
(1987) 08 AHC CK 0003

In the Allahabad High Court

Case No : Income-tax Application No's. 48 and 49 of 1987

Commissioner of Income Tax

APPELLANT

Vs

Raza Textiles Ltd.

RESPONDENT

Date of Decision : 25-08-1987

Acts Referred:

Income Tax Act, 1961 — Section 256(2), 36(1), 37

Citation : (1987) 66 CTR 154 : (1988) 169 ITR 258 : (1987) 35 TAXMAN 377

Hon'ble Judges : V.K. Mehrotra, J; R.K. Gulati, J

Bench : Division Bench

Advocate : Bharatji Agarwal and Rajesh Kumar Agarwal, for the Appellant;
Sudhir Chandra and B. Sapru, for the Respondent

Judgement

R. K. Gulati, J.—These two connected applications u/s 256(2) of the Income Tax Act, 1961 (" the Act " for short), have been filed by the Revenue, praying for a mandamus directing the Income Tax Appellate Tribunal, Allahabad Bench, to refer the questions set out below for the opinion of this court. These questions arise out of a consolidated order passed by the Income Tax Appellate Tribunal, deciding two cross-appeals, one filed by the assessee and the other by the Revenue, in respect of the assessment year 1981-82. The questions referred to in these applications are similar and identical in nature and are to the following effect:

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in ignoring the fact that the assessee had not established the genuineness and nature of the payment and, as such, had failed to discharge the onus for deduction of the payment in computing the business income ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in admitting the claim for payment of incentive bonus over and above the admissible bonus under the Payment of Bonus Act ?

3. Whether, on the facts and in the circumstances of the case, the Income Tax

Appellate Tribunal was correct in law in stating that if a particular payment does not fall within the first proviso, it can still be considered under the second proviso to Section 36(1)(ii) of the Act even u/s 37(1) of the Act ?

4. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that the assessee is entitled to the deduction of the entire incentive bonus of Rs. 22,23,518?"

2. We have heard learned counsel for the parties and have also looked into the order of the Income Tax Appellate Tribunal. All these four questions are concerned about the deductibility of Rs. 22,23,518 which the assessee claimed as deduction in computing its taxable income. This amount is said to have been paid by the assessee to its workers and members of its staff and debited under the head "Incentive Bonus". This payment was in addition to another amount of Rs. 11,31,000 paid under the Payment of Bonus Act, 1965.

3. Taking questions Nos. 2, 3 and 4, the Department's claim is that the amount paid under the nomenclature " incentive bonus" (assuming genuineness of payment for argument's sake) is nothing but a bonus which is covered under the Payment of Bonus Act, 1965. It is claimed that the Tribunal fell into an error when it held that what was payable under the Bonus Act was customary bonus (or incentive bonus as described in the account books) and was, therefore, allowable under the second proviso to Section 36(1)(ii) of the Act. In the alternative, it is claimed that before the disputed amount could have been allowed under the aforesaid provisions, it must be established to the satisfaction of the assessing officer that it is a reasonable payment when considered in the light of Clauses (a) to (c) of the second proviso.

4. It is apparent on a consideration of those provisions that such payments which are not warranted by the Bonus Act will be regarded as reasonable only when it is justifiable by reason of the pay of the employee and his conditions of service, the profits of the business or profession for the period in question and the general practice in similar business or profession.

5. The grievance of the Department is that the aforesaid conditions are not satisfied in the instant case inasmuch as no material was furnished by the assessee before the Tribunal in that regard. The Tribunal has allowed the claim without objectively applying the tests laid down in Clauses (a) to (c) of the second proviso aforesaid and has allowed the claim of the assessee on its bare asking without furnishing the necessary materials in support of its claim.

6. Another contention was that there is no justification for the Tribunal's view that if the payments were not covered by the second proviso to Section 36(1)(ii), nevertheless it could be allowed u/s 37 of the Act.

7. The question whether the impugned payment with reference to given facts was a permissible deduction within the purview of the second proviso to Section 36(1)(ii), in our opinion, is certainly a mixed question of law and fact, if not a

pure a question of law. In considering identical questions, the Punjab and Haryana High Court in *Commissioner of Income Tax Vs. Hindustan Wire Products Ltd.*, has taken the view that such questions were questions of law. The Supreme Court in *Commissioner of Income Tax, Kerala Vs. C.D. Lonappan*, , while considering the objection of the Revenue that the High Court should not interfere in its advisory jurisdiction with the order of the Tribunal where it had disallowed a part of the bonus under the provisions in the Act of 1922 corresponding to the second proviso to Section 36(1)(ii), has held that *ex facie* it involved a question of law and the High Court could give its opinion when it came to the conclusion that the Tribunal misdirected itself in disallowing a part of the bonus paid to the assessee's employees.

