act, the assessee is entitled to the relief u/s 89(1) of the Act.

9. Mr. Mani, learned Counsel appearing on behalf of the assessee submitted that in the present case, after granting exemption of Rs. 5,00,000, the balance amount has been taxed under the head "Salary" and, therefore, once it is accepted by the Revenue that the amount received is liable to be taxed under the head "Salary", it is not open to the Revenue to contend that the amount received is not salary and deny the benefit of rebate u/s 89 of the Act. Mr. Mani submitted that in view of the consistent view taken by various High Courts in respect of the amount received on voluntary retirement, the decision of the Tribunal that the assessee is entitled to exemption u/s 10(10C) as well as the benefits of Section 89(1) of the Act cannot be faulted. In this connection, Mr. Mani relied upon the decisions in the case of Commissioner of Income Tax Vs. G.V. Venugopal, , State Bank of India Vs. Central Board of Direct Taxes, , Commissioner of Income Tax and Another Vs. P. Surendra Prabhu, and J.K. Helene Curtis Limited Vs. Commissioner of Income Tax, .

10. Before dealing with the merits of the case, we may set out the relevant provisions of Section 10(10C) and Section 89(1) of the Act, which read as follows:

10. Incomes not included in total income.--In computing the total income of a previous year of any person, any income falling within any of the following

clauses shall not be included--....

(10C) any amount received or receivable by an employee of--

(i) a public sector company ; or

(ii) any other company ; or

(iii) an authority established under a Central, State or Provincial Act; or

(iv) a local authority ; or

(v) a co-operative society ; or

(vi) a University established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a University u/s 3 of the University Grants Commission Act, 1956 (3 of 1956) ; or

(vii) an Indian Institute of Technology within the meaning of Clause (g) of Section 3 of the Institutes of Technology Act, 1961 (59 of 1961) ; or

(viia) any State Government; or

(viib) the Central Government; or

(viic) an institution, having importance throughout India or in any State or States, as the Central Government may, by notification in the Official Gazette, specify in this behalf; or

(viii) such institute of management as the Central Government may, by notification in the Official Gazette, specify in this behalf, on his voluntary retirement or termination of his service, in accordance with any scheme or schemes of voluntary retirement or in the case of a public sector company referred to in Sub-clause (i), a scheme of voluntary separation, to the extent such amounts does not exceed five lakh rupees:

Provided that the schemes of the said companies or authorities or societies or Universities or the Institutes referred to in Sub-clauses (vii) and (viii), as the case may be, governing the payment of such amount are framed in accordance with such guidelines (including, inter alia, criteria of economic viability) as may be prescribed:

Provided further that where exemption has been allowed to an employee under this clause for any assessment year, no exemption thereunder shall be allowed to him in relation to any other assessment year;

11. Section 89(1) of the Act as it stood prior to the Finance Act, 2002, reads as follows:

Section 89 Relief when salary, etc., is paid in arrears or in advance.--(1) Where, by reason of any portion of an assessee's salary being paid in arrears or in advance or by reason of his having received in any one financial year salary for

more than twelve months or a payment which under the provisions of Clause (3) of Section 17 is a profit in lieu of salary, his income is assessed at a rate higher than that at which it would otherwise have been assessed, the Assessing Officer shall, on an application made to him in this behalf, grant such relief as may be prescribed.

12. Section 89 as substituted by the Finance Act, 2002 with retrospective effect from 1st April, 1996 reads thus:

89. Relief when salary, etc., is paid in arrears or in advance.--Where as assessee is in receipt of a sum in the nature of salary, being paid in arrears or in advance or is in receipt, in any one financial year, of salary for more than twelve months or a payment which under the provisions of Clause (3) of Section 17 is a profit in lieu of salary, or is in receipt of a sum in the nature of family pension as defined in the Explanation to Clause (iia) of Section 57, being paid in arrears, due to which his total income is assessed at a rate higher than that at which it would otherwise have been assessed, the Assessing Officer shall, on an application made to him in this behalf, grant such relief as may be prescribed.

