

(2001) 06 CAL CK 0027

In the Calcutta High Court

Case No : IT Ref. No. 194 of 1992 20 June 2001 A.Y. 1980-81 & Income-tax
Reference No. 194 of 1992

Star Paper Mills Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-06-2001

Acts Referred:

Constitution of India, 1950 — Article 299, 299(1)

Forest Act, 1927 — Section 82, 83

Income Tax Act, 1961 — Section 10(1), 10(2)(xv), 256(1), 37, 43B

Citation : (2001) 252 ITR 337 : (2001) 118 TAXMAN 873

Hon'ble Judges : Y.R. Meena, J;Arunabha Barua, J

Bench : Division Bench

Advocate : Bajoria, for the Appellant;Mallick, for the Respondent

Judgement

Y.R. Meena, J.—On an application u/s 256(1) of the Income Tax Act, 1961, the Tribunal has referred the following questions set out at pages 1 and 2 of the paper book :

"1. Whether, the Tribunal was right in holding that the additional liability of Rs. 1,17,20,456 for eucalyptus royalty was an unascertained contingent liability and hence not an allowable deduction in computing the total income for the assessment year 1980-81 ?

2. Whether, the finding of the Tribunal that the said additional liability for eucalyptus royalty Rs. 1,17,20,456 was a contingent liability or that the assessee had chosen to adopt cash system of accounting in respect thereof are based on any material and/or are perverse ?

3. Whether, the Tribunal was right in holding that the said additional liability for eucalyptus royalty Rs. 1,17,20,456 was neither a statutory liability nor a liability in present but a contractual or de futuro liability ?"

2. The assessee is a limited company and engaged in the manufacture and sale

of paper. The assessment year involved is 1980-81 for which the relevant year ended on March 31, 1980. The main raw materials used by the applicant/assessee for manufacture of paper are eucalyptus wood and pine wood. The said raw materials are obtained from the forests of the Government of Uttar Pradesh. The terms and conditions on which such raw materials are supplied by the Government of Uttar Pradesh are that the applicant would pay the royalty as would be determined by the Government. Initially, royalty on eucalyptus wood supplied by the Government of Uttar Pradesh was fixed at Rs. 90 per volumetric ton (hereinafter referred as V. M. T.). In terms of the Government order, the said royalty was revisable every two years. During the relevant previous year the applicant/assessee received an intimation dated April 13, 1979, from the Government of Uttar Pradesh about the revision of royalty from the last fixed rate of Rs. 90 per V. M. T. to Rs. 216 and Rs. 290 per V. M. T. On representations made by the applicant, the said rates were revised by the Government of Uttar Pradesh by an order dated November 5, 1979, to Rs. 145 and Rs. 156 in respect of the supplies made from October 1, 1976, to September 30, 1978, and October 1, 1978, to September 30, 1980, respectively.

3. The applicant disputed the fixation of the royalty by way of a writ petition before the Allahabad High Court {Lucknow Bench} whereupon the Allahabad High Court by an interim order directed the applicant to pay Rs. 110 per V. M. T. during the pendency of the writ petition.

4. In its books of account for the relevant period, the applicant made provision in the accounts for the royalty on account of the said revision at the rate of Rs. 110 per V. M. T., which it was directed to pay by the interim order of the High Court.

5. In the notes appended to the audited accounts the applicant mentioned the further amount in accordance with the said rate that is at the rate of Rs. 145 and Rs. 156 per V. M. T. In the return for the assessment year 1980-81, the applicant claimed deduction of royalty at the said rate that is Rs. 145 and Rs. 156 per V. M. T.

6. The Assessing Officer allowed deduction at the rate of Rs. 110 only per V.M.T. which was provided in the accounts but did not allow the applicant's claim for allowance of the balance royalty on the ground that provision had not been made in the accounts at the said rates of Rs. 145 and Rs. 156 per V. M. T. and the liability to pay such royalty was disputed by the applicant before the High Court. Such claim amounted to Rs. 1,17,20,456. That has been disallowed by the Assessing Officer.

7. In appeal before the Commissioner of Income Tax (Appeals), the Commissioner of Income Tax (Appeals) accepted the contention of the applicant that non-making of the provision in the books of account and/or the fact of pendency of the writ petition disputing the rates fixed did not justify - rejection of its claim for deduction of the said sum of Rs. 1,17,20,456 and accordingly directed deduction of the said amount.

8. In appeal before the Tribunal, the Tribunal held that the royalty to the extent, which was not provided by the assessee in the accounts, was an uncertain contingent liability and therefore cannot be allowed as deduction. In computing the income of the assessee for the assessment year 1980-81. The Tribunal further held that it is not a statutory liability. Therefore, deduction cannot be allowed.

