
(1997) 09 DEL CK 0011

In the Delhi High Court

Case No : IT Ref. No's. 19 and 222 of 1980

Triveni Engineering Works Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 05-09-1997

Acts Referred:

Citation : (1999) 154 CTR 465 : (1998) 234 ITR 447

Hon'ble Judges : R.C. Lahoti, J;J.K. Mehra, J

Bench : Division Bench

Advocate : Santosh K. Agarwal, for the Appellant; R.D. Jolly and Ms. Premlata Bansal, for the Respondent

Judgement

1. This common order shall govern the disposal of IT Ref. No. 19 of 1980 and IT Ref. No. 222 of 1980. The two references are between the same parties though arising out of different assessment years.

IT Ref. No. 19 of 1980 is at the instance of the assessee. It arises out of the asst. yrs. 1969-70 and 1970-71 seeking the opinion of the High Court on the following common question :

"Whether, on the correct interpretation of law and on facts and in the circumstances of the case, the Tribunal was justified in holding that the disallowance of Rs. 59,842 paid to Shri K. L. Sahni as guarantee commission and in interpreting the circular of the Reserve Bank of India as a condemnation of the practice of the banks asking personal guarantee in the case of public limited companies holding large assets ?"

2. The assessed is a public limited company engaged in the business of manufacture and sale of crystal sugar. It was amalgamated with Triveni Engineering Works by an order of the High Court of Delhi w.e.f. 1st February, 1970. In the asst. yr. 1969-70, the assessed had claimed a deduction of Rs. 59,842 on account of guarantee commission paid by it to its managing director, Shri K. L. Sahni, for giving a personal guarantee on its behalf. The assessee-

company was being managed earlier by managing agents, who were none else than the three directors of the assessee-company, namely, Shri K. L. Sahni, D. C. Sahni and P. C. Sahni. Those managing agents gave the necessary personal guarantee but never charged any commission for the same. The managing agents continued to manage the business of the company up to the asst. yr. 1967-68. In the asst. yr. 1968-69, the business was managed by the directors themselves as by that time the managing agency had been abolished. Even in the asst. yr. 1968-69, the directors did not charge any guarantee commission for furnishing a similar personal guarantee to the Central Bank of India Ltd.

The ITO held that the guarantee commission paid by the company to its director was not an admissible deduction. The AAC has held that the discretion was judicially exercised by the ITO. The Tribunal too has rejected the appeal preferred by the assessee.

3. A perusal of the order of the Tribunal shows the ITO having assigned three reasons for disallowing the deduction : firstly, that it was for the first time in the accounting year relevant to the asst. yr. 1969-70 that the board of directors passed a resolution allowing two per cent. commission on the limit of the cash credit to the directors for furnishing personal guarantee; secondly, the commission was allowed only to Shri K. L. Sahni although the other two directors in the company had also furnished the personal guarantees; thirdly, the company had available (sic) ample realisable assets wherefrom the bank could realise the loan advanced by it. The ITO held that the transaction appeared to be tainted. The Tribunal has maintained the findings recorded by the ITO, confirmed in first appeals. In addition, the Tribunal has also held that there was no material to suggest any services were rendered by Shri K. L. Sahni to the company so as to warrant the payment of commission. The Tribunal further held that Shri Sahni did not run any risk and there was no detriment involved in furnishing the personal guarantee.

4. In IT Ref. No. 222 of 1980, the statement of case has been made by the Tribunal at the instance of the Revenue seeking opinion of the High Court on the following question of law arising out of the asst. yr. 1973-74 :

"Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in allowing the expenditure of Rs. 2,55,000 claimed by the assessee-company in this year as guarantee commission paid to one of the directors of the company for securing loans from banks for the assessor's business ?"

5. The assessed had taken loans from the Central Bank of India and the Punjab National Bank for its sugar unit on the personal guarantee of the director, Shri Puran Chand Sawhney. A sum of Rs. 2,55,000 was claimed by the assessed as a deduction on account of guarantee commission paid to Shri Puran Chand Sawhney. The claim was disallowed by the ITO. The disallowance was maintained in appeal by the AAC. The assessed went in appeal to the Tribunal.

The Tribunal relied on the Delhi High Court judgment in the case of CIT vs. Punj Sons (P) Ltd. (IT Ref. No. 48 of 1966, decided on 1st March, 1971), and a judgment of the Allahabad High Court. It also recorded a finding that the guarantee commission of Rs. 2,55,000 paid to Shri Puran Chand Sawhney was incurred wholly and exclusively for the purpose of business.

