
(2014) 02 P&H CK 0004

In the Punjab And Haryana At Chandigarh

Case No : IT Appeal Nos. 111 and 112 of 1999 (O and M)

Romesh Kumar

APPELLANT

Vs

CIT

RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Income Tax Act, 1961 — Section 141(1) 143(2) 148 2(41) 40A(2)(a)

Citation : (2014) 02 P&H CK 0004

Hon'ble Judges : Rajive Bhalla, J; Bharat Bhushan Parsoon, J

Bench : Division Bench

Advocate : Supriya Garg, Advocate for the Appellant; Rajesh Katoch, Advocate for the Respondent;

Judgement

Dr. Bharat Bhushan Parsoon, J.

1. These two appeals arise out of joint order dt. 29-4-1999 (Annexure P-3) passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (hereinafter referred to as, the Tribunal) in ITA Nos. 432/Chandi/92 and 493/Chandi/93 pertaining to assessment years 1989-90 and 1990-91.

2. Since a common question of law is involved in both these appeals and these appeals pertain to the same assessee, they have been taken up for adjudication together. However, for convenience and clarity, facts are being taken from appeal No. 111 of 1999.

3. The assessee is engaged in supply and maintenance of sophisticated electronics equipment. He filed his return of income tax for the assessment year 1989-90 on 30-10-1989 declaring his income as Rs. 24,34,593 which as per revised return was changed to Rs. 20,62,310. Pursuant to notice issued under section 148 of the Income Tax Act, 1961 (for short, the Act) on 31-5-1991, the assessee had filed his revised return on 1-7-1991 finally declaring his income as Rs. 26,66,840.

4. Thereafter, notices under section 143(2) and 141(1) of the Act were served.

The assessing officer (hereinafter mentioned as, the assessing officer) after finalizing the assessment vide assessment order (Annexure P-1) made an addition of Rs. 1,74,484, inter alia, on account of commission paid to one Anil Kumar Gupta.

5. In appeal, the Commissioner of Income Tax (Appeals), Ludhiana (hereinafter mentioned as, the Commissioner (Appeals)) vide his order dt. 29-1-1993 (Annexure P-2) affirmed the said addition of Rs. 1,74,484 on account of commission paid though gave relief with regard to some other additions which had been made by the assessing officer.

6. Agreeing with this order (Annexure P-2) of the Commissioner (Appeals), the Tribunal vide a joint order (Annexure P-3) upholding the re-opening of assessment by the Commissioner (Appeals), gave no relief to the assessee with respect to the addition made by the assessing officer when it affirmed order of the Commissioner (Appeals) in this regard.

7. This appeal was admitted for hearing on 21-8-2000. Following substantial questions of law were posed for adjudication by the appellants:

"(i) Whether in the facts and circumstances of the case, the orders Annexures P1, P2 and P3 are legally sustainable?

(ii) Whether in the facts and circumstances of the case, in view of the agreement and affidavit on record, the disallowance of the commission as an expenditure is legally sustainable?

(iii) Whether in the facts and circumstances of the case, the relationship of the assessee/appellant and Sh. Anil Kumar Gupta not falling within the ambit of section 40A(2)(b) the disallowance of expenditure by ignoring the provision of section 2(41) of the Income Tax Act can be legally sustained?

(iv) Whether on correct interpretation of sections 2(41) and 40A(2)(b) of Income Tax Act, the disallowance of expenditure on account of commission paid to Sh. Anil Kumar Gupta is legally justified?"

8. We have heard counsel for the parties, while going through the paper books.

9. Contention of the assessee is that the income tax authorities had wrongly construed employment of Anil Kumar Gupta to be that of a relative of the assessee and thus the said authorities were wrongly alarmed by the quantum of commission paid to him. It is further claimed that this wrong approach of the revenue resulted in addition of said commission which had been paid to Anil Kumar Gupta, to income of the assessee. It is claimed that Anil Kumar Gupta is not a relative of the assessee in terms of definition of term "relative" given in section 2(41) of the Act, which reads as under:

"Relative", in relation to an individual, means the husband, wife, brother or sister or any lineal ascendant or descendant of that individual".

10. It is then urged that when there is no application of provisions of section 2(41) of the Act to the facts of the case, no resort could be made to provisions of section 40A(2)(b) of the Act. It is further urged that income tax authorities are not expected to question quantum of remuneration or commission paid to their employees by the assessee as in the conduct of his business, the assessee is to pay for the skills and acumen of his employees commensurate to their abilities.

11. Per contra, claim of the revenue is that entire evidence given by the assessee qua engagement of Anil Kumar Gupta and payment of huge commission to him was analysed and evaluated by the income tax authorities who then had concurrently come to a finding that payment of commission was not genuine and rather was a camouflage for reducing profits in order to escape liability of taxation. Some facts worthy of importance, are recapitulated hereunder:

(i) Anil Kumar Gupta was working with the assessee on salary;

(ii) No such commission as was paid in assessment year 1989-90, had ever been paid to him earlier;

(iii) As per statement of Anil Kumar Gupta dt. 25-3-1991, his duties were confined to liaison work and to entertain customers in Delhi Branch; and,

(iv) There is assertion of Anil Kumar Gupta that he was thinking of resigning from this service but had dropped the idea because the assessee had agreed to pay him commission @ 2.5 per cent on the gross-receipts over and above, his salary and allowances.

