

(2005) 10 BOM CK 0015
In the Bombay High Court
Case No : IT Ref. No. 415 of 1988

Piem Hotels Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 25-10-2005

Acts Referred:

Hotel Receipts Tax Act, 1980 — Section 21
Income Tax Act, 1961 — Section 21, 256(1), 37

Citation : (2006) 201 CTR 537 : (2006) 283 ITR 204

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : F.B. Andhyarujina, P.C. Tripathi and Pallavi Divekar, for the Appellant;
Ashok Kotangale, for the Respondent

Judgement

V.C. Daga, J.—This is a reference u/s 256(1) of the IT Act, 1961 ("the Act" for short) made by the Income Tax Appellate Tribunal, Bombay Bench "E", Bombay ("Tribunal" for short) referring following two questions for the opinion of this Court; one at the instance of the assessee and, another at the behest of the Revenue, arising from its order dt. 6th Feb., 1986 passed in ITA No. 1721/Bom/1986, for the asst. yr. 1982-83 of which relevant accounting year ended on 31st March, 1982 :

At the instance of the assessee

(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount of hotel receipts tax collected by the petitioner-company constituted trading receipts ?

At the instance of the Revenue

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that for asst. yr. 1982-83 the assessee was entitled to a deduction of Rs. 84,95,504 in respect of the hotel receipts tax ?

The facts :

2. This reference relates to the amount collected under the provisions of the Hotel Receipts Tax Act, 1980 ("HRT" Act) which received the assent of the Hon"ble President of India on 9th Dec., 1980. This Act levied hotel receipts tax (HRT) at the rate of 15 per cent of the chargeable receipts w.e.f. 1st Feb., 1981.

3. The assessee is engaged in the business of running chain of 5 star hotels. The assessee had collected HRT in the sum of Rs. 14,55,241 during the period 1st Feb., 1981 to 31st March, 1982. The present reference relates to the period 1st April, 1981 to 31st March, 1982, which was the relevant accounting year. During this period, the HRT collection was in the sum of Rs. 84,95,503. The assessee did not pay HRT collected and payable under the HRT Act but chose to challenge the constitutional validity of the said legislation before the Hon"ble Supreme Court of India along with various hoteliers as well as the hotel associations by way of writ petition. The Hon"ble Supreme Court stayed operation of the said Act during the pendency of the writ petition subject to the condition that in the event of assessee failing in the petition, they shall be liable to pay HRT irrespective of the fact whether or not they had collected HRT from its customers.

4. The aforesaid order of stay was renewed from time to time and it operated during the pendency of the petition. Ultimately, validity of HRT Act was upheld by the Supreme Court.

5. The assessee during the pendency of the petition, had credited the amount received from its customers on account of HRT to a separate account that was shown under the head of other liabilities and consolidated under the head of sundry creditors in the balance sheet. Thus, the amounts collected were not treated as a part of trading receipts and, accordingly, not routed through the P&L a/c.

6. The AO considered the HRT collected by the assessee as its trading receipt by placing reliance on the decision of the apex Court in the case of Chowringhee Sales Bureau (P) Ltd. Vs. Commissioner of Income Tax , West Bengal, and rejected the assessee's claim for deduction of a corresponding amount on the ground that no legally enforceable liability had arisen since the operation of the HRT Act itself had been stayed by the apex Court.

7. The CIT(A) vide its order dt. 6th Feb., 2003 held that the HRT has been collected along with the sales made by the assessee on the regular day-to-day basis in the course of the assessee's business. The same thus constituted a trading receipt and the accounting treatment given by the assessee is immaterial. The claim for deduction was also rejected since as per the CIT(A); the apex Court had granted stay on the operation of HRT Act and, therefore, there was no liability on the appellant to make payment of the HRT collected from the customers. The amount was, thus, held deductible as a business expense in the year in which the liability arises or the year in which it is discharged, depending upon method of accounting.

8. Being aggrieved by the aforesaid order of the CIT(A), an appeal was carried to the Tribunal. The Tribunal vide its order dt. 6th Feb., 1987, held that the HRT collected by the assessee was not subject to diversion by overriding title; the obligation to pay could not be discharged out of other receipts also. The same is, therefore, in the nature of trading receipts. As regards corresponding deduction, it was held that a liability had definitely arisen during the accounting year; the moment the taxable event, i.e., receipt of room rent took place. The liability was directed to be allowed as deduction.

