

**(1992) 11 AHC CK 0053**

**Allahabad High Court**

**Case No:** Income-tax Reference No. 12 of 1979

Commissioner of Income Tax

APPELLANT

Vs

Laxmi Sugar and Oil Mills Ltd.

RESPONDENT

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**Date of Decision:** Nov. 2, 1992

**Acts Referred:**

- Income Tax Act, 1961 - Section 40A(7)

**Citation:** (1993) 204 ITR 265

**Hon'ble Judges:** Om Prakash, J; M.C. Agarwal, J

**Bench:** Division Bench

**Advocate:** Shekhar Srivastava, for the Appellant; Bharatji Agarwal, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

1. At the instance of the Commissioner, the Income Tax Appellate Tribunal, Allahabad Bench, has u/s 256(2) of the Income Tax Act, 1961 (for short, "the Act"), referred the following question for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the assessee was entitled to deduction of ,Rs. 79,300 on account of contribution to the employees" gratuity fund even though the gratuity fund was not approved by the Commissioner of Income Tax as required under the Income Tax Act, 1961, for the assessment year 1974-75 ?"

2. We have heard Sri Shekhar Srivastava, learned standing counsel for the Commissioner and Sri Bharatji Agarwal, learned counsel for the assessee-respondent.

3. The proceedings relate to the assessment year 1974-75, the accounting period for which had ended on September 30, 1973. The assessee had claimed a deduction of Rs. 75,930 as an expenditure representing its contribution to the employees" gratuity fund. The Income Tax Officer disallowed the same as had been done in the

past. The matter ultimately reached the Tribunal which, following its own order passed in the appeal for the assessment year 1972-73, deleted the disallowance. In its order, the Tribunal reproduced the relevant portion of its order for the assessment year 1972-73, which reads as under :

"We shall first take up the appeal against the Income Tax assessment-order. The first ground is against disallowance of Rs. 76,930 as an allowable deduction from the income of the assessee being contribution of the assessee to the employees' gratuity fund. In the opinion of the Income Tax Officer, the claim was inadmissible and he added back this amount in the income. The Appellate Assistant Commissioner on the other hand, following the decision of the Income Tax Appellate Tribunal in the assessee's own case in I. T. A. No. 2341 of 1967-68, deleted the disallowance. That appeal related to the assessment for the assessment year 1964-65. In the appeals for the assessment years 1967-68, 1968-69 and 1969-70, this question again came up before the Appellate Tribunal in the Department's appeal I. T. A. Nos. 647, 1360 and 1361/(All) of 1972-73, which was decided by order dated September 20, 1974. A copy of that order has been filed by the assessee. One of us was a party to that order, the earlier decision was followed and it was held that the contribution made by the assessee to the employees' gratuity fund was an allowable deduction from the income of the years concerned. In the present appeal as well we take the same view and agree with the Appellate Assistant Commissioner."

4. As would be evident from the above extract, the dispute regarding the disallowance of contribution to the gratuity fund is coming up from the assessment year 1964-65 onwards. A copy of the Tribunal's order for the assessment year 1964-65 has been annexed to this reference and a perusal of the relevant discussion as contained in paragraph 21 of that order reveals that the deduction claimed by the assessee on account of contribution to the gratuity fund was declined on the ground that the gratuity fund was not approved by the Commissioner of Income Tax. The Tribunal held that the deduction is admissible u/s 28 or 37(1) read with Section 40(a)(iv) of the Act. This reasoning had been followed from year to year and as the Tribunal's order under reference would show it has allowed the deduction following its order for the assessment year 1972-73 which in its turn had followed the Tribunal's order for the assessment year 1964-65 onwards. In the order under reference, the Tribunal has not specifically mentioned that the gratuity fund was not approved by the Commissioner. Therefore, learned counsel for the assessee contended that the question as framed by the Tribunal does not arise out of the order of the Tribunal. We have given the genesis of the controversy in sufficient detail only to show that this contention is not correct. The disallowance was made only for the aforesaid reason right from the assessment year 1964-65 and the Tribunal's reference to the earlier orders which have been made the basis of its decision is sufficient to show that the same reason was adopted for deciding the controversy for the year under consideration. We may mention that learned counsel

for the assessee did not even contend that there was any alteration in the facts and that the aforesaid reason did not subsist in the year under consideration. For these reasons, we reject the objection raised by learned counsel for the assessee.

