
(2008) 06 CAL CK 0014
In the Calcutta High Court

Sunil Kumar Ganguly and Others

APPELLANT

Vs

ITO and Others

RESPONDENT

Date of Decision : 10-06-2008

Acts Referred:

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

Citation : (2010) 1 CALLT 238 : (2010) 322 ITR 297

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Indira Banerjee, J.—The short question involved in this writ application is, whether the petitioners are entitled to exemption of tax for compensation to the extent of Rs. 5 lakhs under the optional early retirement scheme introduced by the Reserve Bank of India for voluntary retirement of its employees.

2. The petitioners are all ex-employees of the Reserve Bank of India (RBI). On or about 11-8-2003, RBI introduced an Optional Early Retirement Scheme, hereinafter referred to as the OERS, under which employees who had completed 25 years of full-time regular service and had also completed 50 years of age as on 1-8-2003 were given the option to take voluntary retirement.

3. The terms and conditions on which the petitioners were offered voluntary retirement under the OERS are extracted hereinbelow for convenience:

(b) The Scheme is applicable to employees who have completed 25 years of full-time regular service in the bank and have also completed 50 years of age. Only an employee who has completed 25 years of service and 50 years of age as on 1-8-2003 (for convenience), will be eligible to apply for retirement under the Scheme.

(c) The Scheme will be available to an employee entirely at his/her option/discretion. The employees in the banks service would be fully entitled to continue

in service, with all benefits for which they are eligible, if they decide not to opt for this facility. The eligible employees should apply in the prescribed application form.

(e) On acceptance of an employees application by the bank, his/her date of relieving from service, will be decided by the bank in keeping with administrative exigencies/convenience and advised in writing. Once an employees application under OERS has been accepted, the option will be irrevocable.

(g) Income Tax shall be deducted at source on the entire amount payable as ex gratia.

(j) As retirement under OERS is optional, it shall not be negotiable and shall not be deemed or construed as a subject-matter of right or contract of service. It will not be a subject-matter of any industrial disputes under the provisions of the Industrial Disputes Act, 1947, and shall not be cited as precedent, custom, convention, usage or practice, anytime in future.

(k) As retirement under OERS is optional, the employee seeking retirement under the OERS will not be eligible for any retrenchment compensation payable under the provisions of the Industrial Disputes Act.

(q) The benefit of counting of service in excess of six months as a completed year of service under the Scheme of OERS towards computing the "exgratia", will not be applicable for the purpose of determining the required minimum period of service of 25 years.

(r) In the case of an employee whose application for retirement under OERS is accepted, he/she will be permitted to retain the banks/leased flat beyond the date of retirement for a maximum period of 3 months, if he/she is in occupation of residential accommodation provided by the bank, recovery of rent being made at normal rate for the first 2 months and leased flat rental ceiling in the case of an officer and twice the amount of normal rent in the case of an employee in Class III or Class IV, for the 3rd month. As provided in the Scheme, in such cases, the ex gratia amount and other dues will be payable only after the employees hands over vacant possession of the banks/leased flat.

4. Some of the terms and conditions of the OERS as finalised are as follows:

2. Eligibility: Full-time regular employees who have completed minimum service of 25 years and have also completed 50 years of age, will be eligible to apply for retirement under the Optional Early Retirement Scheme.

4. Period of operation: The Scheme is being introduced on an experimental basis without a closing date but it can be withdrawn by the bank after watching the response for some time and after giving a minimum of one months notice.

5. Exgratia payable: Upon acceptance of the application for early retirement under the Scheme, the employee will be eligible for ex gratia amount equal to pay plus dearness allowance for the number of years of actual service rendered

at 60 days for each completed year of service or part thereof in excess of six months or pay plus dearness allowance for remaining months of service reckoned up to the date on which the employee would retire on superannuation, whichever is less.

6. Income Tax liability: Income Tax, if any, on the amount of ex gratia, will have to be borne entirely by the employees concerned. The ex gratia amount will be payable in one lump sum subject to recovery of Income Tax, which is to be borne entirely by the employee.

7. Retirement benefits: In addition to the ex gratia amount payable, employees who are granted early retirement under the Scheme will be eligible for retirement benefits, viz., PF, pension, gratuity, encashment of ordinary leave and bonus under guarantee fund as per normal rules applicable in that respect.

8. Weightage of service for pension: Addition of service up to five years in the qualifying service for pension, if admissible under the provisions of the RBI Pension Regulation, 1990, will not be available for calculation of amount of ex gratia payable.

