(2013) 12 AP CK 0031

Andhra Pradesh High Court

Case No: Income Tax T.A. No. 71 of 2000

Sriram Refregeration Industries	APPELLANT
Vs	
Income Tax Officer	RESPONDENT

Date of Decision: Dec. 24, 2013

Citation: (2014) 361 ITR 119

Hon'ble Judges: G. Chandraiah, J; Challa Kodanda Ram, J

Bench: Division Bench

Advocate: Y. Ratnakar, for the Appellant; S.R. Ashok, assisted by S. Seshidhar Reddy, for the Respondent

Judgement

Challa Kodanda Ram, J.
This appeal is preferred by the assessee, against the order dated February 10, 2000, in I.T.A. No. 1721/Hyd/96 passed by the income tax Appellate Tribunal, Hyderabad Bench "B" (in short "the Tribunal") raising the following four substantial questions of law. The present case is pertaining to the assessment year 1995-96.

(1) Whether conveyance allowance is given for coming from house to office/factory and back instead of providing a vehicle for transportation is liable to be treated as salary for the purpose of deduction of tax at source?

(2) Whether in a case where interest is debited to the account of an Indian company by bank to recoup the interest charged to it by the discounting bank would it entail deduction of tax at source u/s 195 of the income tax Act by the Indian company?

(3) Whether the appellant is liable for payment of interest u/s 201 of the income tax Act in respect of royalty amount when the payment of tax was effected soon after the ascertainment of the quantum of royalty payable to the non-resident company in accordance with the agreement entered into with the non-resident company?

(4) Whether items which are subject matter of dispute, controversy and legal interpretation could at all be considered for the purpose of passing order u/s 201 of

the income tax Act demanding payment of tax and interest thereof?

So far as question No. 1 is concerned, the contention of the learned counsel for the assessee, Sri Y. Ratnakar, is that the conveyance allowance is given to the employees of the company in lieu of providing a vehicle for transportation and as such the same does not form part of the salary. The specific claim before the authorities was that the conveyance allowance paid to employees for coming to office from the residence and returning thereto, qualified u/s 10(14) of the income tax Act, 1961 (in short "the Act"). This claim of the assessee was rejected by the authorities concerned and confirmed by the Tribunal. The authorities had held that admittedly, the amount that is paid not being of wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit. The conveyance allowance paid to defray expenses connected with journeys from residence to office and back cannot be treated as an allowance paid for defraying expenses wholly, necessarily and exclusively in the performance of the duty. The Tribunal, authorities had also recorded a finding that amounts are being paid on a lump sum fixed basis without there being any correlation to the expenses actually incurred. The Tribunal following the orders in the case of (1996) 58 ITD 104) in I.T. Appeal No. 236 (Hyd.) of 1995, disallowed the claim of the assessee.

2. The learned counsel for the assessee, Sri Y. Ratnakar, would contend that the amount paid to the employees is in lieu of providing transport facility otherwise would not have been part of salary. He would draw the attention to section 17(2) of the Act and in particular to the Explanation to contend that if the assessee had provided a vehicle to enable an employer for the journey from his residence to his office or other place of work, or from such office or place to his residence, the benefit or amenity granted or provided to the employee at free of cost or at a concessional rate shall not be treated as a perquisite.

3. On the other hand, the learned counsel for the Department, Sri S.R. Ashok, assisted by Sri S. Seshidhar Reddy, would contend that the assessee''s claim all along is only u/s 10(14) of the Act and in that view of the matter, the argument advanced for the first time before this court that the amount paid would fall within the scope of section 17(2) of the Act and the explanation cannot be permitted and accepted. He would reiterate that in the absence of actual expenditure, the amount cannot be allowed as an expenditure wholly, necessarily for the purpose of businesses of the assessee. He would also point out that the amount that is being paid to the employees cannot be allowed as an expenditure under the head "conveyance allowance" as such expenses are expected to be met by the employee and for which the employee is entitled for the standard deduction when his income being assessed under the head "Salary" income.

