
(1984) 01 BOM CK 0010

In the Bombay High Court

Case No : I. T. APPEAL NO. 3075 (BOM.) OF 1983

Income Tax OFFICER

APPELLANT

Vs

ELYS CHEMICALS LAB. (P.) LTD.

RESPONDENT

Date of Decision : 30-01-1984

Acts Referred:

Income Tax Act, 1961 — Section 36(1)(ii)

Citation : (1986) 17 ITD 325

Hon'ble Judges : P. J. Goradia, A.M.

Bench : Division Bench

Judgement

Per Shri P. J. Goradia, Accountant Member - In this appeal filed by the revenue, following grounds are taken :

1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in directing the ITO to delete the disallowance of bonus to the tune of Rs. 81,914 ignoring the fact that the said provision was in excess of limits prescribed u/s 36(1) (ii) of the Income Tax Act, 1961 (the Act).
2. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in holding that in respect of disallowance of remuneration paid to a director, provisions of section 40(c) are applicable and not 40A (5) of the Income Tax Act.
3. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in directing the ITO to allow interest u/s 214 to the assessee on the excess amount of advance tax paid as per law, ignoring the fact that no appeal lies against provisions of section 214 of the Act.

The assessee is following mercantile system of accounting and closes the books of account on 30th June. During the accounting period ending 30-6-1978, the assessee made a provision of Rs. 1,42,139 for payment of bonus to the workers at 20 per cent of their salary and wages. The ITO observed that during the previous year, the company had suffered loss and there was no allocable surplus

available from which the bonus at the rate of 20 per cent on salaries and wages could be paid. Under the Bonus Act, since there was no allocable surplus, the liability of the company was only in respect of minimum bonus to the extent of 8.33 per cent of salaries and wages. Any excess bonus over the minimum payable was not admissible as deduction u/s 36(1) (ii) of the Act and, therefore, he disallowed this excess sum of Rs. 81,914. The submission of the assessee that 20 per cent bonus was provided on the basis of an agreement entered into with the workers was rejected.

2. On appeal, on behalf of the assessee, reliance was placed on the decision of the Tribunal in IT Appeal No. 3274 (Bom.) of 1980 decided on 30-4-1982. Agreeing with the said Tribunal's decision, the Commissioner (Appeals) came to the conclusion that the settlement between the workers and the employers was outside the restricted provisions of section 10 of the Bonus Act, and, therefore, section 36(1) (ii) did not apply. The conclusion was also supported by the award of the Industrial Tribunal-cum-Labour Court, New Delhi, in the case of American Express International Banking Corp. where even SLP filed on behalf of the management was rejected by the Supreme Court. He therefore, allowed the appeal of the assessee.

3. In respect of the second ground, the ITO observed that to the remuneration paid to the directors, the provisions of section 40A (5) were attracted and, therefore, disallowed a sum of Rs. 14,400.

4. On appeal, the Commissioner (Appeals) relying upon the decision of the Special Bench of the Tribunal, allowed the appeal of the assessee by holding that provisions of section 40(c) were applicable in the case of employee-directors.

5. In respect of the third ground, the ITO did not grant interest u/s 214 on the full amount of advance tax paid during the financial year ending March 1978. The assessee had paid advance tax of Rs. 3 lakhs and further amount was adjusted (being refund for earlier years) towards advance tax of Rs. 1,28,416 during March 1978.

6. The Commissioner (Appeals) directed the ITO to allow interest u/s 214 of the Act on the basis of the High Court decisions in the case of Commissioner of Income Tax, Bombay City-V Vs. Traub (India) P. Ltd., and in the case of Chandrakant Damodardas Vs. Income Tax Officer Ward, "A" (Company), Rajkot,

7.1 The learned departmental representative opposed the allowability of bonus in excess of that payable under the Bonus Act in view of section 36 (1) (ii). According to him, there was no scope for any doubt. Alternatively, even if as per the settlement it was held that the assessee was liable to make the payment to the extent of 20 per cent of salaries and wages, since the settlement was arrived at after 30-6-1978, there was no liability with the assessee to make the payment in excess of 8.33 per cent under the Bonus Act. In support, reliance was placed on the decision in IT Appeal Nos. 1545 to 1547 (Bom.) of 1983 decided on 14-10-1983 for the assessment years 1977-78 to 1979-80.

7.2 In respect of the remuneration u/s 40(c) or section 40A (5), it was submitted that the department wanted to keep the issue alive as the decision of the Special Bench (supra) was not accepted by the department.

7.3 In respect of the interest u/s 214, it was submitted that the payments of advance tax were made as under :

Date

Amount

Rs.

