
(1994) 12 BOM CK 0043

In the Bombay High Court

Case No : Income-tax Reference No. 241 of 1984

J.H. Doshi

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-12-1994

Acts Referred:

Income Tax Act, 1961 — Section 17, 17(1), 17(2)

Citation : (1995) 123 CTR 356 : (1995) 212 ITR 211 : (1995) 79 TAXMAN 392

Hon'ble Judges : S.M. Jhunjhunwala, J;B.P. Saraf, J

Bench : Division Bench

Advocate : Dilip Dwarkadas, for the Appellant; G.S. Jetley, for the Respondent

Judgement

S.M. Jhunjhunwala, J.—By this reference made u/s 256(1) of the Income Tax Act, 1961, the following question has been referred to this court for opinion at the instance of the assessee :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the sum of Rs. 45,000 was includible in the computation of the assessee's income for the assessment year 1974-75 ?"

2. This reference relates to the assessment year 1974-75 having the corresponding previous year ended on March 31, 1974.

3. The assessee, an individual, was the managing director of a company known as "Amar Dye Chem Limited" (for short, "the company"). Under an agreement dated May 11, 1970, between the assessee and the company, the assessee was appointed as the managing director of the company for a period of five years commencing from January 1, 1970, on a salary of Rs. 72,000 per annum plus commission at the rate of one per cent. of the net profits subject to a ceiling of 50 per cent. of the approved salary. The terms of the said agreement were modified by mutual consent by a subsequent agreement termed as "supplemental deed" which was executed on April 26, 1971, whereby the salary of the assessee was increased to Rs. 90,000 and the limit of the maximum

commission was raised to Rs. 45 000. During the previous year relevant to the assessment under consideration, the company passed two resolutions at its extraordinary general meeting held on September 13, 1973. By one of these resolutions, it was resolved that the assessee would not be entitled to any commission on net profits in respect of the Financial year 1973 and the subsequent financial years. By the second resolution, it was resolved that in lieu of the commission, the company would purchase for the financial year 1973 and subsequent financial years, deferred annuity policies from the Life Insurance Corporation of India, on the life of the assessee, by making payment to the extent of Rs. 45,000 by way of single premium, towards deferred annuities to be payable to the assessee or his legal representatives after his death. The agreement recording modification of the supplemental deed was, however, executed on April 22, 1974, i.e., after a few days of the end of the relevant previous year.

4. The assessee, in his return of income filed on June 20, 1974, claimed that the sum of Rs. 45,000 paid by the company for purchase of the deferred annuity policy from the Life Insurance Corporation of India on his life was not includible in the computation of his income. The Income Tax Officer, however, held that the amount so paid was an item of perquisite to the assessee from the company and was includible in the computation of the assessee's income. On appeal by the assessee, the appellate Assistant Commissioner held that the said sum of Rs. 45,000 paid as premium to the Life Insurance Corporation of India could not be added to the income of the assessee as perquisite due to him during the year and ordered deletion thereof. On the Departmental appeal, the Income Tax Appellate Tribunal held that the said sum of Rs. 45,000 paid to the Life Insurance Corporation of India as premium for purchase of the deferred annuity policy was includible in the computation of the assessee's income as a part of salary and, as such, reversed the decision of the Appellate Assistant Commissioner and restored the order of the Income Tax Officer on this point. It is, in these circumstances, the present reference has been made at the instance of the assessee.

5. In accordance with the approval granted by the Central Government by its letter dated March 16, 1970 the company appointed the assessee as managing director of the company at the remuneration and upon the terms and conditions mentioned in the said agreement executed on May 11, 1970, for a period of five years commencing from January 1, 1970. Under the said agreement, the assessee was to be paid as remuneration for his services as managing director, salary at Rs. 72,000 per annum, i.e., Rs. 6,000 per month, and in addition, a commission at the rate of one per cent. of the net profits of the company for each financial year computed in the manner laid down in sections 349, 350 and 351 of the Companies Act, 1956, subject to a maximum ceiling of 50 per cent. of the approved salary, i.e., an absolute ceiling of Rs. 36,000 per annum. In view of modifications by the Central Government to its approval earlier granted, it became necessary to modify the said agreement dated May 11, 1970, and,

accordingly, an agreement supplemental thereto and termed as "supplemental deed" was executed on April 26, 1971, by and between the assessee and the company by which the company agreed to pay to the assessee as remuneration for his services as managing director salary of Rs. 90,000 per annum, i.e. Rs. 7,500 per month and in addition a commission at the rate of one per cent. of the net profits of the company for each financial year computed in the manner laid down in sections 349, 350 and 351 of the Companies Act, 1956, subject to a ceiling of Rs. 45,000 or one-half of the salary whichever is less with effect from January 1, 1970. It was, thereafter, agreed that the assessee as managing director would not be entitled to any commission on the net profits in respect of the financial year 1973 and subsequent financial years and the company agreed to purchase deferred annuity policies from the Life Insurance Corporation of India on the life of the assessee for the financial year commencing from January 1, 1973, and subsequent financial years. The company, at its extraordinary general meeting held on September 13, 1973, passed the following resolutions :

"Resolved that the company do purchase deferred annuity policies from the Life Insurance Corporation of India on the life of Shri J. H. Doshi for the financial year commencing from January 1, 1973, and for subsequent financial years by making payment of one per cent. of the net annual profits of the company or Rs. 45,000 whichever is less by way of single premium towards the deferred annuity policies and no interest other than contingent interest is created in favour of Shri J. H. Doshi, the managing Director of the company, until the date of the first payment of annuity, i.e., date of retirement or death."

