Gestetner Duplicators Pvt. Ltd.

Vs

Commissioner of Income Tax, West Bengal

Civil Appeal Nos. 565-570 of 1978

(P. N. Bhagwati, V. D. Tulzapurkar, R. S. Pathak JJ)

14.12.1978

JUDGMENT

TULZAPURKAR, J. –

1. These appeals, by certificates are directed against the common judgment and order rendered by the Calcutta High Court on February 8, 1977 in Income Tax Reference No. 156 of 1969 and Income Tax References Nos. 398, 399 and 400 of 1969, whereby the assessee's claim for deduction under Section 36(1)(iv) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') in respect of three sums of Rs. 95,421, Rs. 1,00,564 and Rs. 1,17,969 out of the total contributions made by the assessee to a recognised Provident Fund for the assessment years 1962-63, 1963-64 and 1964-65 respectively was disallowed and the principal question raised in these appeals is whether the expression "salary" as defined in Rule 2(h) in Part A of the Fourth Schedule to the Act includes "commission" paid by the assessee to its salesmen in terms of their contracts of employment ?

2. The assessee is a private limited company and carries on the business of manufacture and sale of duplicating machines and accessories. It has in its regular employment three categories of salesmen - machine salesmen, mixed salesmen and supply salesmen. As a term of the contract of employment between the assessee and the salesmen of the aforesaid categories, the assessee, besides paying a fixed monthly salary also paid commission to them at fixed percentage of turnover achieved by each salesmen, the rate of percentage varying according to the class of article sold and the category to which the salesman belonged. The assessee maintained a regular Provident Fund for its employees which was recognised by the Commissioner of Income Tax some time in 1937 and the said recognition continued and was in force during the relevant years in question. In the previous years ending on December 31, 1961, December 31, 1962 and December 31, 1963 relevant to the assessment years 1962-63, 1963-64 and 1964-65 the assessee made contributions, out of its own moneys, to the individual accounts of these salesmen in the said Provident Fund on the basis of salary and commission paid to them and claimed such contributions as allowable deductions under Section 36(1)(iv) of the Act and in that behalf reliance was placed by the assessee upon Rule 2 of the assessee-company's Recognised Provident Fund Scheme Rules under which "salary" meant not only the fixed monthly salary but also the commission and dearness allowance as might be paid by the company to its employees. Out of such total contributions the Income-Tax Officer disallowed the sums of Rs. 95,421, Rs. 100,564, and Rs. 1,17,969 on the ground that these amounts pertained to the commission paid by the assessee to its salesmen for the three years respectively and that under Rule 2(h) of Part A of the Fourth Schedule to the Act, which was applicable, the expression "Salary" did not include such commission. Three appeals, for the aforesaid three years, filed by the assessee were heard by two different Appellate Assistant Commissioners, one of whom rejected the appeal for the assessment year 1962-63 in view of Rule 2(h) of Part A of the Fourth Schedule to the

Act but the other Appellate Assistant Commissioner allowed the appeals for the assessment years 1963-64 and 1964-65 by accepting the assessee's contention. The assessee as also the Revenue preferred appeals to the Appellate Tribunal. On the one hand, relying upon the dictionary meaning of the expression "salary" as given in the Shorter Oxford Dictionary and Stroud's Judicial Dictionary and upon the manner in which the term was defined in Rule 2 of the assessee's Recognised Provident Fund Scheme Rules, it was contended on behalf of the assessee that the commission of the nature paid by it to its salesmen was nothing but a composite part of the salary itself, the same being determine as per the terms of the contract and as such the contributions on the basis of such commission made by the assessee to the Provident Fund were deductible under Section 36(1)(iv) of the Act; it was further contended that since these payments were being admittedly made to a Provident Fund recognised by the Commissioner of the Income-Tax, which recognition was in force during the relevant years, the Taxing Authorities could not disallow the deduction claimed by the assessee, and the view taken by the Appellate Assistant Commissioner in respect of assessment years 1963-64 and 1964-65 was canvassed for acceptance. On the other hand, the Revenue contended before the Tribunal that the definition of the expression "salary" as given in Rule 2(h) of Part A of the Fourth Schedule to the Act which applied to the recognised Provident Fund governed the matter and since that definition excluded all other allowances and perquisites the commission paid by the assessee to its salesmen, which was nothing but some sort of allowance, could not be regarded as salary and, on that basis the Tribunal was pressed to accept the contrary view taken by the Appellate Assistant Commissioner for the assessment year 1962-63. The Tribunal on a consideration of the rival submissions held that the commission paid by the assessee to various classes of salesmen was a part of the contractual obligation and as such was part of the salary of the employees and contributions made on that basis were liable to be deducted under Section 36(1)(iv) of the Act. It also took the view that since the Provident Fund maintained by the assessee was a recognised Fund and since it fulfilled the condition laid down in Rule 4(c) of Part A of the Fourth Schedule to the Act the contributions by the employer to the same would be entitled to deduction under the said provision. In this view of the matter the Tribunal by its order dated June 12, 1968 allowed the assessee's appeal and dismissed the appeals of the Department.