(i)

10-1-1979

1,50,000

(ii)

16-1-1979

1,00,000

(iii)

17-3-1979

50,000

(iv)

Refund for earlier adjusted during March 1978

1,28,416

Total

4,28,416

It was submitted that payment in response to the notice u/s 210 of the Act would only be considered as advance tax payment. Reliance was also placed on the decisions in the case of Kangundi Industrial Works (P.) Ltd. Vs. Income Tax Officer, A-Ward, and in the case of A. Sethumadhavan Vs. Commissioner of Income Tax and Another, For the sake of clarification, it was also mentioned that no interest u/s 217 of the Act was charged. Support was also drawn from the Special Bench of the Tribunal in the case of ITO v. India Tyre & Rubber Co. (I.) (P.) Ltd. [1983] 3 SOT 52 (Bom). Basically, no appeal lies for interest u/s 214 as was decided in that case. Therefore, the Commissioner (Appeals) was in error in directing the ITO to allow interest u/s 214.

8.1 The learned counsel for the Assessee made the submissions as under :

8.2 In respect of the first ground, he submitted a copy of the agreement entered

into between the assessee and the workers on 26-9-1978 and a copy of decision in IT Appeal No. 3274 (Bom.) of 1980 for the assessment year 1976-77 decided on 30-4-1982. It was the plea of the counsel that there already existed a liability to pay the bonus to the workers and the settlement arrived at in 1978 was only quantification of the amount payable by the assessee. In fact, 20 per cent bonus was also paid in previous two years and in the earlier assessments, the same was allowed.

8.3 In respect of the second ground, he submitted that the issue involved was already covered by the Special Bench decision in *Geoffrey Manners & Co. Ltd. v. ITO* [1983] 3 SOT 40 (Bom.).

8.4 In respect of the interest u/s 214 it was submitted that the assessment was completed u/s 143(3), read with section 144B of the Act. In draft assessment order, the ITO had allowed the interest u/s 214 but it was only in final assessment order the interest was not allowed. Reliance was placed on the decision of the Honble Gujarat High Court in the case of *Chandrakant Damodardas* (supra) where it was held that the payments made towards the advance tax within the financial year should be taken as advance tax payments.

9. We have considered the submissions and have also considered the materials to which our attention was drawn.

10. In respect of the allowability of bonus, we hold that the Commissioner (Appeals) was in error in allowing deduction of Rs. 81,914 on the basis of IT Appeal No. 3274 (Bom) of 1980. From the decision in IT Appeal No. 3274 (Bom.) of 1980, it is seen that the appeal related to the assessment year 1976-77 for which the relevant previous year ended on 31-3-1976. The assessee had entered into an agreement with its workmen on 29-4-1974 according to which the assessee was liable to pay bonus at the rate of 20 per cent of the wages. The plea of the assessee that during the previous year the liability to make the payment of bonus did exist even as per the agreement which was entered into prior to the beginning of the previous year, i.e., on 29-4-1974 as also under the Bonus Act, if applicable, was accepted. It was with these facts that the deduction to the extent of 20 per cent was held to be allowable. However, the facts of the case under appeals are different. It is an admitted fact that agreement with the employees was arrived at only on 26-9-1978, i.e., after the accounting year ended. Though the terms of settlement do include the payment of bonus even for the year under consideration, this aspect has no bearing on the point of allowability of the expenditure. The Commissioner (Appeals) was in error in not distinguishing these features of the case under appeal. There was no question of applicability of decision of *The Kedarnath Jute Mfg. Co. Ltd. Vs. The Commissioner of Income Tax, (Central), Calcutta*, because in this case, the liability was a statutory liability which accrued on the specified statutory dates. In the case of the assessee, what is under consideration is a contractual liability which did not crystallise until the date of agreement, i.e., 26-9-1978. Therefore, the revenue was fully justified in claiming that liability for making the payment to

the extent of 20 per cent did not exist at all before the end of the previous year. If at all liability existed, it was only to the extent of 8.33 per cent as provided under the Payment of Bonus Act. The revenue has also correctly relied upon the decision in IT Appeal Nos. 1545 to 1547 (Bom) of 1983. On going through the said decision, we find that the facts under consideration were similar to the facts under that appeal and it was held that merely because the liability related to the accounting periods under consideration, the assessee was not entitled to deduction thereof. The assessee was maintaining its books of account on mercantile system, as is the case here, the claim would be admissible when the liability actually accrued and crystallised. Both the events were after the end of the accounting year as is the case under appeal. Therefore, we set aside the order of the Commissioner (Appeals) on this point and restore the order the ITO.

11. In respect of the second ground, the issue is covered by the Special Bench decision of the Tribunal in the case of Geoffrey Manners & Co. Ltd (supra) and, therefore, the issue is decided in favour of the assessee. We, therefore, uphold the order of the Commissioner (Appeals) on this point.