"Further resolved that subject to the Central Government approval, if necessary, the company do effect a variation in the terms of appointment of Shri J. H. Doshi, managing director of the company, as presently contained in his contract with the company dated 11th May, 1970, as modified by supplemental agreement dated 26th April, 1971, in terms of the draft of the agreement as placed before the meeting and initialled by the secretary for the purpose of identification, by providing that the company is authorised to purchase deferred annuity policies from the Life Insurance Corporation of India on the life of Shri J. H. Doshi as aforesaid."

6. The board of directors of the company was empowered to make such alterations and amendments in the said principal agreement as modified by the said supplemental deed to the effect as resolved in the said resolutions and to accept modifications as might be directed by the Central Government. By its letter dated April 11, 1974, the Central Government approved deletion of the commission payable by the company to the assessee and purchase of deferred annuity policies by the company for the assessee with effect from January 1, 1973. Accordingly, on April 22, 1974, a second supplemental agreement to the said principal agreement dated May 11, 1970, was executed by and between the company and the assessee and with effect from January 1, 1973, the company ceased to be liable to pay to the assessee commission at the rate of one per

cent. of the net profits of the company and became obliged to purchase deferred annuity policies ,from the Life Insurance Corporation of India on the life of the assessee for the financial year commencing from the financial year January 1, 1973, and subsequent financial years by making payment to the extent of Rs. 45,000 by way of single premium towards the deferred annuity policy.

7. Since u/s 17(1) of the Income Tax Act, 1961, "salary" includes any fees, commission, perquisites, or profits in lieu of or in addition to any salary or wages and u/s 17(2) of the Act, "perquisite" includes the value of any benefit or amenity granted or provided free of cost or at concessional rate by a company to an employee who is a director thereof, the Income Tax Officer held that the company had incurred expenditure of the said sum of Rs. 45,000 in providing a deferred annuity payable to the assessee who was its managing director under the terms of his employment and the "deferred annuity" being a "benefit" to the assessee provided free of cost by the company, fell within the ambit and, scope of clauses (iii) and (v) of sub-section (2) of section 17 of the Act and, as such, required to be added as a perquisite in the income of the assessee. As the Appellate Assistant Commissioner held that the said sum of Rs. 45,000 could not be added to the income of the assessee as perquisite due to him during the year under consideration and ordered deletion of the addition thereof, the Department had filed an appeal before the Tribunal. On the footing that on the last day of the company's relevant previous year, the valid agreement between the assessee and the company was the one dated April 26, 1971, under which the assessee was entitled to commission as aforesaid in addition to the salary of Rs. 90,000 per annum and that the approval of the Central Government to the new arrangement was not received till the end of the relevant previous year which ended on March 31, 1974, the Tribunal held that as on March 31, 1974, the assessee was entitled to salary and commission as per the said supplemental deed dated April 26, 1971, and that the said commission amount of Rs. 45,000 having accrued to the assessee during the relevant previous year ended on March 31, 1974, the same was rightly includible under "salary" u/s 17 of the Act. In our opinion, the Tribunal was not right in taking this view.

8. As aforesaid, during the relevant previous year, it was agreed by and between the assessee and the company that the assessee as managing director would not be entitled to any commission on net profits in respect of the financial year 1973 and subsequent financial years. Since at the extraordinary general meeting of the company, the abovereferred resolutions were passed on September 13, 1973, the assessee was in deemed agreement with the arrangement recorded in the said resolutions in any event from September 13, 1973, with retrospective effect from January 1, 1973. Even the Central Government, as is evident from the letter bearing No. 1/52/CL. VII of 1973, dated April 11, 1974, addressed by the Government of India, Ministry of Law, Justice and Company Affairs, granted its approval to the modification of the said principal agreement dated May 11, 1970, as modified by the supplemental deed dated April 26, 1971, as per the said resolutions dated September 13, 1973, with effect from January 1, 1973.

The appointment of the assessee as managing director of the company on the modified terms as recorded in the said resolutions dated September 13, 1973, was good and became effective on being approved by the Central Government with retrospective effect from January 1, 1973. Moreover, since the commission amount payable to the assessee was to be calculated on the net profits at the end of the relevant previous year which ended on March 31, 1974, it cannot be said that the said sum of Rs. 45,000 by way of commission had accrued to the assessee prior to March 31, 1974, or that the assessee had become entitled to the payment thereof prior to March 31, 1974. Merely because the agreement modifying the said supplemental deed was executed a few days later than March 31, 1974, i.e., on April 22, 1974, it, in the circumstances, cannot be said that the said commission amount of Rs. 45,000 had accrued to the assessee during the relevant previous year ended on March 31, 1974. No "benefit" in respect of payment of premium made by the company for deferred annuity policy had accrued or became due to the assessee during the relevant previous year. The said amount, in the circumstances of the case, could not have been included in the salary of the assessee during the relevant previous year. In this view of the matter, the Tribunal was not justified in holding that the said sum of Rs. 45,000 was includible in computation of the assessee's income for the assessment year 1974-75.

9. We, accordingly, answer the question in the negative, that is, in favour of the assessee and against the Revenue.

10. There shall be no order as to costs.