Commissioner of Income Tax Vs Bijoy Kumar Jain

Court: CALCUTTA HIGH COURT

Date of Decision: June 10, 2016

Acts Referred: Income Tax Act, 1961 - Section 145, 263

Citation: (2016) 385 ITR 339

Hon'ble Judges: Girish Chandra Gupta and Asha Arora, JJ.

Bench: Division Bench

Advocate: Mr. M.P. Agarwal, Mr. S.B. Saraf, Advocates, for the Appellant; Mr. P. Bag, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

1. The subject matter of challenge in the appeal is a judgment and order dated 29th October, 2010 passed in ITA No.1018/Kol/2010 pertaining

to the assessment year 2005-06 by which the learned Income Tax Appellate Tribunal ""C"" Bench, Kolkata allowed an appeal preferred by the

assessee against an order passed under section 263 holding that the order dated 12th September, 2007 passed under section 143(3) of the

Income Tax Act was erroneous and prejudicial to the interest of the revenue. The assessing officer was directed by the Commissioner of Income

Tax to reassess the income of the assessee in the light of the discussions made by him.

2. Aggrieved by the order of the learned Tribunal, the reveue has come up in appeal. The following questions have been suggested.

(i) Whether in view of the facts of the instant case the Tribunal was justified in quashing the order dated 29th October, 2010 passed by the said

Commissioner ignoring the fact that on and from 01.04.1997 mixed system of accounting has been prohibited and the assessee should maintain

either cash or mercantile system as provided under Section 145 of the Income Tax Act, 1961 and departure therefrom made the entire system of

accounting as unrated and illegal ?

(ii) Whether the order of ITAT is at all sustainable as the ITAT has passed an order not sanctioned by the provisions of law as such the order of

ITAT is perverse ?

(iii) Whether the Learned Tribunal was justified in not considering the proposition of law laid down by the HonÃ¯Â¿Â½ble Supreme Court in the case of

ED Sassoon & Company Ltd. v. CIT reported in 26 ITR 27(SC) that income received or deemed to be received in the previous year is

eligible to tax and there is absolutely nothing in the Income Tax Act, 1961 to permit the assessee to treat a part of his income as deferred income ?

(iv) Whether the Learned Tribunal was justified in relying on the following decisions where neither in the Tribunal in the case of R.N.

Jhunjhunwala v. Asst.CIT, Circle - 54, Kolkata nor before the High Court at Calcutta in CIT v. R.N. Jhunjhunwala passed in G.A. No.588

of 2008, arising out of I.T.A No. 6.124 of 2008, considered the question of accessibility and moreover the said order passed by the HonÃ¯Â¿Â½ble

High Court at Calcutta has been challenged before the HonÃ¯Â¿Â½ble Supreme Court, which is pending adjudication?

3. The appeal is at the admission stage.

4. Reason which weighed with the CIT in passing the order under section 263 briefly stated is as follows:-

In the Balance Sheet, the assessee had shown advance receipts of Rs.2,90,98,283/- from clients. The same has not been taken as income of the

assessee despite assesseeÃ¯Â¿Â½s following cash system of accounting resulting in the assessment order passed under section 143(3) being erroneous

in so far as it is prejudicial to the interest of revenue.

5. The CIT was also of the opinion that ""the provisions of Section 145 of the IT Act, after they have been recast with effect from 1.4.1997

permitting only cash or mercantile system of accounting and the decision of the HonÃ¯Â¿Â½ble ITAT, ""C"" Bench, Chennai in the case of M/s. Sterling

Holiday Resorts, mentioned above, following the decision of the Apex Court in the case of E.D. Sassoon and Company Ltd. v. CIT 1954 (26)

ITR 27 (SC) the assessment order under section 143(3) dated 12.09.2007 is erroneous and prejudicial to the interest of revenue.

6. Learned advocate appearing for the revenue is unable to produce any copy of the order passed by the learned Tribunal in the case of Sterling

Holiday Resorts. We therefore, did not have the benefit of acquainting ourselves with the reasoning advanced in that case. However, it can

straightway be pointed that the judgment of the Apex Court in the case of E.D. Sassoon & Company Ltd. v. Commissioner of Income-tax

reported in (1954) 26 ITR 27 has no manner of application to the facts and circumstances of the case.

7. What had happened in that case was that ""S"" company was the managing agent of ""U"" company. ""S"" company was entitled to receive by way of

their remuneration commission of certain percentage of the annual income of ""U"" company on 31st March of every calendar year. On 1st

December, 1943, ""S"" company transferred its right of managing agency to company ""A"". The question arose whether the remuneration received by

company ""A""on 31st March, 1944 was the income of company ""A""or company ""A""was liable to share the same with the company ""S"". This

question was answered by Their Lordships by holding that ""S"" had no right to participate in the profits because the profit had accrued only on 31st

March, 1944 whereas the transfer took place on 1st December, 1943. The question before us is whether money received by way of deposits by

the assessee, who is a solicitor by profession, from his clients is taxable. No elaborate reasoning is required to show that in the facts of the case

before us, the judgment in the case of E.D. Sassoon & Company Ltd has no manner of application. The only other reason which weighed with the

CIT is section 145 of the Income Tax Act as amended with effect from 1st April, 1997.