9. Learned counsel for the assessee, Shri Bajoria, submits that the royalty payable by the assessee is a statutory liability in view of the provision of Section 82 of the Indian Forest Act, 1927. He further submits that royalty is a tax as per the latest decision of the Supreme Court in the case of India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, . When it is a statutory liability whether the assessee has challenged or disputed that liability in the High Court does not make any difference when the assessee is following the mercantile system of accounting. He supported the view taken by the Commissioner of Income Tax (Appeals). On the other hand, learned counsel for the Revenue, Shri Mallick, submits that the royalty payable by the assessee is a contractual liability and when it is disputed it cannot be allowed when the dispute is pending in the court.

10. When the hearing was concluded the liberty was also given to the parties to file the written arguments if they so desire, Learned counsel for the assessee filed the written submissions. No written submissions are filed by learned counsel for the Revenue till date. Therefore, we have to consider the arguments and written submissions made by learned counsel for the assessee, Shri Bajoria.

11. The facts are not in dispute that the assessee has received a letter dated April 13, 1979, communicating to him regarding the revised rate of royalty. That was revised from Rs. 90 per V. M. T. to Rs. 216 per V. M. T. for the period from October 1, 1976, to September 30, 1978, and Rs. 290 per V. M. T. for the period from October 1, 1978, to September 30, 1980. On November 5, 1979, the said rate of Rs. 216 per V. M. T. reduced to Rs. 145 per V. M. T. and for the period from October 1, 1978, to September 30, 1980, the rate was reduced to Rs. 156.

12. The facts regarding revised royalty demanded by the U. P. Government vide letter dated April 13, 1979, subsequently revised on November 5, 1979, given by the assessee read as under :

Rs. Rs.

"From 1-10-1976 to 30-9-1978 at Rs. 145 per V. M. T. From 1-10-1978 to 31-3-1980 at Rs. 156 per V. M. T.

2,48,87,071 1,93,72,540

4,42,59,611

Less : Royalty provided in accounts up to 31-3-1979 and allowed by the Assessing Officer : From 1-10-1976 to 31-3-1978 at Rs. 90 per V. M. T. From

1-4-1978 to 30-9-1978 at Rs. 90 per V. M. T. From 1-10-1978 to 31-3-1979 at Rs. 99 per V. M. T. Liability arose during the previous year ended 31-3-1980 (assessment year 1980-81) Out of above, further royalty provided in accounts for the year ended 31-3-1980 (assessment year 1980-81) and also allowed by the Assessing Officer I : From 1-10-1976 to 31-3-1973 at Rs. 20 (Rs. 110-90) per V.M.T. From 1-4-1978 to 30-9-1978 at Rs. 20 (Rs. 110-90) per V.M.T.

1,28,26,221 26,22,938 50,12,164

28,47,917 5,82,393

2,04,61,323

2,37,98,288

From 1-10-1979 to 31-3-1979 at Rs. 11 (Rs. 110- 99) per V.M.T. From 1-4-1879 to 31-3-1980 at Rs. 110 per V. M. T.

5,57,027 (-) 80,90,495

1,20,77,832

1,17,20,456

Balance amount not provided for in the accounts but claimed in the assessment year 1980-81 by the appellant-Not allowed by Income Tax Officer but allowed by the Commissioner of Income Tax (Appeals).

13. The assessee has disputed these higher rates, that is, Rs. 145 per V. M. T. and Rs. 156 per V. M. T. in a writ filed before the Allahabad High Court. But mere dispute of the liability does not deprive the assessee to claim that liability as deduction when the assessee is following the mercantile accounting system and it is a statutory liability. That has been concluded by the apex court in the case of The Kedarnath Jute Mfg. Co. Ltd. Vs. The Commissioner of Income Tax, (Central), Calcutta, , their Lordships observed as under :

"The main contention of the learned Solicitor-General is that the assessee failed to debit the liability in its books of account and, therefore, it was debarred from claiming the same as deduction either u/s 10(1) or u/s 10(2)(xv) of the Act. We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income Tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter. The assessee who was maintaining accounts on the mercantile system was fully justified in claiming deduction of the sum of Rs. 1,49,776 being the amount of sales tax which it was liable under the law to pay during the relevant accounting year. It may be added

that the liability remained intact even after the assessee had taken appeals to higher authorities or courts which failed. The appeal is consequently allowed and the judgment of the High Court is set aside. The question which was referred is answered in favour of the assessee and against the Revenue. The assessee will be entitled to costs in this court and in the High Court."

14. A similar view has been taken by their Lordships in the case of *Sutlej Cotton Mills Limited Vs. Commissioner of Income Tax, Calcutta*, . As the law on the issue is that mere not making entry in the books of account does not deprive the assessee of his right to deduct the liability, similarly mere disputing the liability in court also does not deprive the assessee to claim that liability as deduction under the Income Tax.

