Commissioner of Income Tax

Vs

Sirpur Paper Mills

Civil Appeal No. 2398 of 1994

(S.P Bharucha, R.C. Lahoti JJ)

18.03.1999

JUDGMENT

S.P. Bharucha, J.

1. In these appeals the question that we are concerned with reads thus :

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal was justified in confirming the order of the Commissioner of Income-tax (Appeals) that the entire initial contribution made to the superannuation fund is allowable deduction ?"

The High Court declined to all for its reference and the Revenue is in appeal. The High Court relied upon its earlier judgment in the case of *Hyderabad Asbestors Cement Products Ltd., 172 ITR 762*. The Revenue had filed a Special Leave Petition against this judgment but it was dismissed on the ground of undue delay.

2. The facts of these appeals are similar. The facts now set out are of Civil Appeal No. 2398 of 1994.

3. The assessee had in the relevant Assessment Year (A.Y. 1981-82) made a contribution to an approved superannuation fund. For the current year the amount contributed was Rs. 2,70,911/- and for the past five years it was an aggregated amount of Rs. 2,14,785/- calculated on the basis of 25% of the employees dues on account of past service. The Income Tax Officer allowed tghe deduction only to the extent of 80% of the aggregate contribution and spread it out over a period of five years. For so doing, he relied upon a notification dated 21.10.1965 issued by the Central Board of Direct Taxes. The assessee appealed and the Commissioner of Income-Tax (Appeals) allowed the deduction in full. The order of the C.I.T. (Appeals) was upheld by the Income Tax Appellate Tribunal. The application of the Revenue to refer the question aforestated to the High Court for consideration was rejected both by the Tribunal, under Section 256(1), and by the High Court, under Section 256(2). The High Court, as aforesaid, followed its decision in Hyderabad Asbestos Cement Products Limited.

4. Having regard to the fact that the Special Leave Petition filed by the Revenue against the judgment in Hyderabad Asbestors Cement Products Ltd. was dismissed on a technical ground, we have heard these appeals on their merits.

5. Section 36(1)(iv) of the Income Tax Act deals with deductions on account of contributions to

recognised provident funds and approved superannuation funds. Section 36(1)(iv) reads thus :-

> "Section 36(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein in computing the income referred to in section 28.....
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> (iv) any sum paid by the assessee as a employer by way of contribution towards a recordgnised 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 superannation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head 'Salaries' or to the contribution or to the number of members of the funs."

Rules 87 and 88 of the Income Tax Rules. 1962 are relevant. They read thus :

> *"87. Ordinary annual contributions* - The ordinary annual contribution by the employed to a fund in respect of any particular employee shall not exceed twenty-five per cent of his salary for each year as reduced by the employer's contribution if any, to any provident fund (whether recognised or not) in respect of the same employee for that year.
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> *88. Initial Contribution* - Subject to any condition which the Board may think fit to specify under clause (iv) of sub-section (I) of section 36, the amount to be allowed as a deduction on account of an initial contribution which an employer may make in respect of the past services of an employee admitted to the benefits of a fund shall not exceed twenty-five per cent of the employee's salary for each year of his past service with the employer as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of that employee for each such year."

6. In exercise of the powers conferred by Section 36(1)(iv), the Board issued the notification dated 21.10.1965 which was relied upon by the assessing authority. It reads thus :

> "Contribution to approved superannuation fund - Conditions specified under clause (iv) of sub-section (1) for the purposes of deduction of certain contribution :
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> In exercise of the powers conferred by clause (iv) of sub-section (1) of section 36 of the Income Tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby specified the following conditions for the deduction of contribution, not being annual contribution of fixed ammounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head 'Salaries' or to the contribution or to the number of members of the fund namely :-
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> 1. The total amount of contribution that shall be taken into account for the purposes of this notification shall not exceed twenty-five per cent of the employee's salary for each year of his past service with the employer as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of that employee for each such year.

2. Subject to condition 1, eighty per cent of the amount actually paid by the employer by way of contribution during any previous year shall be the deductible allowance.

3. One-fifth of such deductible allowance shall be allowed in the assessment year relating to the previous year in which the amount was actually paid and the balance of the deductible allowance shall be allowed in equal instalments for each of the four immediately succeeding assessment years."

7. The question, therefore, that we are concerned with is whether the said notification goes beyond the powers conferred on the Board under Section 36(1)(iv), as was held by the High Court in the case of Hyderabad Asbestors Cement Products Ltd. and reaffirmed in the orders under appeal.

8. Section 36(1)(iv) states that the deductions provided in the clauses thereof "shall be allowed" when computing income under Section 28. Clause (iv) lists as so deductible 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 limits that may be prescribed for the purposes of recognition of these funds and subject also to such conditions as the Board might think fit to specify in cases where the contribution are not in the nature ofannual contribution of fixed amounts or annual contribution fixed on some definite basis by reference to the income chargeable under the head 'Salaries' or to the contributions or to the number of members of the fund.

9. The contributions in the instant case were not payments for recognition or approval and, therefore, outside the limit that could be prescribed under clause (iv) in that behalf.

10. It is arguable that the contributions made here annual contributions of fixed amounts but, for the purposes of these appeals, we will proceed on the basis that they are not and that the Board was, therefore, entitled to make conditions that would apply. Even so, the question is whether the conditions which were laid down in the said notification fall outside the power of the Board in this behalf.

11. For this purpose, the said notification must be analysed. The first condition is that the total amount of the contribution shall not exceed 25% of the employees salary and there is no dispute that this is a condition which the Board was empowered to impose, having regard to the provisions in this behalf in Rule 88.

12. The second conditions is that only 80% of the amount actually paid by the employer can be allowed as a deduction. This really falls into two parts; one is the requirement that the amount must be actually paid and the other is that the deduction shall only be of 80%. Taking the second part first, we see no justificaiton for it. The Section states that the deduction shall be wholly allowed. It permits the Board to specify conditions but conditions cannot have the effect of curtailing the scope of the deduction granted by the Section. The amplitude of the deduction permitted by the Section cannot be cut down under the guise of imposing a "condition". In fact, this is not a condition but an impermissible attempt to rewrite the Section. As to the second part, in the cases before us the payment had in fact been made and we do not need to dilate : but we should point out that Section 36(1)(iv) itself speaks of "any sum paid".

13. The last condition imposed by the said notification is that the deduction shall be spread out equally over a period of five years commencing with the assessment year relating to the previous year in which the amount was paid. This too is no "condition" but a provision super-added to the

Section which does not contemplate any such distribution of the deduction. Under the Section the deduction is available in the assessment year relating to previous year in which the payment was made and it must be so granted.

14. We think, in the circumstances, that the view taken by the Andhra Pradesh High Court in the case of Hyderabad Asbestos Cement Products Ltd. is substantially correct. We use the qualifying word 'substantially' because it has not been necessary for us in these proceedings to go into the correctness of its view that the Board could not have required actual payment of the contribution. The appeal are dismissed. No order as to costs.