3. At the instance of the Revenue the following two questions were referred to the High Court for its opinion :

> (1) whether, on the facts and in the circumstances of the case, the sums of Rs. 95,421, Rs. 1,00,564 and Rs. 1,17,969 disallowed by the Income Tax Officer out of the total contributions made by the assessee towards the provident fund were allowable under Section 36(1)(iv) of the Income Tax Act, 1961 for the assessment years 1962-63, 1963-64 and 1964-65 respectively ?
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> (2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the provident fund maintained by the assessee satisfied the condition laid down in Rule 4(c) of the Fourth Schedule, Part 'A' of the Income Tax Act, 1961 ?
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> The former question was the subject-matter of Income Tax Reference 156 of 1969 made under Section 256(1) of the Act while the latter was the subject-matter of Income-tax References 398, 399 and 400 of 1969 made under Section 256(2) of the Act. These References were heard together and disposed of by the High Court by a common judgment and order dated February 8, 1977. Rejecting the contentions urged on behalf of the assessee the High Court answered both the questions in the

negative and in favour of the Revenue. In doing so the High Court principally relied upon (a) Rule 2(h) of Part A of the Fourth Schedule to the Act where the expression "salary" has been defined as inclusive of dearness allowance but exclusive of all other allowances and perquisites, (b) Circular 6 dated January 16, 1941 issued by the Central Board of Revenue under the Indian Income Tax Act, 1922 but which has been continued under Section 297(k) of the Act, which provided that unless commission and bonuses are fixed periodical payments not dependent on a contingency, they are not covered by the term "salary" as used in Chapter IXA of the Act (1922 Act), and (c) observations of this Court in M/s. Bridge & Roofs Co. Ltd. v. Union of India (AIR 1963 SC 1474, 1477 : (1963) 3 SCR 978 : (1962) 2 LLJ 490 : (1962-63) 23 FJR 550) to the effect that "commission and other similar allowances are excluded from the definition of "basic wages" under the Provident Fund Act, 1952 because it was not a universal rule that each and every establishment must pay commission to its employees". The High Court further held that the Circular 80 dated March 4, 1972 on which reliance was placed by the assessee and which stated that "if the terms and conditions of service are such that commission is paid not as a bounty or benefit but is paid as a part and parcel of the remuneration for services rendered by the employee such payment may partake of the nature of salary rather than as a benefit or perquisite" could not be availed of because the same was not in existence during the relevant years and further it had been issued under Section 40(c)(iii) of the Act and would not apply to Section 36(1)(iv). The High Court also held that the ordinary meaning of "salary" was a fixed monthly payment while "commission" was not such payment and, therefore, it could not be included within the scope and ambit of the term "salary", the meaning of which could not be extended by the assessee company by defining it in a particular manner in its Provident Fund Scheme Rules for the purposes of recognition of its Fund and deductibility as well. The High Court's view on both the questions is challenged by the assessee in the instant appeals preferred on the strength of the certificate granted by that Court under Section 261 of the Act.

