ANDHRA PRADESH HIGH COURT

Commissioner of Income-Tax

Vs

Warner Hindustan Ltd

(Punnayya and Jeevan Reddy, JJ.)

29.12.1982

JUDGMENT

Jeevan Reddy, J.

1. Dissatisfied with the decisions of the Income-tax Appellate Tribunal, the Revenue applied to the Tribunal to refer as many as 12 questions under Section 256(1) of the I.T. Act. The Tribunal, however, chose to refer only questions Nos. 3, 8, 10 and 11 and refused to refer the other questions. Accordingly this application is made under Section 256(2) by the Revenue to refer the remaining questions. We shall deal with each of the questions separately.

2. Questions 1 & 2 go together. They read as follows:

"1. On the facts and in the circumstances of the case, whether the Income-tax Appellate Tribunal was right in law in holding that the house rent allowance, conveyance allowance, etc., paid to the employees of the assessee-company form part of the salary under Section 40A(5) of the Income-tax Act ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the club fees and medical bills should not be taken into account as perquisites for the purpose of disallowance under Section 40A(5) of the I.T. Act ?"

3. The Tribunal has refused to refer these questions on the ground that on a similar question being decided in favour of the assessee by the Bombay High Court, the Revenue approached the Supreme Court, which refused to grant leave to appeal and, therefore, it cannot be said that a question of law arises, which must be referred to the High Court. We are in agreement with the Tribunal. It has been held in CIT v. Kanan Devan Hills Produce Co. Ltd. , by the Calcutta High Court, that any cash payment directly made to the employee cannot be considered to be a "perquisite" within the meaning of Section 40(c)(iii) of the Act, which provision corresponds to Sub-section (5) in Section 40A. (Section 40(c)(iii) was omitted by the Finance (No. 2) Act of

1971 with effect from April 1, 1972, which Act simultaneously introduced Sub-section (5) in Section 40A with effect from the same date). Even after the introduction of Sub-section (5) in Section 40A, the Calcutta High Court has reaffirmed the same view in Indian Leaf Tobacco Development Co. Ltd. v. CIT , where it held thus (headnote):
"In order to come within the scope of the main provision of Section 40A(5), the expenditure resulting in a benefit or amenity to an employee must be one which results directly or indirectly in the provision of a perquisite. A direct payment would not result in the provision of any perquisite."

4. The Bombay High Court also seems to have taken the same view which fact is found referred to in the decision of the Madras High Court in *CIT v. Manjushree Plantations Ltd*[1]. The decision of the Madras High Court refers to the decision of the Calcutta High Court in CIT v. Kanan Devan Hills Produce Co. Ltd. , to the decision of the Bombay High Court and to the Supreme Court's refusal to grant leave against the judgment of the Bombay High Court as well as to a communication of the Central Board of Direct Taxes, and holds that payments made directly to an employee do not fall within the meaning of the expression "perquisites". We respectfully agree with the above interpretation and hold that the allowances concerned herein, viz., house rent allowance, conveyance allowance, club fees and medical bills which are amounts paid directly to the employees, do not fall within the meaning of the expression "perquisites" in Sub-section (5) of Section 40A We accordingly see no ground for directing a reference of questions Nos. 1 and 2 to this court.

5. Questions Nos. 4, 5 and 12 go together. They read as follows:

"4. Whether the Tribunal was right in holding that liabilities should not be excluded for the purpose of relief under Section 80J of the I.T. Act?

5. Whether the Tribunal was right in holding that the development rebate, depreciation and the loss incurred in relation to the chemical unit in the earlier years should not be deducted from the total income for the purpose of relief under Section 80J of the I.T. Act ?

12. Whether the written down value of enhanced cost of imported machinery due to devaluation should be considered as assets for working out relief under Section 80J of the Act ?"

6. The Tribunal refused to refer these questions for the reason that it had remitted the entire matter relating to the computation of relief under Section 80J, to the assessing authority, and hence there is no occasion for making any reference under Section 256(1). We agree with the reasoning of the Tribunal. Once the matter is remitted to the authority below, and no aspect or question is decided finally by the Tribunal, no question of making a reference arises at this stage. If and when the matter comes back to the Appellate Tribunal and decided, it shall be open to the party aggrieved to apply under Section 256(1). Hence, these questions also cannot be directed to

be referred.

7. Question No. 6 reads as follows:

> "Whether the Tribunal was right in holding that the perquisite value of the rent-free accommodation during the period of the leave of the employee should not be considered for the purpose of disallowance under Section 40A(5) of the I.T. Act ?"

8. On this question, the Tribunal has found as a fact that on the employee departing on leave, he handed over possession of the house to the assessee-company. Therefore, the Tribunal was right in holding that the perquisite value of rent-free accommodation during the period of leave of the employee cannot be considered for purpose of disallowance under Section 40A(5) of the Act.

9. Question No. 7 reads as follows:

> "Whether the Tribunal was right in holding that Section 40(c) and not Section 40A(5) is applicable to the employee-directors for the purpose of limiting their salary ?"

10. It is really immaterial for the purpose of this case, whether payment to employee-directors is considered under the proviso to Section 40A(5)(a) or under Section 40(c) of the Act, inasmuch as the ceiling under both the provisions is the same, viz., Rs. 72,000 per annum. Only if the ceiling prescribed in Clause (c)(i) of Sub-section (5) of Section 40A applies, would the salary be restricted to Rs. 60,000. The Tribunal has held that the proviso to Section 40A(5), being a specific provision applicable to the directors of a company, is attracted as against Clause (c) of Section 40A, which is of a general nature. Having regard to the ambiguity in the question sought to be referred the Department has not specified whether it is seeking to apply Clause (c)(i) of Section 40A(5) or the proviso to Clause (a) of Section 40A(5) and also having regard to the facts and circumstances of this case, we are not inclined to direct reference of this question.

11. The only question remaining is question No. 9, which reads as follows:

> "Whether the Tribunal was right in holding that the amount of Rs. 22,438 on account of entertaining expenditure is allowable under the I.T. Act?"

12. The finding is that the amount was spent by the assessee for providing snacks, lunch and dinner to the customers. It is not suggested that this amount was spent in giving parties or providing amusement or was otherwise wasteful in nature. Following the decision of this court in Addl. CIT v. Maddi Venkataratnam & Co. Ltd. , we see no question of law arising from the order of the Tribunal, which ought to be referred to this court. For the above reasons, the income-tax case fails and is accordingly dismissed. No costs.

Cases Referred.

1[1980] 125 ITR 150