13. In all these cases, it is not in dispute that the assessee is entitled to exemption up to Rs. 5,00,000 u/s 10(10C) of the Act. The only dispute is regarding the availability of the relief u/s 89 of the Act in respect of the amounts in excess of Rs. 5,00,000 received by the assessee on voluntary retirement. The question therefore to be considered is, whether Section 10(10C) of the Act bars the assessee from availing of the benefits u/s 89(1) of the Act ? If not, whether the assessee is entitled to the relief u/s 89(1) of the Act in respect of the amount received on voluntary retirement ?

14. Dealing with the first question, it may be noted that Section 10 of the Act provides that the incomes referred to therein are exempt and are to be disregarded wholly for the purposes of computation of income under the Act. Section 10(10C) of the Act inter alia provides that any amount received by an employee on his voluntary retirement or termination of service from any employer named therein, in accordance with any scheme or schemes of voluntary retirement shall not be included in computing the total income to the extent not exceeding five lakh of rupees. Section 10(10C) applies to the amount received on voluntary retirement up to Rs. 5,00,000 and it does not place any embargo on the amount received on voluntary retirement in excess of Rs. 5,00,000. According to the Revenue, in view of the second proviso to Section 10(10C) of the Act, once exemption u/s 10(10C) of the Act is availed of up to Rs. 5,00,000, the assessee is not entitled to relief u/s 89 of the Act in respect of the amount received in excess of Rs. 5,00,000.

15. There is no merit in the above contention of the Revenue, because, what the second proviso to Section 10(10C) contemplates is that the total exemption up to Rs. 5,00,000 from the amount received on voluntary retirement will be available only once and even if the assessee receives the amount under any voluntary

retirement scheme in any other assessment year, the exemption u/s 10(10C) will not be available. Thus, the second proviso to Section 10(10C) merely states that the exemption thereunder will be available only once. The second proviso to Section 10(10C) does not place any embargo on the amount received by the assessee in excess of Rs. 5,00,000. Therefore, the argument of the Revenue that Section 10(10C) bars the assessee from availing of relief u/s 89(1) cannot be accepted.

16. The Madras High Court in the case of Commissioner of Income Tax Vs. G.V. Venugopal, while construing the word "thereunder" in the second proviso to section 10(10C), observed thus (page 312):

The use of the word "thereunder" in the above proviso means that once exemption is allowed, again no exemption "thereunder", i.e. u/s 10(10C) shall be allowed in relation to any other assessment year. The word "thereunder" referred to in this proviso cannot mean any section other than Section 10(10C). This view draws support from the Central Board of Direct Taxes Circular No. 657 dated August 30, 1993 see [1993] 204 ITR 106. In paragraph 16 to 16.3 of this circular while explaining the scope and effects of the amendment introduced by the Finance Act 1993, in Section 10(10C) it has been stated as under (page 113):

Extending the tax exemption on payments under voluntary retirement schemes to employees of certain authorities.

16.1 The guidelines prescribed by the Board, specify that the amount receivable on account of voluntary retirement of an employee should not exceed five hundred thousand rupees. The intention was to restrict the benefit of Income Tax exemption u/s 10(10C) to the aforesaid amount in the case of an employee. The Finance Act incorporates the aforesaid intention in the law itself by providing that the amount exempt u/s 10(10C) shall not exceed five lakh rupees.

16.2 The guidelines prescribed by the Board for framing the schemes of voluntary retirement further specify that the employee should not have availed of the benefit of any other voluntary retirement scheme in the past. It may be difficult for the employers to comply with this requirement where the employees do not disclose the fact of their having availed of such benefit in the past. It has, therefore, been provided that where exemption has been allowed to an employee u/s 10(10C) for any assessment year, no exemption shall be allowed to him "thereunder" in relation to any other assessment year.