4. Counsel for the assessee raised a two-fold contention in support of the appeals. In the first place he contended that once recognition was granted by the Commissioner of Income-Tax to the Provident Fund maintained by the assessee under the relevant rules and such recognition was in force during the relevant assessment years, the Taxing Authorities could not disallow the deductions claimed by interpreting the expression "salary" in Rule 2(h) of Part A of the Fourth Schedule to the Act so as to exclude the "commission" that was paid by the assessee to its salesmen, for, by doing so the Taxing Authorities would be sitting in judgment over the recognition granted and allowed to be retained by the Commissioner of Income-Tax to the assessee. It was pointed out that Rule 4 of Part A of the Fourth Schedule to the Act set out the conditions, particularly, the one contained in clause (c) of the said rule that were required to be satisfied, before recognition could be granted and in the instant case the Commissioner after having been satisfied that the said conditions had been fulfilled had granted recognition to the Provident Fund maintained by the assessee. In particular, counsel placed reliance upon the correspondence which took place between the assessee and the Commissioner of Income Tax, West Bengal, during the course of which, the Commissioner had by his letter dated September 9, 1937 required the assessee to inform him of the basis on which the commission payable to the salesmen participating in the fund was computed with a view to seeing whether the commission would be includible in the definition of "salary" for purposes of Chapter IXA of the 1922 Act and the assessee had by its reply dated September 11, 1937 stated that the

commission was the monthly amount payable to the salesmen in accordance with their written contract and was based on a fixed term of rate and that it was after such correspondence that recognition was granted to the Provident Fund of the assessee and that the said recognition had continued and was in operation during the relevant assessment years. He, therefore, urged that it was not open to the Taxing Authorities to reach a conclusion that the Provident Fund of the assessee did not satisfy the condition laid down in Rule 4(c) of Part A of the Fourth Schedule to the Act during the relevant years nor was it open to them to disallow the deductions claimed under Section 36(1)(iv) of the Act by interpreting the expression "salary" in Rule 2(h) in Part A of the Fourth Schedule to the Act as being exclusive of the commission of the nature and kind paid by the assessee to its salesmen. Secondly counsel contended that on a true and proper construction of the expression "salary" occurring in the said Rule 2(h) the commission of the nature and type paid by the assessee to its salesmen under the terms of their contract of employment would be included or covered by that expression. According to him, commission in business practice covered various kinds of payments made under different circumstances and in the cases where a servant was employed by a businessman and as a condition of his employment it was agreed that he would be paid for his services at a fixed rate of percentage over the turnover it was clear that such commission payable to the employee will partake of the character of "salary" received by him for his services, the percentage basis being the measure of the salary; in other words, according to him, there was no difference between the concept of salary and the concept of commission if the latter was of the aforesaid nature or kind and as such the expression salary in Rule 2(h) would include such commission. In this behalf he relied upon a decision of the Allahabad High Court in the case of Raja Ram Kumar Bhargava v. Commissioner of Income Tax, U. P. ((1963) 47 ITR 680 (All HC)). He urged that the decision of this Court in M/s. Bridge & Roofs Co. Ltd. v. Union of India (supra) on which the High Court has relied was inapplicable since it was a case under the Provident Fund Act, 1952 and this Court was required to construe the term 'basic wages' appearing in that Act and in that context it observed that that term did not include any bonus, commission or other similar allowances. He, therefore, urged that the Tribunal was right in allowing the deductions claimed by the assessee under Section 36(1)(iv) of the Act.

