Smith Kline & French (India) Ltd. and Others

Vs

Commissioner of Income Tax

Civil Appeals Nos. 1187-88 of 1985

(B.P. Jeevan Reddy, K.T. Thomas JJ)

16.04.1996

ORDER

1. A common question arises in this batch of appeals. For the sake of convenience, we may refer to the question in Civil Appeal No. 455 of 1987 directed against a Full Bench judgment of the Kerala High Court A.V. Thomas and Co. Ltd. v. CIT ((1986) 159 ITR 431 : 1986 KLT 522 (FB)). The following question was stated by the Income Tax Appellate Tribunal under Section 256(1) of the Income Tax Act for the consideration of the Kerala High Court :

> "(1) Whether Rs 76,777 being the surtax liability is to be allowed as a deduction in computing the total income of the assessee for the Assessment Year 1976-77 ?"

The claim for the said deduction was disallowed by the Income Tax Officer on the basis of and with reference to sub-clause (ii) of clause (a) of Section 40 which read thus at the relevant time :

> "40. Notwithstanding anything to the contrary in Sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession',
>
> (a) in the case of any assessee -
>
> #(i) * * *##
>
> (ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains."

2. On appeal, the Appellate Assistant Commissioner allowed the assessee's claim but on further appeal by the Revenue, the Tribunal upheld the Revenue's contention and disallowed the claim for deduction on the basis of Section 40(a)(ii). The High Court has affirmed the view taken by the Tribunal. The only question before us is whether the tax levied under the Companies Profits (Surtax) Act, 1964 is "a tax levied on the profits or gains of any business or profession or assessed at a proportion of or otherwise on the basis of any such profits or gains", as contemplated by the said sub-clause.

3. Section 40 opens with a non obstante clause "notwithstanding anything to the contrary in Sections 30 to 39", which means that even if any amount is entitled to deduction under any of the provisions contained in Sections 30 to 39, it will be disallowed if it falls inter alia within sub-clause (ii) of

clause (a) of Section 40. The question, therefore, is whether the tax levied under the Companies Profits (Surtax) Act, 1964 falls within the mischief of the said sub-clause. We think it does.

4. The preamble to the Surtax Act says that it is "an Act to impose a surtax on the profits of certain companies". Indeed, the Statement of Objects and Reasons appended to the Bill makes the said intention clear. It says :

> "The object of this Bill is to impose a special tax on companies (other than those which have no share capital) on their excess profits, namely, the amount by which the total income of a company as reduced by certain types of income and certain sums and the income tax and super tax payable by it exceeds a sum of ten per cent of its capital reserves and certain borrowed moneys or a sum of Rs 2 lakhs, whichever is higher..."

Section 4 is the charging section. It says :

> "Subject to the provisions contained in this Act, there shall be charged on every company for every assessment year commencing on and from the first day of April, 1964, a tax (in this Act referred to as the surtax) in respect of so much of its chargeable profits of the previous year or previous years, as the case may be, as exceed the statutory deduction, at the rate or rates specified in the Third Schedule."

The expression "chargeable profits" is defined in clause 5 of Section 2. It reads :

> "'Chargeable profits' means the total income of an assessee computed under the Income Tax Act, 1961 for any previous year or years, as the case may be, and adjusted in accordance with the provisions of the First Schedule."

It is thus clear beyond any doubt that the surtax is levied on the profits of a company, i.e., on the profits above the prescribed limit. The mere fact that the tax is levied upon "chargeable profits" (which means the total income of the assessee computed under the Income Tax Act, 1961 adjusted in accordance with the provisions of the First Schedule) does not mean that the tax is not levied on the profits of business. In other words, the mere fact that the First Schedule provides for certain further deductions out of the total income computed in accordance with the provisions of the Income Tax Act, 1961, it cannot be said that the amount on which the surtax is levied cases to be the profits of the business. For this reason, it must be held that the surtax levied under the Surtax Act squarely falls within the mischief of sub-clause (ii) of clause (a) of Section 40 and cannot be allowed as a deduction while computing the business income of the assessee under the provisions of the Income Tax Act.

5. The learned counsel for the assessee sought to rely upon Section 15 of the Surtax Act in support of their contention that surtax does not fall within the four corners of Section 40(a)(ii). Section 15 of the Surtax Act reads as follows :

> "Notwithstanding anything contained in clause (i) of Section 109 of the Income Tax Act, in computing the distributable income of a company for the purposes of Chapter XI-D of that Act, the surtax payable by the company for any assessment year shall be deductible from the total income of the company assessable for that assessment year."

