Indore Malwa United Mills

Vs

Commissioner of Income-Tax, (Central) Bombay

Civil Appeal Nos. 1006-1011 of 1963

(A. K. Sarkar, J. R. Mudholkar, R. S. Bachawat JJ)

19.11.1965

JUDGMENT

BACHAWAT, J. –

These appeals arise out of proceedings for assessment of income-tax of the appellant Company (hereinafter referred to as the assessee) for the assessment years, 1943-44, 1944-45, 1945-46, 1946-47, 1947-48 and 1948-49, the relevant accounting years being the Calendar years 1942, 1943, 1944, 1945, 1946 and 1947 respectively.

During the relevant accounting years, the assessee years, the assessee was a non-resident. It carried on the business of manufacturing textile goods at Indore then situated in an Indian State, and had offices at Indore and Bombay. The assessee supplied goods to the Indian Stores Department, Government of India, under purchase orders placed by the latter with the assessee at Indore. Duplicate copies of the purchase orders signed on behalf of the assessee at Indore used to be sent to the Government of India in British India. The goods used to be inspected at Indore by an inspecting officer of the Government and the inspection certificates were issued at Indore. One of the conditions of the contract was that the delivery would be F.O.R.,. Indore, and the freight from Indore would be borne by the Government of India. The goods used to be despatched by railway from Indore station and the railway receipts used to be made out in name of a representative of the Government. There were two types of purchase orders, namely, (1) purchasewar order and (2) bulk purchase order. Clause 9 of the bulk purchase order was in these terms :

> "9. Payment : Unless otherwise agreed between the parties, payment for the delivery of the stores will be made on submission of bills in the prescribed form in accordance with the instructions given in the Acceptance of Tender by cheque on a Government Treasury in British India or on a branch in British India of the Reserve Bank of India or the Imperial Bank of the India transacting Government business."

From the judgment of K. T. Desai J. it appears that in the High Court both parties agreed that the aforesaid cl. 9 was one of the terms on which all the goods were supplied by the assessee. In paragraph 2 of the petition for leave to appeal to this Court and paragraph 3 of the appellant's statement of case also, the assessee stated that the contracts between the parties were subjects to the aforesaid clause 9. The prescribed form of the bill (Form No. WSB. 116), which the assessee was required to submit to the Government of India, Department of Supply, contained inter alia, the following receipt clause :

> #"Received payment one anna Please pay by cheque receipt stamp self Bank on

> original only to ----- on --------- Bank TreasuryContractor's at .....signature Contractor's signature."##

Introductions Nos. 13 and 14 with regard to payment were as follows :

> "13. If payment is desired to be made to the Contractor's Bankers or other parties, the endorsement must be completed on the Bill Form (W.S.B. Form No. 116) and signed separately and the word 'self' scored out; in addition, a power of attorney will be necessary in such cases, except when payment is desired to a Bank mentioned in the second schedule to the Reserve Bank Act. 14. Payment in all case will be made to the Contractors by the Accounts Officer named in the Acceptance of Tender by means of crossed cheques, unless a specific request is made to the contrary for the issue of an open cheque on the bill."

The assessee used to make out bills in the prescribed form. The receipt clause in the completed bill used to be in the following terms : "Please pay by cheque to self on a bank at Indore."

The receipt clause in the bill used to be signed in advance of behalf of the assessee on a one anna stamp. The bills with the signed receipts of the assessee then used to be sent to the Controller of supplies, New Delhi, after the later was debited with the amounts of the bills in the books of the assessee. On receipt of the bills, the Government of India used to draw cheques on the Reserve Bank of India, Bombay, in favour of the assessee and used to send them by post of the assessee at Indore. On receipt of the cheques, the assessee used to credit the Controller of Supplies in its book with the amount of the cheques, and then used to deposit the cheques in their account with the Imperial Bank of India, Indore, and thereupon, the Bank used to credit the assessee in the aforesaid account with the amount of the cheques.

The question is whether on these facts the profits of the assessee, a non-resident, in respect of the supplies were received by the assessee in British India and, therefore, taxable under s. 4(1)(a) of the Indian Income-tax Act, 1922. Before the Appellate Tribunal and at all stages of the assessment proceedings, the contentions of the authorities was what that the profits were received at Bombay where the cheques of the Reserve Bank of India, Bombay, were encashed. By its order dated March 13, 1953, the Appellate Tribunal negatived this contention and held that the amounts of the cheques were received by it at Indore. On the application of the Commissioner of Income-tax, Central, Bombay, under s. 66(1) of the Indian Income-tax Act, 1992, the Tribunal by its order dated March 4, 1955 referred the following question of law to the Bombay High Court :

> "Whether the assessee Company is liable to pay tax in the taxable territories on the ground that the sale proceeds, which included the profit element therein, were received in the taxable territories."