5. On the other hand, counsel for the Revenue contended that notwithstanding the recognition accorded to the assessee's Provident Fund by the Commissioner of Income-Tax the assessee had to satisfy the taxing authorities every year that the Provident Fund maintained by it satisfied the conditions of Rule 4, particularly, the one contained in Rule 4(c) of Part A of the Fourth Schedule to the Act and if for any particular assessment year the assessee's Provident Fund failed to satisfy the condition in Rule 4(c) of Part A of the Fourth Schedule to the Act the assessee could not claim deduction under Section 36(1)(iv) of the Act in respect of such portion of the contribution made by it to the Fund as was in breach of the said condition. Secondly, he urged that by relying upon the fact of recognition obtained by it and the further fact that such recognition had remained in force during the relevant assessment years the assessee could not by-pass the real question that arose for determination before the taxing authorities for the relevant assessment years, namely, whether the expression 'salary' as defined in Rule 2(h) of Part A of the Fourth Schedule to the Act included or excluded commission paid by the assessee to its salesmen and he urged that the definition of the expression 'salary' as given in the said Rule 2(h) clearly showed that the 'salary' did not include commission, for, according to him, the definition merely included dearness allowance and excluded all other allowances and perquisites and commission payable by the assessee to its salesmen was nothing but an allowance paid without reference to any time factor which is associated with salary or wages as an important concomitant thereof. In this behalf reliance was also placed by him upon the circular 6 dated January 16, 1941 issued by the Central Board of Revenue under the 1922 Act

and continued under Section 297(k) of the 1961 Act wherein on the question whether the term 'salary' as used in Chapter IXA (of the old Act) included commissions and bonuses paid to the employees, the Board expressed its view that "unless commission and bonuses are fixed periodical payments not dependent on a contingency they are not covered by the term 'salary' as used in Chapter IXA of the Act". Counsel further contended that in the matter of deductions climbable in respect of contributions to the Provident Fund the position of employer could not be different from that of the employee and in regard to employee's contribution the condition required to be satisfied in Rule 4(b) was to the effect that the contribution of an employee in any year shall be a definite proportion of his 'salary' for that year and shall be deducted by the employer from the employee's 'salary' in that proportion at each periodical payment of such salary in that year, and credited to the employee's individual account in the Fund and under Section 80C read with Rule 7 of Part A of the Fourth Schedule to the Act the employee is entitled to a deduction in respect of his contribution which pertains to a definite proportion of the 'salary' which would not include the commission. He, therefore, urged that the High Court was right in answering both the questions against the assessee and in favour of the Revenue.

6. As stated at the outset, in our view, the main question raised in these appeals is whether the expression 'salary' as defined in Rule 2(h) of Part A of the Fourth Schedule to the Act includes commission payable by an assessee to his or its employees in terms of their contracts of employment ? We shall, therefore, address ourselves to that question first and then deal with the aspect regarding the true impact of the recognition granted by the Commissioner of Income Tax under the relevant rules to a Provident Fund maintained by an assessee.

7. The expression 'salary' has been defined in Section 17 of the Act as well as in Rule 2(h) of Part A of the Fourth Schedule to the Act but each of the said definitions serves a different purpose. Section 17 defines the expression 'salary' for purposes of Sections 15 and 16 which deal with "Salaries" as a head of income, and under clause (iv) of sub-section (1) that expression includes :

any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages.

In Part A of the Fourth Schedule to the Act, which contains rules relating to Recognised Provident Funds the word 'salary' has been defined in Rule 2(h) thus :

"Salary" includes dearness allowance, if the terms of employment so provide, but excludes all other allowances and perquisites.

Since we are concerned in this case with contributions made to a recognised Provident Fund and deductions thereof under Section 36(1) it will be the definition of 'salary' as given in Rule 2(h) of Part A of the Fourth Schedule to the Act and not the one given in Section 17 that will be applicable and will have to be considered. Under Section 36(1)(iv) the deduction allowable is in respect of

any sum paid by the assessee as an employer by way of contribution towards a Recognised Provident Fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognising the Provident Fund or approving the superannuation fund, as the case may be.

Rule 2(c) of Part A of the Fourth Schedule defines "contribution" as meaning

any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee, but does not include any sum credited as

interest.

Rule 4 of Part A of the Fourth Schedule lays down the conditions which are required to be satisfied by a Provident Fund in order that it may receive and retain recognition, and the conditions in clauses (b) and (c) are material and these conditions are :

> 4(b) the contributions of an employee in any year shall be a definite proportion of his salary for that year, and shall be deducted by the employer from the employee's salary in that proportion, at each periodical payment of such salary in that year, and credited to the employee's individual account in the fund;
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> (c) the contributions of an employer to the individual account of an employee in any year shall not exceed the amount of the contributions of the employee in that year, and shall be credited to the employee's individual account at intervals not exceeding one year.

