

(1981) 06 CAL CK 0012

In the Calcutta High Court

Case No : Income-tax Reference No. 233 of 1979

Russel Properties (P.) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 01-06-1981

Acts Referred:

Calcutta Municipal Act, 1951 — Section 236(3)

Citation : (1982) 26 CTR 330 : (1982) 137 ITR 358 : (1981) 7 TAXMAN 187

Hon'ble Judges : Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : D. Pal and D.K. Dhar, for the Appellant; B.K. Bagchi and P.L. Shome, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this reference u/s 256(1) of the I.T. Act, 1961, the following three questions have been referred to this court :

"1. Whether, on the facts and in the circumstances of the case, the sum of Rs. 49,413 being interest to the Calcutta Corporation was allowable as a deduction in computing the total income of the assessee ?

2. Whether there was any material before the Tribunal in coming to its conclusion that the interest of Rs. 49,413 was on account of defiance of provisions of law and, therefore, not allowable as a deduction in computing the total income of the assessee or the said conclusion is perverse ?

3. Whether, on the facts and in the circumstances of the case, the decision of the Tribunal in holding that interest of Rs. 49,413 payable to the Calcutta Corporation is not allowable as a deduction in computing the total income of the assessee is perverse ? "

2. While we are on this aspect, we may point out a fact upon which some reliance was placed on behalf of the revenue; that is to say, that the assessee sought to raise another additional question, namely :

"Whether the Tribunal was justified in not dealing with the contention of the assessee that the interest claimed on the outstanding Corporation taxes was to be deductible against the income from business ?"

3. The Tribunal declined to do so on the ground that the question did not arise out of the order of the Tribunal. Thereafter, there was no further attempt to seek any reference u/s 256(2) of the I.T. Act, 1961, on this aspect of the matter. In view of the contentions raised in this matter, it would be desirable to refer to the order of the ITO.

4. The assessee claimed a deduction of the amount which was the interest paid on account of delayed payment of Corporation taxes. It is the case of the assessee that a sum of Rs. 49,413 was payable to the Corporation of Calcutta on account of delayed payment of Corporation taxes. Be that as it may, dealing with the "income from other sources", the ITO observed in his order for the assessment year 1971-72 as follows :

"The total amount of interest paid of Rs. 1,67,084 includes an amount of Rs. 49,413 as interest paid to the Calcutta Corporation for delayed payment of municipal taxes. As this expenditure cannot be said to have been incurred for the purpose of earning any income from interest, this amount is not allowable to be deducted as an expenditure incidental to the other source of income....."

5. Thereafter the ITO computed the income from other sources. There was an appeal before the AAC,

6. It has been stated in the miscellaneous application before the Tribunal that in the appeal filed against the said assessment order before the AAC in the grounds of appeal under the heading "Statement of Facts", it was, inter alia, stated by the assessee as follows :

"That the interest income claimed under the head "Business" and it would not have been altered under the head "Other sources" without assigning any reason thereto."

7. It has been further stated in the said miscellaneous application before the Tribunal that in the grounds of appeal in the appeal filed before the AAC it was, amongst other grounds, stated as follows;

"12. For that the interest should not have been assessed under the head "Other sources" as against business as claimed by the appellant.

13. For that, the learned Income Tax Officer has misinterpreted the interest claimed on Corporation tax and has disallowed the claim of Rs. 49,413 and in arriving at such finding he has ignored the appellant's explanation."

8. This aspect is important to be borne in mind, because by this assertion the assessee was claiming that it had claimed deduction of payment of interest under the head "Business". But it had been wrongly treated by the ITO under the head "Other sources". It was reiterated, as we have stated hereinbefore, that in the

grounds of appeal before the AAC this point was specifically taken. The AAC in disposing of the appeal observed as follows :

"20. In respect of assessment year 1971-72 the appellant is aggrieved at the action of the ITO in not allowing the claim in respect of Corporation tax amounting to Rs. 49,413. The appellant paid interest of this amount to the Calcutta Corporation for delayed payment of municipal taxes. The ITO disallowed this expenditure and held that it had not been incurred for the purposes of earning income and was not incidental to the appellant's income from other sources. The appellant had drawn my attention to Section 236(3) of the Calcutta Municipal Act, 1951. Such section is to be read with Section 253 of that Act. According to Section 236, interest is payable at the rate of 1/2% per month for the period commencing on the first day of the quarter following that in which the bill is presented. Such interest is paid in circumstances where the bill as presented u/s 235 of that Act is not paid within 15 days from such presentation. Section 253 states that interest payable will be along with principal amount first charged upon the land or building or movable property, if any.

