(2003) 02 CAL CK 0002

In the Calcutta High Court

Case No : Matter No. 1695 of 2001 20 February 2003

SAIL DSP VR Employees Association 1998 APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 20-02-2003

Acts Referred:
Income Tax Act, 1961 — Section 10(10C)
Income Tax Rules, 1962 — Rule 2BA

Citation : (2003) 128 TAXMAN 704

Hon'ble Judges : Maharaj Sinha, J;Dilip Kumar Seth, J;D.K. Seth, J

Bench : Full Bench

Advocate : S. Bagchi, for the Assessee Tapas Banerjee, C.L. Singh, P.K. Someand M.D. Nizamuddin, for the Revenue, for the Appellant;

Judgement

D.K. Seth, J.

In this case the petitioner appellants were subjected to voluntary retirement pursuant to a Voluntary Retirement Scheme (hereinafter referred to as "the Scheme") by the employer respondent. The Scheme appears at page 21 of the paper book (Annexure "B" to the writ petition). The respondent authority had been deducting tax at source under the provisions of section 192 of the Income Tax Act, 1961. This seems to have been clarified by the employer through Annexure "C" at page 24 of the paper book. This has since been challenged by the Employees'' Association, the petitioners/appellants, as not chargeable to tax in view of clause (10C) of section 10 of the Income Tax Act.

2. According to Mr. Bagchi, learned counsel for the appellants, the amount received under the Scheme is an amount referred to in section 10(10C) and became due and payable at the time when the voluntary retirement under the Scheme took place and chargeable to tax u/s 15 clause (a) of the said Act, whether paid or not. If the payment is spread over for a period, according to the Scheme, it would not be chargeable to tax bereft of clause (10C) of section 10 because of its payment even at subsequent assessment years than the

assessment year for which it had become due, but not paid. He has referred to section 43(2) of the said Act and pointed out that the word ''paid'' includes incurring of the liability to pay. He further contends that the Scheme under which the voluntary retirement had taken place is in commensurate with the Scheme provided in rule 2BA of the Income Tax Rules, 1962. There is no conflict or friction in between the said rule and the Scheme formulated. As such to the extent of Rupees Five lakhs the employees opted under the Scheme are entitled to exemption of tax in terms of sections 10(10C). Therefore, the amount paid under the Scheme represents the amount contemplated under clause (10C) and assumes the character of salary or benefit in lieu of salary as defined in section 17 sub-sections (1) and (3) respectively and are chargeable u/s 15 clause (a) as soon it was due though not paid and as such, liable to be exempted u/s 10(10C). He has led us through different clauses in order to point out that there is no conflict in between the Scheme and rule 2BA of Income Tax Rules.

3. Mr. Tapas Banerjee, learned counsel for Steel Authority of India Limited (SAIL), has pointed out that the scheme is in conflict with rule 2BA on two grounds. Firstly, it includes gratuity, leave pay and half pay leave, etc. which is something different from the amount receivable under a voluntary retirement scheme and are salary or benefit in lieu of salary, as defined in section 17(1) and (3) respectively. Therefore, the amount received under the Scheme does not qualify for exemption u/s 10(10C) The second ground he has pointed out that it contemplates prohibition of re-employment in any of the units or subsidiaries or joint ventures of SAIL. Whereas clause (v) of rule 2BA contemplates re-employment in any other company which necessarily means that it is not confined to the units or subsidiaries of SAI, but to any other company. Therefore, according to him, the Scheme is not in accordance with the scheme as contemplated u/s 10(10C) read with rule 2BA. Therefore, no benefit of section 10(10C) could be availed of in this case. He has than, contended that the circular at page 24 of the paper book, which is Annexure "C" to the writ petition modified the Scheme to the extent that the optees for voluntary retirement shall be liable to pay Income Tax like employees in services. Since the employees themselves have opted with their eyes open with the modification in the scheme they are estopped from claiming any benefit u/s 10(10C). He contends that section 192 of the Income Tax Act casts a liability on the respondent. Therefore, they had rightly deducted the tax at source. He has also hinted at the second proviso to section 10(10C) and contended that since such benefit, if available by stretching the meaning even then the benefit can be allowed for one assessment year, it cannot be allowed for any subsequent assessment years.

