

(2008) 09 CAL CK 0014
In the Calcutta High Court
Case No : IT Reference No. 6 of 2001

Sanjib Kumar Agarwal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Income Tax Act, 1961 — Section 10(1), 256(2)

Citation : (2009) 310 ITR 295 : (2009) 176 TAXMAN 443

Hon'ble Judges : Sankar Prasad Mitra, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Judgement

1. We have heard the learned Counsel for the parties.
2. In this reference u/s 256(2) of the Income Tax Act, 1961 for the assessment year 1989-90, the following questions have been referred for the opinion of this Court:
 - (i) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the Commission for the period 1-7-1988 to 31-3-1989 accrued to the assessee in the previous year relevant to the assessment year 1989-90?
 - (ii) Whether on the facts and in the circumstances of the case and having regard to the true meaning of the word "accrual", the assessee had a right to receive the commission income in the previous year relevant to the assessment year 1989-90 and there was accrual of such income in the hands of the assessee during the said period?
3. It appears that the assessee was whole time Director of the company in question, namely, M/s. Hindustan Safety Glass Works Limited (hereinafter referred to as "the said company"). As per the conditions of service, the assessee was to receive commission at the rate of 1 per cent on the net profits of the said company apart from the monthly salary and certain perquisites which were allowed to him.

4. The disputes which arose in this matter with regard to the assessment was as to whether the said commission which was received by the assessee being a sum of Rs. 1,02,464 relating to the period 1-7-1988 to 31-3-1989 accrued as income to the assessee and was liable to be taxed for the assessment year 1989-90. The assessee had filed the TDS certificate issued by the said company for the said assessment year which did not include the commission which was granted to him. The Assessing Officer on the basis of the printed account of the said company where the said commission was specified subjected the tax for the said assessment year (1989-90).

5. The assessee being aggrieved from the order so passed by the Assessing Officer filed an appeal before the Commissioner of Income Tax (Appeals) on the ground that the commission for the period 1-7-1988 to 31-3-1989 accrued to the assessee only in September 1989 after the determination of the net profits of the said company and was liable for tax in the assessment year 1990-91. The Commissioner of Income Tax (Appeals) held that the profit was earned by the company on day-to-day basis and not at the end of the financial year and, as such, the assessee earned commission on day-to-day basis and not at the time when the accounts of the said company were finalised. The said appellate authority held that the assessee should have shown the estimated commission in his return.

6. Being aggrieved from the order so passed by the Commissioner of Income Tax (Appeals), the assessee filed an appeal before the learned Tribunal. It appears from the facts placed before the learned Tribunal that the commission amount was ascertained only after the finalisation of the accounts of the said company and determination of the profits earned by the said company which would be reflected at the end of the said accounting year and not before. The said company had also not considered the said amount (commission) for the purpose of tax deduction at source for the said assessment year being 1989-90. The assessee had shown the said commission as part of his income for the assessment year 1990-91 and also duly paid the tax payable therefrom in the next year. Therefore, it would be evident from the said facts that the assessee had no intention even to evade the tax on the said amount which was received by him as commission.

7. However, the learned Tribunal held that the commission was part of salary and was assessable on accrual basis in the assessment year. It further held that the commission for the said period being 1-7-1988 to 31-3-1989 became due within the previous year ended on 31-3-1989 and on such basis it was assessable in the assessment year 1989-90.

8. Being aggrieved, the assessee filed the application before this Court u/s 256(2) and the appeal was admitted on the grounds as mentioned hereinabove.

9. Mr. Khaitan appearing on behalf of the assessee/appellant submitted that the learned Tribunal could not appreciate the facts and came to the conclusion

wrongly that the commission for the period 1-7-1988 to 31-3-1989 became due and accrued within the previous year ended 31-3-1989 and was assessable in the assessment year 1989-90. He further submitted that under the terms and conditions of service of the appellant no due date was specifically provided for assessing and/or payment of the said commission which would have been earned by the appellant. Therefore, it is submitted that in such a case where no due date is fixed for payment of commission, it does not accrue till the accounts of the company are finalised and the amount of commission is ascertained. It is only after the accounts of the company are finalised and the commission amount is ascertained then it becomes receivable by and payable to the assessee. He further relied upon a decision of the Supreme Court in Commissioner of Income Tax, West Bengal II Vs. Birla Gwalior (P) Ltd., . In this case, the managing agent gave up the managing agency commission after the end of the financial year but before the accounts of the managed company were made up. In the managing agency agreement, no date was stipulated for payment of the commission. The question before the Hon"ble Supreme Court was as to whether the commission was given up by the managing agent before it accrued as income and was therefore not liable for taxation in the hands of the managing agent. The Hon"ble Supreme Court held as follows:

