
(1996) 04 MP CK 0060

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 564 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Sumermal Gopichand

RESPONDENT

Date of Decision : 15-04-1996

Acts Referred:

Income Tax Act, 1961 — Section 139(1), 43B

Citation : (1997) 138 CTR 149 : (1997) 226 ITR 456

Hon'ble Judges : A.K. Mathur, C.J;S.K. Kulshrestha, J

Bench : Division Bench

Advocate : V.K. Thanka, for the Appellant; B.L. Nema, for the Respondent

Judgement

S.K. Kulshrestha, J.—The Income Tax Appellate Tribunal, Indore Bench, Indore, has referred the following question of law, arising out of the order dated February 23, 1990, of the Tribunal, passed in appeal ITA No. 639/Ind. of 1987, on an application having been made to the Tribunal by the Revenue u/s 256(1) of the Income Tax Act, 1961 ;

"Whether, on the facts and in the circumstances of the case, the Tribunal correctly construed Section 43B of the Income Tax Act, 1961, that when under the provisions of the relevant statute the sales tax, though fallen due in the accounting year but was payable after the close of the accounting year it was not open to the Income Tax Officer to disallow the tax payable and actually paid within the time allowed ?"

2. The respondent-assessee was assessed to Income Tax for the year 1985-86, previous year ending Diwali, 1984. The assessee observed the mercantile system of accounting and claimed deduction on account of sales tax in the sum of Rs. 43,134, krishi tax in the sum of Rs. 2,953, entry-tax in the sum of Rs. 103 and nirashrit tax in the sum of Rs. 643 : thus, a total sum of Rs. 46,833. Out of the above claimed deductions, a sum of Rs. 40,453 related to the last quarter of sales tax which had fallen due for payment on Diwali, 1984, but was payable

within 30 days from the close of the accounting year. However, the Income Tax Officer on an interpretation of Section 43B of the Act, held that the assessee was not entitled to deduction of the entire amount of Rs. 46,833, since it had not actually been paid within the accounting year.

3. The assessee preferred an appeal to the Commissioner of Income Tax (Appeals) who confirmed the addition of Rs. 46,833 as made by the Income Tax Officer. On second appeal being filed to the Tribunal, the Tribunal held that the assessee had paid Rs. 40,453 on November 21, 1984, relating to the last instalment of sales tax which had fallen due in the accounting period and was payable within 30 days from the end of the said period. The Tribunal, therefore, deleted Rs. 40,453 from the income. An application u/s 256(1) was filed by the Revenue to refer the question of law arising out of the order passed by the Tribunal and hence the above question has been referred to this court for opinion.

4. Section 43B was inserted by the Finance Act, 1983, with effect from April 1, 1984, to permit certain deductions only on actual payment of the amount. The said section for the period in question, read as follows :

"43B. Certain deductions to be only on actual payment.--Notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act in respect of -

(a) any sum payable by the assessee by way of tax or duty under any law for the time being in force, or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees,

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in Section 28 of that previous year in which such sum is actually paid by him.

Explanation.--For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in Clause (a) or Clause (b) of this section is allowed in computing the income referred to in Section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him."

5. Later, a proviso was added by the Finance Act, 1987, with effect from April 1, 1988, to carve out an exception to permit deduction where a sum referred to in the said section was actually paid by the assessee before the due date applicable in the case for furnishing the return of income under Sub-section (1) of Section

139 in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment was furnished by the assessee along with such return. With a view to obviate any confusion about the incurring of the liability in the previous year, Explanation 2 was inserted by the Finance Act, 1989, with retrospective effect from 1st April, 1984, the date on which Section 43B had been inserted, to clarify that any sum payable within the meaning of Clause (a) of Section 43B would mean a sum for which the assessee incurred liability in the previous year, even though such sum might not have been payable within that year under the relevant law. The purpose was obviously to make provision for cases where the relevant law permitted time for deposit of the amount beyond the previous year in respect of the liability incurred during the accounting year of the assessee.