8. This brings us to question No. 1 for consideration. In order to appreciate the contentions of the parties, it is necessary to state some facts in detail.

9. Before the assessing officer, the assessee claimed that the disputed amount represented overtime payments for extra work done by the workers in double shift. It was also claimed that some loyal workers had agreed to remain in the factory premises when the employees of the assessee-company were on strike during the period November 22, 1980, to May, 1981. These workers were provided with food, extra payments as " Rewards for loyalty, compensation for good work and risk involved in their staying in factory premises ".

10. On an examination of the account books by the assessing officer, it was revealed that payment of incentive bonus (stated to be in the nature of overtime) was not recorded in the relevant columns of the wages register. It was recorded on a separate sheet and was debited to the workers "loan account". At the end of every three months, the balance in workers' loan account was transferred to " Salary and Wages Account " under the head " Incentive Bonus ". In the ultimate analysis, the claim was disallowed mainly on three grounds : firstly, the payment made to the employees as loan cannot be allowed as deduction, secondly, if the incentive bonus is taken to be as bonus, it is not allowable in view of the first proviso to Section 36(1)(ii) and, lastly, presuming that the payment is covered by the second proviso to Section 36(1)(ii), it did not qualify for deduction with reference to the circumstances mentioned therein.

11. In appeal, the disallowance was sustained in part by the Commissioner of Income Tax (Appeals) to the extent of rupees ten lacs only.

12. By a letter dated May 16, 1985, the assessee explained before the appellate authority that the incentive bonus was a customary bonus paid by the company. Explaining the concept of customary bonus, it pointed out that the payment is made at the sweet will of the management to which the employees are not entitled in law as of right. The customary bonus is not overtime payment but paid on the basis of production achieved with no relation to the time factor and it is paid only to some of the employees. In another reply dated October 15, 1985, filed under the signature of the joint managing director of the company, it was

stated that the " incentive bonus " was paid to the workers for additional work done mainly during the time other than their normal duty hours. In view of these contrary stands, the appellate authority observed that in spite of sufficient opportunities, the assessee did not clarify the real nature of the payment and was taking a self-contradictory stand. He further observed that the reasons for not showing such overtime payment in the wages register, which is approved under the Factories Act, were also not forthcoming.

13. In its anxiety to prove the factum of payment, the assessee produced certain vouchers and a wages register before the appellate authority for the first time. These documents had not been produced earlier at the time of assessment. On initial scrutiny, the appellate officer entertained some doubt about the genuineness of the thumb impressions appended to the various vouchers representing payments to workers. The assessing officer was thus required to submit a remand report after a thorough enquiry.

14. During the remand proceedings, the opinion of a handwriting and fingerprint expert was sought, who confirmed the doubts of the assessing officer that the thumb impressions appended to payment vouchers in several cases were similar and identical, though payments in respect thereof were said to have been made to different persons. Some of the workers were also examined but their statements were not found acceptable for the detailed reasons stated in the appellate order. The explanation furnished by the assessee in this regard that some workers had authorised other persons to receive payment was rejected as this fact was not noted in the wages sheet. In addition to the above, the appellate authority further observed that payment as " incentive bonus" to workers was only an adjustment of loans advanced earlier to the workers. For these and other discrepancies mentioned in the appellate order, the Commissioner of Income Tax (Appeals) invoked the provisions of Section 145(2) of the Act and held that the books of account of the assessee, in so far as they related to the payment of incentive bonus, were not reliable and must be rejected. Having held so, he then proceeded to estimate the amount which could be allowed to the assessee out of the disputed amount with reference to past history. In paragraph 32 of his order, he referred to a comparative chart showing month-wise salaries, wages and incentive bonus for the year 1980-81. In the assessment year 1980-81, the total payment amounted to Rs. 12,68,682 whereas in the year under reference, such payment amounted to Rs. 22,23,518. This included Rs. 8,69,440 in the month of December, 1980, alone. This payment, according to the assessee, represented payment for two extra shifts to its workers over and above the normal shifts for which they were paid wages of Rs. 2,84,913. Commenting upon the genuineness of the payments and assessee's claim, he held :

"In the first place, it is impossible to believe that a worker could work three shifts (24 hours) for all the 30 days in December and partly in November. Even if he did perform this superhuman task, the wages for the two extra shifts would have

been given at the same rate as for the first shift as is also clear from the statements and vouchers produced during the hearing. Therefore, against wages of Rs. 2,84,913 shown in December, the incentive bonus for that month could be a maximum figure of double of Rs. 2,84,913, i.e., Rs. 5,69,826. The assessee, however, claims to have paid incentive bonus in December of Rs. 8,69,440 which is not possible by simple arithmetic, of course based on the assumption that the statement made and furnished by the appellant is correct. If accounts for a part of year are found unreliable, the accounts of the entire year can be rejected."