A reading of the above provision makes it evident that its operation is confined to the computation

of the distributable income of a company for the purposes of Chapter XI-D of the Income Tax Act. It cannot be extended to any other chapter or provision in the Act.

6. The learned counsel for the appellants placed strong reliance upon the decision of this Court in Jaipuria Samla Amalgamated Collieries Ltd. v. CIT ((1972) 3 SCC 317 : (1971) 82 ITR 580) to contend that a tax has to be computed in accordance with the provisions of the Income Tax Act to fall within the mischief of Section 40(a)(ii). Inasmuch as the surtax is computed on a basis different from the basis prescribed in the Income Tax Act, it is contended, it cannot fall within the four corners of Section 40(a)(ii). It is not possible to agree with this contention either. The said decision was rendered with reference to sub-section (4) of Section 10 of the Income Tax Act, 1922 which corresponds to sub-clause (ii) of clause (a) of Section 40 of the present Act. The question therein was whether the amount payable as (i) road and public works cess levied under the Bengal Cess Act, 1880 (9 of 1880) and (ii) the education cess levied under the Bengal (Rural) Primary Education Act, 1930 (7 of 1930) fall within the mischief of Section 10(4). This Court held that they do not. A perusal of the decision shows that the road and public works cess was levied on immovable property to provide for construction and maintenance of roads and other works of public utility. Under Section 5 of the Act (Bengal Cess Act, 1880) all immovable property, with certain exceptions, was subjected to payment of road cess and public works cess. Section 6 provided that the said cesses shall be assessed on the annual value of lands and, until provision to the contrary was made by Parliament, on the annual net profits from mines, quarries, tramways, railways and other immovable property at such rates as were to be determined in the manner prescribed. Similarly the education cess was also levied under Section 29 of the Bengal (Rural) Primary Education Act, 1930, on immovable property on which the road and public works cesses were assessed. The rate at which the education cess was to be levied depended upon the character of the property; in respect of mines and quarries, it was leviable at the rate of three and a half pice on each rupee of annual net profits. It is thus abundantly clear that the levy of the aforesaid cesses was upon the immovable properties and not on profits. It is no doubt true that the tax was measured with reference to the net profits of business but it is well settled by a series of decisions of this Court that the measure by which a tax is computed does not determine the character of the tax vide Union of India v. Bombay Tyre International Ltd. ((1983) 4 SCC 210 : 1983 SCC (Tax) 315 and (1984) 1 SCC 467 : 1984 SCC (Tax) 17 : AIR 1984 SCC 420), and Goodricke Group Ltd. v. State of W.B. (1955 Supp (1) SCC 707). It is, therefore, idle to contend that the said decision helps the assessees' case in any manner. The cesses considered in the said decision were not taxes "levied on the profits or gains of any business or profession or assessed at a proportion of or otherwise on the basis of any such profits or gains" within the meaning of Section 40(a)(ii) as explained hereinabove. The learned counsel, however, relied upon the following observations in the said decision : (SCC pp. 320-21, paras 5-6)

> "The words 'profits and gains of any business, profession or vocation' which are employed in Section 10(4) can, in the context, have reference only to profits or gains as determined under Section 10 and cannot cover the net profits or gains arrived at or determined in a manner other than that provided by Section 10. The whole purpose of enacting sub-section (4) of Section 10 appears to be to exclude from the permissible deductions under clauses (ix) and (xv) of sub-section (2) such cess, rate or tax which is levied on the profits or gains of any business, profession or vocation or is assessed at a proportion of or on the basis of such profits or gains. In other words sub-section (4) was meant to exclude a tax or a cess or rate the assessment of which would follow the determination or assessment of profits or gains of any business, profession or vocation in accordance with the provisions of Section 10 of the Act.

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These profits arrived at according to the provisions of the two Cess Acts can by no stretch of reasoning be equated to the profits which are determined under Section 10 of the Act. It is not possible to see, therefore, how Section 10(4) could be applicable at all in the present case."

