
(1997) 04 MAD CK 0128
In the Madras High Court
Case No : TC No. 132 of 1986

McDOWELL and CO. LTD.

APPELLANT

Vs

COMMISSIONER OF INCOME TAX

RESPONDENT

Date of Decision : 02-04-1997

Acts Referred:

Citation : (1999) 153 CTR 279

Hon'ble Judges : N.V. Balasubramanian, J;N. V. Balasubrama, J;Abdul Hadi, J

Bench : Full Bench

Advocate : P.P.S. Janarthana Raja and S.V Subramanian, for C.V Rajan, for the Appellant;

Judgement

N. V. BALASUBRAMA J.

At the instance of the assessee, the Tribunal has stated a case and referred the following two questions of law under s. 256(1) of the IT Act, 1961 for our opinion :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the surtax liabilities was not an allowable deduction in the computation of the income?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the commission paid to the directors was part of remuneration for the purpose of computation of disallowance under s. 40(c) of the IT Act? "

2. Insofar as the first question is concerned, Mr. Janarthana Raja, learned counsel appearing for the assessee has fairly stated that the issue whether the surtax liability paid by the assessee is an allowable deduction or not is settled by a decision of the Supreme Court in Smith Kline and French (India) Ltd. and Others Vs. Commissioner of Income Tax, wherein the Supreme Court has held that the surtax paid is not an allowable deduction in the computation of the

business income of an assessee. Following the decision of the Supreme Court, we answer the first question of law referred to us in the affirmative and against the assessee.

3. Insofar as the second question is concerned, the question deals with the interpretation of s. 40(c) of the Act. The assessee paid certain commission to its directors and the ITO held that the commission paid to the directors are to be included for the purpose of computing disallowance under s. 40(c) of the Act. The assessee preferred an appeal before the CIT(A) and the CIT(A) also held that the language used in s. 40(c) of the Act is clear to apply to the commission received by the director and he, therefore, held that the disallowance made by the ITO was in accordance with law. The assessee filed a further appeal before the Tribunal. The Tribunal also held that the Commission paid to the Director would form part of the remuneration and there is nothing in s. 40(c) of the Act to exclude the commission payments to the director for the purpose of determining the disallowance under s. 40(c) of the Act.

4. Mr. Janarthana Raja, learned counsel appearing for the assessee submitted that s. 40(c) of the Act does not apply to directors, who are not full-time directors, and the commission paid to the director would not form part of the remuneration.

5. Mr. S.V. Subramanian, learned senior counsel appearing for the Revenue submitted that the s. 40(c) of the Act would apply to directors as well.

6. We have carefully considered the rival contentions of the parties. Sec. 40(c) of the Act applies to the directors, and under s. 40(c)(i) of the Act if there is any expenditure incurred by the company which has resulted, directly or indirectly, in the provision of any remuneration or any benefit or any amenity to a director or to a person who has substantial interest in the company or to a relative of these persons, then the said expenditure is also subject to ceiling limit prescribed under s. 40(c) of the Act. The question that arises is whether s. 40(c) of the Act would apply to the directors. A mere reading of s. 40(c) of the Act clearly indicates that it applies to a company and it applies to remuneration paid by a company to the directors. Sec. 40(c) of the Act does not make any distinction between a full-time director or a part-time director. Once a person is found to be a director, whether whole-time or part-time, and if the company pays any remuneration to him, then the remuneration paid to such a director is subject to the ceiling limit prescribed under s. 40(c) of the Act. Hence, we are not able to accept the contention of the learned counsel for the assessee that s. 40(c) of the Act is inapplicable to a director who is not a whole-time director. Since the first contention of the learned counsel for the assessee is rejected, the next contention of the learned counsel for the assessee is that the remuneration paid by the company to its director would not form part of remuneration within the meaning of s. 40(c)(i) of the Act has to be examined. The expression "remuneration" in s. 40(c)(i) of the Act has to be construed in a wide manner. It is not used in the restrictive sense. The section applies to any remuneration or

salary, and the remuneration may partake the character of salary, as normally understood or it may include a commission paid to the director for the work done by him. A similar question whether the commission paid to an employee can be regarded as salary came up for consideration before the Supreme Court in *Gestetner Duplicators Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal*, and the Supreme Court held that the commission paid to an employee is also a salary. The Supreme Court held as under :

"Conceptually there is no difference between salary and wages, both being a recompense for work done or services rendered, though ordinarily the former expression is used in connection with services of non-manual type while the latter is used in connection with manual service. The expression "wages" does not imply that the compensation is to be determined solely upon the basis of time spent in service : it may be determined by the work done; it could be estimated in either way. If conceptually salary and wages mean one and the same thing then salary could take the form of " payment by reference to the time factor or by the job done. In fact, in the case of salary, the recompense could be determined wholly on the basis of the time spent on service or wholly by the work done or partly by the time spent in service and partly by the work done. In other words, whatever be the basis in which such recompense is determined it would all be salary."

7. Following the decision of the Supreme Court, we hold that the commission paid to the director on the basis of the work done or on the basis of the time spent by the director for the services rendered by him should be regarded as a remuneration within the meaning of s. 40(c)(i) of the Act. The remuneration may be paid in any manner. It may be paid and measured on the basis of work done or time spent by him. So long as the payment was made, on whatever be the measure for such payment or by whatever name it is called, for the work done by the director for the company, it will be remuneration paid by the company as the company has in effect remunerated the director for the work done by the director. Therefore, we are of the view that the Tribunal was right in holding that the commission paid to the director should also be taken into account for the purpose of determining the ceiling provided upon s. 40(c) of the Act. Hence, we are of the view that the second question of law referred to us has to be answered in the affirmative and against the assessee. Accordingly, we answer the second question of law in the affirmative and against the assessee. There will be no order as to costs.