4. Mr. Some, learned counsel for the respondent No. 4, on the other hand, has contended that the Scheme is in conflict with rule 2BA. He has pointed out to the material differences from the Scheme itself. According to him, the benefits under the Scheme are different. In some cases, it is 100 per cent in some case 90% and in some case 80 per cent and includes leave, gratuity and other benefits. Therefore, it cannot be construed to be the payment receivable on account of

voluntary retirement. On the other hand, these are payments in lieu of those components. This would definitely make the said payment ''salary'' within the meaning of section 17(1) or benefit in lieu of salary within the meaning of section 17(3), as the case may be. He has adopted the arguments made by Mr. Banerjee and has elaborated the same. We need not repeat his submissions since the crux of his submissions is already noted. The last contention that was suggested by Mr. Some was with regard to second proviso to section 10(10C), which makes the benefit available once in one assessment year and not allowable in any subsequent assessment year. Therefore, according to him, when the payment is stretched over a period of years even if the benefit is available, it would be available only for the assessment year following the voluntary retirement. It cannot be stretched over to any other assessment year. Therefore, the payment that has been spread over a period of years is liable to be taxed u/s 15 clause (a) of the Income Tax Act.

5. Mr. Bagchi, in reply, has contended that in case there is any absurdity in the construction of the provision having regard to the proviso, then and in that event, the construction is not to be made literally or grammatically. It is to be made having regard to the object and purpose, for which particular enactment was incorporated. In order to sustain his contention, he has referred to the decision in the case of Central Board of Direct Taxes and Others Vs. Aditya V. Birla, , and the decision in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, .

6. We have heard the respective counsel at length. The question depends upon the interpretation of section 10(10C) read with the second proviso thereof and sections 15 and 17 as referred to above, having regard to the facts and circumstances of the case.

The Scheme: Rule 2BA: No conflict

7. Let us first examine the respondents'' contention that the scheme does not come within the scope and ambit of section 10(10C) on account of its being contrary to or in conflict with rule 2BA of the Rules. We have examined the Scheme for voluntary retirement and compared the same with the requirements contained in rule 2BA. In our opinion, it conforms to rule 2BA. Nowhere there is any provision in the Scheme which, in our view, could be said to be in conflict with the requirement of rule 2BA. The question of re-employment, as contemplated in requirement clause (v) of rule 2BA, provides that the retiring employee of a Company shall not be re-employed in another company or concern belonging to the same management. If we paraphrase this provision, we may read that a retiring employee shall not be employed in another company or in any other concern belonging to the same management. Both another company and another concern was intended to mean to belonging to the same management as expressed by the Legislature. Therefore, the Scheme cannot be said to be in conflict with the requirement of rule 2BA. Inasmuch as, clause (8) of the scheme clearly lays down that a retiring employee shall not be eligible for

employment in any of the plant, subsidiaries or joint ventures of the SAIL. This is in consonance with clause (v) of rule 2BA.