4. We have considered the rival submissions and it may be useful to refer to the orders of the Tribunal in Dr. Reddy Laboratories case (supra), which was followed by the Tribunal:

9. We have considered the rival submissions and perused the orders of the lower authorities and other papers filed before us. As regards the conveyance allowance, we find from the orders of the lower authorities and other material papers filed before us that the assessee has been making payment of conveyance allowance to its employees in fixed sums, with no bearing on the actual expenditure incurred by them and the same has been paid basically to enable the employees to perform the journeys to come to the work place and to go back to their residences. It has been the contention of the assessee right from the beginning that the conveyance allowance paid to the employees for coming to office from residence and returning thereto does qualify for exemption u/s 10(14) of the income tax Act. The provisions of section 10(14) read as follows:

(i) any such special allowance or benefit, not being in the nature of a perquisite within the meaning of clause (2) of section 17, specifically granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, as the Central Government may, by notification in the Official Gazette, specify to the extent to which such expenses are actually incurred for that purpose;

(ii) any such allowance granted to the assessee either to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at the place where he ordinarily resides, or to compensate him for the increased cost of living, as the Central Government may, by notification in the Official Gazette, specify, to the extent specified in the notification;

It is not the case of the assessee that the conveyance allowance paid by it to its employees has been notified by the Central Government as exempt under the above section. At least no notification to that effect has been brought to our notice. Further, as per clause (i) extracted above, it is only the special allowance granted to meet expenses ''wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit'', that would qualify for exemption u/s 10(14). The conveyance allowance paid to defray expenses connected with journeys from residence to office and back, cannot be termed as an allowance paid for defraying expenses ''wholly, necessarily and exclusively'' in the performance of the duties. Further, it is only to the extent such expenses are actually incurred, that exemption would be available u/s 10(14) in respect of even an allowance notified by the Central Government in that behalf. In the case on hand, the conveyance allowance paid by the assessee without any relevance or bearing on the actual expenditure incurred by the employees, cannot come within the purview of section 10(14) and for that matter, since the standard deduction granted u/s 16(1) is meant to take care of the expenses of an employee, incidental to his employment, including the journeys from residence to office and back, the conveyance allowance is clearly taxable under the head ''Salary'' and as such the assessee could not have excluded the conveyance allowance paid, while computing the tax deductible at

source, from the salaries paid by it to its employees.

5. The reasoning given by the Tribunal is apt and we do not see any reason to defer (differ?) from the same. In that view of the matter, question No. 1 is required to be answered against the assessee and in favour of the Revenue.

6. So far as question No. 2 is concerned, this question arises on account of the fact that certain amounts were paid by the assessee to Allahabad Bank, who had arranged the letters of credit (in short "L.C.") in favour of their suppliers M/s. Tecumseh Products Co. The Allahabad Bank debited a sum of US $ 1,16,468-70 + US $ 3457-66 along with certain other payments to M/s. Amex International, which were recouped from the assessee. The amount of US $ 3,457-66 which was collected by Allahabad Bank was treated as paid by the assessee to the American Express Bank towards interest. On such amount, the assessee was treated as the assessee in default for non-deduction of tax at source u/s 195 of the Act and was demanded with a sum of Rs. 2,78,639 with further interest of Rs. 44,292. All along, the assessee''s contention was that the assessee had no privity of the contract with American Express Bank and the sum which has been paid was only to the Allahabad Bank for the purpose of arranging the L.C. and at any rate the additional cost incurred would only go to the cost of the material which was purchased by the assessee. Before the Tribunal also the assessee denied that any interest was paid to the American Express Bank and stated that the payment was made to the Allahabad Bank only. As a matter of fact, the Tribunal also recorded the same.

7. Now, the question for consideration is that merely because American Express Bank had charged certain sum terming it as interest on the Allahabad Bank in the process of negotiating the L.C. on behalf of its customer, viz., the assessee herein when the said amount is recouped by the Allahabad Bank can it be said that the assessee had made payment to the American Express Bank towards interest. When one considers the transactions in a commercial world with respect to negotiations of letters of credit any amounts paid in whatever name, they could only be termed as the L.C. charges. In the present case, admittedly, the assessee had privity of contract only with the Allahabad Bank and the amounts were paid to Allahabad Bank. It is different matter that Allahabad Bank in turn had made payments to American business. In that view of the matter, it cannot be said that the assessee had any obligation to the American Express Bank and in that view of the matter it cannot be said that the transaction would fall within section 9(1)(5) of the Act. In the circumstances there was no obligation on the assessee to make TDS deduction u/s 195 of the Act.