Thus, "thereunder" does not mean any section other than Section 10(10C). This means the appellant is entitled for relief u/s 89(1). Further, there is no specific or express provisions laid down in the Act that when exemption is allowed u/s 10(10C), relief u/s 89(1) is not allowable. In this connection, reference can be made to other provisions of the Act where twin or double benefits have been curtailed by the statute wherever the statute has specifically so intended. For example, where a deduction has been allowed u/s 80CCC, a rebate with reference to such amount cannot be allowed u/s 88. In respect of the amount

received under voluntary retirement scheme there is no such specific curtailment of benefits regarding exemption u/s 10(10C) and relief u/s 89(1). Basically relief contemplated u/s 89(1) is aimed to mitigate hardship that may be caused on account of high incidence of tax due to progressive increase in tax rates. This can never be considered as a deduction or exemption like that of Section 10(10C).

17. Thus, on a plain reading of the second proviso to Section 10(10C) of the Act, it is clear that the restriction therein is only with reference to the grant of exemption u/s 10(10C) and the said proviso does not bar relief if available u/s 89 of the Act.

18. The question, therefore, to be considered is, whether the assessee is entitled to deduction u/s 89 of the Act.

19. As noted earlier, Section 89 of the Act has been substituted by the Finance Act, 2002 with retrospective effect from 1st April, 1996. The said amendment does not affect the merits of the appeals which are before us.

20. Section 89 of the Act inter alia provides that where in any financial year, the assessee receives an amount in the nature of salary or receives payment which is a profit in lieu of salary, then the Assessing Officer, on an application, shall grant such reliefs as may be prescribed. Rules 21A, 21AA and 21B of the Income Tax Rules, 1962, provide for the mechanism for granting relief u/s 89 of the Act.

21. The words "profits in lieu of salary" are defined u/s 17(3) of the Act. Section 17(3) of the Act, to the extent relevant herein, reads thus:

17. "Salary", "perquisite" and "profits in lieu of salary" defined.--For the purposes of Sections 15 and 16 and of this section--....

(3) "profits in lieu of salary" includes--

(i) the amount of any compensation due to or received by an assessee from his employer or former employer at or in connection with the termination of his employment or the modification of the terms and conditions relating thereto ;

(ii) any payment (other than any payment referred to in Clause (10), Clause (10A), Clause (10B), Clause (11), Clause (12), Clause (13) or Clause (13A) of Section 10), due to or received by an assessee from an employer or a former employer or from a provident or other fund, to the extent to which it does not consist of contributions by the assessee or interest on such contributions or any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy.

Explanation.--For the purposes of this sub-clause, the expression "Keyman insurance policy" shall have the meaning assigned to it in Clause (10D) of Section 10 ;

(iii) any amount due to or received, whether in lump sum or otherwise, by any assessee from any person--

(A) before his joining any employment with that person ; or

(B) after cessation of his employment with that person.

22 The apex court in the case of Karamchari Union, Agra Vs. Union of India and Others, , while construing the words "profits in lieu of salary" has held thus (page 150):

In our view, even though there is much substance in the contentions raised by learned Counsel for the assessee yet it is to be stated that the Act is a self-contained code and the taxability of the receipt of any amount or allowance is to be determined on the basis of meaning given to the words or phrases in the Act. Section 2(24) of the Act gives wide inclusive definition to the word "income". Similarly, for levying tax on salary income, exhaustive definition is given u/s 17, which includes perquisites and profits in lieu of salary. The only exclusion provided under Clause 3 is any payment referable to Clause (10), Clause (10A), Clause (10B), Clause (11), Clause (12), Clause (13) or Clause (13A) of Section 10. In view of this specific inclusion and exclusion in the meaning of the word "income" and "salary", it is rightly submitted that payment received by the assessee has no connection with the profits of the employer. The word "profits" is used only to convey any "advantage" or "gain" by receipt of any payment by the employee. Webster's Comprehensive Dictionary gives the meaning of the word "profit", inter alia, to mean advantage or benefit. It states:

Profit-Synonyms : advantage, avail, benefit, emolument, expediency, gain, good, improvement, proceeds, receipts, return, returns, service, utility, value.... Advantage is that which gives one a vantage ground, either for coping with competitors or with difficulties, needs, or demands ; as, to have the advantage of a good education ; it is frequently used to what one has beyond another or secures at the expense of another; as, to have the advantage in argument, or to take advantage in a bargain.

