
(2013) 01 AHC CK 0174
In the Allahabad High Court
Case No : IT Reference No. 128 of 1989

Commissioner of Income Tax, Kanpur	APPELLANT
Vs	
Elgin Mill Co. Ltd	RESPONDENT

Date of Decision : 03-01-2013

Acts Referred:

Income Tax Act, 1961 — Section 256(1), 41, 41(1)

Citation : (2013) 352 ITR 153 : (2013) 213 TAXMAN 311

Hon'ble Judges : R.K. Agrawal, J;Prakash Kirshna, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Income Tax Appellate Tribunal, Allahabad Bench, Allahabad has referred the following question of law u/s 256(1) of the income tax Act, 1961, hereinafter referred to as "the Act", for opinion to this Court.

Whether on the facts and in the circumstances of the case the Tribunal was correct in law in holding that the sum of Rs. 32,39,929/- being provision made for retirement gratuity written back in the year under consideration relating to assessment year 1972-73 where it already stood allowed, cannot be taxed by invoking the provisions of section 41(1) of the I.T. Act, 1961?

Briefly stated the facts giving rise to the present Reference are as follows:

The Reference relates to the Assessment Year 1976-77. The respondent-assessee had filed its return declaring loss of Rs. 73,90,600/- The assessment was, however, completed on the net loss of Rs. 28,54,873/-. While computing the loss the Assessing Officer had made an addition of Rs. 32,39,929/- u/s 41(1) of the Act. It was noticed that the assessee had written back all the gratuity provided in its accounts for the earlier years to the credit of profit and loss appropriation account. Total amount thus credited to profit and loss appropriation account was to the tune of Rs. 81,20,209/--This amount included the amount of Rs. 32,99,929/ - relating to the provision of retirement gratuity made in the

Assessment Year 1972-73. This amount was claimed by the assessee before the income tax Officer during Assessment Year 1972-73. The income tax Officer did not allow the same but on appeal this amount was allowed by the Commissioner of income tax (Appeals). Provisions made for subsequent years were not allowed by the Assessing Officer. Thus, the Assessing Officer had noted that out of the provision written back by the assessee in this year only an amount of Rs. 32,39,929/- relating to the Assessment Year 1972-73 stands allowed so far. Therefore, it was held by him that this amount alone satisfies the condition laid down u/s 41(1) of the Act. Feeling aggrieved the assessee preferred an appeal before the Commissioner of income tax (Appeals), who vide order dated 22nd December, 1983 had held that Section 41(1) of the Act empowers the Assessing Authority to bring to tax the amount only when deduction is allowed in the past, with respect to some liability which ceases to exist or with respect to which there has been some remission as a result of which the assessee has derived some benefit. In the circumstances of case he held that there was no cessation or remission of the liability and by writing back the amount, no benefit has been derived by the assessee. He, therefore, held that the addition by invoking the provisions of Section 41(1) of the Act cannot be sustained and, therefore, the addition of Rs. 32,99,929/- was deleted. The Revenue feeling aggrieved preferred an appeal before the Tribunal, which confirmed the order of the Commissioner of income tax (Appeals).

2. We have heard the learned counsel for the parties.

3. Learned counsel for the Revenue submitted that as the assessee has written back the amount of gratuity of Rs. 32,39,929/- during the previous year relevant to the assessment year in question, which amount was allowed in the Assessment Year 1972-73, therefore, the Assessing Officer has rightly invoked the provisions of Section 41(1) of the Act by adding back the said amount. Reliance has been placed on a decision of the Apex Court in the case of Polyflex (India) Pvt. Ltd. Vs. Commissioner of Income Tax, Karnataka, Taxman 373.

4. Learned counsel for the assessee, however, submitted that the provisions of Section 41(1) of the Act would not apply in the present case as it could only be invoked when there has been any remission or cessation of the trading liability. According to him, the amount was unilaterally written back in the profit and loss account and there was neither any remission nor cessation of the trading liability. He relied upon a decision of the Apex Court in the case of Commissioner of Income Tax, Calcutta Vs. Sugauli Sugar Works P. Ltd., Taxman 713.

5. We have given our thoughtful consideration to the various plea raised by the learned counsel for the parties. We find that the provisions of Section 41(1) of the Act would be applicable only where there has been a remission or cessation of trading liability and if such liability has been allowed as an expenditure in any of the assessment years. It is not in dispute that the amount of Rs. 32,39,929/- towards gratuity has been allowed as trading liability during the Assessment Year 1972-73. The question is whether the said amount can be added back u/s 41 (1)

of the Act on the ground that there liability has been by way of remission or cessation as an unilateral act of writing back in the books of account by the assessee. The Apex Court in the case of Sugauli Sugar Works (P.) Ltd. (supra) has held as follows:

3. It will be seen that the following words in the section are important: "the assessee had obtained, whether in cash or in any other manner whatsoever any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by him". Thus, the section contemplates the obtaining by the assessee of an amount either in cash or in any other manner whatsoever or a benefit by way of remission or cessation and it should be of a particular amount obtained by him. Thus, the obtaining by the assessee of a benefit by virtue of mere fact that the assessee has made an entry of transfer in his accounts unilaterally will not enable the Department to say that s. 41 would apply and the amount should be included in the total income of the assessee. The reasoning of the High Court is correct and we are in agreement with the same.

6. So far as the decision relied by the Revenue in the case of Polyflex India (P.) Ltd. (Supra) is concerned we find that in that case the Apex Court was considering a situation where the assessee had incurred an expenditure of by reasons of payment of excise duty on goods which was allowed in the earlier year and he had obtained refund of the said amount and mere possibility of refund on a future date will not be a relevant consideration in applying the provisions of Section 41(1) of the Act as the moment the assessee gets back the amount, which was claimed and allowed as business expenditure during an earlier year, deeming provision in Section 41(1) of the Act comes into play and it is not necessary that the Revenue should await the verdict of a higher court or Tribunal. In our considered opinion in the present case by an unilateral act of the assessee in writing back the amount of gratuity of Rs. 32,39,929/ which was allowed as expenditure in the Assessment Year 1972-73 would not be treated as remission or cessation of the trading liability so as to attract the provisions of Section 41(1) of the Act and the principles laid down by the Apex Court in the case Sugauli Sugar Works (P.) Ltd. (supra) are squarely applicable. We may mention here that from the Assessment Year 1997-98 even unilateral act of writing off a trading liability attracts Section 41(1) of the Act as Explanation (1) to Section 41(1) has been inserted by the Finance (No. 2) Act, 1996 with effect from 1.4.1997 which provides that the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof shall include the remission or cessation of any liability by a unilateral act by the first mentioned person under clause (a) of Section 41(1) of the Act or by the successor in business under clause (b) of Section 41 (1) of the Act by way of writing off such liability in his accounts. Thus, this Explanation has been made effective from 1.4.1997 i.e. it shall be applicable from the Assessment Year 1997-98 onwards and cannot be pressed into service for the Assessment Year 1972-73. In view of the foregoing discussion, we are of the considered opinion

that the Commissioner of income tax (Appeals) and also the Tribunal had rightly held that the sum of Rs. 32,39,929/- cannot be taxed during the assessment year in question by invoking the provisions of Section 41(1) of the Act. The question referred to us is, therefore, answered in the affirmative i.e. in favour of the assessee and against the Revenue. However there shall be no order as to costs.