

(2009) 02 KL CK 0067
High Court Of Kerala
Case No: IT Appeal No. 35 of 2009

M.K. Raghu

APPELLANT

Vs

Assistant
Commissioner of
Income Tax

RESPONDENT

Date of Decision: Feb. 10, 2009

Acts Referred:

- Income Tax Act, 1961 - Section 115BB, 194B, 199, 2(24), 260A

Citation: (2009) 226 CTR 269 : (2009) 182 TAXMAN 362

Hon'ble Judges: K. Surendra Mohan, J; C.N. Ramachandran Nair, J

Bench: Division Bench

Advocate: Sarangan, K. Vinod Chandran and A.S. Beenu, for the Appellant; P.K.R. Menon and Jose Joseph, for the Respondent

Judgement

C.N. Ramachandran Nair, J.

The appeal is filed by the assessee. An amount of Rs. 4,55,57,980 was received by him towards prize money in a super lotto on-line lottery conducted by the Government of Sikkim, The Government of Sikkim however deducted Rs. 45,54,886 towards Sikkim Income Tax from the prize money and paid the appellant only the balance amount. In the Income Tax assessment completed for the assessment year 2003-04 the Income Tax Officer brought to tax the entire prize money of Rs. 4,55,57,980 at the rate of 30 per cent u/s 115BB of the Income Tax Act, 1961. Even though assessee claimed credit of tax deduction at source by the Sikkim Government the same was rejected by the officer. The assessee filed appeal against the assessment before the Commissioner of Income Tax (Appeals) who allowed the appeal by directing the officer to give credit for the Sikkim Income Tax deducted at source by the Government of Sikkim. The revenue filed appeal against this order before the Income Tax Appellate Tribunal contending that assessee is not entitled to credit Income Tax deducted at source by the Lottery Directorate of Sikkim because

the amount deducted is not Income Tax under the Income Tax Act and the same is not paid to the account of the Central Government. The assessee also filed a cross appeal claiming alternately that he is entitled to double taxation relief provided in Chapter IX u/s 90 of the Income Tax Act. The Tribunal allowed the department's appeal following their earlier order in other cases and rejected the cross appeal filed by the assessee. Even though assessee has filed another appeal against the very same order of the Tribunal dismissing the cross appeal we proceed to decide this case as the main issue arises in this appeal.

2. We have heard senior Counsel Shri G. Sarangan appearing for the appellant/assessee and senior Counsel Shri. P.K.R. Menon appearing for the department.

3. The questions raised for our decision are the following:

(1) Whether the Sikkim lottery prize was liable to be subject to tax, the same having suffered tax already by deduction of tax at source in the State of Sikkim?

(2) Whether alternatively, the assessee is entitled for deduction of tax at source made by Sikkim authorities against the tax payable on the assessment made in India?

(3) Without prejudice to the above, whether the appellant is taxable in India on the amount of prize money as reduced by the amount of tax deducted at source having regard to the fact that tax deducted at source by the Sikkim authorities did not accrue to and was not received by the appellant?

The first question is whether winnings from lottery from Sikkim can be assessed as income u/s 2(24)(ix) of the Income Tax Act. The Income Tax Act provides a specific charging Section 115BB provides tax at 30 per cent on income from lotteries. The assessee is an individual residing in India and Sikkim being a State in India, we see no reason why the income earned by the assessee in the form of prize money from lotteries is not assessable under the Act. Even though assessee has claimed that the lottery income was subjected to tax in Sikkim, we are unable to accept the same because the authority to tax income under the Constitution vests with Central Government and the income earned in Sikkim is no exception. Even though the Directorate of Lotteries has deducted Sikkim Income Tax from the lottery income received by the assessee we do not know what entails him to deduct Sikkim Income Tax after 1-4-1990 when the Income Tax Act is made applicable to the State of Sikkim. The deduction of Sikkim Income Tax apparently is unauthorised and it is not for us to consider the legality while considering the appeal u/s 260A of the Income Tax Act. However, we hold that assuming a resident in India is assessable for the income received in the form of winnings from lottery under from Sikkim Section 115BB of the Income Tax Act. Consequently, the finding of the Tribunal in this regard is upheld.

