GRINDLAYS BANK LTD. Vs COMMISSIONER OF Income Tax.

Court: Calcutta High Court

Date of Decision: Sept. 5, 1989

Acts Referred: Income Tax Act, 1961 â€" Section 201(1A)

Citation: (1992) 94 CTR 46 : (1992) 193 ITR 457 : (1991) 56 TAXMAN 213

Hon'ble Judges: Suhas Chandra Sent, J; Suhas Chandra Sen, J; Bhagabati Prasad Banerjee, J; Bhagabati Parsad Banerjee, J

Bench: Full Bench

Judgement

SUHAS CHANDRA SENT J. - The Tribunal has referred the following questions of law u/s 256 (1) of the Income Tax Act, 1961 :

1. Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that it was obligatory on the part of the assessee to

deduct Income Tax at source u/s 192 of the Income Tax Act, 1961, from furlough pay which was payable in terms of the contract of service and

was paid to the expatriate officers of the assessee in sterling in the U. K. outside the territories of India ?

2. Whether the Tribunal was justified in holding that the fact that the tax could not be recovered from the assessee because of the provisions of

section 231 of the Income Tax Act, 1961, would not stand in the way of the liability of the assessee to pay interest; u/s 201 (1A) of the Income

Tax Act, 1961, and the proceedings initiated by the Income Tax Officer for levy of interest u/s 201 (1A) of Act are not barred by limitation ?

3. Whether the Tribunal was justified in holding that although the return regarding the deduction of tax in respect of the employees could have been

filed to the Income Tax Officer mentioned in the Notification issued by the Central Board of Direct Taxes dated May 13, 1968, u/s 126 of the

Income Tax Act, 1961, the assumption of jurisdiction to treat the assessee as in default u/s 201 and to levy interest u/s 201 (1A) of the Income

Tax Act, 1961, by the Income Tax Officer, H-Ward, Companies Dist. IV, Calcutta, cannot be said to be bad in law ?

4. Whether the Tribunal was justified in holding that the jurisdiction of the Income Tax Officer to pass the impugned order could not be challenged

by the assessee at the appellate stage because at the most it could be said to be a case of concurrent jurisdiction and the objection should have

been taken earlier ?

5. Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that proceedings u/s 201 can be initiated and continued

and interest u/s 201 (1A) of the Income Tax Act, 1961, can be recovered from the employer-bank ?

The facts of the case have been stated by the Tribunal in the statement of case as under :

The assessee-bank had a number of expatriate officers working in India during the year 1973. These officers were entitled to proceed on furlough

on completion of a specific period of service in India and while on furlough they were entitled to furlough pay being disbursed outside India.

Consequently, furlough pay was disbursed in pound sterling in the U. K. According to the Income Tax Officer as the furlough pay was received by

the expatriate officers for the period of furlough, to which they were entitled on account of their service rendered in India, such pay was assessable

in the hands of the officers under the head ""Salary"". The assessee should have, therefore, deducted tax at source on this pay u/s 192 (1) read with

section 192 (6) and section 9 (1) (ii) of the Income Tax Act, 1961. Since it had not deducted any tax, it was liable to pay interest u/s 201 (1A) of

the Income Tax Act on the amount thereof. He, therefore, directed the bank to show cause as to why interest should not be levied accordingly.

The bank, however, urged that the interest was not leviable and wanted time to verify the statement sent by the Income Tax Officer in this behalf.

Therefore it did not take any further steps in the matter. Accordingly, the Income Tax Officer held that the tax on furlough pay was deductible u/s

192 of the Income Tax Act and the bank not having done so, interest was chargeable u/s 201 (1A) and, ultimately, levied a sum of Rs. 1,70,331

as interest and issued a demand notice therefor. The said order was confirmed on appeal by the Commissioner of Income Tax (Appeals).

The assessee came in second appeal before the Tribunal before which a number of contentions were raised by the assessee. The Tribunal

ultimately rejected the assessees appeal by its order in question with the following observations :

To our mind, the entire legislation has to be interpreted harmoniously. If the appellant was not bound to deduct the tax under Chapter XVII

payable in respect of the salaries at all, even if it chose to deduct the tax from the salaries of its own, it cannot be said to be strictly a deduction

under Chapter XVII. However, it cannot be seriously disputed that the assessee would get benefit of these payments as deductible amounts

notwithstanding section 40 (iii) and, therefore, if follows that the mere fact that the amounts in question were payable outside India would not take

these payments out of the ambit of Chapter XVII. In this behalf, we may also refer to sub-section (6) of section 192 of the Income Tax Act which

provides that for the purpose of deduction of tax on salary payable in foreign currency, the value in rupees of such salary shall be calculated at the

prescribed rate of exchange. Though the mere existence of this provision does not mean that Chapter XVII necessarily applied to all these

payments outside India, the fact that it finds place in section 192 shows it was intended to be applicable in case of salary payments.