10. Vacation of banks residential accommodation: An employee who is in occupation of residential accommodation provided by the bank, will be permitted to retain the banks/leased flat beyond the date of retirement under the Scheme for a maximum period of 3 months, recovery of rent being made at normal rate for the first 2 months and leased flat rental ceiling in the case of an officer and twice the amount of normal rent in the case of an employee in Class III or Class IV, for the 3rd month. The actual payment of ex gratia amount and other dues will be made to the employee only after the employee hands over to the bank vacant possession of the banks residential accommodation, if any, occupied by him.

11. Effect of the provisions of the scheme: Except to the extent provided specifically in this Scheme, the provisions of the RBI (Staff) Regulations, 1948 and other instructions issued by the bank from time to time will continue to apply in this respect.

5. It is stated that many other banks also introduced schemes for voluntary retirement including the United Bank of India. The terms and conditions offered by the United bank of India for voluntary retirement of its employees are similar to the OERS introduced by the Reserve Bank of India.

6. From the language and tenor of the OERS, it is patently clear that the scheme is for voluntary retirement. The use of the word "optional" is a synonym or at best a close variant of the word "voluntary".

7. The petitioners have contended, and very rightly, that the word "early" in the nomenclature of the scheme is superfluous, since retirement cannot be optional or voluntary unless it is at an earlier date.

8. The petitioners contend that in view of Section 10(10C) of the Income Tax Act, 1961, employees who opt for OERS are entitled to exemption of tax on compensation up to a limit of Rs. 5 lakhs.

9. Section 10(10C) of the Income Tax Act is extracted hereinbelow:

10. (10C) any amount received or receivable by an employee of-

(i) a public sector company; or

(ii) any other company; or

(iii) an authority established under a Central, State or Provincial Act; or

(iv) a local authority; or

(v) a co-operative society; or

(vi) a University established or incorporated by or under a Central, State or Provincial Act and in an institution declared to be a University u/s 3 of the University Grants Commission Act, 1956 (3 of 1956); or

(vii) an Indian Institute of Technology within the meaning of Clause (g) of Section 3 of the Institutes of Technology Act, 1961; or

(viia) any State Government; or

(viib) the Central Government; or

(viic) an institution, having importance throughout India or in any State or States, as the Central Government may, by notification in the Official Gazette, specify in this behalf; or

(viii) such institute or management as the Central Government may, by notification in the Official Gazette, specify in this behalf,

at the time of his voluntary retirement or termination of his service, in accordance with any scheme or schemes or voluntary retirement or in the case of a public sector company referred to in Sub-clause (i), a scheme of voluntary separation, to the extent such amount does not exceed five lakh rupees:

Provided that the schemes of the said companies or authorities or societies or Universities or the Institutes referred to in Sub-clauses (vii) and (viii), as the case may be, governing the payment of such amount are framed in accordance with such guidelines including, inter alia, criteria of economic viability as may be prescribed:

Provided further that where exemption has been allowed to an employee under this Clause for any assessment year, no exemption thereunder shall be allowed to him in relation to any other assessment year;

10. In terms of Clause (g) of the OERS extracted hereinabove, the Reserve Bank of India had reserved upon itself, the right to deduct tax at source, in respect of

the amount payable at the time of voluntary separation. In exercise of its right reserved in Clause (g), the Reserve Bank of India deducted tax at source in respect of some employees, who had opted for voluntary retirement under the OERS.

11. A writ application was moved by one Tarapada Ghosh and others which was numbered W.P. No. 4957 (W) of 2004. In the writ petition, it was contended that compensation under the OERS would be exempted from tax u/s 10(10C) of the Act to the extent of Rs. 5 lakhs.

12. By a judgment and order dated 2-4-2004, G.C. Gupta J. disposed of the writ application by granting leave to the writ petitioners to apply for refund from the Income Tax authorities along with interest, since the tax deducted by the RBI at source had already been deposited with the Income Tax authorities. The learned judge observed that prima facie the money received on account of voluntary retirement did not appear to be taxable to the extent of Rs. 5 lakhs. The final decision was left to the concerned Income Tax authority.

13. According to the petitioners, all the petitioners submitted their individual Income Tax returns for the financial year 2003-04/assessment year 2004-05. In the returns, the petitioners claimed exemption u/s 10(10C) of the Income Tax Act, 1961 of tax on compensation under the OERS to the extent of Rs. 5 lakhs.

