

Commissioner of Income Tax Vs Mahendra Swarup and Vikram Swarup

Court: Calcutta High Court

Date of Decision: Nov. 9, 1992

Acts Referred: Income Tax Act, 1961 "Section 17(2), 17(2)(iii)(a), 254(2), 256(1), 263

Citation: (1993) 71 TAXMAN 268

Hon'ble Judges: Shyamal Kumar Sen, J; Ajit K. Sengupta, J

Bench: Division Bench

Advocate: S.K. Mitra, for the Appellant; N.K. Podder and D. Mitra, for the Respondent

Judgement

Ajit K. Sengupta, J.

This is a consolidated reference u/s 256(1) of the income tax Act, 1961 ("the Act") for the assessment year 1984-85.

The assessee has challenged the appellate order of the Tribunal whereby the Tribunal held that the grant of loan to the assessee by Paharpur

Cooling Towers (P.) Ltd. at a concessional rate amounted to assessable perquisite. The assessee had filed two miscellaneous applications. In the

first miscellaneous application the assessee had drawn the attention of the Tribunal to the decision of this Court in the case of Commissioner of

Income Tax Vs. P.R.S. Oberoi, The Tribunal distinguished the said judgment of this Court in the case of P.R.S. Oberoi (supra) and rejected the

said first miscellaneous application, but the Tribunal allowed the second miscellaneous application filed by the assessee and held that the facts and

circumstances were identical with those of P.R.S. Oberoi's case (supra). The revenue's reference is on the question whether the Tribunal after

having rejected the first miscellaneous application of the assessee whereby the assessee had drawn the attention of the Tribunal to the decision of

this Court in the case of P.R.S. Oberoi (supra) is justified in holding in the order passed in the second miscellaneous application that the issue

involved before the Tribunal and decided was identical.

2. The revenue has contended that such course ought not to have been taken by the Tribunal as there was no mistake apparent from the record

and the Tribunal in fact reviewed the original appellate order by the order passed in the second miscellaneous application.

3. On these facts, the following questions have been referred by the Tribunal at the instance of the assessee:

1. Whether, the Tribunal was justified in failing to consider and/or to hold that in view of the amendments made by the Taxation Laws

(Amendment) Act, 1984 as well as the Finance Act, 1985 in section 17(2) of the income tax Act, 1961 the grant of loans by Paharpur Cooling

Towers (P.) Ltd. to the assessee on the facts and circumstances of the case did not amount to any assessable perquisite ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in upholding the initiation of proceedings as well as

the order passed by the Commissioner u/s 263 of the income tax Act, 1961 in respect of the assessment year 1984-85?

4. At the instance of the revenue the following three questions have been referred:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that there was a mistake apparent from the

record in the order passed in M.A. Nos. 16 and 17 (Cal.) of 1989 and revise the same u/s 254(2) of the income tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in not upholding the order passed by the Commissioner u/s

263 of the income tax Act, 1961, that loan given to the assessee by his employer at a concessional rate of interest be treated as perquisite in the

hands of the assessee as per provisions of section 17(2)(iii)(a) of the income tax Act, 1961?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in relying on the decision of the Hon"ble Calcutta High

Court in the case of Commissioner of Income Tax Vs. P.R.S. Oberoi, in its second order in spite of its observations in order dated 25-2-1991?

5. It is no doubt true that the Tribunal sought not to have gone into the question on merits of the case in the miscellaneous application filed by the

assessee, but having regard to the facts found by the Tribunal it appears to us that the appellate order of the Tribunal was not correct. In the order

passed in the first miscellaneous application the Tribunal distinguished the facts of the case of P.R.S. Oberoi (supra) in the following manner:

The facts in the instant case are distinguishable because the assessee in this case had not paid anything to the company where he has served. There

is also nothing on record that a Board of Directors have passed a resolution to advance the money free of interest to the assessee. Further, there is

nothing on record that Paharpur Cooling Towers Ltd. had not lent the money to the assessee from the amounts borrowed by it. However, the said

company charged the concessional rate of interest. In the case before the Calcutta High Court all these facts were different from the facts of the

assessee. That case is distinguishable on facts. There is considerable substance in the contention of the learned departmental representative that

now holding the perquisite as no benefit would amount to change of opinion and the review of the order. Therefore, there is no mistake of law on

the face of the order.

