Commissioner of Income Tax, Bombay

Vs

Vanaz Engineering (P) Ltd., Bombay

Civil Appeal No. 4253 of 1983

(R. S. Pathak, R. B. Misra, G. L. Oza JJ)

02.05.1986

JUDGMENT

PATHAK, J. -

1. This appeal by special leave is concerned with a question of some importance.

2 The respondent, which maintains its accounts on the mercantile system, follows the calendar year as its accounting period. It had no gratuity scheme for the years preceding the calendar year 1970, but such a scheme was formulated for the first time in the middle of 1970 and was put into operation with effect from July 1, 1970. The scheme provided that in the case of the retirement or resignation of any employee he would be eligible to gratuity provided he had put in 15 years of continuous service. In the case of death or permanent physical or mental disablement, an employee was eligible for gratuity at different rates depending upon whether he had put in 10 years of continuous service or more. In the case of termination of service or retrenchment, no gratuity was payable up to 5 years of continuous service, and was payable at rates thereafter depending upon whether the continuous service was from 5 years to 10 years, 10 to 15 years or more than 15 years. No gratuity was payable if an employee was dismissed for misconduct, for causing loss to the company, for violent action and similar reasons. The respondent bad debited to the Profit and Loss Account a sum of Rs. 2,11,205 as a charge against the profits, being the total liability as on December 31, 1970, on account of the gratuity scheme. There is no dispute that this amount was provided for on the basis of an actuarial report prepared by a consulting actuary.

3. In assessment proceedings for the assessment year 1971-72 (the relevant accounting periods being the calendar year 1970), the Income Tax Officer was not prepared to allow the entire amount claimed by the respondent as a provision on account of gratuity. At his instance, a certificate was obtained from the consulting actuary regarding the liability as on December 31, 1961, and as on December 31, 1970. The burden of the liability as on December 31, 1969, was Rs. 1,84,056. The Income Tax Officer, therefore, allowed the liability only to the extent of the difference between Rs. 2,11,305 and Rs. 1,84,056, that is to say, he allowed Rs. 27,249.

4. On appeal by the respondent, the Appellate Assistant Commissioner of Income Tax, following the decision of this Court in the case of Metal Box Co. of India Ltd. v. Workmen, held that the entire amount was allowable. Accordingly, he gave a relief of Rs. 1,84,056.

5. The revenue proceeded in second appeal to the Income Tax Appellate Tribunal, and the Appellate Tribunal, following an earlier decision rendered by it in a case where the decision of this Court in Metal Box Co. of India Ltd., of the Allahabad High Court in Madho Mahesh Sugar Mills (P) Ltd. v.

CIT, and of the Delhi High Court in Delhi Flour Mills Co. Ltd., v. CIT, had been considered, came to the conclusion that the Appellate Assistant Commissioner was right and the entire amount had to be allowed as a charge against the profits. The appeal filed by the Revenue was dismissed.

6. A similar question was considered at length by the Bombay High Court subsequently in Tata Iron & Steel Co. Ltd. v. D. V. Bapat, ITO, in which a corresponding view was taken by the High Court.

7. At the instance of the revenue, a reference was sought from the appellate Tribunal for the opinion of the High Court on the following question of law :

> Whether on the facts and in the circumstances of the case, the assessee is entitled in law to the deduction of the entire provision for gratuity amounting to Rs. 2,11,305 either under Section 28 read with Section 29 or under Section 37(1) of the Income Tax Act, 1961?

It is not clear whether the Appellate Tribunal made a reference or declined it. What purports to be a copy of the order dated April 23, 1980 of the Appellate Tribunal before us appears to indicate that the Appellate Tribunal had indeed referred the question to the High Court. But the special leave petition filed in this Court under Article 136 of the Constitution "against the order dated March 9, 1979 of the Bombay High Court in I. T. Ref. No. 485 of 1976, in the matter of CIT v. Vanaz Engineering Pvt. Ltd. for the assessment year 1971-72", states that the Appellate Tribunal rejected the reference application, and thereafter an application made to the High Court was rejected on April 23, 1980. It is unfortunate that this discrepancy exists in the record before us. It demonstrates a want of sufficient care in preparing the petition. It makes no difference, however, for even if we take it that the High Court rejected the reference application made by the Revenue, we are of the opinion that a question of law does arise in the terms sought by the Revenue. We are further of the opinion that instead of sending the case back to the High Court and directing it to call for a statement of the case and thereafter to answer the question of law, it would be appropriate to dispose of the case on the merits itself inasmuch as the question is one which has engaged the attention of this court in a number of cases already. Learned counsel for the parties are also agreed that the case should be disposed of in the same terms as D. V. Bapat, I. T. O. v. Tata Iron & Steel Co. Ltd.

8. It is urged by learned counsel for the appellant that the provisions of Section 40-A(7)(b)(ii) of the Income Tax Act, 1961, have not been satisfied and, therefore, the respondent was not entitled to the deduction of the gratuity amount. The provisions of Section 40-A(7)(b)(ii) have been recently construed by this Court in Shree Sajjan Mills Ltd. v. CIT, and it seems to us necessary that the High Court should examine whether those provisions have been complied with in the present case having regard to what has been laid down in that case. There is no dispute between the parties that the first condition in that provision has been satisfied by the respondent. What remains is to determine whether the second and third conditions are also satisfied.

9. In the circumstances, we think it appropriate to set aside the judgment under appeal and remand the case to the High Court for fresh consideration of the case in the light of observations made by us in the judgment.

10. The appeal is allowed, the judgment of the High Court is set aside and the case is remanded to the High Court for disposal in accordance with the observations made by us. There is no order as to costs.

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