8. It may be stated that so far as the employer is concerned the contributions credited by him to the employee's individual account in the fund are deductible under Section 36(1)(iv) whereas the contributions of an employee are deductible in the computation of his total income under Section 80C read with Rule 7 of Part A of the Fourth Schedule to the Act and the scheme of clause (b) and (c) of Rule 4 of Part A of the Fourth Schedule does suggest that in the matter of deductions climbable in respect of contributions to the Recognised Provident Fund the position of both the employer and the employee would be the same; but since in the case of an employee his contributions are to be a definite proportion of his salary for a particular year, the question whether such proportion would be inclusive of commission received by him from his employer must depend upon the true meaning or construction of the expression 'salary' as occurring in Rule 2(h) of Part A of the Fourth Schedule; in other words, in the matter of deductions climbable in respect of contributions to the Recognised Provident Fund qua both the employer and the employee the question has to be answered by reference to the true meaning of the expression 'salary' occurring in Rule 2(h). Now, Rule 2(h) of Part A of the Fourth Schedule does not define the expression 'salary' conceptually but merely proceeds to state what is included therein and what is excluded therefrom and, therefore, one is required to turn to the dictionary meaning of that expression as also to ascertain how judicial decisions have understood that expression. According to the Shorter Oxford English Dictionary (3rd Edn.) 'salary' means :

To recompense, reward; to pay for something done;

In Jowitt's Dictionary of English Law (1959 Edn.) the term is explained thus :

> (A) recompense or consideration generally periodically made to a person for his service in another person's business; also wages, stipend, or annual allowance.

In Stroud's Judicial Dictionary (4th Edn.) the expression 'salary' is explained at item (2) thus :

> Where the engagement is for a period, is permanent or substantially permanent in character, and is for other than manual or relatively unskilled labour, the remuneration is generally called a salary. (per Latham, C.J., in Federal Commissioner of Taxation v. Thompson (J. Walter) (Aus.) Pty. Ltd. 69 C.L.R. 227.)

It appears that conceptually 'salary' and 'wages' connote one and the same thing, namely,

remuneration or payment for work done or services rendered but the former expression is generally used in connection with services of a higher or non-manual type while the latter is used in connection with manual services. In Gordon v. Jennings ((1882) 51 LJ QB 417 : 9 QBD 45). Grove, J. observed as follows :

> Though this word (wages) might be said to include payment for any services, yet, in general, the word 'salary' is used for payment of services of a higher class, and 'wages' is confined to the earnings of labourers and artisans.

In Mohmedalli v. Union of India (AIR 1994 SC 980 : 1963 Supp 1 SCR 993 (1963) 1 LLJ 536 : (1963-64) 24 FJR 221) this Court, while repelling the contention that the Employees' Provident Fund Act, 1952 was intended by Parliament to apply to employees who were mere wage earners and not salaried servants, has made observations clearly indicating that there is no difference between the two concepts of salary and wages. Chief Justice Sinha speaking for the Court observed in para 10 of the judgment as follows :

> It is a little difficult to appreciate the distinction sought to be made. Both 'salary' and 'wages' are emoluments paid to an employee by way of recompense for his labour. Neither of the two terms is a 'term of art'. The Act has not defined wages, it has only defined "basic wages" as all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash to him ..... 'Salary', on the other hand, is remuneration paid to an employee whose period of engagement is more or less permanent in character, for other than manual or relatively unskilled labour. The distinction between skilled and unskilled labour itself is not very definite and it cannot be argued, nor has it been argued, that the remuneration for labour is not 'wages'. The Act itself has not made any distinction between 'wages' and 'salary'. Both may be paid weekly, fortnightly or monthly, though remuneration for the day's work is not ordinarily termed 'salary'. Simply because wages for the month run into hundreds, as they very often do now, would not mean that the employee is not earning wages, properly so called. A clerk in an office may earn much less than the monthly wages of a skilled labourer. Ordinarily he is said to earn his salary. But, in principle, there is no difference between the two.