8. It may be useful to refer to the decision relied on by the assessee''s counsel reported in G.E. India Technology Centre Private Ltd. Vs. Commissioner of Income Tax and Another, herein it was held that the obligation to deduct the tax with respect to the foreign remittances would arise only when the sum paid is chargeable under the provisions of the Act. Inasmuch as, in the present case, there

was no payment by the assessee, in the facts of this case neither section 9 nor section 195 of the Act itself has no application. In that view of the matter, question No. 2 is required to be answered in favour of the assessee and against the Revenue.

9. With regard to question No. 4, the learned counsel for the assessee, Sri Y. Ratnakar, would submit that section 201 of the Act at the relevant point of time did not deal with the situation of short deduction and payment of the tax. He would draw the attention of the court to section 201 of the Act before and after amendment which reads as under:

Before amendment

201. (1) If any such person and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax:

Provided that no penalty shall be charged u/s 221 from such person, principal officer or company unless the Assessing Officer is satisfied that such person or principal officer or company as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that subsection does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at fifteen per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1).

200. (2) Any person being an employer, referred to in sub-section (1A) of section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.

(3) Any person deducting any sum on or after the 1st day of April, 2005, in accordance with the foregoing provisions of this Chapter or, as the case may be, any person being an employer referred to in subsection (1A) of section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare such statements for such period as may be prescribed and deliver or cause to be delivered to the prescribed income tax authority or the person authorised by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be

prescribed.

After amendment

201. (1) Where any person, including the principal officer of a company,--

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that no penalty shall be charged u/s 221 from such person unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that subsection does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,--

By pointing out the difference in language he would submit that the invocation of section 201 in the facts and circumstances of the case is not permissible. He would also submit that when the assessee under a bona fide impression that the conveyance allowance would not form part of salary for the purpose of deduction of tax at source, section 201 of the Act cannot be invoked. He would submit that even assuming that conveyance allowance which was paid to the employees may not qualify for a deduction u/s 10 of the Act, in view of the bona fide dispute/controversy, whether the conveyance allowance would form part of salary or not, non-deduction of a portion of the salary would not attract section 201 of the Act as it then existing. He would also rely on the judgment of the Division Bench of this court reported in P.V. Rajgopal and Others Vs. Union of India and Others,), wherein it was held as follows (page 696):

It is quite significant that these circulars do not contain any warning about short deduction or action u/s 201 though they specifically mention the need to revise the amounts of deduction in case of pay revision as well as the action u/s 201 for failure to deduct any tax or pay the deducted tax in time. This indicates that the Revenue is very well aware of the position that section 201 does not apply to a case of deduction of tax at a lesser amount. Moreover, the circulars advise the drawing and disbursing authority to satisfy itself that the computation of taxable salary income is in order with reference to deduction available to the employee. This does not convert him into an income tax Officer or an adjudicating authority as many

erroneously believe. All that it means is that the assessee must declare his claim so that with reference to section 201 proviso he can say that he had good and sufficient reasons not to deduct tax at source in respect of any income to avoid imposition of penalty. It is to be noted that the deduction is in respect of income computed under the head ''Salary'' and not in respect of each component of it. Any difference of opinion about the computation has to be resolved by the employee at the risk of his paying interest u/s 234B and 234C and not by the employer as section 201 cannot be utilised to compel any such adjudication by him.

10. We are in agreement with the learned counsel for the assessee, Sri Y. Ratnakar, that at relevant point of time section 201 of the Act did not provide for a situation where a short deduction or short payment was made with respect to tax deduction at source. The fact that subsequently, the amended section 201 of the Act has specifically provided for the same itself is a proof positive about the same. In that view of the matter, it may be appropriate to refer to the judgment of the Division Bench of this court cited by the learned counsel for the assessee, wherein it was held as follows (page 694 of 233 ITR):

201. Consequences of failure to deduct or pay.--(1) If any such person and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax:

Provided that no penalty shall be charged u/s 221 from such person, principal officer or company unless the Assessing Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that subsection does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at fifteen per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company as the case may be, referred to in sub-section (1).