The Tribunal dealt with the argument that no interest could be charged. It held :

In the present case, the appellant should be deemed to be in default in the year 1973 and, therefore, no proceedings could be taken after the

expiry of one year therefrom. For this purpose, reliance was placed on decision of the Calcutta High Court in Commissioner of Income Tax Vs.

Dunlop Rubber Co. (India) Ltd., . We are afraid, this argument again does not carry weight. The matter was thoroughly considered by the B-

Bench of the Tribunal to which one of us was a party in the assessees own case in Grindlays Bank Ltd. v. ITO [1982] 1 ITD 1100. Of course, in

that case a different question, viz., liability for interest on salaries disbursed to resident employees, was involved and there was another question as

to when the liability under chapter XVII arose for the purpose of computation of interest and it was held the same arose only from the time of

payment and not on the date of credit itself. But it was clearly held that for the purpose of levy of interest under sub-section (1A) of section 201

the fact that no recovery could be made from the assessee because of section 231 of the Income Tax Act, was not material inasmuch as interest

had to be calculated to the date of actual payment whether by the assessee or by the employees and the provisions of section 201 (1A) were

without prejudice to the provisions of sub-section (1). Therefore, the mere fact that the tax could not be recovered from the assessee because of

section 231 would not stand in the way of its liability u/s 201 (1A).

The Tribunal went on to observe :

Lastly, it was argued that the Income Tax Officer had no jurisdiction in this matter. Reference was made in this behalf to notification No. 12 (F.

No. 55/31/68-II (AII)) issued by the Central Board of Direct Taxes on 13th May, 1968, by which covenanted officers of National and Grindlays

bank stationed anywhere in India were to be handled by the Income Tax Officer, E-Ward, Dist. VA, Calcutta. It was argued that the present

order was passed by the Income Tax Officer, H-Ward, Comp. Dist. IV, Calcutta, who, therefore, had no jurisdiction to do so. This matter was

also taken up by him before the Commissioner of Income Tax (Appeals) who was of the opinion that no specific objection against jurisdiction had

been raised during the proceedings. In other words, the assessee had surrendered to the jurisdiction of the Income Tax Officer by way of giving

explanation, etc., and, therefore, it was not entitled to raise such a preliminary issue before the appellate authority. The contention of the assessees

representative in this behalf was that the provisions of sub-section (5) of section 124 were not applicable to the present case inasmuch as,

according to this sub-section, the bar against questioning the jurisdiction of the Income Tax Officer came into operation after the expiry of one

month from the date of the return filed u/s 139 (1) or after the completion of the assessment which ever was earlier or where no return was filed,

after the expiry of the time allowed by the notice u/s 139 (2) or section 148. In the present case, there was no return u/s 139 (1) or assessment nor

was any notice u/s 139 (2) or section 148 ever issued. therefore, sub-section (5) was not at all applicable to the case of the present assessee and

apart from this there was no bar upon the assessee to challenge the notice in question. It was also contended that the question of jurisdiction is one

which cannot be waived by the assessee and if an Income Tax Officer concerned had no jurisdiction, the entire proceedings Income Tax Officer

concerned had no jurisdiction, the entire proceedings are bad in law. Reliance was placed upon a decision of the Calcutta High Court in B. K.

GOOYEE Vs. COMMISSIONER OF Income Tax, WEST BENGAL., for the proposition that submission of a return in response to a notice

without any objection to jurisdiction is not sufficient relinquishment of the right to take objection to the validity of the notice.

The Tribunal thereafter observed as follows :

After carefully considering the legal position on the subject, we are of the opinion that the ground raised in this behalf has no substance. While

jurisdiction over the employees of the assessee-bank may have been vested in some other Income Tax Officer by the notification in question, the

jurisdiction over the assessee itself is that of the Income Tax Officer who has passed the order in question. According to sub-section (7) of section