14. The contention of the petitioners, of their being entitled to exemption of tax on OERS compensation to the extent of Rs. 5 lakhs was accepted. Accordingly, intimation u/s 143(1) was issued intimating the petitioners of refund towards tax deducted at source.

15. Subsequently, however, the assessing officer decided to assess/reassess the income of the petitioner in the assessment year in question. Notices u/s 148 of the Income Tax Act, 1961 dated 16-11-2004, 8-12-2004 and 30-12-2004 respectively were issued to the petitioners, wherein it was alleged that the income of the petitioners for the assessment year 2004-05 had escaped assessment and it was, therefore, proposed to reassess the income for which it was necessary for the petitioners to file returns within 30 days from the date of service of the said notices.

16. Pending proceedings for assessment and/or reassessments of income, which had allegedly escaped assessment, orders were passed u/s 281B of the Income Tax Act provisionally attaching the refund vouchers/cheques.

17. The petitioners wrote letters dated 5-1-2005 and 10-1-2005, through their advocate, to the assessing officer, requesting that the returns already filed by the petitioners be treated as returns filed in pursuance of the notices u/s 148 of the Income Tax Act.

18. By several letters addressed to the respective petitioners dated 4-1-2005, 19-1-2005, 20-1-2005, 25-1-2005, 31-1-2005 and 2-2-2005 respectively, the assessing officer intimated to the petitioners the reasons u/s 148(2) of the

Income Tax Act for initiating proceedings u/s 147 of the Income Tax Act, 1961 for assessment and/or reassessment of income that had allegedly escaped attention.

19. The reasons disclosed to the various petitioners were identical and are as follows:

It appears from the return for the assessment year 2004-05 that the assessee had claimed exemption u/s 10(10C) of the Income Tax Act, 1961 to the tune of Rs. 5,00,000. The return was processed u/s 143(1) on 23-8-2004 in which the claim of such exemption u/s 10(10C) was allowed. Refund to the tune of Rs. 1,53,905 was raised and the refund voucher is also granted to the assessee.

It appears from the records, the assessee had claimed such exemption u/s 10(10C) on account of VRS. However, it is seen from records that the employer, Reserve bank of India had deducted tax at source and not allowed this exemption u/s 10(10C) in the original Form No. 16 issued to the assessee. Accordingly the Reserve Bank of India was asked to clarify the reason for not allowing such claim of exemption u/s 10(10C) and also the reasons for deducting tax at source. The Reserve Bank of India replied that the banks optional early retirement scheme does not fulfil the guidelines laid down in Rule 2BA of the Income Tax Rules, 1962. According to their reply the scheme is not in conformity with Clauses (i), (iii) and (iv) of Rule 2BA. The scheme introduced by the bank was not in the nature of voluntary retirement scheme as per the guidelines laid down in Rule 2BA of the Income Tax Rules. In view of the differences between the banks optional early retirement scheme and the guidelines laid down in Rule 2BA of the Income Tax Rules, the ex gratia paid under banks scheme does not qualify for exemption u/s 10(10C) of the Income Tax Act.

Keeping in mind, Section 10(10C) of the Income Tax Act, 1961, read with Rule 2BA of the Income Tax Rules, 1962, I have reason to believe the exemption u/s 10(10C), as claimed by the assessee, in his return of income for the assessment year 2004-05, has been wrongly made and that income has escaped assessment for the assessment year 2004-05.

20. Rule 2BA of the Income Tax Rules, 1962, as it stood at the material time, is set out hereinbelow for convenience:

2BA. The amount received by an employee of-

- (i) a public sector company; or
- (ii) any other company; or
- (iii) an authority established under a Central, State or Provincial Act; or...

at the time of his voluntary retirement or voluntary separation shall be exempt under Clause (10C) of Section 10 only if the scheme of voluntary retirement framed by the aforesaid company or authority or co-operative society or University or institute, as the case may be, or if the scheme of voluntary separation framed by a public sector company, is in accordance with the

following requirements, namely:

- (i) it applies to an employee who has completed 10 years of service or completed 40 years of age;
- (ii) it applies to all employees (by whatever name called) including workers and executives of a company or of an authority or of a cooperative society, as the case may be, excepting directors of a company or of a co-operative society;
- (iii) the scheme of voluntary retirement or voluntary separation has been drawn to result in overall reduction in the existing strength of the employees;
- (iv) the vacancy caused by the voluntary retirement or voluntary separation is not to be filled up;
- (v) the retiring employee of a company shall not be employed in another company or concern belonging to the same management;
- (vi) the amount receivable on account of voluntary retirement or voluntary separation of the employee does not exceed the amount equivalent to three months salary for each completed year of service or salary at the time of retirement multiplied by the balance months of service left before the date of his retirement on superannuation: Provided that requirement of (i) above would not be applicable in case of amount received by an employee of a public sector company under the scheme of voluntary separation framed by such public sector company.