This section has two limbs, one is where the employer does not deduct the tax and the second where after deducting, the tax fails to remit it to the Government. There is nothing in this section to treat the employer as the defaulter where there is a shortfall in the deduction. The Department assumes that where the deduction is not

as required by or under the Act, there is a default. But the fact is that this expression as required by or under this Act, grammatically refers only to the duty to pay the tax that is deducted and cannot refer the duty to deduct the tax. Since this is a penal section, it has to be strictly construed and it cannot be assumed that there is a duty to deduct the tax strictly in accordance with the computation under the Act and if there is any shortfall due to any difference of opinion as to the taxability of any item the employer can be declared to be an assessee in default.

11. We have also noticed a Circular No. 195 dated March 25, 1976 (Circular No. 198, dated March 31, 1976 (see [1976] 103 ITR (St.) 38)), wherein it was mentioned as follows:

If the disbursing authority is satisfied that the conveyance allowance granted to the employees are covered by section 10(14), then the obligation to deduct tax thereon may not arise. In such contingency tax is not liable to be deducted at source from this allowance. However, at the same time it will have to be ensured that a certificate in trims of section 10(14) is endorsed on the tax deduction bills, by the disbursing authority. The employees who are in receipt of conveyance allowance would also have to furnish the necessary certificate before the assessing authorities in support of the fact that conveyance is only a reimbursement of expenses laid out wholly, necessarily and exclusively for the performance of the duties of an office. Such satisfaction of the disbursing authority would still be liable for security by the income tax Officer (now Assessing Officer) during regular assessment proceedings before him.

12. We may also notice, Circular issued by the Board, vide Circular No. 696, dated December 16, 1994, wherein it is directed as follows (see [1995] 211 ITR (St.) 98):

Section, Act No. 192 of the income tax Act, 1961

Grant of opportunity to defaulter u/s 192 to pay proper tax along with interest liability u/s 201(1A)

1. It has come to the notice of the Board that some employers are not correctly evaluating the perquisites, allowances or other profits in lieu of or in addition to any salary or wages (referred to as ''salaries'' hereinafter) paid to their employees for the purpose of deducting tax at source u/s 192 of the income tax Act, 1961. Such defaulters are liable to penalty proceedings under sections 221 and 271C of the Act, and also liable to prosecution under Chapter XXII of the Act.

2. However, before taking stringent measures, the Board has decided to grant an opportunity to such defaulters. Even now if they pay the proper tax on ''salaries'' as envisaged u/s 192 along with interest liability u/s 201(1A) of the Act no penalty proceedings u/s 221 or prosecution under Chapter XXII of the Act shall be initiated provided such payment is made on or before February 28, 1995.

3. This circular shall also cover such cases which were earlier covered by Circular No. 685V dated June 17, 1994 (see [1994] 208 ITR (St.) 54), where the facility was extended in respect of salaries and allowances paid abroad or perquisites provided abroad to the employee for services rendered in India. The time-limit of July 31, 1994, was fixed by Circular No. 685 (which was later extended to August 31, 1994) is now extended to February 28, 1995.

4. The contents of this circular may be brought to the notice of all the assessees especially those responsible for deducting tax u/s 192, so that they can avail of this opportunity. It may be emphasised that the Department will initiate coercive steps to recover the due tax, which was not deducted at source and/or not paid to the Government before February 28, 1995.

5. The circular will apply in respect of the assessment years beginning from 1989-90 till the assessment year 1994-95.

13. Reading of both the circulars would reveal there being no reference of section 201 of the Act in case of short payment. The first circular categorically states that it is the satisfaction of the disbursing authority whether to take into consideration the conveyance allowance for the purpose of tax deduction at source. Such satisfaction of disbursing authority is liable for security by the income tax Officer during regular assessment proceedings (No section 201 proceedings mentioned). Likewise, in the second Circular speaks about interest liability u/s 201(1A) of the Act, apart from proceedings u/s 221 or prosecution under Chapter XXII of the Act. In view of the scheme of the Act as understood by the authorities and in the light of the judgment of the Division Bench of this court reported in P.V. Rajagopal (supra), for the purpose of payment of tax no proceedings u/s 201 of the Act could have been made. In view of the same, the question is required to be answered in the negative and in favour of the assessee and against the Revenue.

14. So far as question No. 3 is concerned, the learned counsel did not choose to press the same, and as such we decline to answer the same.

15. In the light of the above discussion question No. 1 is answered in favour of the Revenue and against the assessee and questions Nos. 2 and 4 are answered in favour of the assessee and against the Revenue and question No. 3 is declined to be answered. Accordingly, the appeal is disposed of. No order as to costs.