4. The next question to be considered is whether the assessee is entitled to deduction of tax at source made by the Sikkim authorities. As already stated, we notice that what is deducted as is clear from the certificate issued by the Lottery Director is the "Sikkim income tax" and not Income Tax due under the Income Tax Act, 1961. Section 194B of the Income Tax Act provides for deduction of tax while paying any income by way of winnings from any lottery to any person. Section 199 of the Act provides that deduction of tax made under any provision of the Act should be paid to the Central Government and only on such payment, the payment shall be treated as payment of tax by or on behalf of the person whose income was subjected to deduction. It is clear from the certificate issued by the Lotteries Director that he has not deducted Income Tax u/s 194B of the Income Tax Act on the payment of lottery prize money to the assessee and admittedly he has not paid the amount so deducted to the Central Government. He has clearly stated in the certificate that what is deducted is Sikkim Income Tax. Therefore, the Tribunal rightly reversed the order of the Commissioner (Appeals) and held that assessee is not entitled to any credit of tax based on the certificate issued by the Lotteries Director u/s 199 of the Income Tax Act. Consequently we uphold the order of the Tribunal in this regard as well.

5. The last question raised by the assessee is whether he is entitled to exclusion of the amount deducted by the Director of Lotteries in Sikkim from the prize money. The Tribunal has considered the claim as one of deduction from the income which was turned down by referring to Section 58(4) of the Income Tax Act. Income from lottery is assessable under the head "Income from other sources" and, therefore, by virtue of the express bar contained u/s 58(4) no deduction of any expenditure is admissible on the income from lotteries. However, Counsel for the assessee rightly pointed out that what is to be assessed as income from winnings from lottery is only the actual income received and not any notional income. Prize money from lottery is assessable under the Act by virtue of inclusion of "winnings from lottery" as income u/s 2(24)(ix) of the Act. Lottery defined therein includes winnings from prize awarded to any person to draw lots or by chance or in any other manner whatsoever under any scheme or arrangement by whatever name called. In the dictionary one shade of meaning given to winning is money won especially in betting etc. Similarly the charging u/s 115BB provides for levy of tax on income by way of winnings from any lottery. Obviously it is clear from these provisions that what is assessable is real income and not notional income or income declared in the lottery as prize money. In our view what is assessable is the actual income received by the assessee which in this case is excluding the Income Tax deducted by the Lotteries Director in the State of Sikkim, no matter such deduction may be unauthorised.

6. Even though standing Counsel for the department contended that if the Director of Lottery has made unauthorised deduction it is for the assessee to pursue his remedy elsewhere, we do not think that the assessee can be expected to recover

this amount through the litigation against the State Government. On the other hand we feel that if the State Government is recovering Income Tax and retains it for itself payment to the Central Government, it is for the Central Government to take necessary steps to ensure that constitutional provisions are not violated by the State Government. We therefore hold that what is assessable as income from lottery in the hands of the assessee u/s 115BB is the net amount received by the assessee after excluding the amount of Rs. 45,54,886 recovered by the Director of Lotteries towards Sikkim Income Tax and the balance amount is only assessable u/s 115BB of the Act.

7. We therefore allow the appeal in part by reversing the order of the Tribunal on this limited ground and direct the Assessing Officer to revise the assessment on the net amount as directed above. However, we make it clear that if Sikkim Government credits the recovered amount to the Government of India through the efforts of the Central Government it shall be open to the assessee to apply for rectification of the assessment on full amount and to get credit u/s 199 of the Income Tax Act. In that event the relief granted by us will stand automatically cancelled and the entire income including the Sikkim Income Tax recovered by Lotteries Director there will be assessed as income from lottery.