

(1998) 08 CAL CK 0043

Calcutta High Court

Case No: IP No. 144 of 1996 22 December 1997

COMMISSIONER OF Income Tax

APPELLANT

Vs

BENGAL WATERPROOF LTD.

RESPONDENT

Date of Decision: Aug. 14, 1998

Citation: (1998) 150 CTR 188

Hon'ble Judges: Shyamal Kumar Sen, J; Sen, J; Mitra, J; Buitendra Mohan Mitra, J

Bench: Full Bench

Judgement

Sen, J.

Rule was issued on the following question:

"Whether, on the facts and in the circumstances of the case the Tribunal was justified in law in holding that the technical know-how fee of Rs. 5 lakh (equivalent of Sri Lankan Rs. 10 lakh) receivable by the assessee as per the agreement between the assessee and Bansri Rubber Products (P) Ltd. is not taxable in the assessment year under consideration?"

2. It is not in dispute that in terms of the agreement between the assessee and the Sri Lankan company, Rs. 5 lakh was to be paid by the Sri Lankan company to the assessee-company. The claim of the assessee that due to stipulation by the Indian Bank as a term of the loans and deferred payment, government facility extended by them laying down a covenant, the royalty and consultancy fees due to the assessee-company stood modified to the extent, was not accepted by the assessing officer and the assessing officer held that at best such remittance may be held back but would nevertheless remain income accrued in the hands of the assessee-company as the accounts are maintained on mercantile basis.

3. Before the Commissioner (Appeals) it was submitted that as per the agreement between the assessee and Bansari Rubber Products (P.) Ltd. of Sri Lanka, the assessee was to receive Sri Lankan Rs. 10 lakh as technical fees, royalty and export

commission within 240 days of the signing of the agreement, which came into effect from 23-9-1982. However, before the period of 240 days was over, the Indian Bank who financed the entire project of the new company vide their letter dated 7-12-1982 put a restriction to the effect that no such payment will be allowed to be paid to Bengal Waterproof Ltd. so long as any loan to the bank is in arrears. As a result, the agreement stood amended to this extent and no payments were received. It was further submitted that in respect of the income from this portion of foreign venture, the Board had resolved vide its resolution dated 20-5-1982 that the new source of income of the company from technical fees, royalty and export commission receivable under agreement with Bansari Rubber Products (P.) Ltd. be treated on cash basis. In view of these arguments, the assessee submitted that the addition made by the assessing officer was unjustified.

4. The Commissioner (Appeals) considered the submission of the assessee and found that there is no dispute regarding the source of income, the quantum or that the amount is receivable by the company and that the only point of dispute is that this amount of Rs. 10 lakh in Sri Lankan money although receivable as per the terms of the agreement was not actually received due to the stipulation of its restriction laid down by the Indian Bank vide their letter dated 7-12-1982. According to the Commissioner (Appeals), as the assessee had passed a resolution vide the board's resolution dated 20-5-1982 to treat the income receivable from Sri Lanka on cash basis, such amount could not be included in the income as no amount has been received by the assessee. He also observed that it is not the assessee's ground that the amount in question is not receivable or could not be included even if mercantile system of accounting was followed. According to the Commissioner (Appeals), till 7-12-1982 the assessee did not have any reason to believe that the amount would not be remitted to India within the time stipulated. He further observed that in spite of that the Board had passed a resolution on 26-5-1982 resolving to maintain cash system in respect of the income from this agreement. The Commissioner (Appeals) further observed that it is also surprising that this vital fact was never raised before the assessing officer nor was made the ground for claiming non-taxability of the amount in a specific manner based on the board's resolution but was only mentioned in a general way. As the assessee had claimed that the amount should be taxed on actual receipt basis, the Commissioner (Appeals) held that the assessing officer has correctly included the amount of Rs. 5 lakh. Being aggrieved by the order of the Commissioner (Appeals), the assessee has preferred this appeal to the Tribunal.

5. The Tribunal, however, found that there was no dispute regarding the source of income, quantum of income or the amount was receivable by the assessee. The only point of dispute was that this amount of Rs. 10 lakh in Sri Lankan money although receivable as per the terms of the agreement which came into effect from 23-9-1982 was not actually received due to stipulation/ restriction laid down by the Indian Bank vide their letter dated 7-12-1982. The Tribunal found that the assessee had passed a

resolution on 20-5-1982 to treat the income receivable from Sri Lanka on cash basis on 20-5-1982. The resolution indicates clearly that the board of directors long before the foreign company came into existence resolved to account for the income of the company from the agreement on cash basis. It is also observed that no income had accrued even on the date of resolution. The assessee has furnished a copy of the resolution passed by the Board as well as a copy of the Indian Bank's sanctioned letter of 7-12-1982 placed at page 12 of the paper book No. 2, in order to prove its contention. On a perusal of these facts, the Tribunal found that the observation of the Commissioner (Appeals) in his order quoted as under is not correct :

"It is also surprising that this fact which is so vital to this issue, was never raised before the Inspecting Assistant Commissioner nor made the ground for claiming non-taxability of the amount and in fact never found a place in the assessment order, in a specific manner based on the Board's resolution but was only mentioned in a general way."

The Tribunal held, even if it was indicated in a general way by the assessee before the assessing officer, that it was the duty of the assessing officer to look into the books of account and minutes of the directors' meeting by which the above resolution was passed. The Tribunal also found that the bona fide of the assessee in passing this resolution has not been challenged by the department.

The Tribunal considered several decisions and held that the orders of the assessing officer or the Commissioner are not in accordance with the provisions of law and Rs. 5 lakh cannot be included in the income of the assessee for the assessment year in consideration.

6. We have considered the submissions made by the learned advocates for the parties.

7. It appears that the assessee passed a resolution on 20-5-1982 to treat the income receivable from Sri Lanka on cash basis. We are also of the view that the said resolution passed on 20-5-1982 indicates that the board of directors, long before the foreign company came into existence, resolved to account for the income of company from the agreement on cash basis. The bona fide of the assessee in passing this resolution which has not been challenged by the department has also been noted by the Tribunal in view of the fact that the assessee was maintaining the income relating to this transaction on cash basis. The amount since not realised in the particular assessment year has not been shown in the account for the said year and the amount in fact being taxable in that particular year, the said amount will form part of the income as and when the same is received and will be taxed in that particular assessment year.

8. The method of accounting so far as the assessee is concerned in respect of this transaction not being disputed, the same cannot be taxable since the same has in fact not been realised in that particular year.

9. In that view of the matter, we do not find any merit in the contention of the learned advocate for the applicant and there is no ground on our view to make the rule absolute.

10. Accordingly, the rule issued stands discharged.

11. There will be no order as to costs.

Mitra, J. - I agree.