(2001) 10 AP CK 0008

Andhra Pradesh High Court

Case No: Writ Petition No''s. 14201 and 14218 of 2001 4 October 2001

Y.S.C. Babu		APPELLANT
	Vs	
Chairman and Managing Director, Syndicate Bank		RESPONDENT

Date of Decision: Oct. 4, 2001

Acts Referred:

- Income Tax Act, 1961 - Section 192
- Institutes of Technology Act, 1961 - Section 10, 15, 16, 17, 3
- University Grants Commission Act, 1956 - Section 3

Citation: (2001) 120 TAXMAN 88

Hon'ble Judges: S.R. Nayak, J; S. Ananda Reddy, J

Bench: Full Bench

Advocate: K. Gani Reddy, for the Assessee, A. Krishnam Raju and S.R. Ashok, for the Revenue, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

Nayak, J.

The petitioner in W.P. No. 14201 of 2001 and the petitioner in W.P. No. 14218 of 2001 worked as Deputy Chief Officer (Inspection) and Manager (Audit), respectively, in the establishment of the Syndicate Bank and both of them took voluntary retirement under Syndicate Bank Employees Voluntary Retirement Scheme, 2000 (VRS), which scheme is approved by the Government of India. In terms of the said scheme, a total sum of Rs. 9.44 lakhs is payable to the petitioner in W.P. No. 14201 of 2001 whereas a sum of Rs. 10,59,530 is payable to the petitioner in W.P. No. 14218 of 2001 as ex gratia/compensation. Out of the said sums of money payable to the petitioners, only 50 per cent of the compensation, i.e., Rs. 4.72 lakhs to the petitioner in W.P. No. 14201 of 2001 and Rs. 5,29,765 to the petitioner in W.P. No. 14218 of 2001, has to be paid within 30 days of relief and the balance of 50 per cent

of compensation is payable in five equal annual instalments with interest at 10 per cent per annum. The management of the Syndicate Bank, represented by the respondent Nos. 1 and 2 herein, while paying 50 per cent of compensation to the petitioners, deducted a sum of Rs. 1,20,000 in the case of the petitioner in W.P. No. 14201 of 2001 and a sum of Rs. 1,36,000 in the case of the petitioner in W.P. No. 14218 of 2001 towards the Income Tax liability of the petitioners. Hence, these two writ petitions by these two retired officers of the Syndicate Bank praying for mandamus declaring the action of the management of the Syndicate Bank in deducting the tax at source from out of the 50 per cent of compensation payable to the petitioners under the VRS as illegal, arbitrary and ultra vires of the provisions of the Income Tax Act, 1961 (hereinafter referred to as the Act) and for a consequential direction to the management of the Syndicate Bank not to deduct the above sums of money from 50 per cent of the compensation payable to them towards Income Tax liability.

2. In response to rule nisi, respondent Nos. 1 and 2 representing the management of the Syndicate Bank and the Chief Commissioner of Income Tax, Andhra Pradesh, Hyderabad, the 4th respondent herein filed counter-affidavits.

3. Shri K. Gani Reddy, the learned counsel appearing for the petitioners, would contend that since section 10(10C) of the Act expressly provides that the amount received up to Rs. 5 lakhs under VRS is exempt from Income Tax, the management of the Syndicate Bank ought not to have withheld any amount from 50 per cent of the compensation payable to the petitioners under the VRS towards tax liability. The learned counsel would also contend that since the balance 50 per cent of the compensation is to be paid in future, there cannot be any deduction at source in respect of that part of compensation. The learned counsel would contend that an employer can deduct tax at source u/s 192 at the time of actual repayment of chargeable income and not otherwise.

4. On the other hand, the learned standing counsel for the Syndicate Bank and the learned senior standing counsel for Income Tax department would support the action of the management of the Syndicate Bank in deducting the amounts towards Income Tax liability from 50 per cent of the compensation payable to the petitioners under the VRS.

5. In the light of the rival contentions of the parties, the only point that arises for decision is whether the compensation accrued to the petitioners under the VRS is chargeable income and if so, whether the action of the respondent Nos. 1 and 2 in deducting Income Tax at source u/s 192 in respect of the amounts paid by it to the petitioners towards 50 per cent of the compensation under the VRS consequent upon the voluntary retirement of the petitioners is legal and justified.