But in the order passed in the second miscellaneous application the Tribunal has held as follows:

It has become necessary now to examine the Tribunal's order dated 9th January, 1991, and to find out if any mistake crept in the said order. The

appeals were filed against the order passed u/s 263. The question involved in those appeals was whether the grant of loan or advance by Paharpur

Cooling Towers (P.) Ltd. to its directors, i.e., the assesseees who were charged interest at the rate of 6 per cent per annum attracted the provisions

of section 17(2)(iii)(a) of the income tax Act, 1961 or not. The Commissioner held in his order u/s 263 that the grant of loan at a concessional rate

of interest amounted to perquisite to be valued and charged to income tax in the hands of the assesseees who were the directors of Paharpur

Cooling Towers (P.) Ltd.

The loans were granted by Paharpur Cooling Towers (P.) Ltd. to the assesseees about 15 years back. The said loans were granted out of the said

company's own funds and not out of borrowed funds. The Commissioner (Appeals) has dealt with this particular aspect in his orders dated 14th

February, 1988 and 14th July, 1988 for the assessment years 1983-84 and 1984-85, respectively.

Shri N.L. Poddar, the learned representative for the assessee, has contended that in fact it was nobody's case that the advances were made by

Paharpur Cooling Towers (P.) Ltd. to the assesseees out of the borrowed funds of the said companies. The Commissioner also did not record such

a finding in his order u/s 263 dated 30th January, 1989 under consideration for the assessment year under appeal. He has also contended that the

assessee's case is fully covered by the decision of the Calcutta High Court in the case of Commissioner of Income Tax Vs. P.R.S. Oberoi, .

In Oberoi's case (supra), the loan was granted by the Company to its director-employee free of interest. However, in the present cases, the loan

was granted at 6 per cent with the approval of the Board of Directors of the Company. The loans advanced by Paharpur Cooling Towers (P.)

Ltd. to the assesseees were shown in the printed accounts of the said company. The loans were also approved by the shareholders in the General

Meetings during the last 15 years. This requirement was fulfilled as per Companies Act, 1956. These, facts have not been disputed.

Shri Poddar has pointed out a mistake that the Commissioner in his order u/s 263 of the income tax Act, 1961 has held that the grant of loans

amounted to perquisite assessable in the hands of the assessee and, ultimately directed the Assessing Officer to make fresh assessments

accordingly. However, the Tribunal made an observation to consider whether the grant of loans @ 6 per cent in this case to the assessee

amounted to assessable perquisite or not and that the assessee would be at liberty to put forth all the propositions and argument before the

Assessing Officer. Therefore, he has pointed out that there is a contradiction between the orders passed by the Commissioner of income tax and

the Tribunal and it is not clear whether the Assessing Officer would examine the whole issue afresh. Therefore, he has contended to rectify the

appellate orders.

6. Having regard to the decision of this Court in P.R.S. Oberoi's case (supra) we are of the view that the Tribunal was not justified in holding that

the grant of loans by Paharpur Cooling Towers (P.) Ltd. to the assessee on the facts and circumstances of this case amounted to any assessable

perquisite.

7. For the reasons aforesaid, we answer the first question referred at the instance of the assessee in the affirmative and in favour of the assessee

and the second question in the negative and in favour of the assessee.

8. In view of our answers to the questions raised at the instance of the assessee, the questions referred at the instance of the revenue have become

academic. We, therefore, decline to answer these questions. There will be no order as to costs.

Sen, J.

I agree.