Commissioner of Income-Tax, Bombay North

Vs

Harivallabhadas Kalidas And Co.

Shri Ambica Mills Ltd.

Vs

Commissioner of Income-Tax, Bombay North

Civil Appeal Nos. 145 of 1958 and 323 of 1957

(S. K. Das, M. Hidayatullah, J. L. Kapur JJ)

19.02.1960

JUDGMENT

KAPUR, J. –

This judgment will dispose of two appeals, C.A. No. 145 of and C.A. No. 323 of 1957. They arise out of the same transaction, i.e., managing agency agreement, and the result of C.A. No. 323 of 1957 is dependent upon the judgment in C.A. No. 145 of 1958 and we propose to deal with the latter appeal which was argued before us and the former for reasons to be stated later was not pressed. The appellant in C. A. No. 145 of 1958 is the Commissioner of Income-tax, Bombay, and the respondent is the assessee, a registered firm, which on March 8, 1941, was appointed the managing agents of Shri Ambica Mills Limited (hereinafter termed the managed company) the appellant in C.A. No. 323 of 1957. The duration of the managing agency period was 20 years. By clause (2) of the managing agency agreement it was provided :

> "(2). (a) The company shall pay each year to the said firm either the commission of 5 (five) per cent. on the total sale proceeds of yarn, and of all cloth, manufactured from cotton, silk, jute, wool, waste and other fibres and sold by the company, or a commission of three pies per Pounds avoirdupois on the sale, Whichever the said firm choose to take, and also a commission of 10 (ten) per cent. on the proceeds of sale of all other materials sold by the company and 10 (ten) per cent. on the bills of any ginning and pressing factories and on any other work done by the company.
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> (b) If in any year the net profits of the company shall not be sufficient to enable the directors, if they think fit, to recommend a dividend of eight per cent. per annum on the capital paid up on the ordinary shares for the time being, the same firm shall be bound to give up from the total amount of commission payable under clause 2(a) hereof such portion thereof as may be necessary to make up the deficit. PROVIDED THAT in no event the amount so given up by the said firm shall exceed one-third of such total amount of commission."

And by clause (5) it was provided :

"(5) The remuneration payable to the said firm under clause 2(a) shall be paid to the said firm forthwith after the 31st day of December, or such other date as the directors may fix for the closing of the accounts of the company in each year and after such accounts are passed by the company in general meeting."

On December 9, 1950, the board of directors of the managed company passed a resolution to the effect that the directors had for some time past been discussing with the managing agents the advisability of modifying the terms of the managing agency agreement as to the commission payable under it and that the managing agents had agreed to charge 3 per cent. on sales instead of 5 per cent. for the year ending December 31, 1950. A resolution was passed at the annual general meeting of the managed company on April 22, 1951, which was to the same effect. The resolution of the board of directors was ratified at an extraordinary general meeting of the shareholders of the managed company on October 7, 1951, and the same day a formal agreement embodying the terms of the resolution was executed between the managing agents and the managed company. For the accounting years 1950 and 1951, i.e., assessment years 1951-52 and 1952-53, the managing agents were taxed by the income-tax authorities on the basis that in those two

In the connected appeal, i.e., C.A. No. 323 of 1957, by the managed company the facts are the same except that the Appellate Tribunal allowed the managed company the sum of which the managing agents were to be taxed as allowable deduction. When the Commissioner got the case stated to the High Court the managing company also had a case stated. But as the High Court upheld the contention of the managing agents the managed company did not press its application which was, therefore, dismissed. The appeal of the managed company is brought against that order.