In its order dated March 4, 1955, the Tribunal referred to the decision of this Court in Commissioner of Income-tax v. Kirloskar Bros. Ltd. ((1954) 25 I.T.R. 547.) decided on April 19, 1954, and stated that on the facts of the case, a contention might arise that the assessee had requested the Government to send the cheque by the post office as the agent of the of the assessee, had received the cheque in British India, but the Tribunal pointed out that this contention had not been raised before it.

The reference under s. 66(1) was heard by a Division Bench of the Bombay High Court consisting

of J. C. Shah and S. T. Desai, JJ. J. C. Shah J. answered the question referred to the High Court in the affirmative whereas S. T. Desai, J. answered it in the negative. The matter then went before third Judge, K. T. Desai J. who agreed with J. C. Shah, J. and answered the question in the affirmative. The majority of the Judges held that the cheques were received by the assessee through its agent, the post office in British India and the Revenue authorities were entitled to urge this contention for the first time in the High Court. The assessee to now appeals to this Court on a certificate granted by the Bombay High Court.

In the appeals before us, the following two question arise : (1) Was the post office the agent of the assessee to receive the cheque representing the sale proceeds on its behalf, and did the assessee consequently receive the sale proceeds through its agent in British India; and (2) whether the Revenue authorities could raise this contention for the first time at the hearing of the reference before the High Court, though this contention was not raised by it before Tribunal or at any stage of the assessment proceedings ?

Where, as in this case, the question of law in issue between the parties and referred to the High Court is the broad question whether or not the assessee is liable to pay tax on the ground that the sale proceeds including the profits of the sale were received by the assessee in British India, the Revenue authorities may be permitted to argue for the first time at the hearing of the reference that on the facts found by the Tribunal, the post office was the agent of the assessee for the purpose of receiving the cheques representing the sale proceeds and the assessee received the sale proceeds in British India were the cheques were posted, though this aspect of the question was not argued before the Tribunal and though the only point there argued was that the sale proceeds were received at Bombay where the cheques were encashed. See The Commissioner of Income-tax v. Messrs. Ogale Glass Works Ltd ([1955] 1 S.C.R. 185.) Zoraster and Co. v. Commissioner of Income-tax ([1961] 1 S.C.R. 210.). See also Commissioner of Income-tax, Bombay v. Scindia Steam Navigation Co. Ltd. ([1962] 1 S.C.R. 788, 814.). The decision in New Jehangir Vakil Mills Ltd. v. Commissioner of Income-tax ([1960] 1 S.C.R. 249.) relied on by the assessee is distinguishable. There, the question of law referred to the High Courts was "Whether the receipt of the cheques at Bhavnagar amounted to receipt of sale proceeds in Bhavnagar ?", and this question was not broad enough to cover the enquiry whether there were postings of the cheques at the request of the assessee and receipts of the cheques by the assessee through the post office in British India. The precise point decided by this Court in the New Jehangir Vakil Mills' ([1960] 1 S.C.R. 249.) case was that the High Court has no jurisdiction under s. 66(4) to direct the Tribunal to collect evidence not already on the record and to make it a part of a supplementary statement of case, and this decision was followed and affirmed recently in Keshav Mills Co. Ltd. v. Commissioner of Income-tax ([1965] 2 S.C.R. 908.). But, in the instant case, the High Court did not call for any supplementary statement of case. Nor is the question of law referred in this case a narrow one as in the New Jehangir Vakil Mills' case ([1960] 1 S.C.R. 249.) so as to exclude consideration of the contention that the assessee received the sale proceed through its agent, the post office in British India. We are, therefore, satisfied that the revenue authorities can raise this contention for the first time in the High Court.

The next question is whether the post office was the agent of the assessee to receive the cheques representing the sale proceeds and whether the assessee received the sale proceeds in British India where the cheques were posted. Now, if by an agreement, express or implied, between the creditor and the debtor or by a request, express or implied, by the creditor the debtor is authorised to pay the debt by a cheque and to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque and the creditor receives payment as soon as the cheque is posted to him : See The Commissioner of Income-tax v. Messrs. Ogale Glass Works Ltd. ([1955] 1 S.C.R.