9. As pointed out hereinabove, the apex Court on 2nd May, 1989, upheld constitutional validity of the HRT Act in the decision rendered in the case of Elel Hotels and Investments Limited and Others Vs. Union of India, , as a result thereof, the assessee discharged its liability during the year ended 31st March, 1990 and March, 1991. The decision of the Supreme Court has resulted in the HRT Act being valid right from the day on which it received assent of the President of India along with various provisions relating, inter alia, to chargeability, deducibility in computing the profit and loss or gains of the business. Thus, the liability of the assessee to collect and pay HRT stood confirmed by the Supreme Court right from the inception of HRT Act as if HRT Act was in full force applicable to the assessee for the year under consideration.

10. Both the parties to the appeal sought reference to get the substantial questions of law referred for the opinion of this Court. The Tribunal after hearing rival parties was pleased to refer to this Court, two substantial questions of law for opinion, extracted in the opening part of the judgment.

Submissions :

11. Shri Andhyarujina, learned senior counsel appearing for the assessee, relying upon provisions of Section 21 of the HRT Act contends that amount of tax so collected ought to have been treated as receipt and the amount ought to have been held deductible from the profits and gains of the business of the hotel assessable for that assessment year. He relies on the judgment of the apex Court in the case of Jonnella Narashimharao and Co. etc. Vs. Commissioner of Income Tax, . In that case, the appellant had collected certain amount by way of sales-tax describing it as "rusum" inasmuch as its liability to sales-tax was disputed by it. The same was questioned in the various proceedings. It maintained its accounts on the mercantile system. The questions for consideration were whether or not the amount collected by the appellant in the name of "rusum" was the income of the assessee, and whether or not the sales-tax paid was allowable as a deduction in the relevant assessment year. High Court held that amounts collected in the name of "rusum" were income but were not deductible in the assessment year. The apex Court reversed and held that the amounts collected in the name of "rusum" constituted business receipts of the assessee.

12. Learned senior counsel for the assessee also relied upon decision of the apex Court in the case of The Kedarnath Jute Mfg. Co. Ltd. Vs. The Commissioner of

Income Tax, (Central), Calcutta, to buttress his submission and to demonstrate correct legal position.

13. Learned senior counsel for the assessee further pressed into service another judgment of the Supreme Court in the case of Commissioner of Income Tax, Orissa Vs. Kalinga Tubes Ltd., . In that case, the assessee-company had manufactured and sold steel tubes. During the previous year relevant to the asst. yr. 1962-63, the assessee was held liable to pay sales-tax under the Central Sales-tax Act. The STO completed the assessment in respect of the asst. yr. 1962-63 on 31st March, 1966 and demanded an additional amount of Rs. 11,02,693. The assessee unsuccessfully carried appeal before first appellate authority and then filed second appeal before the Sales-tax Tribunal. The Tribunal vide its order dt. 28th May, 1970, reduced the additional sales-tax to Rs. 2,22,161.

14. On the basis of the above order of the Tribunal, the respondent-assessee in its IT return claimed deduction of the said amount as business expenditure in the asst. yr. 1971-72. The ITO disallowed the said deduction. This was upheld by the Tribunal. However, the High Court on reference held that the assessee was entitled to the deduction in the asst. yr. 1971-72. On the appeal, the Supreme Court held that liability to pay the Central sales-tax arose or accrued on the basis of mercantile system of accounting followed by the assessee during the previous relevant year to the asst. yr. 1962-63. The liability to pay quantified sales-tax under the orders of the STO accrued to the assessee for the asst. yr. 1962-63. Although the assessee had challenged the same and ultimately got the liability to pay the sales-tax for the asst. yr. 1962-63, reduced in second appeal before the Sales-tax Tribunal on 28th May, 1970 to Rs. 2,22,161 that would not affect the accrual of liability to pay sales-tax on the basis of mercantile system of accounting. It was further held that even if it were held to be that the order of the STO had merged in the order of the Sales-tax Tribunal that would not have created any impact on the question as to when the liability to pay sales-tax had accrued to the assessee on the basis of mercantile system of accounting and in which assessment year the claim for deduction u/s 37 of the Act could not have been made by the assessee. The assessee was thus held not entitled to deduction of Rs. 2,22,161 towards sales-tax liability for the asst. yr. 1971-72.

15. While deciding the above case, the judgment of the apex Court in the case of Kedarnath Jute Mfg. Co. Ltd. (supra) was relied upon to reach to the conclusion that the assessee was following mercantile system of accounting in the case of sales-tax payable by the assessee and the liability to pay sales-tax would arise the moment tax event takes place attracting sales-tax, as such the obligation to pay the sales-tax arises at that stage and that any attempt to dispute liability to pay before any higher authority was irrelevant.