21. The only point for consideration is whether the payment of interest was incidental to the earning of income from other sources. The appellant has attempted to draw inferences from the statute, viz., Calcutta Municipal Act, 1951, and therefrom it has concluded that such payment was a statutory obligation. This argument is readily acceptable. However, while such payment might be a statutory obligation under that Act it is only under certain peculiar circumstances. These circumstances are where a person defaults in making the payment of Corporation taxes within 15 days of the presentation of the bill. The appellant is the owner of M/s. Russel Properties and is, therefore, fully aware of its obligation to the Calcutta Corporation. In particular, it is aware of the taxes which it is required to pay and the time schedule which it is required to maintain to pay such taxes. It should take it upon itself to pay such taxes later and, therefore, pay interest for such delayed payment, it cannot claim that the interest itself should be allowed as a deduction in its Income Tax assessment. The payment of interest in these circumstances is more akin to the payment of a fine or penalty. In any case, it is not a payment which could be allowed as deduction from the appellant's income from other sources. This ground of the appellant, therefore, fails. The action of the ITO is sustained."

9. It appears that the AAC considered that the interest paid for a delayed payment of Corporation taxes was penal in nature and, therefore, was not allowable. The AAC, however, did not consider whether it should have been allowed under the head "business income". There was an appeal before the Appellate Tribunal from the said decision of the AAC. The Appellate Tribunal disposed of this aspect of the matter by observing, inter alia, as follows:

"16. The only other objection in the assessment year 1971-72 is against the disallowance of interest of Rs. 49,413 paid to the Calcutta Corporation. The assessee paid interest of Rs. 49,413 to the Calcutta Corporation on account of

late payment of municipal taxes. The ITO was of the view that this payment of interest was not for earning any income. He disallowed the interest payment of Rs. 49,413.

17. In appeal it was urged before the AAC that the interest was paid on account of statutory obligation under the Municipal Act. The AAC was of the view that the payment of interest was in the nature of penalty and could not be allowed. He, therefore, affirmed the action of the ITO.

18. Before us the learned counsel for the assessee reiterated the reason given before the AAC for allowance of interest of Rs. 49,413. We do not find any merit in the contention of the learned counsel for the assessee as the interest was paid on account of defiance of provision of law for non-payment of tax in time. Moreover, the claim of interest cannot be allowed under the head "Income from property". The disallowance is accordingly sustained."

10. Thereafter, as we have mentioned before, the assessee made a petition before the Appellate Tribunal and there set out the grounds, as we have mentioned before, in the appeal before the AAC and the contentions before the ITO. The assessee had further stated in the said application, which is annexure to the statement of case here, that before the Appellate Tribunal the following grounds were taken ;

"4. For that on the facts of the case the learned AAC was wrong in upholding the disallowance of interest claimed, Rs. 49,413, on Corporation tax which is obligatory as per statute of the Calcutta Municipal Act. The observations and remarks in this behalf and the findings of the learned AAC showed that he failed to appreciate the appellant's explanation as regards the claim of interest and, therefore, his findings were completely erroneous."

11. Along with the said miscellaneous application the assessee had annexed a statement of interest on the debit side showing the amount the assessee had to pay which contained interest payments to various parties and also payment to the Corporation of Calcutta of Rs. 49,413. The total interest on the debit side was Rs. 1,67,084.03. On the other hand, in the statement on the credit side interest was shown, viz., the amount of interest earned from different parties which showed a total sum of Rs. 1,01,402.27 ; it had also annexed to the said application before the Tribunal an application made before the ITO, wherein the assessee had stated, inter alia, as follows:

"That without prejudice to above contentions if the interest be not allowable u/s 24(1)(iv), the interest is allowable u/s 36(1)(iii) as the liability has been created by keeping the Corporation tax in arrear and the amount was not kept idle but was put to use in business and, therefore, the arrear Corporation tax is as good as capital borrowed and the interest claimed was allowable deduction u/s 36(1) (iii) in computing the income."

12. On this miscellaneous application the Tribunal passed an order on the 26th

July, 1978, wherein it observed, inter alia, as follows :

"Examining the various assertions made in the application under consideration, we are of the considered opinion that the following sentence in paragraph 18 of the order of the Tribunal cited as subject shall be deleted as it was neither the case of the assessee nor of the department before the tax authorities or the Tribunal that the claim of interest was allowable under the head "Income from property" :

"Moreover, the claim of interest cannot be allowed under the head "Income from property"."