2, ""assessee"" means any person by whom any tax or any other sum of money is payable under this Act and clause (c) of this sub-section includes

the case of every person who is deemed to be an assessee in default under any of the provisions of this Act. In the present case, the interest is

being levied upon the assessee after treating him as an assessee in default u/s 201 (1) of the Income Tax Act. There is no specific section which

gives any particular Income Tax Officer jurisdiction to make an assessment. According to section 124 (1), the Income Tax Officers shall perform

their functions in respect of such areas or of such persons or classes of persons or of such income or classes of income as the Commissioner may

direct. According to section 130, in respect of any function to be performed by the Income Tax Officer under any provision of this Act in relation

to an assessee the Income Tax Officer under any provision of this Act in relation to an assessee the Income Tax Officer has jurisdiction over such

assessee be such Income Tax Officer. Obviously, the Income Tax Officer, Company Circle, Dist. IV, had jurisdiction over the present assessee

and, therefore, this case could be dealt with by him. Clause (b) or (c) of this section would not apply inasmuch as no other Income Tax Officer had

jurisdiction over this assessee and the jurisdiction conferred by the notification referred to by the representative of the assessee relates only to the

covenanted officers of the assessee-bank and not the bank itself which is an altogether different entity.

Assuming for the sake of argument that the Income Tax Officer referred to in the notification had also concurrent jurisdiction over this assessee, all

that can be said for the assessee was that he could have raised an objection to the jurisdiction of the present Income Tax Officer and under sub-

section (6) of section 124, the Income Tax Officer if not satisfied with the correctness of the assessees claim could refer the matter to the

Commissioner of Income Tax for determination of the question as to whether he had jurisdiction to make the present assessment. This again would

be subject to the provisions of sub-section (5), i.e., it was for the assessee to call in question the jurisdiction of the present Income Tax Officer. It

also cannot be argued for the assessee that he had no opportunity to challenge the jurisdiction because a notice was issued by the present Income

Tax Officer to the assessee of the proposal to levy interest u/s 201 (1A) and the views of the assessee were invited in this regard. No objection to

the jurisdiction of the Income Tax Officer was taken by the assessee, although a reply was filed to this letter on 5th June, 1978, contending that no

interest was at all chargeable. In these circumstances, while it may be correct that the return regarding the deduction of tax in respect of the

employees could have been filed to the Income Tax Officer mentioned in the notification referred to by the representative of the assessee, the

assumption of jurisdiction to treat the assessee as in default u/s 201 and to levy interest u/s 201 (1A) by the Income Tax Officer cannot be said to

be bad in law. At any rate, it cannot be challenged by the assessee at this stage because at the most it can be said to be a case of concurrent

jurisdiction and the objection should have been taken earlier.

Thereafter, at the instance of the assessee, the Tribunal referred to this court the five questions of law mentioned hereinbefore.

The first question relates to the liability of the employer-bank to deduct Income Tax, at source u/s 192 from the furlough pay of some of the

employees. The case of the assessee was that this amount was paid in sterling in the United Kingdom outside the territories of India. Therefore, this

payment could not come within the ambit of the Income Tax Act. The jurisdiction of the Income Tax authorities did not travel beyond India. The

payments made by the bank to its employees outside India could not attract the provisions of the Income Tax Act.

We are unable to uphold that argument. Section 4 of the Income Tax Act imposes a charge of tax in respect of the total income of the previous

year of every person. In sub-section (2) of section 4, it has been made clear that Income Tax shall be deducted at source or paid in advance

where it is deductible or payable under the provisions of this Act.

Section 5 (1) lays down :

5. Scope of total income. - (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes

all income from whatever source derived which -

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year.

Sub-section (2) of section 5 limits the scope of total income of a non-resident to income which is received or deemed to be received in India

during such year by or on behalf of such person or accrues or arises or is deemed to accrue or arise to him in India during such year.

In this case, the bank is the employer. It pays a portion of the salary to its employees in the United Kingdom. There is no dispute that the

employees were residents in India at the material time. Therefore, the entire salary income, which was payable because of the services rendered by

the employees in India, accrued or arose in India.

It has been argued by Dr. Pal that only that portion of the salary, which was received by the employees in India, came within the scope of ""total

income"" assessable under the Income Tax Act.

This argument overlooks the fact that the salary income which was received by the employee outside India arose on account of rendering of

services in India. It cannot be said that what was paid in the United Kingdom was without any consideration. It that event, the amount of salary or

the furlough pay which was paid in the United Kingdom would become gifts to the employees and not part of their salary income. The only

consideration for payment of the furlough pay in the United Kingdom was the rendering of services by the employees in India.

Dr. Pal referred me to section 9 of the Act. But section 9 is a deeming section. This section need not be considered in a case where the income in

question squarely comes within the ambit of section 5. Section 9 is a deeming provision. Certain types of income which might not come within the

ambit of section 5 have been brought within the fold of the definition of ""total income"" by virtue of the provisions of section 9. Section 9 (1) lays

down that certain categories of income shall be deemed to accrue or arise in India. The material part of section 9 for the purpose of this case is as

under :

9. Income deemed to accrue or arise in India. - (1) The following incomes shall be deemed to accrue or arise in India - ....