(1) Income chargeable under the head ""Profits and gains of business or profession"" or ""Income from other sources"" shall, subject to the provisions

of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

(2) The Central Government may notify in the Official Gazette from time to time [income computation and disclosure standards] to be followed by

any class of assessees or in respect of any class of income.

(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of

accounting provided in sub-section (1) [has not been regularly followed by the assessee, or income has not been computed in accordance with the

standards notified under sub-section (2)], the Assessing Officer may make an assessment in the manner provided in section 144.

8. All that section 145 provides is that an assessee has the choice to compute his income arising out of profits and gains of business or profession

or income form other sources either in accordance with the cash system or in accordance with the mercantile system.

9. Either of the methods has to be followed. The assessee in this case has been following cash method. Section 145 does not even remotely

influence answer to the question as to whether deposit received by the solicitor is taxable or not. Section 145 is a mere mandate that the assessee

has to follow either of the two systems of accounting. Therefore, section 145 neither militates against the deposit being treated as a capital receipt

nor does it favour the proposition that deposit should be treated as a revenue receipt where the assessee follows cash system. Whether the receipt

is a revenue receipt or a capital receipt would depend essentially on the nature of the receipt. In the case before us the deposits received by the

assessee were treated by him as his liability. In the subsequent years when expenses were incurred both out of pocket and on account of his fees

the liability has been adjusted. In this regard, the finding of the learned Tribunal is relevant which is as follows:-

However, the undisputed facts of this case are that the AO, while passing the consequential order to 263 order in the immediately preceding

assessment year, whether warranted or not, he has given a finding that ""Thus, I find that the total sum of Rs.58,20,174/- appearing as Advances

from Parties/Clients as on 31.3.2004 has already been appropriated towards fee in the subsequent years. Thus, in fact there is no loss of revenue

as the amount has been considered as the income of the assessee in the subsequent years, when it so materialized"". Similarly, for the impugned

assessment year in our considered opinion, as the assessee has established that all the advances as on 31.03.05 have been subsequently adjusted

in the subsequent assessment years, copies of which have been placed at page nos.19A and 19B of the paper book and the Ld. D.R. could not

contradict the submissions of the Ld. Counsel for the Assessee, we find no justification on the part of the Ld. CIT to invoke the provisions of

section 263. Therefore, we set aside the orders of the Ld. CIT on this issue and allow the appeal of the assessee.

10. Therefore, on facts there is no iota of doubt that the deposits were treated by the assessee as a capital receipt and the deposits were adjusted

in the subsequent years against the expenditure incurred for or on behalf of the client from whom the deposit was received. Such expenditure also

included the fees of the assessee himself. It is at that stage that the money was earned by him. Before that, he was holding the money as an agent or

as a fiduciary of his client.

11. There is a judgment of this Court where this point was lucidly explained which has been brought to our notice by Mr. Bag appearing for the

assessee. In the case of CIT v. Sandersons & Morgans, reported in (1970) 75 ITR 433(Cal), the Division Bench held as follows:

In the instant case, we have already observed, the money received was money to the principal received by the agent in a fiduciary capacity, for

being employed for the work of the principal entrusted to the agent. We have already seen that the balance of the money was refundable by the

agent to the principal. Since the money was impressed with the character of somebody elseÃ¯Â¿Â½s money, namely, clientsÃ¯Â¿Â½ money, it did not

become the income of the assessee. It may be, in the absence of a rule like the SolicitorsÃ¯Â¿Â½ Account Rules in this country, the assessee mixed up

this money with its own money and may have deposited the money in its own bank account; it may be that this money remained part of the general

assets of the assessee for a long time; but this mixing up did not have the result of converting the money into the assesseeÃ¯Â¿Â½s money or trading

receipt or income. That being the position, we do not think that the Tribunal was wrong in not relying upon the Punjab case, (1953) 24 ITR 597;

AIR 1954 Punj. 61, and being guided by Tattersall case (1938) 22 TC 51; (1939) 7 ITR 316 (CA), in this matter.

It was lastly contended, on behalf of the revenue, that since the solicitor did not stand in the position of a trustee to the client and since the

Limitation Act applied, the remedy of the clients to recover the sum of the balances may have become barred by limitation. We do not think that

this consideration in any way alters the legal position. In the case of Kohinoor Mills Co. Ltd. v. Commissioner of Income-tax, (1963)49 ITR

578, a question similar to that which we have to consider came up for consideration. There certain wages were payable but they were unclaimed

and their recovery became barred by limitation. Nevertheless, the Bombay High Court held that the debt subsisted, notwithstanding that the

recovery had become barred by limitation. There was no ""cessation of trading liability"" within the meaning of section 10(2A), and the amount of

such wages could not be added to income. Thus, even though the remedy of some of the clients may have become barred by limitation, even then

the barred debt did not become income of the assessee and could not be taxed under the Income-tax Act.

12. For the aforesaid reasons, we find that the Tribunal was right in taking the view as it did. The appeal preferred by the revenue is devoid of any

merit. The questions of law are answered accordingly. The appeal is dismissed. Parties shall bear their own costs.