(1993) 09 BOM CK 0051

In the Bombay High Court

Case No : Income-tax Reference No. 135 of 1981

Filtrona India Ltd. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 20-09-1993

Acts Referred:
Income Tax Act, 1961 — Section 2(31), 2(32), 263, 30, 31

Citation : (1994) 207 ITR 545

Hon'ble Judges : D.R. Dhanuka, J;B.P. Saraf, J

Bench : Division Bench

Advocate : A.V. Sonde, for the Appellant; G.S. Jetly, for the Respondent

Judgement

Dr. B.P. Saraf, J.—By this reference u/s 256(1) of the Income Tax Act, 1961 ("the Act"), made at the instance of the assessee the Income Tax Appellate Tribunal has referred the following question of law to this court for opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in upholding disallowance of a sum of Rs. 1,28,000 out of Rs. 2,00,000 paid by Filtrona India Ltd. to Killick Nixon Ltd., u/s 40(c) of the Income Tax Act, 1961 ?"

2. The assessee, Messrs. Filtrona India Ltd., is a limited company and belongs to the Killick Nixon Group of companies. This reference pertains to the assessment years 1973-74, 1974-75, and 1975-76. In the relevant previous years, the assessee paid a remuneration of Rs. 2,00,000 per year to Messrs. Killick Nixon Ltd., for working as its secretaries. Messrs. Killick Nixon Ltd. held more than 20% of the equity shares of the assessee-company during those previous years, and, as such, it was a person having substantial interest in the company within the meaning of section 2(32) of the Act. The above amount was claimed as deduction by the assessee in computation of its income for all the three assessment years. The claim was allowed by the Income Tax Officer. However, later the Commissioner of Income Tax, in exercise of his powers of suo motu

revision u/s 263 of the said Act, set aside the order of the Income Tax Officer so far as it related to the allowance of the above claim and directed the Income Tax Officer to restrict the claim on that account to Rs. 72,000 for each year as contemplated by section 40(c) of the Act. Before the Commissioner it cases where the recipient of the remuneration was an individual and not where it is a corporate body. This contention of the assessee did nit find favour with the Commissioners who was of the opinion that the expression "a person who has a substantial interest in the company" in section 40(c) cannot be interpreted in a restrictive manner to confine it to individuals only, more so in the light of the definition of the expression of "person" given in section 2(31) of the Act. The assessee appealed to the Tribunal. Before the Tribunal also the contention of the assessee was the same as before the Commissioner that section 40(c) of the Act applies only where the recipient is an individual "capable of being an employee". It was contended by the assessee before the Tribunal that as a company can neither have a relative nor is it capable of being an employee, it cannot fall within the purview of section 40(c) of the Act and, as such, any payment made to the company will not attract the ceiling put by the section even through it may be a person substantially interested in the assessee. It was of the opinion that section 40(c) was wide enough to take within its sweep all types of persons including company and that the person referred to in section 40(c) was not restricted to individuals. The Tribunal, therefore, dismissed the appeal of the assessee and confirmed the order of the Commissioner. Aggrieved by the order of the Tribunal, the assessee sought for reference to this court u/s 256(1) of the Act and the Tribunal, on being satisfied that a question of law did arise, has referred the above question to this court.

3. We have heard learned counsel for the assessee. Section 40(c) of the Act, so far as relevant, as it stood at the material time, reads as follows :

"40. Amounts not deductible. - Notwithstanding anything to the contrary in sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head ''Profits and gains of business or profession'', - ...

(c) in the case of any company

(i) any expenditure which results directly or indirectly in the provision of any remuneration or benefit or amenity to a director or to a person who has a substantial interest in the company or to a relative of the director or of such person, as the case may be,

(ii) any expenditure or allowance in respect of any assets of the company used by any person referred to in sub-clause (i) either wholly or partly for his own purposes or benefit,

if in the opinion of the Income Tax Officer any such expenditure or allowance as is mentioned in sub-clauses (i) and (ii) is excessive or unreasonable having regard to the legitimate business needs of the company and the benefit derived by or accruing to it therefrom, so, however, that the deduction in respect of the aggregate of such expenditure and allowance in respect of any one person referred to in sub-clause (i) shall, in no case, exceed -

(A) where such expenditure or allowance relates to a period exceeding eleven months comprised in the previous year, the amount of seventy-two thousand rupees;

(B) where such expenditure or allowance relates to a period not exceeding eleven months comprised in the previous year, an amount calculated at the rate of six thousand rupees for each month or part thereof comprised in that period :

Provided that in a case where such person is also an employee of the company for any period comprised in the previous year, expenditure of the nature referred to in clauses (i), (ii), (iii) and (iv) of the second proviso to clause (a) of sub-section (5) of section 40A shall not be taken into account for the purpose of sub-clause (A) or sub-clause (B), as the case may be,

Explanation. - The provisions of this clause shall apply notwithstanding that any amount not to be allowed under this clause is included in the total income of any person referred to in sub-clause (i)."

4. From a reading of section 40(c), it is clear that it applies to an expenditure which results directly or indirectly in the provision of remuneration or benefit or amenity to the following categories of persons :

(a) a director,

(b) a person who has substantial interest in the company;

(c) a relative of the director or of such person as the case may be.

5. The expression "person" is defined in section 2(31) to includes -

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) as association of persons or a body of individuals, whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clause."