12. After going through the explanation furnished by the assessee and statement of Anil Kumar Gupta, the assessing officer had come to the following conclusion:

"(1) There was no change in the duties of Shri Anil Gupta prior to the agreement and thereafter, and right from 1984 onwards till date these only involved liaison work in the Delhi branch.

(2) There was no change in his job nor could he improve his qualifications by which it could be said that he had become more useful to the appellant; and,

(3) The payment of commission to Shri Gupta was a device adopted to save the assessee from the tax liability since Shri Gupta had taken a loan of Rs. 7 lacs for the purchase of a plot from the assessee and on which interest had been paid to the appellant and which was sought to be set off by the payment of commission which had merely been credited to the account of Shri Gupta but factually not paid."

13. The assessing officer had also noticed that there was no material on record to prove that there was any contribution made by Anil Kumar Gupta, more than his liaison work which he was already doing, to the assessee's business to justify payment of huge commission to him. It had also been noticed by the assessing officer further that business of the assessee rather had not shown any improvement during the assessment years under consideration i.e., 1989-90 and

1990-91, when huge commission was allegedly paid by the assessee to said Anil Kumar Gupta.

14. It was on the basis of these observations that the assessing officer had disallowed the commission claimed in both the assessment years holding that the commission had been paid on non-business grounds and was a device to reduce the assessee's taxable income. The Commissioner (Appeals) had also turned down the pleas put forth by the assessee that payment of commission to Anil Kumar Gupta was a compulsion to retain his services for improvement of the business. The Commissioner (Appeals) had come to a finding that the assessee had failed to prove that Anil Kumar Gupta had contributed anything towards the improvement of the business to justify payment of huge commission to him. When the entire matter was re-agitated before the Tribunal, its observations and findings were no different than the ones given by the assessing officer and affirmed by the Commissioner (Appeals) on this count. The Tribunal had come to a definite finding that it was not on account of being a nephew of the assessee that he was paid such huge commission. It is also clear that it was well within the cognizance of the Tribunal that a nephew was not included in the term relative as per section 2(41) of the Act. This aspect is not at all concerned with regard to rejection of plea of the assessee and with making of addition in his income. It was on entirely different grounds.

15. With regard to reference to these provisions made by the Commissioner (Appeals), it may be mentioned that even though it has no bearing on final decision of the matter in controversy, the Tribunal has very ably dealt with the entire aspect. Following observations made by the Tribunal, with approval, are reproduced as below:

"Much has been argued about the applicability of section 40A(2)(a) and whether "nephew" was included in the term "relative". In our opinion, this aspect of the matter need not be gone into as it has been the case of the assessing officer and even of the Commissioner (Appeals) that the agreement is same and entered into only for purposes of reducing the tax liability of the assessee. The Commissioner (Appeals) in his wisdom has thought it necessary to refer to the said section but, in our opinion, such reference is not fatal to the case of revenue as we after perusing the record, the arguments advanced by the parties and the factual findings recorded by the tax authorities, do in the ultimate analysis hold that the claim on account of commission was not tenable in the assessment years under appeal and the same came to be rightly rejected."

16. Completely being in agreement with the reasons given by the assessing officer and affirmed by the Commissioner (Appeals) in respect of disallowing the commission paid to Anil Kumar Gupta claimed for these assessment years, the Tribunal had rejected the claim of the assessee on this count.

17. Contention of learned counsel for the assessee is that the Court is concerned with actual action taken by the assessee and not the action which the assessee

should have taken under the circumstances. It is further urged that it is not permissible in law to bring in suppositions and then to find out whether the claim is allowable or not? Support has been sought from Commissioner of Income Tax Vs. Om Parkash Behl, and Smt. Radhadevi Mohatta Vs. Commissioner of Wealth-tax, Bombay City-II, .

18. There is no dispute about the law and there cannot be any. Facts of the case in hand, however, are entirely different. When these facts are appreciated in the context as also in the circumstances in which the commission was paid, no support from these judgments is available to the assessee. All the three revenue authorities on facts had come to one and the same conclusion and there is concurrent finding that payment of commission shown in books of accounts of the assessee was merely a subterfuge to reduce the tax liability of the assessee. It is to be noticed that the Tribunal had re-assessed the entire issue and without being influenced by the earlier two concurring findings, had independently also come to a finding that the claim on account of commission by the assessee was not tenable in the assessment years under appeal and that it had rightly been rejected.

19. As the entire issue in these appeals concerns facts and attending circumstances and there is nothing legal much less substantial to be adjudicated upon, no substantial question of law, in fact, arises for consideration in these appeals. The questions posed by the assessee thus need not be answered as the same are based on facts. Consequently, both the appeals, being without any merit, are dismissed.