By various letters dated February 14, 15, 16, 18, 23 and 24, 2005 written 21 through their advocate Mr. A.K. Ghosh, the petitioners objected to assessment and/or reassessment of the income for the assessment year in question pointing out that the OERS introduced by the Reserve bank of India was in conformity with Rule 2BA including Clauses (i), (iii) and (iv) thereof.

22. In the said letter, it was pointed out that the stand of the Reserve Bank of India was based on an erroneous opinion of M/s. Choksi and Company and the assessing officer erred in relying thereon.

23 The assessing officer, however, issued 10 several assessment orders all dated 10-5-2005, which were received by the various petitioners on diverse dates between May 16 and 25, 2005.

24 According to the petitioners, the assessment orders were passed without considering the objections of the petitioners and were based on the erroneous opinion of the chartered accountants of Reserve Bank of India.

25. Dr. Debi Pal appearing on behalf of the petitioners submitted that the view taken by the Reserve Bank of India, based on the advice of M/s. Choksi and Co., chartered accountants, was erroneous and not binding on the assessing officer and the assessing officer erred in law in relying on the same.

26. Dr. Pal submitted that G.C. Gupta J. had in the writ petition being W.P. No.

4957 (W) of 2004 passed an order dated 2-4-2004, prima facie holding that compensation to the extent of Rs. 5 lakhs was not taxable in view of Section 10(10C) of the Income Tax Act, 1961.

27. Dr. Pal submitted that no appeal having been preferred, the final order of G.C. Gupta J. had assumed finality and was binding on the department. The finding of G.C. Gupta J. was only a prima facie finding as recorded in the order itself, and, therefore, not binding on the department. The final decision was left with the concerned Income Tax authorities.

28. The impugned order of assessment stated that the assessing officer had firm reasons to believe that income of the assessee had escaped assessment since the voluntary scheme introduced was not in conformity with the Clauses (i), (iii) and (iv) of Rule 2BA of the Income Tax Rules and hence the petitioners were not liable to tax on the compensation to the extent of Rs. 5 lakhs, as claimed by them.

29. The assessment order is apparently contrary to a composite decision of the Income Tax Appellate Tribunal in the appeals being I.T.A. No. 471/MDs/06, I.T.A. No. 472/MDs/06, I.T.A. No. 501/MDs/06 and I.T.A. No. 518/MDs/06. The order of the learned Tribunal is extracted hereinbelow:

It may not be out of place to mention that the Calcutta High Court while dealing with the writ petition in 4957/W704 in its operative para has expressed the following view:

Prima facie, it appears that money received on account of voluntary retirement up to the sum of Rs. 5 lakhs was not taxable. The Reserve bank of India, it appears, was conscious of the legal position and that is why it went in for advice in the matter. The correctness of the advice rendered to them, however, appears to be doubtful. This Court, however, does not pass any opinion with regard thereto.

This will answer whether the opinion expressed by the chartered accountant on the issue will make the sums in question taxable. Neither the opinion of the chartered accountants nor the views of the RBI will finally determine the fate of exemption that is claimed u/s 10(10C) but the satisfaction of the conditions or guidelines laid down by the Income Tax Rules, 1962. A plain reading of Section and guidelines of Rule 2BA shows that the scheme in question leaves no doubt in our minds that the sums in question are clearly exempt u/s 10(10C) of the Act up to the extent of Rs. 5 lakhs.

Since the issue involved is identical; adhering to the doctrine of stare decisis, we set aside the order of lower authorities and decide the issue in favour of the assessee.

In the result, the appeals by the assesseees are allowed.

30. On behalf of the revenue, it was argued that the OERS did not fulfil the

requirement of Section 10(10C) of the Income Tax Act and Rule 2BA of the Income Tax Rules inasmuch as the OERS was not in conformity with Clauses (i), (iii) and (iv) of Rule 2BA of the Income Tax Rules.

31. It was further argued that the Reserve Bank of India, itself sent an administrative circular to the Income Tax authorities propounding the view that the scheme did not comply with the requirements of the said provisions.