185.), Jagdish Mills Ltd. v. The Commissioner of Income-tax ([1960] 1 S.C.R. 236.) approving Norman v. Ricketts ((1886) 3 Times Law Reports. 182.), Thairlwall v. The Great Northern Railway ([1910] 2 K. B. 509.). In Messrs. Ogale Glass Works case ([1955] 1 S.C.R. 185.), there was an express request by the assessee at Aundh to its debtor in Delhi to remit the amount of the bills by cheques. In Jagdish Mills case ([1960] 1 S.C.R. 236.), there was a stipulation between the assessee and its debtor that the debtor in Delhi should pay the assessee in Baroda the amount due to the assessee by cheque, and this Court held that there was by necessary implication a request by the assessee to the debtor to send the cheques by the post from Delhi, thus constituting the post office, its agent for the purpose of receiving the payments. In the instant case, cl. 9 of the terms and conditions of the contract read with prescribed form of the bills and the instructions regarding payment show that the parties had agreed that the assessee would submit to the Government of India, Department of Supply, New Delhi bills in the prescribed form the requesting payment of the price of the suppliers by cheques together with signed receipts and the Government of India would pay the price by crossed cheques drawn in favour of the assessee. Having regard to the fact that the assessee was at Indore and the Supply Department of the Government of India was at a New Delhi the parties must have intended that the Government of India would send the cheques to the assessee by post from New Delhi, and this inference is supported by the fact that the cheques used to be sent to the assessee by post. In the circumstances, there was an implies agreement between the parties that the Government of India would send the cheques to the assessee by post.

Mr. Pathak argued that the assessee had requested the Government to pay money by cheques on a bank at Indore and as that request was not complied with and the Government of India sent instead cheques on the Reserve Bank of India, Bombay there was no effective requested by the assessee to the Government of India sent the cheques to post. But independently of any subsequent request by the assessee, the contract between the parties authorised the Government of India to pay the price by cheques drawn on Reserve Bank of India, Bombay and imported a request by the assessee to the Government of India to send cheques by post. The Government of India was entitled to ignore the subsequent request of the assessee for cheque on an India bank and the assessee received payments of the price as and when the cheques on the Reserve Bank of India, Bombay were posted in British India in accordance with the contract. In Thairlwall v. Great Northern Railway ([1910] 2 K.B. 509.) Lord Coleridge J., observed :

> "The real question is whether the posting of the warrant was payment of the amount of the dividend. To established that it was, the defendants must prove a request by the plaintiff or an agreement between the plaintiff and the defendants that payment should be made by means of a warrant posted to the plaintiff. If such a request or agreement is proved, then payment is established by posting even although the instrument is lost in the post : Norman v. Ricketts ((1886) 3 Times Law Reports 182.)."

Mr. Pathak contended that the assessee and the Government of India had agreed that the sale proceeds would be paid to the assessee in Indore outside British India, and therefore the rule in Messrs. Ogale Glass Works' case ([1955] 1 S.C.R. 185.) did not apply, having regard to the decision in Commissioner of Income-tax v. Patney & Co. ((1959) 36 I.T.R. 488.). We are not included to accept this contention. There is nothing on the record to show that there was any express agreement between the parties that the sale proceeds would be paid to the assessee at Indore. We are satisfied that the post office was the agent of the assessee for the purpose of receiving the cheques representing the sale proceeds and the assessee received the sale proceeds in British India where the cheques were posted, and consequently, the profits in respect of the sales were taxable under s.

4(1)(a). The High Court, therefore, rightly answered the question in the affirmative.

Mr. Pathak and following him Mr. Kolah submitted that the assessee would have held additional evidence to disprove the contention that the post office acted as its agent, had that contention been raised before the Tribunal, and the Revenue authorities should not, therefore, have been allowed by the High Court to raise the new contention. On being asked what additional evidence would have been led by the assessee, counsel said that the assessee would have led evidence to show (a) that the purchase orders were accepted by the assessee under compulsion of the Defence of India Act and Rules and consequently there was no voluntary request by the assessee for payment by cheques, and (b) the Imperial Bank of India, Indore, as the statutory agent of the Reserve Bank of India, Bombay, paid the amount of the cheques to the assessee at Indore. But counsel was unable to show any provision of the Defence of Indian Act or Rulers under which the assessee was obliged to accept the purchase orders, and we need not, therefore, enquire into the correctness of counsel's assumption that acceptance of the purchase orders under compulsion of law would have negatively the contention that the post office acted as the agent of the assessee. And if the assessee received payment by cheques posted in British India, the fact that subsequently the Imperial Bank of India, Indore as the statutory agent of the Reserve Bank of India, Bombay paid the amount of the cheques at Indore would not take the case of the assessee out of the purview of section 4(1)(a). We are, therefore, satisfied that the assessee was not prevented from adducing any material evidence by reason of the omission of the revenue authorities to argue the new point before the Tribunal. We do not therefore, think it necessary to express any opinion on the question whether the court should refuse to allow the revenue authorities to raise a new contention where, by reason of these omission to raise the contention before the Tribunal, the assessee had been prevented from adducing material evidence from the point.

In the result, the appeals are dismissed with costs, one set.

Appeals dismissed.

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