Now turning to the question regarding giving up of the commission, as mentioned earlier, the assessee was maintaining its accounts on the basis of the mercantile system. Its accounting year was the financial year. It gave up the commission after the end of the financial year. On the basis of these facts it was contended on behalf of the revenue that the commission had accrued before it was given up. Hence, it cannot be said that the assessee had not earned the commission in question. Therefore, the assessee's case cannot be considered u/s 10(1). We are unable to accept this contention as correct. As mentioned earlier, no due date was fixed for the payment of the commission under the managing agency agreements. The commission receivable could have been ascertained only after the managed company made up its accounts. The assessee had given up the commission even before the managed company made up its accounts. Hence, the mere fact that the assessee-company was maintaining its accounts on the basis of the mercantile system cannot lead to the conclusion that the commission had accrued to it by the end of the relevant accounting year.... (p. 270)

10. He has also relied upon a decision of the Madras High Court in the case of Commissioner of Income Tax Vs. South Madras Industrial Development Co. (P.) Ltd., . In this case, the Hon"ble Madras High Court considered a similar question. In that case also, the agreement did not make any specific provision as to when commission, over and above the minimum remuneration, would accrue. The Court was called upon to decide whether the commission, over and above the minimum remuneration, relating to the previous year ended 31-3-1970 was assessable in the assessment year 1970-71. The Hon"ble Madras High Court held as follows:

... In the present case we have already referred to the terms of the managing agency agreement under which there is a specific provision relating to the minimum remuneration being payable to the managing agent at the end of every month. As regards the rest of the commission, there is no specific provision as to when it accrues. In the absence of such a provision, we have to take it that it accrues at a time when it became payable to the assessee ... In the case of cash system of accounting the problem which is now before us was not likely to arise as the receipt is synonymous with accrual in such cases. However, in the case of mercantile system of accounting where the amount under the contract is due to an assessee even though its payment is postponed, the liability to tax, arises at the time when the amount is due, though the amount is actually paid subsequently. Where the contract is silent as to when the amount becomes due then it is not possible to treat the amount as being due on the last date of the accounting year. In such a case, the date of accrual will be the same as the date of the right to receive it. In the present case, the income did not accrue at all to the assessee on or before 31-3-1970, so that there is no question of it being assessed in the assessment year 1970-71....(p. 919)

According to him, the ratio of the said decisions is in favour of the appellant and supports the contention of the appellant that the commission of Rs. 1,02,464, which was ascertained in September 1989 only after the close of the financial year ended on 31-3-1989 when the accounts of the said company were finalised, became due to the appellant and accrued as his income only upon such finalisation and ascertainment during the previous year ended on 31-3-1990 relevant to the assessment year, that is, 1990-91. Therefore, according to him, the learned Tribunal presumed that the commission became due during the period to which it related overlooking the fact that the terms and conditions of the service of the appellant did not specify any date for its payment.

11. He further contended that the judgment of this Court in BHUBAN MOHAN BANERJEE Vs. COMMISSIONER OF Income Tax, WEST BENGAL, CALCUTTA., shall not have any application in the facts and circumstances of this case, since there was no dispute as to the date when the commission income became due. He further submitted that it is not the contention of the appellant that commission income should not be taxed in the year in which it became due and was taxable in that year and not in the year of receipt. The question raised by the appellant which is required to be adjudicated in the instant case is as to the point of time when the commission became due and accrued as income. Mr. Khaitan further submitted that has to be decided in the light of the principles laid down by the Supreme Court in Birla Gwalior (P.) Ltd.'s case (supra) as well as in the case of South Madras Industrial Development Co. (P.) Ltd. (supra). He further contended that in Commissioner of Income Tax Vs. R. Lakshmi Narayanan, the Hon'ble Madras High Court upheld the view taken by the Commissioner of Income Tax (Appeals) and the learned Tribunal and held that the commission was taxable in the year in which the profit of the company was finalised and the accounts were assessed.

12. Therefore, in these facts and circumstances of the case, he submitted that the reference should be answered in favour of the assessee. After considering all the aspects of the matter and after analyzing the facts of the cases cited before us, we do not find any hesitation to accept the contention of Mr. Khaitan and allow the appeal affirming the reference in favour of the appellant.

13. Both the questions are thus answered in favour of the assessee appellant negating the department's case.