8. Mr. Some has pointed out that the amount of benefit sought to be provided under clause (4) of the Scheme, is in conflict with the requirement clause (vi) of rule 2BA. The benefit, as appearing from clause 4.1(i), indicates that the monthly benefit would be an equivalent of specific percentage of the basic pay and D.A. on the date of voluntary retirement and it shall be payable for a period of 10 years or till attainment of 58 years of age, whichever is earlier. But, in our view, this provision itself makes it clear that it is not in conflict with the requirement clause (vi) of rule 2BA. Inasmuch as requirement clause (vi) provides that the amount payable shall not exceed the amount equal to three months'' salary for each completed year of service or salary at the time of voluntary retirement multiplied by the balance months of service left till the date of retirement or super-annuation in due course. If the left over service is more than 10 years, then the amount paid cannot exceed the amount payable at the rate of salary payable at the time of voluntary retirement multiplied by the months of service left. At the same time, if it is less than 10 years, in that event, an employee is liable to get the benefit till 58 years of age which would be exactly the left over months of service the multiplying factor of the basic plus D.A. payable on the date of voluntary retirement. In any event, the eligibility for applying for voluntary retirement is two fold. One is minimum 20 years'' service or above 50 years of age. If the person is above 50 years of age, he cannot have 10 years service left since the retirement age is admittedly 58 years. If he is below 50 years, but had completed 20 years of service, then also he could not get more than 10 years benefit and that too at the rate of 80 per cent of his basic plus D.A. which would definitely be an amount less than the amount contemplated under the requirement clause (vi) of rule 2BA. Having regard to the Scheme we have found that there is nothing which can persuade us to hold that it is in conflict with rule 2BA.

Section 10(10C): Exemption : Availability and Extent of

9. Section 10(10C) uses the expression "any amount received by an employee ... at the time of his voluntary retirement in accordance with any Scheme or Schemes of voluntary retirement.... It is the meaning of the word "amount received" is important in this case. Whether this expression includes all the amount payable under the Scheme or only the compensation payable in lieu of cessation of employment. In other words, whether this will also include the retirement or superannuation or terminal benefits which the employee is otherwise entitled to receive even without the Scheme simply on cessation of employment without having voluntarily retired. The expression "amount received" even if we interpret literally or grammatically would be something other than the terminal benefits. Inasmuch as, terminal benefits are otherwise payable on cessation of employment under the provisions of Statute. An employee cannot be deprived of such dues on any ground whatsoever unless

provided in the respective statutes governing those respective terminal benefits. An expression used in the statute is not always to be interpreted literally or grammatically. Sometimes it has to be interpreted having regard to the context in which the expression is used and having regard to the object and purpose for which the same is enacted. Section 10(10C) was inserted in order to make voluntary retirement attractive so as to reduce human complements for securing economic viability of certain companies. This object was elaborated by various departmental circulars and explanatory statements issued from time to time. Similarly, rule 2BA, which was inserted by the Income Tax (Sixteenth Amendment) Rules, 1992, were amended from time to time. All these go to show that this was intended to make the voluntary retirement more attractive and beneficial to the employee opting for voluntary retirement. Therefore, this has to be interpreted in a manner beneficial to the optee for voluntary retirement, if there is any ambiguity. Therefore, while searching the meaning of the word "amount received" used in section 10(10C), we are to look into the section itself and rule 2BA as well. Rule 2BA prescribes the limit. Initially it was one and one half month''s salary for each completed year of service since amended to three months'' salary for each completed year of service or the salary for the months remaining after voluntary retirement till retirement. This clearly indicates that it is only the compensation part payable on account of cessation of employment, which is the amount intended in section 10(10C). Inasmuch as, on the date an employee opts for voluntary retirement, he is already entitled to the accumulation of the provident fund in his account governed by the Provident Fund Act and the Scheme, gratuity payable under the Payment of Gratuity Act, encashment of leave pay under the Leave Rules and pension payable under the Pension Rules, if there be any. These are all terminal benefits to which an employee is entitled even without the Scheme. This entitlement cannot be taken away under any Scheme. Therefore, if these amounts are also payable under the Scheme, the same would not be a component of the compensation for voluntary retirement and is not an amount receivable on account of voluntary retirement. Therefore, the terminal benefits cannot be brought within the scope and ambit of the expression "amount received" used in section 10(10C).