15. Taking into account the aggregate payment of wages, salary and incentive bonus in the preceding year and those paid in the year in dispute and also comparing these figures excluding the salary, and taking into account the payments relating to wages and incentive bonus alone in the two years, he sustained the disallowance to the extent of rupees 10 lacs only.

16. Being aggrieved by the order of the Commissioner of Income Tax (Appeals), the assessee, as well as the Revenue, both filed appeals before the Income Tax Appellate Tribunal. These cross-appeals were decided by a consolidated order. The Appellate Tribunal dismissed the Department's appeal whereas the assessee's appeal was accepted in toto.

17. Thereafter, the Revenue applied for references u/s 256(1) of the Act which were not granted. It is in these circumstances that the present two applications u/s 256(2) of the Act have been filed giving rise to question No. 1 and other questions considered earlier.

18. Learned counsel for the Revenue took us through the Tribunal's order and various findings concerning question No. 1. The main thrust of his argument was that the Income Tax Appellate Tribunal had reversed the orders of the tax authorities without referring and dealing with the evidence relied upon by those authorities. It was argued that the Tribunal while allowing the assessee's claim relied upon tailor-made and self-serving certificate obtained by the assessee, instead of meeting the material used against the assessee.

19. Mr. Sudhir Chandra, learned counsel appearing for the assessee, contended that assuming the criticism levelled against the Tribunal's order to be true, yet the present application regarding question No. 1 is liable to be rejected for it amounts to reappraisal of evidence, soundness of reasons recorded in support of the finding of fact and sufficiency of evidence. This, according to him, does not give rise to any question of law which should be gone into by this court, exercising its advisory jurisdiction u/s 256 of the Act. For this proposition, he referred to a few decided cases.

20. The proposition, as stated by learned counsel for the assessee, is well-settled and there is no quarrel about it. It is not necessary to refer to the decisions cited by him. However, in our opinion, the present case stands on a different footing. It is not a case where this court is called upon to go into the question either of sufficiency or of reappraisal of evidence, etc.

21. The question which needs consideration is whether a detailed order passed by the tax authorities based on the material gathered during the scrutiny of the assessee's own record could, in law, be reversed in appeal without meeting the reasons recorded therein and the material referred to in support thereof by the appellate authority.

22. In these proceedings, we are not required to deal finally with the question arising out of the Tribunal's order. The limited jurisdiction at this stage is to decide whether any question of law arises from the order of the Tribunal or not. In view of this, we refrain ourselves from commenting upon the criticism levelled against the Tribunal's order. Bearing in mind that the Tribunal was not passing an order of affirmance but one of reversal, in our opinion, the minimum requirement of the appellate court in such a situation is at least to consider the material as also the reasons which weighed with the subordinate authorities. What the Tribunal has done in this case is that it kept aside the material relied upon by the lower authorities and in its turn it has relied upon fresh and other material including some which was obtained after the assessment order had been passed. It was not disputed that the assessee had been taking an inconsistent stand about the nature of the impugned payments before the revenue authorities. The Tribunal, without referring to the assessee's own version, filed in writing, passed over the issue, relying upon a certificate issued by the Chamber of Commerce dated July 27, 1985, which was of a general nature and did not refer to the affairs of the assessee. This certificate admittedly is of a date after the assessment order had been made. Likewise, the Tribunal did not dispute the fact that the thumb impressions appended to the payment vouchers were of persons other than those who were supposed to be the recipients. Instead of dealing with the statements of the workers referred to in the order of the Commissioner of Income Tax (Appeals) and other material, the Tribunal relied upon the certificate issued by the assessee's chartered accountants and two trade unions of the assessee's mill, etc., in reversing the finding of the lower authorities. Similarly, the discrepancies pointed out by the Commissioner of Income Tax (Appeals) while determining the reasonableness of the amount were not taken notice of by the Tribunal. It did not also refer to the assessee's claim which was severely commented upon by the Commissioner of Income Tax, namely, that the workers could not have worked for 24 hours round the clock for the entire month of December, 1980, in which the extra payment of over Rs. 8 lacs was said to have been made.

23. In view of the above, we are clearly of the opinion that question No. 1 also does arise out of the Tribunal's order. In a situation like the one with which we are faced in this case, a Division Bench of this court has expressed a similar view in Commissioner of Income Tax Vs. J.K. Synthetics Limited, .

24. For what has been stated above, we allow these applications and direct the Income Tax Appellate Tribunal, Allahabad Bench, to draw up a statement of the case and refer the questions of law set out earlier in, this order for the opinion of

this court. The Revenue shall be entitled to one set of costs which we assess at Rs. 200.