Applying the aforesaid general meaning of the word "profits" and considering the dictionary meaning given to it u/s 17(1)(iv) and (3)(ii), it can be said that "advantage" in terms of payment of money received by the employee from the employer in relation or in addition to any salary or wages would be covered by the inclusive definition of the word "salary". Because of the inclusive meaning given to the phrase "profits in lieu of salary" would include "any payment" due to or received by an assessee from an employer, even though it has no connection with the profits of the employer. It is true that the Legislature might have avoided giving an inclusive meaning to the word "salary" by stating that any payment received by the employee from an employer would be considered to be salary except the payments which are excluded by Section 17(3)(ii), i.e., Clauses (10), (10A), (10B), (11), (12), (13) or (13A) of Section 10. However, it is for the Legislature to decide the same. This would not mean that by giving an exhaustive and inclusive meaning, the word "profits" can be given a meaning only when it pertains to sharing of profits by the employer. For the assessee, the

receipt of such amount would be a profit, gain or advantage in addition to salary, even though it is not named as salary. Therefore, the word "profits" in the context is required to be understood as a gain or advantage to the assessee. Hence, it is not possible to accept the contention of learned Counsel for the employees that as the city compensatory allowance amount is paid to meet the additional expenditure as contemplated by the statutory service rules, it cannot be said to be profit, gain or additional salary. Under the Act, such receipt of the amount as conceded is covered by the definition of the word "income" and as provided it would be in addition to salary. Hence, it would be part and parcel of income by way of salary, which would be a taxable one.

23. In the present case, it is not in dispute that the amount received by the assessee on account of voluntary retirement in excess of Rs. 5,00,000 has been assessed under the head "Income from salary". Having assessed the amount in excess of Rs. 5,00,000 received on voluntary retirement under the head "Income from salary", is it open to the Revenue to contend that the said amount is not salary for the purposes of relief u/s 89 of the Act is the question. As rightly contended by Mr. Mani, learned Counsel for the assessee and Mr. Dewani, assisting the court as amicus curiae, even if the assessee has opted for retirement voluntarily, there has to be termination by the employer and, therefore, while terminating service any amount paid on account of voluntary retirement would be "profits in lieu of salary" covered u/s 17(3) of the Act. The amount paid on termination of service due to voluntary retirement may be ex gratia payment, but it would be "profits in lieu of salary" as contemplated u/s 17(3) of the Act. In other words, as per Section 17(3) of the Act, any amount paid at or in connection with the termination of employment would be "profits in lieu of salary". Whether the termination of employment took place on account of the voluntary decision of the employee or not is wholly irrelevant. In the present case, on the assessee opting for voluntary retirement, his services were terminated and the amount has been paid as per the voluntary retirement scheme at the time of terminating the service of the assessee. Therefore, the amount received by the assessee being "profits in lieu of salary" as contemplated u/s 17(3) of the Act, the assessee would be entitled to the relief u/s 89 of the Act.

24 Apart from the above, it is pertinent to note that the definition of the words "profits in lieu of salary" in Section 17(3) of the Act, is an inclusive definition and as per Section 17(3)(ii), any payment received by the assessee from an employer except the payments referred to in Clauses (10), (10A), (10B), (11), (12), (13) or (13A) of Section 10 would be "profits in lieu of salary". Since the payment received under the voluntary retirement covered u/s 10(10C) of the Act does not find place in the excluded category specified in Section 17(3)(ii), it is evident that the amount received on voluntary retirement would be "profits in lieu of salary" as contemplated u/s 17(3) of the Act and consequently entitled to relief u/s 89 of the Act.

25. For all the aforesaid reasons, the decision of the Tribunal in holding that the

assessee is entitled to the exemption u/s 10(10C) of the Act and also rebate u/s 89 of the Act in respect of the amount received in excess of Rs. 5,00,000 on account of voluntary retirement, cannot be faulted.

26. In the result, the question of law set out hereinabove is answered in the affirmative, that is, in favour of the assessee and against the Revenue.

27. Before closing, we would like to place on record our appreciation regarding the assistance rendered by Shri K.P. Dewani, advocate in this matter as amicus curiae.

28. For the reasons set out hereinabove, all these appeals are dismissed with no order as to costs.