10. Such question is to be dealt with having regard to the context in which the expression is used and having regard to the purpose and object and its grammatical and literal meaning. As discussed above, we do not find any difficulty in construing the meaning of the expression "amount received" even by literal and grammatical meaning which is something different from an amount receivable by an employee under a particular statute or enactment or rules and to which he is otherwise entitled even without the voluntary retirement scheme and which has already accrued to him and of which he cannot be deprived.

11. In order to arrive at such interpretation, we may draw inspiration from the ratio decided in Aditya V. Birlas case (supra). In case the interpretation leads to absurdity or becomes mischievous, then while construing an enactment, the absurdity and mischief are to be avoided. If a plain literal interpretation of

statutory provision produces a manifestly absurd and unjust result, which the Legislature could not have intended, the court is supposed to modify the language used by the Legislature even to do some violence to it so is to achieve the obvious intention of the Legislature and produce a rational construction. It was so held in K.P. Varghese case (supra). We, however, as discussed above, do not find any absurdity or any unjust result having regard to the provision with which we are concerned.

12. Now let us examine as to what extent the amount receivable under the Scheme qualifies for exemption u/s 10(10C). The encashment of leave pay or half pay leave (clause 4.1(ii)) though payable with the monthly benefit, in terms of clause 4.1(iii), yet the same is not a component of monthly benefit provided in clause 4.1(i) of the Scheme, as is the case with regard to clause 4.1(ii), (v) and (vi) of the Scheme. It is only the monthly benefit provided under clause 4.1(i) of the Scheme that represents the amount exempted u/s 10(10C). The amounts mentioned in clause 4.1(ii), (iv), (v) and (vi) were already payable. The employee would have been entitled to it inspective of voluntary retirement on termination of or superannuation from service, except in case of dismissal in which case the gratuity under clause (iv) and medical benefit under clause (v) would not be payable. Therefore, the amounts payable under the Scheme other than those under clause 4.1(i) are salary, etc., within the meaning of section 17(1) or (3) as the case may be and not an amount receivable under a voluntary retirement scheme. That apart, upon voluntary retirement, the employee is deprived of further benefit of service including the leave or gratuity that would have accrued to him after such retirement if he had continued in service and that the said amount is being paid on account of retirement since preponed by reason of option for voluntary retirement. Therefore, by no stretch of imagination, these components can be included within the amounts receivable for voluntary retirement, Therefore, the contention of Mr. Banerjee and Mr. Some that this is not exempted u/s 10(10C) cannot be accepted as a whole.

13. This seems to be made clear by the clarification issued by the department, in the guidelines for the purpose of section 10(10C) of the Income Tax Act clarification of queries regarding (Circular No. 640, dated 26-11-1992) (page 757, Volume 1 Income Tax Law, 5th Edition by Chaturvedi and Pithisaria), the Board had clarified in question No. 12 that the exemption is available on the amount of voluntary retirement, which is in addition to normal retirement benefits like provident fund, gratuity, pension, etc. According to the Board, the provisions regarding Income Tax exemption on the amount receivable on account of voluntary retirement are separate from the provisions, which govern taxation of provident fund, gratuity, pension, etc. In question No. 13, it was clarified that if all the conditions specified in section 10(10C), read with rule 2BA are satisfied, the employer need not deduct tax at source from the amount of the voluntary retirement paid to an employee.

14. Having regard to the above contention, in our view, the amount receivable

under clause 4.1(i) of the Scheme, to the extent it does not exceed Rs. 5 lakhs, qualifies for exemption u/s 10(10C) but not the other amounts payable under clauses (ii), (iv), (v) and (vi), etc., thereunder.

Second proviso to section 10(10C) : How far applies

15. Once we have found that the amounts payable comes u/s 10(10C) and the same is being paid in accordance with the Scheme framed for voluntary retirement, now we are to examine whether it would be hit by the second proviso to section 10(10C). The second proviso provides that exemption to clause (10C) to the extent that the benefit of exemption is available only in one assessment year and would not be available for any other assessment year, once availed of. According to Mr. Some and echoed by Mr. Banerjee, the payment having stretched over to a longer period than one assessment year, the payments made in subsequent assessment years are hit by the said proviso. Admittedly, provisos are exemptions curved out of the principal section. But, this question has to be dealt with having regard to sections 15 and 17, read with section 43(2) of the Income Tax Act.

