(1992) 11 CAL CK 0022

Calcutta High Court

Case No: IT Reference No. 267 of 1991

Commissioner of Income Tax		APPELLANT
	Vs	
Mahendra Swarup and Vikram Swarup		RESPONDENT

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 assessees 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 assessees 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 assessees who were the directors of Paharpur Cooling Towers (P.) Ltd.

The loans were granted by Paharpur Cooling Towers (P.) Ltd. to the assessees 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 assessees 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 assessees 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 assessees amounted to assessable perquisite or not and that the assessees 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.