5. As regards the merits of the controversy, learned standing counsel referred to Section 36(1)(v) of the Act which permits deduction of any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust. Learned standing counsel contended that since the gratuity fund, to which the assessee had made the contribution in question, had not been approved, the necessary requirements of Section 36(1)(v) were not met and, therefore, the deduction was not allowable. Learned counsel for the assessee, on the other hand, relied on *Madho Mahesh Sugar Mills (P.) Ltd. v. CIT* [1973] 92 ITR 503 in which this court, while dealing with the proceedings for the assessment year 1962-63, held that a provision for gratuity made in compliance with an order of the Uttar Pradesh Government was allowable as a deduction. Reference to Section 36(1)(v) was made on behalf of the Revenue before the High Court and it was held that this section was not applicable as the amount was deductible in the computation of the gross profit itself. Reliance was also placed on [Commissioner of Income Tax Vs. Steel Rolling Mills of Bengal Ltd.](#), which is a judgment dealing with the assessment year 1972-73 and it was held that the deduction in respect of a provision made by an assessee on account of its liability to pay gratuity to its employees was allowable under Sections 28 and 37 of the Act. Both these rulings, thus, deal with the law as it stood during the relevant assessment years.

6. By the Finance Act, 1975, Section 40A(7) was introduced in the Act with retrospective effect from April 1, 1973, and the relevant portion thereof reads as under :

"(7) (a) Subject to the provisions of Clause (b), no deduction shall be allowed in respect of any provision (whether called as such or by any other name) made by the assessee for the payment of gratuity to his employees on their retirement or on termination of their employment for any reason.

(b) Nothing in Clause (a) shall apply in relation to-

(i) any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund, or for the purpose of payment of any gratuity, that has become payable during the previous year ;

(ii) any provision made by the assessee for the previous year relevant to any assessment year commencing on or after the first day of April, 1973, but before the first day of April, 1976, to the extent the amount of such provision does not exceed the admissible amount, if the following conditions are fulfilled, namely :--

(1) the provision is made in accordance with an actuarial valuation of the ascertainable liability of the assessee for payment of gratuity to his employees on their retirement or on termination of their employment for any reason ;

(2) the assessee creates an approved gratuity fund for the exclusive benefit of his employees under an irrevocable trust, the application for the approval of the fund having been made before the first day of January, 1976 ; and

(3) a sum equal to at least fifty per cent. of the admissible amount, or where any amount has been utilised out of such provision for the purpose of payment of any gratuity before the creation of the approved gratuity fund, a sum equal to at least fifty per cent. of the admissible amount as reduced by the amount so utilised, is paid by the assessee by way of contribution to the approved gratuity fund before the first day of April, 1976, and the balance of the admissible amount or, as the case may be, the balance of the admissible amount as reduced by the amount so utilised, is paid by the assessee by way of such contribution before the first day of April, 1977."