13. As far as the assertion made by the assessee in the application under consideration are concerned, we are of the opinion that whatever matters were urged before the Tribunal, the same have been brought out in its aforesaid order. These arguments have been considered and decided. In respect of these assertions, there is no mistake apparent from record."

14. It is upon these circumstances that the questions indicated above have been referred before us.

15. Now, it appears that the questions are wide enough to cover the broad questions whether deduction of Rs. 49,413 being the interest paid to the Corporation was allowable deduction in computing the total income of the assessee. Now, this deduction can be allowed either as against the business income or against the income from other sources. The Tribunal has rightly deleted the observation that the interest was not allowable against "income from property" ; that was never claimed. The Tribunal has disallowed the assessee's claim only on the ground that this interest was paid for the infraction of the law. The Tribunal was of the view that the interest of Rs. 49,413 was paid for the defiance of the provisions of law for nonpayment of tax in time. Therefore, according to the Tribunal, any payment made for the defiance of law could not be deductible in computing the total income of the assessee.

16. In order to resolve this question, we are to examine the provisions of the Calcutta Municipal Act, 1951, under which the interest became payable. Section 236 of the Calcutta Municipal Act provides for the notice of demand for the dues of the Corporation. Sub-section (1) of Section 236 provides that if any amount for which a bill has been presented u/s 235, which incidentally deals with the consolidated rate of taxes, is not paid within 15 days from such presentation into the municipal office, or to a municipal officer appointed to receive the same, the Commissioner may cause to be served upon the person liable, a notice of demand in a particular form. Sub-section (2) of Section 236 provides that for every notice of demand a fee of an amount not exceeding two rupees, shall be payable by the said person and the said amount shall be included in the costs of recovery. Sub-section (3) of Section 236 is important and relevant for our present purpose, which provides, inter alia, as follows :

"(3) On the amount of a bill remaining unpaid after fifteen days after presentation of the bill, interest shall be payable at the rate of one-half per cent. per mensem for the period commencing on the first day of the quarter following that in which the bill is presented and ending with the month preceding the month in which payment is made.

Explanation.--In calculating the interest payable under this Sub-section, a fraction of a rupee in the amount of the bill on which interest is to be calculated shall,--

(a) where it is less than fifty paise, be left out of account, and

(b) where it is not less than fifty paise, be taken as one rupee."

17. There are other provisions of the Calcutta Municipal Act for enforcing the payment of the dues of the Corporation. For example, we may refer to Section 237 which provides for distraint in Calcutta and Section 245 which provides for public recovery or recovery of the dues of the Corporation of Calcutta. On a plain reading of Sub-section (3) of Section 236 it is apparent that on the amount of the bill remaining unpaid after fifteen days after presentation of the bill, interest "shall be payable" at the rates specified. So it is a statutory obligation imposed by the statute upon the person who has failed to pay the dues liable to pay interest. The question is whether an amount in discharge of such an obligation would be described as a penalty for defiance of law.

18. This question, though not under this statute, came up before the Supreme Court in the case of Mahalaxmi Sugar Mills Co. Vs. Commissioner of Income Tax , Delhi, . There the Supreme Court was concerned with interest that was payable under Sub-section (3) of Section 3 of the U.P. Sugarcane Cess Act, 1956. The question before the Supreme Court was whether such interest paid on arrears of cess was a permissible deduction u/s 10(2)(xv) of the Indian I.T. Act, 1922. The Supreme Court noted that interest was paid by the assessee-company engaged in the business of the manufacture and sale of sugar u/s 3(3) of the U.P. Sugarcane Cess Act, 1956, on arrears of cess payable on the entry of cane into the premises of a factory for use, consumption or sale therein. The Tribunal had held in that case that interest on the arrears of cess constituted permissible deduction but the High Court on a reference held, inter alia, that the interest did not fall within the scope of Section 10(2)(xv) of the Indian I.T. Act, 1922, because it was paid by way of penalty for infringement of the Cess Act. The assessee appealed to the Supreme Court. Learned advocate for the revenue drew our attention to that the department did not dispute that the payment of interest represented expenditure laid out wholly and exclusively for the purpose of the business and that it was of the nature of revenue expenditure. The Supreme Court referred to the provisions of the section imposing liability to pay interest. It may be instructive to refer to the said provisions (at p. 432 of 123 ITR) :

"3. Imposition of cess.--(1) The State Government may by notification in the

Official Gazette impose a cess not exceeding four annas per maund on the entry of the cane into the premises of a factory for use, consumption or sale therein.

