

(1942) 03 PAT CK 0016

In the Patna High Court

In Re: S.R. Mitra

Date of Decision : 06-03-1942

Acts Referred:

Income Tax Act, 1961 — Section 66(2), 7(1)

Citation : AIR 1943 Patna 144

Hon'ble Judges : Harries, C.J; Manohar Lall, J

Bench : Full Bench

Judgement

Manohar Lall, J.

1 This is a reference by the Commissioner of Income Tax u/s 66(2), Income Tax Act, asking for the opinion of this Court upon the question:

Whether in the circumstances of the case the payment received by the assessee from the unrecognised provident fund maintained by his employer was rightly assessed as income chargeable u/s 7(1) of the Act.

2. The facts found are that the assessee, who is drawing a pay of over Rs. 75 per mensem, is an employee in the Tata Iron and Steel Co. Ltd., of Jamshedpur. Under the rules of the Provident Fund maintained by that company the assessee began to subscribe to that fund by contributing 1/24th or a larger sum out of his salary received every year. The employer under the rules of the fund also contributed a similar sum. These sums, namely the employer's and the employee's contributions together with 6 per cent, interest thereon were placed to the credit of the assessee, who in the previous year in question withdrew a sum of Rs. 6214 which consisted of the contributions made by the employer towards the provident fund rupees 3445 and the accumulated interest thereon Rs. 1319. The contention of the assessee was that this sum of Rs. 4764 was not assessable to Income Tax because it was received by him not as his salary but as a capital voluntary payment within the meaning of the decision of their Lordships of the Judicial Committee in Fletcher's case AIR 1937 261 (Privy Council) . The Income Tax Officer and the Assistant Commissioner of Income Tax rejected this contention and made an assessment by bringing into aid Explan. 2 to Section 7, Income Tax Act. But the Commissioner of Income Tax did not accept this view

because he found that the assessee had received the amount while he was still in service and, therefore, this amount was received

not in connexion with the termination of service but while the assessee is still in service and, therefore, technically the assessee was out of the pale of Explanation 2 to Section 7(1), Income Tax Act.

3. He, however, was of the opinion that the assessee was liable to Income Tax otherwise under Sub-clause (1) of Section 7 because the amount which he received was in the nature of a deferred salary if the rules of the provident fund of his employer are kept in view. This is the question which arises for consideration in this case. It should be observed here that the statement of the case in the reference was silent as to whether the assessee was drawing a salary below Rs. 75 or over. As the assessee was not represented before us, we asked the learned standing counsel to obtain for us this information from the Commissioner. He has supplied us an extract from the register of salaries which shows that the assessee was drawing a salary of over Rs. 200 per mensem, for the period in, question.

4. As was observed by their Lordships of the Judicial Committee in AIR 1937 261 (Privy Council) the answer to the question must depend mainly upon the constitution of the provident fund in question.

5. I, therefore, proceed to consider the relevant rules of this fund which are to be found in the paper-book. To begin with it is clear that it was not a part of the assessee's original contract of service that he should have the benefit of this Provident Fund. Rule 2 clearly states that it is optional with the uncovenanted employees to subscribe to this Fund. Rule 8 provides that the subscriber is at liberty to nominate a person or persons to whom the whole or any portion of the amount standing to his credit shall be payable in the event of his death while in the service of the company. Rule 11 has great bearing upon the question and may be quoted so far as relevant to this case:

On the voluntary registration, after giving due notice of any subscriber from the service of the Company he shall be paid the aggregate amount subscribed by him to the Fund and full amount standing to his credit as interest on his own contribution. He shall also get a proportion of the Company's contribution and interest thereon as given below according to the length of his service:

For actual satisfactory service of three years...25 per cent. For every further completed year of actual service...8 1/3 per cent. Provided nevertheless that the Board of Directors may, in their absolute discretion, direct payment to any subscriber retiring or resigning, irrespective of the period of his service, of the whole or such portion of the balance to the credit of such subscriber as they may think fit and the same shall be forthwith paid.

6. Rule 12 prescribes the mode in which the amount contributed can lapse or be forfeited. In such a case 33 1/3 per cent, of the amount is to be invested in a

Fund for the provisions of gratuities to be paid to employees who have served the company continuously for 12 years upon retirement and the remaining will be credited to the company to be applied by them at their discretion. Rule 13 states that the subscriber shall at his option be entitled to draw the entire amount standing to his credit after satisfactory service for 12 years and in accordance with these rules. By Rule. 17 when a subscriber is dismissed or is compulsorily retired for gross misconduct or wilful insubordination, of which the General Manager shall be the sole judge, he shall be allowed only the aggregate amount subscribed by him to the Fund with the amount of interest on his own contribution, and the balance, if any, will be forfeited to the use of the Fund, but the General Manager may, in his discretion, still pay him the amount. By Rule 18 the company has the first and paramount charge upon the amount from time to time standing to the credit of the subscriber in respect of all losses, damages costs and expenses which the company may at any time have to pay, sustain or be put to by any act of embezzlement or default by the subscriber.

7. The point that emerges from an examination of the rules set out above is that the sums which are allotted by the company cannot be withdrawn by the assessee at the end of each year as he was entitled to do if his pay was not Rs. 75 and over. Even when the subscriber resigns after serving as many as eleven years he has no right to withdraw beyond a certain proportion. If he resigns within three years he cannot withdraw anything, but he can withdraw 25 per cent, if he resigns after three years have been completed and further $8\frac{1}{3}$ per cent, for every subsequent year of actual service. The assessee, therefore, has no right to withdraw or receive any sum until he has served completely and satisfactorily for a period of 12 years and even then the question whether he has served satisfactorily depends upon the discretion of the General Manager. The Commissioner was wrong in thinking that Rule 13 was a part of the assessee's contract of service. I have already shown that it was not a part of the contract of service that the assessee must compulsorily join the Provident Fund. The consideration of these factors lead me to the conclusion that the allotments made to the Fund in the name of the assessee were not in the nature of salary for current services, but were merely the measure of a sum or sums which the company volunteered to pay to him on the termination of his service upon a certain percentage basis, if the service terminated after three years and more, and upon another percentage when he had served 12 years satisfactorily. It follows, therefore, that the sum in question when paid was not "income" of the assessee.

8. The Commissioner invited a reference to the decision of the Rangoon High Court in Commissioner of Income Tax, Burma v. Bombay Trading Corporation, Ltd. AIR 1933 Bang. 45, but the rules of the Provident Fund in question in that case have not been set out in the report. It may be that the contributions which the company made to the Provident Fund of the employees in that case were such as they were bound to contribute under the contract of service of the assessee (who was also bound to join the Fund) with company and as such the

interest thereupon when it was paid to the assessee would be assessable under the heading of salaries as defined in Section 7, Income Tax Act. Again it appears from the judgment of Page C.J. at page 157 that the interest was taxable only when the employee's service with the company had been terminated in such circumstances that under the scheme the amount standing to the credit of the employee in the Provident Fund became payable to and was received by him. I am unable to apply the decision in the Rangoon ease to the facts of the present case.

9. For these reasons I am of opinion that the answer to the question framed by the Commissioner is in the negative.

Harries, C.J.

I agree.