In the appeal by the Commissioner of Income-tax, i.e., C.A. No. 145 of 1958, it was argued that according to the terms of the agency agreement the managing agents were to get the commission on the sales and as the accounts were kept on a mercantile basis, the amount of commission accrued as and when the sales took place and paragraph 5 of the agreement was only a machinery for quantifying the amount. It was also argued that the managing agents by entering into an agreement with the mills had voluntarily relinquished a portion of the amount of commission which had accrued to them and, therefore, the whole of the income from commission which had already accrued was liable to income- tax; and reference was made to the cases reported as Commissioner of Income-tax v. Thiagaraja Chetty & Co., Sassoon & Co. Ltd. v. Commissioner of Income-tax and to an English case Commissioners of Inland Revenue v. Gardner, Mountain & D' Ambrumenil Ltd. But these cases have no application to the facts of the present case.

In Commissioner of Income-tax v. Thiagaraja Chetty & Co., the assessee firm was, under the terms of the managing agency agreement, entitled to a certain percentage of profits and in the books of the company a certain sum was shown as commission due to the assessee film and that sum was also adopted as an item of business expenditure and credited to the managing agents' commission account but subsequently it was carried to suspense account by a resolution of the company passed at the request of the assessee firm in order that the debt due by the firm might be written off. The accounts were kept on mercantile basis and it was held that on that basis the commission accrued to the assessee when the commission was credited to the assessee's account and subsequent dealing with it would not affect the liability of the assessee to income-tax. It was also held that the quantification of the commission could not affect the question as it was not a condition precedent to the accrual of the commission. At page 267 Ghula

"Lastly it was urged that the commission could not be said to have accrued, as the

> profit of the business could be computed only after the March 31, and therefore the commission could not be subjected to tax when it is no more than a mere right to receive. This argument involves the fallacy that profits do not accrue unless and until they are actually computed. The computation of the profits whenever it may take place cannot possibly be allowed to suspend their accrual. In the case of income where there is a condition that the commission will not be payable until the expiry of a definite period or the making up of the account, it might be said with some justification, though we do not decide it, that the income has not accrued, but there is no such condition in the present case."

This passage does not help the appellant's case. The question there decided was that the accrual of the commission was not dependent upon the computation of the profits although the question whether it would make any difference where the commission was so payable or was payable after the expiry of a definite period for the making of the account was left undecided. In the case before us the agreement is of a different nature and the above observations are not applicable to the facts of the present case.

The next case is Sasson & Co. Ltd. v. Commissioner of Income-tax. But it is difficult to see how it helps the case of the appellant. If anything it goes against his contention. In that case the assessee company was the managing agent of several companies and was entitled to receive remuneration calculated on each year's profits. Before the end of the year it assigned its rights to another person and received from him a proportionate share of the commission for the portion of the year during which it worked as managing agent. On the construction of the managing agency contract it was held that unless and until the managing agent had carried out one year's completed service, which was a condition precedent to its being entitled to receive any commission. The facts in that case were different and the question for decision was whether the contract of service was such that the commission was only payable if the service was for a completed year or the assessee company was entitled to receive even for a portion of

As was observed by Lord Wright in Commissioners of Inland Revenue v. Gardner, Mountain & D' Ambrumenil Ltd., "It is on the provisions of the contract that it must be decided, as a question of construction and therefore of law, when the commission was earned". The contract in the present case in paragraph 2 shows that (1) the company was to pay each year; (2) that the managing agents were to be paid 5 per cent. commission on the proceeds of the total sales of yarn and of all cloth sold by the company or three pies per Pounds avoirdupois on the sale, whichever the managing agents chose; thus there was an option to be exercised at the end of the year; (3) they were also to be paid at 10 per cent. on the proceeds of sales of all other materials; and (4) the mills were to pay to the managing agents each year after December 31, or such other date which the directors of the company may choose for the closing of the accounts. There was a further clause that if the net profits of the managed company, that is, the mil

We are of the opinion, therefore, that the High Court correctly found against the appellant and we therefore dismiss C.A. No. 145 of 1958 with costs. In view of this Mr. Palkhivala for the managed company did not press C.A. No. 323 of 1957, which is therefore dismissed but the parties will bear their own costs in that case because the result of that appeal is really dependent upon the result in C.A. No. 145 of 1958.

Appeals dismissed.

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