6. We may briefly refer to the relevant legal provisions. Expenses incurred wholly and exclusively for the purposes of the business are to be allowed in computing the income chargeable under the head "Profits and gains of business and profession" under s. 37(1) of the IT Act. Sec. 40 of the Act has been drafted as a proviso to the above said provision. In the case of an assessed which is a company, notwithstanding the provisions of s. 37(1), any expenditure which results directly or indirectly in the provision of any remuneration or benefit or amenity to a director or to a person who has a substantial interest in the company or to a relative of the director or of such person, as the case may be, cannot be allowed, if in the opinion of the ITO any such expenditure or allowance is excessive or unreasonable having regard to the legitimate business needs of the company and the benefit derived by or accruing to it there from.

7. We have perused the decision of the Delhi High Court in CIT vs. Punj Sons (P) Ltd. (supra). Therein it has been held :

"An inquiry has to be made into the excessiveness or unreasonableness of the amount paid to the director or the person having a substantial interest in the assessee-company."

The Tribunal had found that the payment of the amount was for due consideration and was neither excessive nor unreasonable. In this background, the Court opined in favor of the deduction being allowed.

8. Learned counsel for the Revenue have invited attention of the Court to two decisions of the Delhi High Court, namely, Commissioner of Income Tax Vs. Indian Aluminium Cables Ltd. (No. 1), and CIT vs. Associated Traders & Engineering Ltd.

In Indian Aluminium Cables Ltd.'s case (supra) the Tribunal had recorded a finding that the guarantee commission was actually paid to the directors and it was neither excessive nor unreasonable having regard to the legitimate needs of the assessee. Rejecting the reference sought for by the Revenue, the Division Bench held that the findings recorded by the Tribunal were of facts and no question of law arose out of the Tribunal's order.

In Associated Traders and Engineering Ltd.'s case (supra) also the Tribunal had found it as a fact that the guarantee commission was paid to the directors in view of personal risks they undertook in furnishing guarantee on behalf of the assessed and hence the payment of commission was liable to be deducted on the basis of such finding of fact.

It is, thus, clear that in both the cases the Division Benches have proceeded on

the findings of fact recorded by the Tribunal.

9. In the two IT references at hand also, the issues are concluded for each of the respective assessment years by findings of fact. As we have already noticed in the factual part of this order, for the asst. yr. 1969-70, the findings of fact consistently recorded by all the authorities are that the transaction was tainted and the payment of guarantee commission was excessive or unreasonable. For the asst. yr. 1973-74, the finding of fact is to the contrary. The disallowance or allowance of the guarantee commission has been so done on the facts found. There are several factual considerations relevant to s. 37(1) which have to be kept in view by the AO. One of them is whether the expenditure was excessive or unreasonable. We are, Therefore, of the opinion that for both the years the findings recorded by the Tribunal are those of facts and hence the questions sought to be referred do not arise as questions of law from the orders of the Tribunal. It is pertinent to note that in the two references none of the petitioners has challenged the findings of fact alleging perversity or non-consideration of material available on record.

10. In *Dr K. George Thomas Vs. Commissioner of Income Tax , Kerala* , their Lordships of the Supreme Court have held :

"Facts must be found by the Tribunal and the High Court must proceed on the basis of the facts found by the Tribunal. The High Court cannot afresh go into the facts overruling the facts found by the Tribunal unless there is a question to that effect challenging the facts found by the Tribunal."

11. In *Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras* , it has been held by their Lordships :

"Under s. 66(1) it is only a question of law that can be referred for decision of the Court. A finding on a question of fact is open to attack as erroneous in law only if it is not supported by any evidence, or if it is unreasonable and perverse; but where there is evidence to consider, the decision of the Tribunal is final even though the Court might not, on the materials, have come to the same conclusion if it had the power to substitute its own judgment.

When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact."

12. The High Court is not bound to answer the question if it be a question of fact and/or if the question be not arising out of the order of the Tribunal merely because the High Court had called upon the Tribunal to state a case on that question [see *Commissioner of Income Tax, West Bengal, Calcutta Vs. Smt. Anusuya Devi* ,].

13. For the foregoing reasons, both the references are refused to be answered. No order as to the costs.

Though we have dismissed the applications, we would like to clarify by way of

abundant caution that we may not be taken to mean that condemnation of the practice of the banks asking personal guarantee in the case of public limited companies holding large assets can itself be a ground for disallowance of commission paid to directors. The AO has to take an overall view of the facts of each case.