12.1 In respect of the interest u/s 214 decision of the Commissioner (Appeals) that the assessee is entitled to interest u/s 214 is correct. In the case of Traub (India) (P.) Ltd. (supra) it was held that advance tax payments made during the financial year, though after the instalments became due, were required to be considered as advance tax payments. It was, therefore, held that while calculating the penalty u/s 273(c) of the Act in respect of payment of advance tax coming to less than 75 per cent of the assessed tax, all the advance tax payments paid before the end of financial year were required to be treated as advance tax payments and credit give, therefore, for the purpose of calculating penalty. Even the Honble Gujarat High Court in the case of Chandrakant Damodardas (supra) had taken a similar view while deciding grant of interest u/s 214.

12.2 This aspect can also be looked from another angle. It is an admitted fact that payments were made on advance tax challans and they were taken as advance tax in the assessment order as also in the tax calculation forms. Having accepted such payments as advance tax payments on the record of the revenue how would it be open to the ITO to change the stand while granting the interest u/s 214 on excess advance tax payments ? Once the assessee made the payments on the advance tax payments, it was his duty to return the payments or at least write to the assessee that payments are accepted though not as advance tax payments. Because sections 59 to 61 of the Indian Contract Act, 1872, lays down that when the payment is made with certain conditions and directions, the payments would be appropriated as directed, if the payment is accepted by the payee. Certainly, it cannot be the case of the revenue that the Indian Contract Act does not apply to it. The learned departmental representative, while giving the details in respect of the payments as brought to our notice that Rs. 1,28,416 pertained to refund of tax for earlier year. Looking

to the assessment order, the ITO has stated as under :

"Give credit for advance tax paid Rs. 3 lakhs and advance tax Rs. 1,28,416 adjusted during March 1978."

Therefore, it is clear that refund of Rs. 1,28,416 was adjusted as advance tax in the records of the revenue by an order of the ITO. Therefore, the refund of the earlier year acquired the same characteristic of the advance tax. We also do not find anything wrong in this business otherwise for delayed refund the revenue is required to pay interest to the assessee. Therefore, if the refund is adjusted as advance tax payment and treated as such, there should not be anything objectionable.

12.3 We shall now touch upon the cases relied upon by the revenue in respect of non-granting of interest u/s 214. In the case of A. Sethu Madhavan (supra), it was held that the liability of the Central Government to pay interest u/s 214 arose only when the instalments of advance tax were paid as required by the Act on the dates on which they were payable as per section 211 of the Act. While deciding the case their Lordships had followed the decision of the Andhra Pradesh High Court in the case of Kangundi Industrial Works (P.) Ltd. (supra) and had distinguished the case of the Bombay High Court in the case of Traub India (P.) Ltd. (supra) while distinguishing the Bombay High Court decision, their Lordships made the following observations :

"The decision of the Bombay High Court in Commissioner of Income Tax, Bombay City-V Vs. Traub (India) P. Ltd., relied on by the petitioners counsel, is of no guidance on this point as that case turned on the basis of an admission on the part of the department." (p. 590)

While reading the decision of the Bombay High Court (supra), it is seen that admission on the part of the departmental referred to by the Kerala High Court was in connection with the finding of the Tribunal that the belated payment of advance tax had been accepted by the department as payment of advance tax in instalments. Therefore, the facts of the case under appeal clearly fall in the ratio of the decision of the Bombay High Court and the Gujarat High Court and the decisions relied upon by the revenue are not applicable. Even in the case of the Andhra Pradesh High Court (supra), interest was not granted u/s 214 on the basis that belated instalments of advance tax payment did not amount to refund of any amount paid as tax which is not the case here because the amounts are already adjusted and treated as tax.

12.4 However, coming to legality regarding maintaining appeal against non-grant of interest, the grievance of the revenue is justified. It is not clear from the order of the Commissioner (Appeals) that whether the ITO had objected to this ground of appeal by stating that no appeal lies against non-grant of interest. The order of the Commissioner (Appeals) is also silent on the point as to how he has decided this ground though no specific right is given for appeal u/s 246 of the Act (see the Special Bench decision in the case of Indian Tyre & Rubber Co. (I) (P.)

Ltd. specific mention regarding allowability of interest u/s 214, he presumed that the ITO had no objection in deciding appeal on this ground. Therefore, on legality to this aspect of appeal for non-grant of interest the matter is sent back to the Commissioner (Appeals) to consider the same and pass the appropriate order in accordance with law. Hence, the decision of Commissioner (Appeals) regarding grant of interest u/s 214 is set aside until the order is passed on legality of maintaining appeal as directed.

13. The appeal is allowed in part.