(ii) income which falls under the head Salaries if it is earned in India;

(iii) income chargeable under the head Salaries payable by the Government to a citizen of India for service outside India;....

(2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall

not be deemed to accrue or arise in India, life the pension is payable to a person referred to in article 314 of the Constitution or to a person who,

having been appointed before the 15th day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the

Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

Even if the language of section 9 is considered carefully, it does not come to the aid of the argument advanced by Dr. Pal. Section 9 (1) (ii) lays

down that income which falls under the head ""Salaries"", if it is earned in India, shall be deemed to accrue or arise in India. The question is where

was the furlough pay received by the employee in the United Kingdom earned. The earning must have taken place where the services to the bank

were rendered by the employees. It is because of services rendered in India that the employees earned their salaries. There may be an arrangement

to pay a portion of the salary in the United Kingdom. But that does not mean that the salary was earned in the United Kingdom.

The meaning of the word ""earn"" according to Websters New International Dictionary of the English Language, Second Edition, Unabridged, is :

(1) To merit or deserve as by labour or service; to do that which entitles one to (a reward whether the reward is received or not); as, to earn a

reputation for generosity.

(2) to acquire by labour, service or performance; to deserve and receive as compensation; as, to earn a good living.

The labour or the service which entitled the employees to the furlough pay was rendered in India. It is difficult to see how it can be contended that

the earning of the furlough pay took place in England. This construction cannot be given except by distorting the meaning of the word ""earn"" and

making it equivalent to ""receive"". The amount which was received by the employees in England was not earned in England but was merely paid in

England. The employees got it because they had rendered service in India. In other words, they received in the United Kingdom what they had

earned in India.

I was referred to a judgment of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat-III Vs. Nathalal Dahyabhai, . In that

case, it was pointed out by the Gujarat High Court that the word ""earned"" had two meanings. One is the narrow meaning of rendering of service,

etc. The word ""earned"" is also used in the wide sense of treating income as ""earned"" only if the assessee has contributed to its accrual or arising by

rendering services and in respect of which a debt is created in his favour. Unless there is a debt in favour of the assessee by reason of his rendering

services, it cannot be said to be ""income earned"" in the wide sense.

The distinction drawn by the Division Bench of the Gujarat High Court between the narrow meaning and the wide meaning of the word ""earned"" is

of no significance in the present case. The services to the bank were rendered by the employees in India. The liability to pay arose as soon as the

services were rendered and such liability arose in India. By agreement of the parties, the liability could be discharged by making payment in

England. But that is a matter of discharging a liability that has already arisen by virtue of rendering of services in India. Therefore, even if a portion

of the salary was payable in England, it cannot be said that the liability to pay salary had arisen in England because the salary had been earned in

England. What has happened in this case is that the salary has been earned in India by rendering services to the bank in India. From the point of

view of the bank, the liability to pay has arise in India because the services have been rendered in India. There was a contract of service which

stipulated that services must be rendered in India. Even otherwise if services are rendered by the employees to the employer and there was no

intention of rendering such services gratuitously, the bank has a liability to pay for such services already rendered. Looked at from any point of

view, the liability of the bank to pay clearly arose in India. If the liability to pay arose in India, whether the liability was discharged in England or

somewhere else becomes immaterial for the purpose of deciding whether there was accrual of income in India.

The facts of the case that came up for consideration before the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat-III Vs.

Nathalal Dahyabhai, were entirely different from the facts of the instant case.

It must, however, be noted that the scope of clause (iii) of section 9 (1) is quite different from the scope of clause (ii) of section 9 (1). The word

earned"" has deliberately not been used by the Legislature in section 9 (1) (iii). Section 9 (1) (iii) is merely confined to payment of salary by the

Government to a citizen of India. If the Government pays salary to a citizen of India for services rendered outside India, then even though the

income may be earned outside India, by virtue of the deeming provision, it has been brought within the ambit of ""total income"" as defined by the

Income Tax Act. But if income is earned by a person who is not a citizen of India by rendering services outside India, then section 9 (1) (iii) will

have no application. Similar will be the case if salary is payable to a person by a private organisation for rendering services outside India.

Therefore, a narrow meaning cannot be given to the scope of section 9 (1) (ii) by referring to the provision of section 9 (1) (iii).

The position is abundantly made clear by section 9 (2). A pension is earned by a person because of services rendered in the course of

employment. When the term of employment comes to an end, lit is said that the man has earned his pension. The earning takes place where the

services had been rendered. Because of the fact that the provision of section 9 (1) (ii), if logically extended, would affect the persons who were

residing permanently outside India in respect of pension payable to such persons, it had to be specifically provided that such pension payable to

persons mentioned in sub-section (2) shall not be deemed to accrue or arise in India.