(2) The cess imposed under Sub-section (1) shall be payable by the owner of the factory and shall be paid on such date and at such place as may be prescribed.

(3) Any arrear of cess not paid on the date prescribed under Sub-section (2) shall carry interest at 6 per cent. per annum from such date.

(4) The State Government may for the purpose of assessment and collection of the cess, appoint officers and authorities and may also prescribe the manner in which the cess shall be assessed and collected.

(5) Where any person is in default in making the payment of the cess, the officer or authority empowered to collect the cess may direct that in addition to the amount of the arrears and interest a sum not exceeding 10 per cent. thereof shall by way of penalty be recovered from the person liable to pay the cess.

(6) The officer or authority empowered to collect the cess may forward to the Collector a certificate under his signature specifying the amount of arrears including interest due from any person, and on receipt of such certificate the Collector shall proceed to recover the amount specified from such person as if it were an arrear of land revenue.

(7) Any sum imposed by way of penalty under Sub-section (5) shall be recoverable in the manner provided in Sub-section (6) for the recovery of the arrear of cess."

19. The Supreme Court was of the view that interest payable on arrears of cess u/s 3(3) was in reality part and parcel of the liability to pay cess. It was an accretion to the cess. The arrears of cess, according to the Supreme Court, if the cess was not paid within the prescribed period, a larger sum would become payable as cess. We have noticed the nature of Sub-section (3) of Section 236 of the Calcutta Municipal Act, which is more or less in similar terms. It is also a like expression as used in Section 3(3) of the U.P. Sugarcane Cess Act, 1956, which enjoins that "interest shall be payable". The Supreme Court was of the view that in truth the interest provided in Section 3(3) of the U.P. Sugarcane Cess Act, 1956, was in the nature of compensation paid to the Govt. for delay in the payment of cess. It was not by way of penalty for which provision has been separately made by Section 3(5). The penalty payable lies in the discretion of the authority.

20. Here also there was no discretion. It was automatic under the Calcutta Municipal Act, 1951. Therefore, on the basis of the parity of reasoning adopted by the Supreme Court and in view of the nature of interest under Sub-section (3) of Section 236 of the Calcutta Municipal Act, 1951, we are of the opinion that the interest paid for delayed payment of municipal tax would also be deductible from the total income of the assessee.

21. Learned advocate for the revenue, however, sought to urge on the analogy of interest payable on Income Tax dues, that such payment should not be allowed as deduction. If an assessee carries on business with house properties, municipal tax, namely, consolidated rates and taxes, would, in our opinion, be allowable expenditure of business for earning income, if any income is earned by the amount of the employment of the interest which would otherwise have been payable if the Corporation tax had been paid in time. He drew our attention to the observations of the Calcutta High Court in the case of National Engineering Industries Ltd. Vs. Commissioner of Income Tax (Central), , where the Division Bench held that interest paid for delayed payment of Income Tax was not an allowable deduction. There is a basic difference on this aspect between interest paid on account of delayed Income Tax and interest paid for delayed payment of Corporation tax. Income Tax is a liability which arises after income is earned but the tax in respect of the buildings or consolidated rates and taxes in respect of buildings will have to be paid for earning the income. Therefore, in our opinion, the analogy of the said decision cannot be of much assistance to the learned advocate for the revenue.

22. We have mentioned before that the assessee had been claiming that the amount should be allowed as against his business income. That the assessee so claimed is evident from the documents produced before the authority below. However, the Tribunal has not directly adverted to it. The Tribunal, however, in disallowing the amount claimed did not disallow it on the ground that it cannot be allowed from the income from other sources. We have noted the several stages through which the proceedings have travelled. Perhaps if different considerations applied for the allowability of deductions in respect of business income as well as income from other sources, then we might have been constrained to remand the case to the Tribunal to consider this aspect of the matter. But for the reasons which we shall presently notice it appears to us that it is not necessary. In this connection reference may be made to the observation of the Supreme Court in the case of Eastern Investments Ltd. Vs. Commissioner of Income Tax, West Bengal, , where dealing with the incidence of taxability u/s 12 of the Indian I.T. Act, 1922, Mr. Justice Vivian Bose had enunciated the following principles (p. 4) :