6. Before dealing with this question, the relevant statutory provisions be noticed at the threshold, section 10(10C) reads

"10. Incomes not included in total income.In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included

** ** **

(10C) any 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

(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 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 Institutes of Technology Act, 1961 (59 of 1961); or

(viii) such institute of 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 of 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;"

Section 15 of the Act reads

"15. Salaries.The following income shall be chargeable to Income Tax under the head Salaries

(a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;"

Section 17(3)(i) reads

"17. Salary, perquisite and profits in lieu of salary defined.For the purposes of sections 15 and 16 and of this section,

(1)Salary includes

(i) wages;

(ii) any annuity or pension;

(iii) any gratuity;

(iv) any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages;

(v) any advance of salary;

(2) ** ** **

(3)profits in lieu of salary includes

(i) the amount of any, compensation due to or received by an assessee from his employer or former employer at or in connection with the termination of his employment or the modification of the terms and conditions relating thereto;"

Section 192 reads

"192. Salary.(1) Any person responsible for paying any income chargeable under the head Salaries, shall, at the time of payment, deduct Income Tax on the amount payable at the average of Income Tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year."

7. The contention of the learned counsel for the petitioners that the petitioners are not paid the entire compensation payable to them in the relevant financial year 2000-2001 and, therefore, only 50 per cent of the compensation paid by the bank management under the VRS should be treated as salary paid and that the remaining 50 per cent of the compensation payable to the petitioners in future in yearly instalments cannot be treated as chargeable income during the relevant financial year is not well founded. Section 15 is couched in the widest possible terms to include within its ambit every kind of remuneration of every kind of servant, however highly or lowly placed he may be. It embraces all kinds of servants,

whether public or private. Section 15 brings to charge the following categories of salary: (i) any salary due, in the previous year, whether paid or not; (ii) advance salary; and (iii) arrears of salary. Section 17 defines the terms salary, perquisite and profits in lieu of salary for the purposes of sections 15 and 16. Accordingly, salary includes wages, annuity or pension, fees, commission, perquisites or profits in lieu of or in addition to salary or wages, advance salary, leave salary, annual accretion in a recognized provident fund, and the aggregate sums in the transferred balance in a recognized provident fund. Perquisite has been defined in section 17(2) and profits in lieu of salary are defined in section 17(3). Thus, section 17 contains definitions within definitions. It is very pertinent to note that the definitions contained in section 17 are only for the purposes of sections 15 and 16 and not for any other sections of the Act. The Finance Act, 1987, inserted clause (10C) in section 10 to provide that any payment received by an employee of a public sector company at the time of his voluntary retirement in accordance with any scheme which the Central Government may, having regard to the economic viability of the public sector undertaking and other relevant circumstances, approve in this behalf, shall be exempt from tax. For and from the assessment year 1993-94, an amount received by an employee of (i) a public sector company, or (ii) any other company, or (iii) a statutory authority, or (iv) a local authority, and for and from the assessment year 1994-95, also of (i) co-operative societies, or (ii) Universities, or (iii) Indian Institutes of Technology, or (iv) such institutes of management as may be specified by the Central Government, at the time of his voluntary retirement in accordance with any scheme or schemes of voluntary retirement will be exempt, subject to the ceiling of Rs. 5 lakhs.

8. A combined reading of the provisions of clause (10C) of section 10, sections 15 and 17 makes it very clear that in terms of the VRS, the entire compensation payable to the petitioners under the VRS accrued to them during the financial year 2001-2002. If that is so, the compensation payable to the petitioners under the VRS becomes a chargeable income in terms of clause (a) of section 15 because that clause provides that any salary due from an employer or a former employer to an assessee in the previous year whether paid or not (Emphasis, here italicised in print, supplied), is chargeable to Income Tax under the head Salaries. In other words, the salary accrued or which becomes due need not be actually paid in order to make it chargeable income. What is relevant is whether the salary is due to an employee from an employer. In the instant case, though the banks management paid only 50 per cent of the compensation under the VRS to the petitioner, in terms of the scheme and the agreement between the petitioner and the management of the bank, the entire amount of compensation payable to each of the petitioners accrued to the petitioners during the relevant financial year 2001-2002 for all practical purposes. Section 15 of the Act creates a charge on the income charged as salaries. In view of creation of charge on the salaried income on receipt or accrual, as the case may be, it cannot be said that the compensation amount in entirety cannot be

