

(1997) 10 DEL CK 0031
In the Delhi High Court
Case No : IT Case No. 52 of 1996

Commissioner of Income Tax

APPELLANT

Vs

N.K. Rajgarhia

RESPONDENT

Date of Decision : 17-10-1997

Acts Referred:

Citation : (1998) 150 CTR 123 : (1998) 232 ITR 949 : (2000) 113 TAXMAN 667

Hon'ble Judges : R.C. Lahoti, J;J.K. Mehra, J

Bench : Division Bench

Advocate : R.D. Jolly and Ms. Prem Lata Bansal, G.C. Sharma and Tarun Dua,
for the Appellant;

Judgement

R.C. Lahoti, J.—This is an application under s. 256(2) of the IT Act, 1961, filed by the Revenue seeking a mandamus to the Tribunal stating the case for the opinion of the High Court on the following questions :

"1. Whether the Tribunal was correct in law in allowing the commission of Rs. 22,50,000 paid to girl Raj Fertilisers and Chemicals (P) Ltd., by holding that it was revenue in nature, allowable under s. 37 of the IT Act ?

2. Whether the commission of Rs. 46,65,600 paid to Anand Pratyabhut Vit Nigam was allowable in law as held by the Tribunal even in the absence of any material that could prove the rendering of services by such company to the assessed ?

3. Whether the Tribunal was correct in law in allowing the commission of Rs. 46,65,600 paid by the assessed to APVN without discharging the onus of proving that it was incurred wholly and exclusively for the purposes of business ?

4. Whether the Tribunal was correct in law in ignoring the fact that the claim for payments of commission was an arranged affair by the assessed to reduce his tax liability ?

5. Whether the order of the Tribunal is correct on facts and not perverse, in allowing the claim of commission by ignoring certain relevant facts, such as -

(a) The AO's findings after collecting necessary information and making enquiries with regard to the assessor's claim of payment of Rs. 22,50,000 as not related to business expenditure of the assessed ?

(b) The AO's conclusion that Anand Pratyabhut Vit Nigam did not file a return of income for the asst. yr. 1990-91 and that payment claimed to have been made at Rs. 46,65,000 were not verifiable from the assessment records of the payee company ?

(c) Likewise, the enquiries made by the AO while examining the claim of the assessed in respect of payments of commission as referred to above and the conclusions drawn have not been taken into consideration ?"

It is conceded at the Bar that the real controversy is reflected by questions Nos. 1 and 2 and the other questions are merely incidental to the first two.

2. The assessed is an individual doing business in the name and style of Taxcomash Exports. For the relevant previous year, the assessor's source of business income were exports of spare parts to Russia as also commission received from various Indian and foreign authorities. As against his receipts from commission, the assessed claimed deduction on account of commission paid to Giriraj Fertilisers and Chemicals (P) Ltd., (GFC, for short), to the tune of Rs. 22,50,000. The genuineness of the payment was not under challenge before the AO. The AO and the CIT(A) had formed an opinion that the expenditure was of a capital nature. However, the plea of the assessed that GFC had helped the assessed in obtaining a better price and there was a regular memorandum of understanding reached by the assessed with the GFC specifying the terms of understanding and commission was paid in accordance with these terms, prevailed with the Tribunal and was upheld. The Tribunal recorded the finding of fact that the assessed received repeated orders for supply of detergent for which he earned commission but no amount was paid to GFC on that account. The amount was paid by the assessed only in respect of a contract for 6000 mt. (and not in respect of every contract) for supply of detergent goods or commodities to USSR or any other contract though the assessed was receiving repeated orders. Both were free to compete with each other in the manner best suited to them. The Tribunal applied the test laid down by a Division Bench of the Madras High Court in Chelpark Company Ltd. Vs. Commissioner of Income Tax, and opined that if the expenditure eliminated for good a competitor, then it was a capital expenditure but if the expenditure related to warding off competition in individual transaction and leaving the competitor surviving in the field then it was merely a revenue expenditure. The test which divides an expenditure between capital and revenue is one of enduring benefit.

In our opinion, the finding recorded by the Tribunal is purely of fact and does not raise any referable question of law.

3. On question No. 2, the relevant facts are that the assessed has received commission for sale of textile machinery imported from USSR against which he

made a claim for payment of Rs. 46,65,600 to Anand Pratyabhut Vit Nigam Ltd., (APVN for short). It was explained that APVN had introduced the assessed to Prakash Cotton Mills Ltd., which was interested in purchasing textile machinery on the assessor's persuasion. The said mill purchased the textile machinery from the USSR. The AO made inquiries under s. 131, but found no such party as APVN at the given address. The assessed also could not produce the said APVN before the AO. The AO found that there was no written agreement for payment of commission between the assessed and APVN, that APVN was not produced before the AO, that the commission paid to APVN was totally disproportionate to the quantum of commission earned by the assessed and that APVN had not filed any returns of its own. For these four reasons, the claim was rejected. The rejection was upheld by the CIT(A).

4. However, the Tribunal reversed the findings of the AO and the CIT(A) by passing a detailed order. A perusal of the order of the Tribunal, specially para 8 thereof, reveals a few findings of fact recorded by the Tribunal. There had been exchange of regular correspondence between the assessed and APVN showing the role played by APVN in helping the assessed securing the order. APVN had confirmed the receipt of commission in part and then reminded the assessed for releasing the balance commission. The payments made by the assessed to APVN were all either by account payee cheques or by account payee bankers cheques (pay order). Inquiries made by the Revenue from the UCO Bank, defense Colony, confirmed these transactions by entries having been made in the accounts of the two. The amount paid to APVN was 18 per cent of the total commission receipts of the assessee. APVN being an independent entity and very much in existence as it was found to have filed its returns prior to the assessment year in question and its records having been taken into custody by the police in connection with some investigation, the factum of such payment could not be doubted. It was not the case of the Revenue that the amount paid to APVN had come back to the assessee. The Tribunal also formed an opinion that such being the facts and circumstances, the claim could not have been rejected merely because APVN could not be produced before the AO by the assessed and because APVN had not filed its return for the relevant assessment year. The Tribunal then came to a finding that the amount of commission paid by the assessed to APVN could not have been added back to the income of the assessee. The addition was deleted.

5. In our opinion, the above said finding recorded by the Tribunal is again a finding of fact. Merely because the fact finding Tribunal could have arrived at a different finding by a parity of reasoning, a question of law does not arise. It is well settled that whether an expenditure was incurred or not, is a question falling within the domain of facts; whether such an expenditure is allowable as a deduction or not and how the nature of such expenditure is to be classified under the relevant legal provision is a question of law. The question as proposed by the Revenue as to the payment of Rs. 46,65,600 to APVN does not arise as question of law in view of the findings of fact arrived at by the Tribunal.

6. In our opinion, no referable question of law arises from the order of the Tribunal. The Tribunal had rightly opined while rejecting the petitioner's application under s. 256(1) of the Act that the questions raised by the Revenue were merely of fact and hence were not referable to the High Court.

7. The application under s. 256(2) of the IT Act is, Therefore, rejected.