" The following principles are relevant :

(a) though the question must be decided on the facts of each case the final conclusion is one of law : THE INDIAN RADIO AND CABLE COMMUNICATIONS COMPANY, LTD. Vs. THE COMMISSIONER OF INCOME TAX, BOMBAY PRESIDENCY and ADEN., and Tata Hydro-Electric Agencies Ltd. v. CIT, [1937] 5 ITR 202 ;

(b) it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned : John Moore v. Stewarts and Lloyds, [1906] 6 TC 501 , and Usher's case [1915] AC 433; 6 TC 399 ;

(c) it is enough to show that the money was expended "not of necessity and with

a view to a direct and immediate benefit to the trade, but voluntarily and on the ground of commercial expediency, and in order indirectly to facilitate the carrying on of the business". *British Insulated and Helsby Cables Ltd. v. Atherton* [1926] AC 205 ; 10 TC 155 ; and

(d) beyond that no hard and fast rule can be laid down to explain what is meant by the word "solely".

23. The Supreme Court in the case of *Commissioner of Income Tax, West Bengal-III Vs. Rajendra Prasad Moody*, , was dealing with the question of taxability of interest paid u/s 57(iii) of the I.T. Act, 1961. The Supreme Court observed that the natural construction of the language used in Section 57(iii) of the I.T. Act, 1961, irresistibly led to the conclusion that to bring a case within that section it was not necessary that any income should in fact have been earned as a result of the expenditure. What Section 57(iii) required was that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. The section did not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It did not say that the expenditure should be deductible only if any income was made or earned. The Supreme Court was of the view that the assessee had borrowed moneys for the purpose of making investment in certain shares and paid interest thereon during the accounting period relevant to the assessment year but did not receive any dividend on the shares purchased with those moneys. It was held that interest on moneys borrowed for investment in shares which had not yielded any dividend was admissible as a deduction u/s 57(iii) of the I.T. Act, 1961, in computing its income from dividend under the head, "Income from other sources". The Supreme Court in this connection referred to the observations of Lord Thankerton in *Hughes v. Bank of New Zealand*, [1938] 6 ITR 636 which are as follows :

"Expenditure in course of the trade which is unremunerative is none the less a proper deduction, if wholly and exclusively made for the purposes of the trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense."

24. The Supreme Court then referred to the observations of Mr. Justice Vivian Bose and applied the same observations in considering the question of taxability of interest u/s 57(iii) of the I.T. Act, 1961. The Supreme Court noted that it was true that the language of Section 37(1) was a little wider than that of Section 57(iii), but did not see how that could make any difference in the true interpretation of Section 57(iii). The language of Section 57(iii), as pointed out by the Supreme Court, was clear and unambiguous and it has to be construed according to its plain natural meaning and merely because a slightly wider phraseology was employed in another section which might take in something more, it did not mean that Section 57(iii) should be given a narrow and constricted meaning not warranted by the language of the section.

25. In that view of the matter on the parity of the reasonings of the Supreme Court, we are of the view that looked at from either point of view, whether as deductible from the business income or from the income from other sources, this amount of interest not being an amount paid for a defiance of law should have been allowed. Learned advocate for the revenue, however, sought to urge that there was no indication that interest that was earned and the interest that was paid it would be evident from the statements which were referred to hereinabove formed part of an integrated transaction. In this connection he relied on certain observations of the Bombay High Court in the case of Commissioner of Income Tax, Bombay City-II Vs. United Wire Ropes Ltd., . The observations, in our opinion, were made in a different context.

26. However, in view of the observations of the Supreme Court referred to above, earning of the income sufficiently warrants to claim deduction. In that view of the matter and inasmuch as this contention had always been urged before the authorities below, in either view of the matter, the amount should have been allowed as a deduction in computing the total income of the assessee.

27. Question No. 1 is answered in the affirmative and in favour of the assessee. Question No. 2 is answered in the negative in the sense that it was not for a violation of the provisions of law. The payment of interest of Rs. 49,413 was not for a defiance of the provisions of law. This is also in favour of the assessee. Question No. 3 is answered by saying that in the facts of the case the decision of the Tribunal that interest of Rs. 49,413 payable to the Calcutta Corporation is not allowable as a deduction is not legally tenable. This is also in favour of the assessee.

28. In the facts of the case, parties will pay and bear their own costs.

Sudhindra Mohan Guha, J.

29. I agree.