brought to tax during the relevant year, merely because part of the amount though accrued, had been deferred having regard to the peculiarities of the VRS framed by the management of the Bank. Therefore, we declare that the entire compensation/ex gratia payable to the petitioners under the VRS is salary in terms of section 17(3) of the Act for the financial year 2001-2002. This takes us to the question whether the management of the Syndicate Bank was justified in deducting tax at source u/s 192 of the Act and whether the petitioners are entitled to refund of the tax so deducted at source.

9. Sub-Chapter (B) of Chapter XVII contains provisions of sections 192 to 206B of the Act dealing with deduction of tax at source in different situations contemplated thereunder. What is deductible at source is only the tax at the rate applicable on the amount which is actually fallen due and is paid. Only in a case where a salary accrued to an employee and the same is paid, the employer can deduct tax at source u/s 192 and not otherwise. In other words, accrual as well as payment of salary should co-exist in order to attract the provisions of section 192.

10. A perusal of the provision of sub-section (1) of section 192 shows that any person responsible for the payment of income chargeable under the head of income Salaries at the time of payment has to deduct Income Tax on the amount payable at the average of Income Tax computed on the basis of the rates in force on the estimated income of the assessee under this head for the financial year. The sum and substance of this provision is that the person paying the salary has to estimate the income under the head of income Salaries for the financial year and arrive at the average of the Income Tax payable on the basis of the rates in force and thereafter deduct the tax payable on the amount paid. In this case as held above, the amount payable by the respondent-bank under VRS as ex gratia/compensation to the petitioners in entirety was computable under the head of income Salaries for the financial year 2001-02. According to the petitioners, they are entitled to the benefit of the provisions of section 10(10C) under which an amount not exceeding Rs. 5 lakhs received under VRS from any of the employers specified therein shall not be included. Therefore, the petitioners contend, the TDS has to be effected only on the amount actually paid under VRS after giving the benefit of exemption provided u/s 10(10C). According to the petitioners, if the benefit of exemption under the abovesaid provision is applied, on the amount actually paid, no TDS is to be effected in the case of the petitioner in W.P. No. 14201 of 2001 and in the case of the petitioner in W.P. No. 14218 of 2001, only a small amount is deductible. We are unable to accept the said contention of the petitioners. Several exemptions provided under the Act have to be cumulatively applied while computing the annual income and not with reference to a particular payment. It is not in dispute that the petitioners in these two writ petitions are entitled to the benefit of exemption provided u/s 10(10C) by virtue of which ex gratia/compensation received under VRS to the extent of Rs. 5 lakhs, shall not be included in the income of the petitioners chargeable under the head of income Salaries. But under the scheme of section 192,

the petitioners are not entitled for the exemption provided u/s 10(10C) only against the 50 per cent of the ex gratia paid by the 1st Respondent Bank within 30 days of their retirement under VRS. As provided u/s 192, the income of every employee has to be estimated for the financial year in question and thereafter, after giving effect to the exemptions that are available not only u/s 10(10C) but also under any other provisions of the Act, one has to compute the average Income Tax on the basis of the rate in force for the financial year and at that rate, TDS has to be effected on the amount paid at the time of such payment.

11. The resultant position emerging from the above discussion is that the average rate of tax deductible has to be arrived at while paying certain amount, which is chargeable under the head of income Salaries. Thereafter, the average rate thus arrived at by the employer has to be applied for effecting deduction of tax deducted at source, while making actual payment. This is how TDS has to be effected throughout the year on all the payments chargeable under the head of income Salaries. In that view of the matter, the petitioners are not entitled to get the benefit of the provisions of section 10(10C) with reference to 50 per cent of the amount of the ex gratia actually paid, thereby avoiding the tax deduction at source to the extent of Rs. 5 lakhs. The exemption that is available u/s 10(10C) has to be allowed while estimating the annual income of the person receiving the salary, but not in respect of any single payment that may be made by the employer. In that view of the matter, it becomes imperative for the respondent-bank first to estimate the annual income of both the petitioners liable to be charged under the head of income Salaries and on that basis to deduct Income Tax at source. This exercise has to be repeated by the banks management in respect of each and every payment made by it to the petitioners during the financial year 2001-2002.

