

(1980) 02 GUJ CK 0003

In the Gujarat High Court

Case No : Income-tax Reference No. 185 of 1978

Commissioner of Income Tax, Gujarat-IV

APPELLANT

Vs

Mascalchi Mario

RESPONDENT

Date of Decision : 25-02-1980

Acts Referred:

Income Tax Act, 1961 — Section 10(14), 10(6), 16, 17(2), 254

Citation : (1981) 127 ITR 49

Hon'ble Judges : S.B. Majmudar, J;B.J. Diwan, J

Bench : Division Bench

Judgement

S.B. Majmudar, J.—At the instance of the Commissioner of Income Tax, Ahmedabad, the Income Tax Appellate Tribunal at Ahmedabad has referred under s. 256(1) of the I.T. Act, 1961, for our decision a question of law arising out of its order dated February 16, 1977. The question referred by the Tribunal at the instance of the revenue is as under :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the salary amount of Rs. 49,521 could not be said to have accrued or arisen in India ?"

So far as this question is concerned, it is fully covered by our decision rendered in ITR No. 270 of 1977, decided today. Divan C.J., speaking for this Bench, has answered an identical question of law arising from similar facts against the revenue and in favour of the assessee. In the light of the aforesaid decision, the aforesaid question is answered in the affirmative, i.e., in favour of the assessee and against the revenue.

2. In the present case, two additional questions Nos. 2 and 3 are also referred to this court by the Tribunal at the instance of the assessee. To these questions a serious objection has been raised on behalf of revenue to the effect that the assessee was a non-applicant before the Tribunal and the Tribunal's order was partly in favour of the assessee and partly against him. So far as the order partly

against the assessee is concerned the assessee ought to have approached the Tribunal for a reference under s. 256(1) of the I.T. Act, 1961. But he did not ask for such a reference. In the submission of the revenue, in the reference application at the instance of the revenue, the non-applicant assessee could not have demanded a reference on questions Nos. 2 and 3 for a decision of this court and hence the said questions cannot be answered by this court.

3. In order to appreciate this objection on behalf of the revenue, it is necessary to have a brief reference to certain salient facts of this case. The relevant year of assessment is 1972-73. The assessee is an individual and his status is "not ordinarily resident". The assessment in question relates to the income under the head "Salary". The period August 22, 1971, to March 31, 1972, is the previous year. The ITO, Circle III, Ward-A, Baroda, assessed the total income at Rs. 52,360 as against the declared "nil" total income. In this return, the assessee had shown receipt of Rs. 18,213 as "living allowance" but his contention was that the said income was exempt by virtue of the provisions of s. 10(14) of the Act. The assessee has also shown in the return a receipt of Rs. 29,521 being retention remuneration. But his contention was that the said remuneration was not taxable as according to the assessee, the provisions of section 5(1)(c) of the Act were not applicable to the said remuneration. The ITO negated both the contentions of the assessee. The assessee preferred an appeal before the AAC, A-Range, Baroda. That appeal was wholly dismissed and the order passed by the ITO was fully maintained by the AAC. The assessee thereafter preferred a second appeal to the Tribunal at Ahmedabad. The Tribunal partially allowed the appeal in so far as the retention remuneration received during the relevant period by the assessee was concerned. The Tribunal took the view that the said remuneration was not earned by the assessee in India and hence it had not accrued or arisen in India and, therefore, it was not includible in the computation of the assessee's total income. So far as the assessee's contention regarding non-payability of tax on living allowance went the Tribunal took the view that the living allowance paid to the assessee during the relevant year constituted a "perquisite" within the meaning of Section 17(2) of the Act and consequently was includible in his total income. It was further held by the Tribunal on this aspect that exemption u/s 10(14) or section 16(v) was not attracted regarding the said receipt. The Tribunal took the view that the benefit of exemption u/s 10(6)(vii)(a) to the extent of the rate mentioned in that provision was attracted to the said receipt. Thus, it is clear that the Tribunal's order at Annexure "B" to the paper book was partly in favour of the assessee and partly against him.

4. So far as the first contention regarding retention remuneration was concerned, the order of the Tribunal was in favour of the assessee. In so far as the question of payability of Income Tax on living allowance was concerned, the decision of the Tribunal was against the assessee. It is pertinent to note that the revenue being aggrieved by that part of decision of the Tribunal by which the retention remuneration received by the assessee was held to be non-taxable, preferred a reference application u/s 256(1) before the Tribunal but the assessee did not