15. Now it brings us to the issue whether the royalty payable by the assessee in pursuance of the order dated April 30, 1979, is a statutory liability.

16. To consider this issue first we would like to refer to some observations, decisions, relevant to the issue.

17. In the case of *Commissioner of Income Tax Vs. Gorelal Dubey*, the issue before the Madhya Pradesh High Court was whether royalty is a tax. Following the decision of their Lordships in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , the Madhya Pradesh High Court has taken the view that royalty is a tax.

18. The Madhya Pradesh High Court has observed at page 248 as under :

"In paragraph 31 (at page 707 of 188 ITR) of the judgment, their Lordships, after referring to the views expressed by the Rajasthan, Punjab, Gujarat and Orissa High Courts that the royalty cannot be said to be a tax because this is something which is being paid in lieu of minerals extracted, in paragraph 34 (ITR 707 188), concluded by saying that the royalty is a tax and thus the decisions of the High Courts cannot hold good."

19. When the royalty is treated as a tax that cannot be a contractual liability. The view taken by the Madhya Pradesh High Court in *Commissioner of Income Tax Vs. Gorelal Dubey*, has been affirmed by their Lordships of the Supreme Court reported in *Gorelal Dubey Vs. Commissioner of Income Tax*, . Their Lordships in para. 3 observed that the Constitution Bench judgment in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, lays down the law, namely, that royalty is tax, and it is a tax for all purposes including Section 43B of the Income Tax Act, 1961.

20. While considering the provisions of Sections 82 and 83 of the Forest Act, the Madhya Pradesh High Court has held in the case of *Dulichand Agarwal " v. State of M. P.* [1980] MPLJ 465, that Section 82 of the Forest Act as substituted by the Madhya Pradesh Act No. 9 of 1965 creates a statutory liability for recovery of the amount payable to the Government under terms of a notice relating to the sale of forest produce by auction. The statutory liability can be enforced even though

there is no contract as envisaged under Article 299 of the Constitution of India. The relevant discussion whether Section 82 creates a statutory liability the court has discussed at page 470. The relevant observations read as under :

"It was argued by learned counsel for the petitioner that Section 82 does not create a new liability and that it only provides for a procedure for enforcing a liability and that in the absence of any contract in the manner provided in Article 299(1) there could be no liability to pay the deficiency. In our opinion, this argument cannot be accepted. Section 82 properly construed creates a statutory liability for recovery of the amount payable to the Government under the terms of a notice relating to the sale of forest produce by auction. This statutory liability can be enforced even though there is no contract as envisaged under Article 299 of the Constitution. This construction of Section 82 is strongly supported by the decision of the Supreme Court in *A. Damodaran and Another Vs. State of Kerala and Others*, ."

21. Now the question is when the Madhya Pradesh High Court has taken a view that Section 82 of the Forest Act creates a statutory liability and their Lordships of the Supreme Court have taken the view in the case of *Gorelal Dubey Vs. Commissioner of Income Tax*, that royalty is a tax, how it can be said that royalty liability is not a statutory liability.

22. Once a particular status is conferred to the nature of liability that cannot be changed unless otherwise warranted under the provisions of the Act. In the case of contractual liability, if the liability is disputed that cannot be recovered as land revenue or to enforce the terms of the agreement, for that one has to approach the court. If it is a statutory liability like royalty in this case that royalty liability which is fixed by the Government can be recovered as land revenue without approaching the court.

23. It is also pertinent to note that in the case in hand the Government is the authority to decide the rate of royalty and that can be revised by the Government also, the assessee can only make request for rate of royalty or can approach the court. If it is a contractual liability, how the power of fixation of rate of royalty can be with Government only. On these peculiar facts of this case, the royalty liability cannot be taken as contractual liability.

24. When the royalty has been held as a tax by the apex court and rate of royalty can be fixed unilaterally by the State Government and its recovery also can be made as in the case of land revenue, in our view it cannot be treated as a contractual liability. It is a statutory liability and once it is a statutory liability whether it is provided for in the books or not does not make any difference.

25. We also found that the deduction has also been denied, as liability is uncertain. We do not understand once it is a statutory liability and a fixed amount of rate has been given in the Government order how it can be an uncertain liability. It is a certain and statutory liability. The Tribunal has wrongly reversed the view taken by the Commissioner of Income Tax (Appeals).

26. In the result, we answer question No. 1 that royalty liability is a certain liability and not a contingent liability, i.e., in favour of the assessee and against the Revenue. We answer question No. 2 in the negative so far whether it is a contingent liability and we also answer that the finding of the Tribunal that the assessee has chosen to adopt the cash system of accounting in respect of royalty liability that finding is perverse. The answer is in favour of the assessee. Question No. 3 we answer in the negative, that is, in favour of the assessee and against the Revenue.

27. The reference so made stands disposed of accordingly.