It will thus appear clear that conceptually there is no difference between salary and wages both being a recompense for work done or services rendered, though ordinarily the former expression is used in connection with services of non-manual type while the latter is used in connection with manual services. It is further common knowledge that this compensation to the labourer or artisan could be a specified sum for a given time of service or a fixed sum for a specified work, i.e. payment made by the job, the commonest example of the latter category being a piece-rated worker. In other words, the expression 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in service; it may be determined by the work done; it could be estimated in either way. If conceptually salary and wages mean and the same thing then salary could take form of payment by reference to the time factor or by the job done. In fact, in the case of salary the recompense could be determined wholly on the basis of time spent on service or wholly by the work done or party by the time spent in service and partly by the work done. In other words, whatever be the basis on which such recompense is determined it would all be salary.

9. Having reached the above conclusion, we have to consider the nature of recompense that is being

made by the assessee to its salesmen, whether the whole of it partakes of the character of salary or not ? The definition of 'salary' in Rule 2(h) includes dearness allowance if the terms of employment so provide and excludes all other allowances and perquisites. It does not in terms exclude 'commission' as such and, in our view rightly, for, though ordinarily according to the Shorter Oxford English Dictionary 'commission' means 'a pro rata remuneration for work done as agent', in business practice commission covers various kinds of payments made under different circumstances. In Raja Ram Kumar Bhargava v. Commissioner of Income-Tax, U. P. (supra) the Allahabad High Court has pointed out how in certain circumstances commission payable to an employee may, in fact, represent the salary receivable by him for the services rendered to the employer. At page 694 of the report the relevant observation runs thus :

> The word "commission", in business practice, cover various kinds of payments made under different circumstances. There are cases where a servant is employed by a businessman and, as a condition of his employment, it is agreed prior to the services having been rendered that he would be paid for his services at a fixed rate of percentage of the turnover or profits. In such a case, it is clear that the commission payable to the employee will, in fact, represent the salary to be drawn by him for his services. The payment on the percentage basis will only determine the measure of the salary.

It is thus clear that if under the terms of the contract of employment remuneration or recompense for the services rendered by the employee is determined at a fixed percentage of turnover achieved by him then such remuneration or recompense will partake of the character of salary, the percentage basis being the measure of the salary and therefore such remuneration or recompense must fall within the expression 'salary' as defined in Rule 2(h) of Part A of the Fourth Schedule to the Act. In the instant case before us, admittedly, under their contracts of employment the assessee has been paying and did pay during the previous years relevant to the three assessment years to its salesmen, in addition to the fixed monthly salary, commission at a fixed percentage of the turnover achieved by each salesman, the rate of percentage varying according to the class of article sold and the category to which each salesman belonged. The instant case is, therefore, an instance where the remuneration or recompense payable for the services rendered by the salesmen is determined partly by reference to the time spent in the service and partly by reference to the volume of work done. But it is clear that the entire remuneration so determined on both the basis clearly partakes of the character of salary. In our view, therefore, the commission paid by the assessee to its salesmen would clearly fall within the expression 'salary' as defined in Rule 2(h) of Part A of the Fourth Schedule to the Act and as such the three sums of Rs. 95,421, Rs. 1,00,564 and Rs. 1,17,969 representing proportionate contributions appertaining to the commission paid by the assessee to its salesmen would be deductible under Section 36(1) (iv) of the Act.