prefer a separate reference application challenging that part of the order of the Tribunal which was against him. Instead he sought a reference of two more questions of law arising from the adverse part of the Tribunal's order only on the basis of the reference application of the revenue and requested the Tribunal to refer these questions which were decided against the assessee for the decision of this court. The revenue objected to this attempt on the part of the assessee and submitted that the assessee could not seek a reference on the questions which were held against by the Tribunal by merely relying upon the reference application of the revenue and without filing a separated application of his own. The Tribunal overruled this objection. The Tribunal took the view that it was all along referring all the relevant questions arising from its orders for the decision of this court without being inhibited by the fact that the reference applications were filed not by all the concerned parties but only on or more of them. The Tribunal had consistently held that relevant questions could be referred for the decision of the High Court irrespective of the fact that they arose from the reference applications. In such eventualities the time lag between the filing of the concerned replies to the reference applications and service of the copies of the Tribunal's appellate orders on the concerned respondents were never given any importance. This practice was held to have been based on the decision of this court in SMT. DHIRAJBEN R. AMIN Vs. COMMISSIONER OF Income Tax, GUJARAT II, AHMEDABAD., , which, in turn, had approved the ratio of a previous judgment in the case of CIT v. Banthia Bank Ltd., at page 198. The Tribunal did not think it fit to accept the objection of the department which had a tendency to unsettle the well-settled position and hence the department's objection was repelled and at the instance of the assessee two more questions were referred to this court. The said two questions are question Nos. 2 and 3, which read as under :

"(2) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the living allowance payable to the assessee in India is a perquisite taxable as per the provisions of the Income Tax Act, 1961 ?

(3) If the answer to the aforesaid question is in the affirmative, whether the said amount of living allowance is exempt u/s 10(14) or clause (v) of section 16 of the I.T. Act ?"

5. Now, so far as this controversy centring round the reference regarding additional questions Nos. 2 and 3 is concerned, it has been set at rest by a recent decision of the Supreme court in Commissioner of Income Tax, Kerala Vs. V. Damodaran, . The Supreme Court : in the aforesaid decision was concerned with an identical question which has been posed for our consideration in this reference. The Supreme Court has in terms observed on this aspect that in every case, it is only the party applying for a reference who is entitled to specify the question of law which should be referred. Nowhere in the Income Tax Act, 1961, is there a right given to the non-applicant to ask for a reference of questions of

law on the application made by the applicant. Where the order of the Tribunal under s. 254 has decided the appeal partly against one party and partly against the other, the party who is aggrieved and who desires a reference to the High Court must file a reference application. It is not open to him to make a reference application filed by the other party the basis of his claim that a question of law sought by him should be referred. Where, however, the order made by the Tribunal operates entirely in favour of one party, although in the course of making the order the Tribunal may have negated some points of law raised by that party, not being a party aggrieved by the result of the appeal, it is not open to that party to file a reference application. On a reference application being filed by the aggrieved party, it is open to the non-applicant to ask for a reference of these questions of law which arise on its submissions negated in the appeal by the Tribunal. In view of the aforesaid settled legal position, it must be held that the objections raised by the department on additional questions Nos. 2 and 3 have got to be upheld and it must be held that the aforesaid questions Nos. 2 and 3 ought not to have been referred to us, and, to adopt the phraseology of the aforesaid Supreme Court judgment, the Tribunal was not competent to refer these questions at the instance of the non-applicant and the reference on these questions must be held to be void. As narrated by us earlier, the Tribunal's order under s. 254 was partly in favour of the assessee and partly against him. This is not a case when the Tribunal's order is wholly in his favour. Hence, the non-applicant assessee could not have demanded reference of questions Nos. 2 and 3 for our decision without undergoing the procedure of s. 256(1). We cannot entertain such a void reference. Accordingly, we decline to answer questions Nos. 2 and 3 which are referred to us for our decision at the instance of the assessee who was a non-applicant before the Tribunal.

6. Before parting with this question we must point out that the Tribunal had observed while making reference of questions Nos. 2 and 3 to this court that it had followed a long settled practice of the Ahmedabad Benches of the Tribunal based on the decision of this High Court in *SMT. DHIRAJBEN R. AMIN Vs. COMMISSIONER OF Income Tax, GUJARAT II, AHMEDABAD.*, and it used to refer questions of law even at the instance of the parties who were non-applicants and the litigant-assessee as well as the department have all consistently followed that practice over a number of years. Consequently, in such cases, we hope that a way may be found out by the department to see that no injustice results to a party who has been guided by the consistent practice spread over a large number of years especially when such a practice was followed not only the party concerned but by the Tribunal itself. The learned Advocate-General submitted to us that for no fault of the assessee, the questions referred to this court years back in 1978 will remain unanswered. We appreciate the contention of learned Advocate-General and we sympathise with his predicament but as the latest decision of the Supreme Court had finally settled this question, we have no alternative but to decline to answer the referred questions Nos. 2 and 3. The learned Advocate-General submitted that the assessee may be permitted to have

recourse to any other remedy permissible at law. We cannot make any more observations about it save and except stating that it is open to the assessee to have recourse to any other remedy that may be permissible at law and we are sure that in such an eventuality the concerned authority will deal with the case of the assessee with due sympathy and in accordance with law in the interests of justice with a view to advance the cause of justice and not to place reliance on any undue technicalities. This reference is disposed of accordingly with no order as to costs.