7. As stated above, we are dealing with the assessment year 1974-75 to which the above provisions would be applicable. Sub-clause (a) of Section 40A(7) creates an absolute bar to the allowance of any provision for payment of gratuity except in the exceptions provided in Sub-clause (b). Sub- Clauses (i) and (ii) which provide for the exceptions again require that the fund to which the contribution is made should be an approved one. Section 40A(7) came up for consideration before the Supreme Court of India in the case of [Shree Sajjan Mills Ltd. Vs. Commissioner of Income Tax, M.P., Bhopal and Another](#) . The Supreme Court was dealing with the assessment years 1973-74 and 1974-75 to which Section 40A(7) applied and it held that after introduction of this provision any deduction for a provision on account of gratuity could be allowed only on the terms of Section 40A(7). Dealing with the nature of a liability to pay gratuity, the Supreme Court observed that the right to receive the payment accrued to. the employees on their retirement or termination of their services and the liability to pay gratuity became the accrued liability of the assessee, when the employees retired or their services were terminated. Until then, the right to receive gratuity is a contingent right and the liability to pay gratuity continues to be a contingent liability qua the employer. The Supreme Court after discussing the various provisions of the Act and the various rulings observed as follows (at page 599) :

"It would thus be apparent from the analysis aforesaid that the position till the provisions of Section 40A(7) were inserted in the Act in 1973 was as follows :

"(1) Payments of gratuity actually made to the employee on his retirement or termination of his services were expenditure incurred for the purpose of business in the year in which the payments were made and allowed u/s 37 of the Act.

(2) Provision made for payment of gratuity which would become due and payable in the previous year was allowed as an expenditure of the previous year on accrued

basis when the mercantile system was followed by the assessee.

(3) Provision made by setting aside an advance sum every year to meet the contingent liability and gratuity as and when it accrued by way of provision for gratuity or by way of reserve or fund for gratuity was not allowed as an expenditure of the year in which such sum was set apart.

(4) Contribution made to an approved gratuity fund in the previous year was allowed as deduction u/s 36(1)(v).

(5) Provision made in the profit and loss account for the estimated present value of the contingent liability properly ascertained and discounted on an accrued basis as falling on the assessee in the year of account could be deductible either u/s 28 or Section 37 of the Act."

8. Then, the Supreme Court discussed the intention of the Legislature in enacting Section 40A(7) and concluded that this provision of law overrides all other provisions in the Act. The relevant observations of the Supreme Court are as below (at page 602) :

"It was pointed out that payment of gratuity was a statutory liability created under the Payment of Gratuity Act, 1972. It could normally be said to have arisen for the carrying on of the business. However, for gratuity to be deductible under the Act. It must fulfil the conditions laid down in Section 40A(7). The deduction could not be allowed on general principles under any other section of the Act because Sub-section (1) of Section 40A makes it clear that the provisions of the section shall have effect notwithstanding anything to the contrary contained in any other provision of the Act relating to the computation of income under the head "Profits and gains of business or profession" or, in other words, it means that Section 40A would have effect notwithstanding anything contained in Sections 30 to 39 of the Act."

9. Thus, the answer to the question referred by the Tribunal is concluded by the aforesaid judgment of the apex court and we answer the question as reproduced above in the negative in favour of the Revenue holding that the assessee was not entitled to deduction of Rs. 79,300 on account of contribution to the employees' gratuity fund.

10. Lastly, learned counsel for the assessee contended that the assessee's accounting period was from October 1, 1972, to September 30, 1973, and the provisions of Section 40A(7) having been enacted with effect from April 1, 1973, they were not applicable to the whole year. This contention is not tenable. It is settled law that the law applicable to an assessment year is the law as it stands on the first day of that assessment year. We are dealing with the assessment year 1974-75 which commenced on April 1, 1974. Section 40A(7) became effective from April 1, 1973, and, therefore, this was applicable to the assessment year in question (See

[Karimtharuvi Tea Estate Ltd. Vs. State of Kerala](#), and [Commissioner of Income Tax, West Bengal Vs. Isthmian Steamship Lines](#), . This contention, therefore, has no force and is rejected.

11. The reference is answered as above. The Commissioner shall get his costs from the assessee-respondent.

12. A duly authenticated copy of this judgment be sent to the Assistant Registrar of the Allahabad Bench of the Income Tax Appellate Tribunal in accordance with Section 260(1) of the Act.