6. The question before us is whether in relation to the assessment year 1985-86, the previous year ending Diwali, 1984, the present assessee was entitled to claim deduction in respect of sales tax fallen due in the accounting year, but which was payable and actually paid after the close of the accounting year. Learned counsel appearing for the Revenue has brought to our notice several decisions of the various courts expressing divergent opinion on the subject. Learned counsel submits that the Delhi High Court on the interpretation of Section 43B of the Act has held in *Sanghi Motors v. Union of India* [1991] 187 ITR 703 that the language was clear and unambiguous and gave an unmistakable indication that the claim for deduction was allowable only if the amount had been actually paid in the accounting year and not when the liability alone had been incurred in the said year. However, in the said decision, the Delhi High Court did not consider the judgment of the Patna High Court in *Jamshedpur Motor Accessories Stores Vs. Union of India (UOI) and Others*, , which had expressed a contrary view and had held that on interpretation of Section 43B read in conjunction with the proviso later added, the proviso was in the nature of an Explanation and thus, retrospective in operation with the result that the liability incurred, even if discharged before the due date for filing the return of income, was an allowable deduction in the accounting year itself. Learned counsel has also referred to yet a later decision of the Delhi High Court in *Escorts Ltd., v. Union of India* [1991] 189 ITR 81, in which even after taking into consideration the decision of the Patna High Court in *Jamshedpur Motor Accessories Stores Vs. Union of India (UOI) and Others*, , the Delhi High Court has reiterated its view and their Lordships have held that merely because the provision is harsh, an extended meaning cannot be given to Section 43B by making the proviso retrospective when the intention of the Legislature is evident from the plain reading of the section. Learned counsel for the parties have further referred to the decision of the Gujarat High Court in *Commissioner of Income Tax Vs. Chandulal Venichand*, , in which the decisions of the Delhi High Court in *Sanghi Motors* [1991] 187 ITR 703 and *Escorts Ltd.* [1991] 189 ITR 81 , have not been followed and also the decision of the Orissa High Court in *Commissioner of Income Tax Vs. Pyarilal Kasam Manji and Co.*, , and of the Rajasthan High Court in *Commissioner of Income Tax Vs. Achaldas*

Dhanraj and Sanklecha Brothers, : which have followed the decision of the Patna High Court in Jamshedpur Motor Accessories Stores Vs. Union of India (UOI) and Others, . While counsel for the Revenue has urged that the decisions of the Delhi High Court in Sanghi Motors [1991] 187 ITR 703 and Escorts Ltd. [1991] 189 ITR 81, correctly interpret the provision as it stood at the relevant time and should be followed notwithstanding that against the later decision of the Delhi High Court following these two decisions, the Supreme Court has already granted special leave to appeal, learned counsel for the assessee stresses on the decision of the Patna High Court in Jamshedpur Motor Accessories Stores Vs. Union of India (UOI) and Others, , on the ground that cleavage of opinion is in favour of the said decision. Learned counsel for the assessee has further urged that it was only with a view to mitigate the hardship occasioned by Section 43B of the Act, that the proviso was added as, otherwise, even the liability incurred on the last date of the accounting year which it was impossible to discharge within the accounting year, came outside the purview of deduction in the accounting year in question. The Explanation later added as Explanation 2 with effect from the date Section 43B had been inserted further confirms the intention of the Legislature that the provision was meant to apply retrospectively and cover proceedings pertaining to the previous years as well.

7. In Jamshedpur Motor Accessories Stores Vs. Union of India (UOI) and Others, , the hon"ble Patna High Court considered whether the proviso to Section 43B inserted by the Finance Act, 1987, with effect from April 1, 1988, will apply to the assessment proceedings pertaining to the past year, i.e., 1984-85, of the assessee in that case. In the said case the statutory dues towards sales tax, provident fund and family pension had not been paid during the accounting year and this amount was added to the net income. It was contended that the liability to deposit the sales tax in respect of the last quarter could not have been discharged during the accounting year, the claim could not be disallowed and such an interpretation of Section 43B was, therefore, harsh and unjust. It was contended that as the sales tax collected on the last date of the accounting year could never be deposited in the accounting year, the provision contained in Section 43B read in conjunction with the proviso was made to apply retrospectively. The High Court of Patna in construing the said section took aid from the statement of objects and reasons of Section 43B made by the Finance Minister in the Budget Speech and also considered the provision made by Explanation 2 later added with retrospective effect and held that in fulfilment of the object of the proviso inserted later by the Finance Act, the same will have to be construed as explanatory in nature, enacted for the purpose of supplying an obvious omission and would, therefore, relate back to the date of the prior Act. As stated above, the said view has been followed by the High Courts of Gujarat, Orissa and Rajasthan, but the view of the High Court of Delhi is to the contrary.

8. As a general rule, laws which fix duties, establish rights and responsibilities are substantive laws in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised are "procedural laws".