32. The revenue argued that notice u/s 148 was issued upon receipt of the circular of the Reserve Bank of India. The reply of the petitioner to the notice was duly considered and the objection raised by the petitioner was disposed of by a speaking assessment order dated 10-5-2005.

33. Mr. Sarkar argued that reopening of the reassessment was not on the self-same materials but on the basis of the letter of the Reserve Bank of India which was received after the date of processing of the return.

34. The revenue relied upon the decision in the case of Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, , wherein it was held that even if information was available at the time of assessment, but the same came to the knowledge of the assessing officer after assessment, the income could still be reassessed.

35. Mr. Sarkar submitted that initiation of proceedings for reassessment of escaped income was on the basis of honest belief of the Income Tax Department and/or the assessing officer and the challenge thereto was not sustainable.

36. On behalf of the revenue, it was further argued that the assessment order had very lucidly discussed how and in what manner the OERS was not in conformity with the Income Tax Act and/or Rules.

37. Mr. Sarkar submitted that there is no apparent error in the assessment order impugned, warranting interference of this Court in exercise of power under Article 226 of the Constitution of India.

38. It was lastly argued that the orders of the Commissioner (Appeals) and the Tribunal were not binding on this Court. This Court exercising jurisdiction ought to confine itself to the issue of whether initiation of proceedings was correct in law and whether the assessment order passed by the assessing officer can be supported in law.

39. Admittedly, there were no new materials before the assessing officer, save and except a circular of the Reserve bank of India that was based on an opinion of a company of chartered accountants which had no binding value.

40. Exemption of tax on compensation amount up to Rs. 5 lakhs has been claimed on the basis of the OERS which was before the authorities. The authorities on considering the terms and conditions of the OERS were of the view that Section 10(10C) was attracted and compensation was not taxable up to Rs. 5 lakhs. Accordingly, intimation of refund had been issued in respect of the tax

deducted at source. The opinion of a chartered accountant, or for that matter the opinion of the Reserve Bank of India, based on the same document which had earlier been examined by the department, could not be a ground for initiation of proceedings for reassessment of income.

41. The OERS is not contrary to Rules 2BA(i), (iii) or (iv) or any other provision of the said rule. To attract Section 10(10C), the requisites of Rule 2BA are to be complied. Rule 2BA(iii) provides that the voluntary scheme is to apply to all employees who have completed 10 years of service. The scheme is voluntary. The word "optional" is a close variant of the word "voluntary", if not a synonym thereof.

42. The OERS applied to all employees who had completed twenty-five years of service, which is, over ten years, and had attained fifty years of age, that is, over forty years. The OERS is apparently designed to reduce the overall employee strength and, therefore, conforms to Rule 2BA(iii). This is clarified by Circular No. 1 dated 11-8-2003 of RBI.

43. The OERS also does not contravene Rule 2BA(iv), whereunder the vacancy caused by the appellant is not to be filled up. The OERS does not contemplate filling up of the vacancies caused by reason of exercise of option to retire under the OERS. Mere reservation of a right to make appointments at some future point of time, should the need arise, cannot amount to contravention of Rule 2BA(iv).

44. In any case, there was an order of the Commissioner (Appeals) in favour of some employees covered by the same OERS. The appeal therefrom had been rejected since the revenue involved did not exceed Rs. 2 lakhs. Moreover, the Income Tax Appellate Tribunal had, in the appeals referred to above clearly held, in no uncertain terms that Section 10(10C) of the Income Tax Act, 1961, was applicable to OERS and set aside the orders of the Commissioner of Income Tax disallowing deduction of up to Rs. 5 lakhs from income on account of the compensation amount under OERS for the purpose of tax.

45. It is true, as argued, on behalf of the revenue that an order of the Commissioner (Appeals) or an order of the Tribunal, for that matter is not binding on this Court. The orders of the Tribunal/Commissioner (Appeals) in favour of the assessee, which had assumed finality, were certainly binding on the assessing officer.

46. The passing of orders contrary to the orders of the Commissioner (Appeals) and the Tribunal in case of some employees of the Reserve Bank of India governed by the OERS is discriminatory and violative of the right of the petitioners to equality conferred under Article 14 of the Constitution of India.

47. The orders impugned being in violation of the fundamental rights of the petitioners and there being apparent errors in the impugned orders, the impugned orders cannot be sustained and the same are set aside and quashed.

48. The writ petition is allowed.