Therefore, the first question must be answered in the affirmative and in favour of the Revenue.

The second question has been dealt with at length in the judgment delivered on September 5, 1989, in the case of British Airways v. CIT by us in

Income Tax Reference No. 212 of 1983 [1922] 193 ITR 439. In view of that decision, the second question must also be answered in the

affirmative and in favour of the Revenue.

The Third question relates to the jurisdiction of the Income Tax Officer to pass an order u/s 201 (1A) of the Income Tax Act, 1961. The order

was passed by the Income Tax Officer, ""H"" Ward, Companies District IV. At the time of hearing of the case before the Income Tax Officer, the

question of jurisdiction of the Income Tax Officer was not challenged. It was only before the Appellate Assistant Commissioner, for the first time,

that the assessee raised the plea of jurisdiction. The Appellate Assistant Commissioner declined to hold in favour of the assessee on this ground.

The Tribunal was also of the view that the question of jurisdiction could not be raised at such a belated stage. Moreover, the Tribunal has pointed

out that the jurisdiction of the Income Tax Officer is concurrent and it is not a case of lack of inherent jurisdiction. Section 125A of the Income Tax

Act lays down categorically that an Income Tax Officer will have concurrent jurisdiction with any other officer.

Section 201 (1A) of the Act merely makes a declaration that the person, principal officer or the company, as the case may be, shall be liable to

pay simple interest at 12 percent. per annum on the amount of tax which has not been paid in accordance with law. The amount of such tax has to

be deposited with such officer as may be notified. The dispute that has been raised is that in the instant case the proper officer was not the Income

Tax Officer assessing and making the assessment.

That the Income Tax Officer, H-Ward, District-IV, had the jurisdiction to assess the assessee-company is not in dispute. It also cannot be

disputed that the word ""assessment"" has to be construed in a wide sense. In the case of Kalawati Devi Harlalka Vs. Commissioner of Income Tax,

West Bengal and Others, , it was held that the assessment would include every type of computation of income and mostly all liabilities under

Chapter IV of the Income Tax Act.

Moreover, this is not a question of intrinsic or inherent lack of jurisdiction as has been specified by the statute. It is not that the Income Tax Officer

will have no concurrent jurisdiction. The jurisdiction that has been vested in the Income Tax Officer may be exercised in accordance with an

administrative order issued by the Board or the Commissioner, as the case may be. These provisions are really provisions of administrative

convenience and it is not a case of inherent lack of jurisdiction. Reference may be made in this connection to the case of Wallace Brothers and Co.

Ltd. v. CIT [1945] 13 ITR 39 at 45, which was followed by the Patna High Court in the case of RAJA BAHADUR KAMAKHYA NARAIN

SINGH Vs. UNION OF INDIA AND OTHERS., In the case of Wallace Brother and Co. Ltd. [1945] 13 ITR 39, the Federal Court observed

as under (p. 45). :

These provisions clearly indicate that the matter is more one of administrative convenience than of jurisdiction and that in any event it is not one for

adjudication by the court.

This passage was quoted with approval by the Supreme Court in the case of PANNALAL BINJRAJ AND ANOTHER Vs. THE UNION OF

INDIA AND OTHERS. (AND OTHER CASES)., and also in the case of Rai Bahadur Seth Teomal Vs. The Commissioner of Income Tax and

The Commissioner of Excess Profits Tax, . In view of the fact that the assessee did not raise any objection at the time of hearing of the case by the

Income Tax Officer or within the period of one month of filling of the return and in view of the clear finding of the Tribunal and the statutory

provisions conferring upon the Income Tax Officer concurrent jurisdiction, we are of the view that the Tribunal has taken a correct view of the

matter.

A point has been made by the assessee that as a result of this deduction, the Department is realising the tax twice on the same income. It does not

appear that this point was agitated before the Tribunal. We, however, make it clear that if the amount of tax has already been realised from the

employees concerned directly, there cannot be any question of further realisation of tax as the same income cannot be taxed twice. If the tax has

been realised once, it cannot be realised once again, but that does not mean that the assessee will not be liable for payment of interest or any legal

consequence for their failure to deduct or to pay in accordance with law to the Revenue.

Under these circumstances, the third question is answered in the affirmative and in favour of the Revenue. Fourth and fifth questions are also

answered in the affirmative and in favour of the Revenue. There will be no order as to costs.

BHAGABATI PRASAD BANERJEE J. - I agree.