6. "Person who has a substantial interest in the company" in relation to a company is defined in section 2(32) of the Act to a mean a person who is the beneficial owner of shares, not being shares entitled to a fixed rate of dividend

whether with or without a right to participate in profits, carrying not less than twenty per cent. of the voting power. On a careful analysis of section 40(c) of the Act, the categories of persons specified therein and the definitions of "person" and "person who has a substantial interest in the company" set out above, it becomes clear that in the absence of clear intention of the Legislature to the contrary, the word "person" in section 40(c) cannot be interpreted to mean an individual, who is only one of the categories of "persons". A company is specifically included within the definition of "person" as given in section 2(31) of the Act. It is also clear that a company can hold shares of another company and it, may be a person who substantial interest in that company if such shareholding exceeds the limit specified therein. It clearly goes to show that to read the expression "person" in section 40(c) to mean only an "individual" will amount to doing violence to the clear language of section 40(c) of the Act. It is a well-settled rule of interpretation that if the language of the statute is clear and explicit, effect must be given to it, for in such a case the words best declare the intention of the law giver. It is only from the language of the statute that the intention of the Legislature must be gathered because the Legislature means no more and not less than what it says. It would not be right to refuse to place on the language of the statute the plain and natural meaning which it must bear on the ground that it produces a consequence which could not have been intended by the Legislature. It is also well settled law that where a word defined is used in that provision, that definition of the word gets substituted. On a reading of section 40(c) of the Act in the light of the above principles with the definition of "person" in section 2(31) of the Act. We find it difficult to accept the contention of learned counsel for the assessee that the application of section 40(c) is restricted to "individuals" and it does not apply to it does not apply to other categories of person specified in section 2(31) of the Act.

7. Much emphasis was laid in the course of the arguments on the expression "a relative of the directors of such person" appearing in section 40(c) to show that the person referred to in the earlier part must be capable of having a relative and as a company is not capable of having a relative, it cannot fall within the expression "person" appearing in section 40(c) of the act. We do not find any force in the above submission because the expression "to a relative of the director or of such person" is also followed by the expression "as the case maybe" which clearly goes to show that this will be applicable only where the person happens to be an "individuals". If the intention of the Legislature was to apply section 40(c) only to individuals, the expression "as the case may be" was not necessary. In any view of the matter, we do not find any force whatsoever in the submission that the person who has substantial interest in the company must only be an individual and none else. In our opinion, any person falling within the category of "person" specified in section 2(31), having substantial interest in the company within the meaning of section 2(32) of the Act, will fall within the expression "any person who has substantial interest in the company". In this connection, we may refer to section 40A of the Act which also deals with

expenses which are not deductible in certain circumstances. This section has some connection and bearing on section 40(c). In this section, at different places, the Legislature has used different expressions such as "any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual". Accepting the contention of learned counsel for the assessee will amount to substituting the word "person" in section 40(c) by the word "individual" which is not permissible. In that view of the matter, we cannot accept the above submission of the assessee.

8. Learned counsel for the assessee referred to section 64 of the Act and decisions based thereon in support of his contention that the courts have restricted the meaning of the word "individual" in the context and setting of the section. We do not dispute the basic proposition that in given circumstances, the meaning of a particular expression may have to be restricted in its scope and ambit but that will depend upon the facts and circumstances of each case. In the instant case, as discussed above, there is no scope for restricting the expression "person who has a substantial interest in the company" to an individual only. On the other hand, there is sufficient reason to hold that the Legislature intended to cover all categories of persons specified in section 2(31) of the Act including individuals, companies, etc.

9. Reliance was also placed on the proviso to section 40(c) of the Act which deals with cases where the person mentioned in clause (c) of section 40 is an employee of the company. We do not think that this proviso in any way supports the contention of the assessee. The proviso is to carve out something from the main provision. It does not restrict the operation of the main provision which is clear and unambiguous. The proviso will apply only to a person who is an employee and included in the main provision of section 40(c) who meet the requirements thereof. In that view of the matter, we are of the clear opinion that "person" referred to in section 40(c) is not confined to "individual" - it means and includes all categories of persons, including a company, specified in section 2(31) of the Act.

10. Learned counsel for the assessee also contended that in the event we decide the question referred to us against the assessee, we should also examine whether the payment of Rs. 2,00,000 was made by the assessee company to Messrs. Killick Nixon Ltd., who is a person substantially interested in the assessee-company in its capacity as such person or in any other capacity. There is no dispute about the fact that such a controversy was never raised by the assessee at any stage right from the Income Tax Officer to the Tribunal. It was never the case of the assessee that in view of the capacity in which the payment was made, section 40(c) was made is primarily and basically a question of fact to be decided by the fact finding authorities on the facts and circumstances of each case. In the instant case, there is no such finding. We, therefore, do not propose to go into such a controversy raised for the first time in this reference before us, because, according to us, it is not a question of law at all. It is a pure question of

fact. Learned counsel for the assessee submitted that the powers of this court are not restricted to the particular aspect of the question referred to it but it can go into all aspects had not been urged or decided by the authorities. We do not find any difficulty in accepting the above proposition of law because it is well settled that the powers of this court are not confined to a particular aspect of the question referred to it. It can go into all aspects of the controversy or all facets of the question even if such facets had not been argued before any of the authorities below. But that applies only to different aspects of a question of law or assumptions of law. Factual controversies stand on a different footing. If the Tribunal proceeds upon as assumption of law which is erroneous in law and refers a question to the High Court, the High Court is not bound by the terms of the question referred. It can correct the erroneous assumption of law underlying the question. Even the fact that the Revenue or the assessee was also a party to such erroneous assumption before the Tribunal cannot stand in the way of such party reselling from an erroneous assumption of law. In such a case, the High Court cannot be called upon to act on the erroneous assumption of law because doing so would neither be in the interest of law or of justice. (See Salem Co-operative Central Bank Limited Vs. Commissioner of Income Tax,).

11. In the light of the above discussion, we answer the question referred to us in the affirmative, i.e., in favour of the Revenue and against the assessee.

12. Under the facts and in the circumstances of the case, we make no order as to costs.