10. Turning to the Circular dated January 16, 1941 issued by the Central Board of Revenue on which counsel for the Revenue has relied, it cannot, in our view, affect the question of deductibility, for, if the commission paid by the assessee to its salesman is covered by the expression 'salary' on its true construction, which, according to us, it does, the Board's view or instructions cannot detract from the legal position arising on such proper construction. In any case we are of the view that by the said Circular what the Board wants to keep out of the term 'salary' are payments by way of commissions which do not partake of the character of salary. Similarly the decision of this Court in M/s. Bridge & Roof Co.'s case (supra) on which the High Court has relied cannot avail the Revenue. In the first place it was a case under the Provident Fund Act, 1952 where this Court was required to construe the expression 'basic wages' as defined in Section 2(b) of that Act and to decide whether

'production bonus' was included in that expression and it was in that context that this Court made observations to the effect that the said expression as defined therein did not include any bonus, commission or other similar allowances. Secondly, as against the definition of 'basic wages' in Section 2(b) (ii) which excluded any dearness allowance, house rent allowance, over-time allowance, bonus, commissions or any other similar allowance, Section 6, of the Act provided for inclusion of dearness allowance for the purposes of contribution and, therefore, this Court was concerned with trying to discover some basis for the exclusion in clause (ii) of Section 2(b) as also for the inclusion of dearness allowance and retaining allowance (if any) in Section 6 of that Act and the Court found that the basis for inclusion in Section 6 and exclusion in clause (ii) of Section 2(b) was that whatever was payable in all concerns and was earned by all permanent employees was included for the purpose of contribution under Section 6 but whatever was not payable by all concerns and was not earned by all employees of a concern was excluded for the purposes of contribution and that is why commission or similar allowances were excluded from the definition of 'basic wages', for commission and allowance were not necessarily to be found in all concerns nor were they necessarily earned by all the employees of the same concern. It is, therefore, clear that the ratio of the decision and the observations made by this Court in a different context in that case would be inapplicable to the facts of the present case.

11. Having regard to the above discussion it is clear that the High Court's view on the first question is clearly unsustainable and that question must be answered in favour of the assessee and against the Revenue.

12. Dealing next with the second question it seems to us clear that having regard to out view on the proper construction of the expression 'salary' occurring in Rule 2(h) of Part A of the Fourth Schedule to the Act it must be held that the Tribunal was right in holding that the Provident Fund maintained by the assessee satisfied the condition laid down in Rule 4(c) of Part A of the Fourth Schedule and that question also must be answered in favour of the assessee and against the Revenue. However, we would like to make some observations with regard to the true impact of the recognition granted by the Commissioner of Income-Tax to a Provident Fund maintained by an assessee. The facts in the present case that need be stressed in this behalf are that it was as far back as 1937 that the Commissioner of Income-Tax had granted recognition to the Provident Fund maintained by the assessee under the relevant rules under 1922 Act, that such recognition had been granted after the true nature of the commission payable by the assessee to its salesmen under their contracts of employment had been brought to the notice of the Commissioner and that said recognition had continued to remain in operation during the relevant assessment years in question; the last fact in particular clearly implied that the Provident Fund of the assessee did satisfy all the conditions laid down in Rule 4 of Part A of the Fourth Schedule to the Act even during the relevant assessment years. In that situation we do not think that it was open to the taxing authorities to question the recognition in any of the relevant years on the ground that the assessee's Provident Fund did not satisfy any particular condition mentioned in Rule 4. It would be conducive to judicial discipline and the maintaining of certainty and uniformity in administering the law that the taxing authorities should proceed on the basis that the recognition granted and available for any particular assessment year implies that the Provident Fund satisfies all the conditions under Rule 4 of Part A of the Fourth Schedule to the Act and not sit in judgment over it. There is ample power conferred upon the Commissioner under Rule 3 of Part A of the Fourth Schedule to withdraw at any time the recognition already granted if, in his opinion, the Provident Fund contravenes any of the conditions required to be satisfied for its recognition and if during assessment proceedings for any particular assessment year the taxing authority finds that the Provident Fund maintained by an assessee has contravened any of the conditions of recognition he may refer the question of withdrawal of

recognition to the Commissioner but until the Commissioner acting under the powers reserved to him withdraws such recognition the taxing authority must proceed on the basis that the Provident Fund has satisfied all the requisite conditions for its recognition for that year, any other course is bound to result in chaos and uncertainty which has to be avoided.

13. Having regard to the above discussion, both the questions are accordingly answered in favour of the assessee and the appeals are allowed with costs.

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