16. Learned senior counsel also relied upon judgment of this Court in the case of Commissioner of Income Tax, Madhya Pradesh Vs. Central Provinces Manganese Ore Co. Ltd., , wherein this Court has held that if a statutory liability arises in a

particular year, then an assessee maintaining books of account on the mercantile basis is entitled to claim deduction in the year in which the liability arises notwithstanding the fact that the liability was disputed and no entries were made in his books of account. The mere fact that such a deduction was not claimed before the ITO was not of much significance. If the liability arises then a claim can be made bona fide at any stage before any higher authority, who is competent to grant relief. While taking this view, the Division Bench has relied upon judgment of the Madras High Court in the case of Pope The King Match Factory Vs. Commissioner of Income Tax, Madras, . A similar view was taken by the Madras High Court which was approved by the apex Court as laying down correct law.

17. The learned senior counsel for the petitioner based on the above precedents submits that notwithstanding the fact that the dispute having been raised as regards the amount to be paid by way of HRT or failure to make entries in the books of account is of no significance. If the statutory liability arises in a particular relevant year; then the assessee maintaining the books of account on mercantile system is entitled to claim deduction in the year in which the liability arises notwithstanding the fact that he has taken steps to dispute his liability, and, ultimately failed or omitted to make entries in the books of account.

18. In the above premises, according to the learned senior counsel, first question has to be answered in the affirmative, i.e., in favour of the Revenue and second question needs to be answered in the negative, i.e., in favour of the assessee and against the Revenue.

Per contra :

19. Learned Counsel appearing for the Revenue submitted that the assessee collected the amount but it had not paid the same to Government as HRT. On appeal by the assessee on a different issue, the CIT(A) directed the ITO to bring to tax the said sum by enhancing the assessment only on further appeal by the assessee. He placed reliance on the judgment of the Madras High Court in the case of Commissioner of Income Tax Vs. Hotel Srilekha (P.) Ltd., .

Rejoinder :

20. In rejoinder, learned senior counsel appearing for the assessee tried to distinguish the view of the Madras High Court in the case of Hotel Srilekha (P) Ltd. (supra) and submitted that the said case came to be decided without reference to the provisions of the HRT Act. According to him, in that case, the assessee had merely collected the amount but did not challenge the validity of the Act in any Court. He further submits that the said Act came into force on 1st April, 1981 whereas period involved in that case of Hotel Srilekha (P) Ltd. (supra) was 1981-82. In the said case, the only issue was whether amount collected was a trading receipt. The principle sought to be applied is based on the judgment of the Supreme Court related only to trading receipt collected and retained. He further submits that Section 21 of the HRT Act was not at all

considered, as such said authority cannot be said to be an authority laying down correct law.

21. While reiterating his earlier submissions, learned senior counsel for the assessee submitted that liability in the case at hand was in the collection itself. He further submits that obligation to pay always existed in the interim order of the apex Court. He alternatively submits that assuming it to be trade receipt, even then by virtue of Section 21 of the Act, the same would be deductible in that year. He tried to press into service Section 21 and tried to emphasis the words "deductible for that assessment year" appearing in the section. He, thus, submits that on the face of Section 21, assessee is entitled to succeed in the reference at hand.

Consideration :

22. Having heard rival parties, we are of the considered view that the facts involved in the present case are identical with that of the facts involved in the case of Jonnalla Narashimharao & Co. (supra), wherein the apex Court has held that since the appellant therein had maintained its accounts on the mercantile basis, the amounts collected as "rusum" were deductible as business expenditure for the asst. yr. 1968-69, though they had not been remitted to the treasury in that year. In the case of Kedarnath Jute Mfg. Co. Ltd. (supra), the apex Court ruled that once it is held that the assessee was following mercantile system of accounting in the case of sales-tax payable by the assessee, the liability to pay sales-tax would accrue the moment the dealer made the sales which were subject to sales-tax. The liability would not arise in case assessee had challenged validity of imposition of tax and obtained stay from the competent Court. However, in the case at hand while granting stay the apex Court had made it clear that the assessee will have to discharge tax liability irrespective of the fact whether or not tax is collected by them from their customers. Therefore, statutory liability to pay was inbuilt in the interim order granted by the apex Court in favour of the petitioner.

23. In the above premises (HRT) tax collected by the assessee will have to be held as treating as trading receipt. This view shall also be in consonance with the text of Section 21 of the HRT Act. The assessee will, thus, be entitled to claim deduction of the amount of HRT to the extent it was paid to discharge their liability under HRT Act.

24. For the reasons recorded hereinabove, we have no hesitation to answer the first question in favour of the Revenue and second question in favour of the assessee as indicated hereinabove.

Reference accordingly stands answered with no order as to costs.