16. Section 43(2) defines the expression "Pay" which includes the incurring of the liability as well. Whereas section 15(a) provides chargeability of salary to tax as soon it becomes due, though not paid. As soon the salary becomes due, the incurring of the liability is complete. As soon the liability is incurred, it becomes a deemed payment in view of the definition of ''pay'' defined u/s 43(2). In the present case, though the amount of monthly benefit paid under clause 4.1(i) of the Voluntary Retirement Scheme consists of salary or benefit in lieu of salary as defined in section 17(1) or (3), read with section 43(2), but the same is exempted from tax by reason of section 10(10C). This amount became chargeable u/s 15(a) as soon as it became due, though not paid. Under the Scheme the liability to pay was incurred and the amount became payable at the time when the employee was released having opted for the voluntary retirement under the Scheme. Therefore, this is an amount, which is receivable by the employee at the time of voluntary retirement according to the Scheme and became chargeable to tax under clause (a) of section 15, even though not paid. Therefore, to the extent of Rupees Five lakhs, the said amount is exempted from being charged to tax by reason of section 10(10C). Even if the payment is stretched over a period of years, the same would not become chargeable to tax in any subsequent assessment year. An amount becomes chargeable once it is earned whether it is received or not. Since the employee was not in service, therefore, the deferred payment will not continue and it would not be a salary from service neither a deferred payment of salary nor arrear payment of salary, since the Scheme postulates an one time payment in consideration of voluntary retirement spread over to a period of 10 years or till the age of 58 years, whichever is earlier, in quarterly payment in advance. it is a deferred payment of the benefit receivable under the Voluntary Retirement Scheme. Therefore, it would not be a payment of salary outside the scope of section 10(10C). The

characteristic cannot be changed because of stretching over the period of payment of dues under the Scheme.

No estoppel in law

17. The question of estoppel because of option exercised with eyes open to the subsequent modification cannot be sustained. What is not otherwise taxable cannot become taxable because of admission of the assessee. Nor there can be any waiver of the right otherwise admissible to the assessee in law. The chargeability is not dependent on the admission of or waiver by the assessee. Chargeability is dependent on the charging section, which needs to be strictly construed. Referring to the decision in Commissioner of Wealth Tax Vs. Bhaskar Mitter, , we had occasion to so hold in the decision in Maynak Poddar (HUF) v. WTO (IT Appeal No. 84 of 1998, dated 24-2-2003).

18. For all these reasons, we are unable to persuade ourselves to agree with the contention argued with ability by Mr. Some and Mr. Banerjee to the extent it relates to the amount receivable under clause 4.1(i) of the Scheme. The appeal, therefore, succeeds to that extent. The respondent shall adjust the amount of tax already deducted in respect of the amount exempted with the tax payable hereafter on the other amounts or on the amount beyond Rupees Five lakhs, under the said Scheme, if there be any, and refund the balance, if any remaining out of taxes already deducted. In case any amount remaining after adjustment, in that event, such amount be refunded to the respective employees within a period of three months of the instalment last payable or within one year from date whichever is later by the concerned Authority with whom the tax is lying in deposit. However, the respondent SAIL shall recalculate the amount adjustable or refundable, as the case may be. Such calculation relating to the respective employees shall be furnished by SAIL to the appellant as well as to the Income Tax Authority within a period of three months from communication. In order to obtain adjustment, the employee shall approach the respondent SAIL and for obtaining refund the employees shall approach the Income Tax department.

19. The learned counsel, appearing for the Income Tax department, prays for stay of operation of this judgment. Since we have indicated a long period for refund, we feel that no stay would be necessary.

Maharaj Sinha, J. - I agree.