The learned counsel pointed out that this Court has in the said decision approved the decision of the Privy Council in CIT v. Gurupada Dutta ((1946) 14 ITR 100 (PC)) and has further observed that Parliament must be deemed to have accepted the view taken by the Privy Council by not changing the language of the relevant provision in the 1961 Act (Section 40(a)(ii)).

7. We are unable to see as to how these observations help the assessees herein. Firstly, it may be mentioned, Section 10(4) of the 1922 Act or Section 40(a)(ii) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the Income Tax Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession. The observations relied upon must be read in the said context and not literally or as the provisions in a statute. But so far as the issue herein is concerned, even this literal reading of the said observations does not help the assessee. As we have pointed out hereinabove the surtax is essentially levied on the business profits of the company computed in accordance with the provisions of the Income Tax Act. Merely because certain further deductions (adjustments) are provided by the Surtax Act from the said profits, it cannot be said that the surtax is not levied upon the profits determined or computed in accordance with the provisions of the Income Tax Act. Section 4 of the Surtax Act read with the definition of "chargeable profits" and the First Schedule make the position abundantly clear.

8. We may mention that all the High Courts in the country except the Gauhati High Court have taken the view which we have taken herein. Only the Gauhati High Court has taken a country view in the decisions in Makum Tea Co. (India) Ltd. v. CIT ((1989) 178 ITR 453 : (1989) 44 Taxman 49 (Gau)) and Doom Dooma Tea Co. Ltd. v. CIT ((1989) 180 ITR 126 : (1989) 78 CTR 3 (Gau)). The decision of the Gauhati High Court in Makum Tea Co. (India) Ltd. ((1989) 178 ITR 453 : (1989) 44 Taxman 49 (Gau)) is under appeal before us in Civil Appeals Nos. 3976-77 of 1995. Similarly Civil Appeal No. 3246 of 1995 is preferred against the decision of the Gauhati High Court following the decision in Doom Dooma Tea Co. Ltd. ((1989) 180 ITR 126 : (1989) 78 CTR 3 (Gau)). (On enquiry, the office has informed that no special leave petition/civil appeal has been filed against the decision in Doom Dooma Tea Co. Ltd. ((1989) 180 ITR 126 : (1989) 78 CTR 3 (Gau))). For the aforesaid reasons, we cannot agree with the view taken by the Gauhati High Court in the aforesaid decisions.

9. We agree with the view taken by the High Courts of Calcutta (Molins of India Ltd. v. CIT ((1983) 144 ITR 317 : 1983 Tax LR 1075 (Cal))) and Brooke Bond India Ltd. v. CIT ((1992) 193 ITR 390 : (1991) 95 CTR 89 (Cal)), Bombay (Lubrizol India Ltd. v. CIT ((1991) 187 ITR 25 : 1990 Tax LR 839 (Bom)) followed in several other decisions of that Court), Karnataka (CIT v. International Instruments (P) Ltd. ((1983) 144 ITR 936 (Kant))), Madras (Sundaram Industries Ltd. v. CIT ((1986) 159 ITR 646 : (1986) 53 CTR 51 (Mad)), Andhra Pradesh (Vazir Sultan Tobacco Co. Ltd. v. CIT ((1988) 169 ITR 35 : 1987 Tax LR 1301 (AP))), Rajasthan (Associated Stone Industries (Kota) Ltd. v. CIT ((1988) 170 ITR 653 : (1988) 68 CTR 8 (Raj))), Gujarat (S.L.M. Maneklal Industries Ltd. v. CIT ((1988) 172 ITR 176 : (1988) 39 Taxman 42 (Guj)) followed in several cases thereafter), Allahabad (Himalaya Drug Co. (P) Ltd. v. CIT ((1996) 218 ITR 346 (All)) and Punjab and Haryana

High Court (Highway Cycle Industries Ltd. v. CIT ((1989) 178 ITR 601 (P&H))).

10. Accordingly, the appeals preferred by the assessees are dismissed with costs assessed at rupees two thousand in each appeal, while the two appeals preferred by the Revenue are allowed with costs of rupees two thousands in each appeal.

11. Before parting with this case, it may be mentioned that when this batch of appeals was posted before us, it included an appeal preferred against a judgment of the Andhra Pradesh High Court rendered by a Bench comprising one of us (B.P. Jeevan Reddy, J.). The said decision merely followed an early decision of that Court. Accordingly with the consent of the counsel for the parties, the said appeal was deleted from the batch and the remaining appeals in the batch taken up for hearing.