Charging provision which impose charge to tax are required to be construed strictly, while machinery sections are generally not so construed. The question of seeking external aid for construction of a particular provision would arise only if the main provision suffers from an ambiguity and makes itself susceptible to interpretation more than one or an obscurity which cannot be removed without an outside aid such as the statement of object for which the provision was enacted. In this respect, we do agree with the view expressed by the Delhi High Court in *Sanghi Motors v. Union of India* [1991] 187 ITR 703 and *Escorts Ltd. v. Union of India* [1991] 189 ITR 81. It is clear that the provision of Section 43B did not admit of any ambiguity to require aid from any external source for ascertaining its purpose. The said Section 43B was clearly prohibitory in nature and couched in mandatory terms. The said provision starts with a non obstante Clause thus giving it overriding effect. On a plain reading of the language, it is clear that deduction was not to be allowed in the previous year, unless the amount had actually been paid in that year itself. Harshness of the provision is no ground for diluting its rigour as the taxing statutes are bound to be harsh one way or the other. Since the intention was obvious from the plain reading of Section 43B and deduction of the amount of liability prescribed in the said section was to be allowed only if the actual payment had been made during the previous year itself, we find that the provision as it stood did not permit the extended meaning to cover cases where payment was made before the due date for filing a return of income but after the expiry of the accounting year merely because subsequently a proviso was added by the Finance Act, 1987, with effect from April 1, 1988. The fact that the proviso was to take effect from April 1, 1988, and not from any date anterior thereto also manifests the intention of the Legislature that it was meant to be prospective in its application.

9. The Supreme Court in *S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others*, , considered the question as to what is the scope of a proviso and what is the effect of an Explanation either to a proviso or to any other statutory provision. Their Lordships held that the well established rule of interpretation of a proviso is that a proviso may have three separate functions. Formally, a proviso is meant to be an exception to something within the main enactment, or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. Their Lordships further considered various authors on the statute law in the following paragraphs of the judgment (at page 589) :

"27. Craies in his book *Statute Law* (7th edn.), while explaining the purpose and import of a proviso, states at page 218 thus :

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it. ... The natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso."

28. Odger in *Construction of Deeds and Statutes* (5th edn.), while referring to

the scope of a proviso, mentioned the following ingredients :

P. 317 "provisos - These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it."

P. 318 "Though framed as a proviso, such a clause may exceptionally have the effect of a substantive enactment.",

29. Sarathi in Interpretation of Statutes at pages 294-295 has collected the following principles in regard to a proviso :

"(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the section as the proviso speaks the later intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation ; but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier, one.

(j) A proviso may sometimes contain a substantive provision.""

10. The author Justice G.P. Singh (former Chief Justice of the Madhya Pradesh High Court), in his book on Principles of Statutory Interpretation, 5th edn., 1992, at page 132, in describing the nature of a proviso, says that the proper function of a proviso is to except and to deal with the case which would otherwise fall within the general language of the main enactment. Further, he says that a proviso is added to an enactment to clarify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule.

11. The fact that the proviso has been applied prospectively by an express

provision in this behalf also centra-indicates that the Legislature meant to give the advantage of the proviso retrospectively. The proviso was to be an exception to the general rule that no such deduction is allowable unless the amount stands actually paid in the previous year. It would further be seen that Explanation 2 has been made retrospective in its application to describe "any sum payable" to mean a sum for which liability was incurred in the previous year, even though the same may not have been payable in that year under the relevant law. The Explanation does not make the proviso inserted by the Finance Act, 1987, retrospective merely because it clarifies the reference date when the liability is incurred irrespective of time available for discharge thereof beyond the last date of the previous year. The Explanation added to the statutory provision is not a substantive provision, but merely made to explain or clarify such ambiguities which may have crept in the statutory provision. The expression "any sum payable" appears in Section 43B and the same has been explained by Explanation 2 and thus Explanation 2 does not affect the prospective applicability of the first proviso, else the Legislature would have said so.

12. In the ultimate analysis, we find ourselves in complete agreement with the view taken by the Delhi High Court in *Sanghi Motors v. Union of India* [1991] 187 ITR 703 and *Escorts Ltd. v. Union of India* [1991] 189 ITR 81, and with great respect differ from the view expressed by the Patna High Court in *Jamshedpur Motor Accessories Stores Vs. Union of India (UOI) and Others*, and by the High Courts of Gujarat, Orissa and Rajasthan. In this view of the matter, we find that, on the facts and circumstances of the case, the Tribunal did not correctly construe Section 43B of the Income Tax Act, 1961, and the deduction claimed had been rightly disallowed by the Income Tax Officer on the ground that the amount of sales tax fallen due in the accounting year had not been actually paid in the said year,

13. The reference is, thus, answered by us in favour of the Revenue and against the assessee.