12. The Calcutta High Court, dealing with the obligation of the employers u/s 192 has observed thus in the case of BRITISH AIRWAYS Vs. COMMISSIONER OF Income Tax., :

"The obligation of an employer u/s 192 of the Income Tax Act, 1961, is to. . . deduct Income Tax . . . at the average rates of Income Tax computed on the basis of the rates in force . . . on the estimated income of the assessee....That means that an estimate of the income under the head Salaries for the financial year in which the payment has been made will have to be made and it is on the basis of that estimate that the amount of tax payable will have to be arrived at. At the time of payment of salary, Income Tax will have to be deducted from the amount payable. The rates of tax and the estimate of income will have to be calculated on an annual basis and whatever is to be included under the head Salaries will have to be taken into consideration for the purpose of making this estimate. Sections 15, 16 and 17 of the Act deal with assessment of income from salaries. Section 17 lays down that, for the purpose of sections 15 and 16 and also section 17, salary would include various items like annuity, pension and perquisites. An employer is required to give

particulars of any income chargeable under the head Salaries. That means whatever is includible under the head Salaries under sections 15, 16 and 17 of the Act will have to be shown in the return. The position has been made clear also by the Rules framed for this purpose. Under rule 32 of the Income Tax Rules, 1962, an employer is under an obligation to send a monthly return in Form No. 21 to the Income Tax Officer where payment is made by way of income chargeable under the head Salaries. In Form No. 21, it has been specifically laid down that particulars of all benefits and allowances and also other income chargeable under the head Salaries will have to be given. Note No. 1 to Form No. 21 does not leave any room for doubt that the estimate of salary income will not be confined only to the amount of money actually handed over to an employee monthly but will also include various other things including perquisites and the estimate is to be made in accordance with the provisions contained in sections 15, 16 and 17. The deduction of Income Tax may have to be made at the time of payment of salary but the calculation of the tax deductible will have to be made on the estimated salary income of the employee for the relevant financial year according to the provisions of the Act and the Rules framed for this purpose. There is no warrant for the proposition that the amount of Income Tax deductible will be calculated only on the amount that is actually handed over to the assessee ....." (p. 439)

13. From the above judgment also it is clear that the TDS has to be worked out after estimating the annual income chargeable under the head of income Salaries and also arriving at the average rate of Income Tax computed on the basis of the rates in force on the said estimated income of the assessees. Therefore, the computation of the TDS taking the entire sum of Rs. 9,44,000 in the case of the petitioner in W.P. No. 14201 of 2001 and a sum of Rs. 10,59,540 in the case of the petitioner in W.P. No. 14218 of 2001 is not correct, for the amounts deducted were computed by taking into account only the abovementioned amounts and without estimating the annual income of the petitioners chargeable under the head of income Salaries and without giving effect to the deductions that are available to the petitioners u/s 10(10C). However, the petitioners are not eligible to have the benefit of availing the exemption, contemplated u/s 10(10C) only in respect of 50 per cent of the ex gratia/compensation paid, as the said computation is violative of the provisions of section 192. Therefore, the respondent-bank has to work out the TDS to be effected while making actual payment of 50 per cent of ex gratia under VRS, by estimating the entire income chargeable under the head of income Salaries for the financial year 2001-2002 in question and also arriving at the average rate at which the tax was to be deducted at source.

14. At the time of hearing, the learned standing counsel for the Syndicate Bank submitted that the tax deducted by the management of the bank at source out of the compensation payable to the petitioners has already been transmitted to the Income Tax Department and in the event of the court holding that the deduction at source is illegal, the Income Tax Department be directed to refund the tax. Shri S.R.

Ashok, the learned senior standing counsel did not dispute remittance of the tax deducted at source by the management of the bank to the Income Tax Department. Since the respondent-bank had already effected TDS, it is directed that after computation, as directed above, if the amount deducted as TDS is found to be in excess of the required amount, to that extent, the petitioners are entitled for refund from the respondents.

15. The writ petitions are, accordingly, disposed of with the above direction. No costs.