CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

Anderson Wright Ltd

(Ray J.)

20.03.1962

JUDGMENT

Ray J.

1. This question referred to us is as follows :

> "Whether on the facts and in the circumstances of this case and on a proper construction of the trust deed dated February 10, 1950, the payments by the assessee company constituted an expenditure within the meaning of section 10(2)(xv) of the Indian Income-tax Act in respect of which a claim for deduction could be made."

The assessee company appointed Gerald Joseph Feenan Hook as the manager of the assessee company. On November 19, 1948, an agreement was entered into between the assessee and Hook, where it was agreed that the company would pay the manager a pension for life of Pounds 1,000 sterling per annum in London from April 1, 1955, and in the event of his death provide a similar pension for his wife. By a deed of trust dated February 10, 1950, between Lloyds Bank Ltd., who were made the trustees, and the assessee company, a provision was made that the said Hook would be paid a pension for life and other benefits stipulated in the aforesaid agreement between Hook and the company. In order to provide for such pension the company undertook to pay annually the rupee equivalent of Pounds 2,546-3-0 until seven such annual payments inclusive of the initial payment were made to the trustees or until Hooks death, if earlier. In pursuance of this agreement the company paid the sum of Rs. 33,955 in the year of account, which is the assessment year 1954-55, and the accounting year ending December 31, 1953.The contention of the assessee before the revenue authorities was that this payment was an expense admissible under section 10(2)(xv) of the Income-tax Act. Though the revenue authorities in the assessment years 1950-51 to 1953-54, had allowed such expense to the assessee, the Income-tax Officer held in the year of the present reference that there being no present liability for the payment of pension and the company being liable to pay pension only on the retirement of the

manager, the amount paid to the trustee was not to meet any lump sum liability of the company and since the manager was in service in the material year the amount paid was that of a capital nature.The Appellate Assistant Commissioner held in favour of the assessee that the payments to the trustees though made in seven annual installments should be regarded as a lump sum payment, because the installments were paid on account of the particular kind of annuity policy which did not require that the amounts should be paid in lump sum but in certain instalments. the Appellate Assistant commissioner further held that the company had not acquired any asset either in the shape of fund or an insurance policy under which the company would received amounts equal to the pension payable to Hook, but the trustees were to pay the pension to the manager or his wife and the company got rid of the liability to pay the pension without acquiring assets under its own control with the result that the payment was on revenue account and not a capital disbursement.Before the Appellate Tribunal is was contended first that by clause 14 of the November 1948 agreement, it was provided that on the dismissal of Hook the agreement was terminated and, therefore, in such circumstances pension was not payable to him and, secondly, it was contended, relying on the decision in Indian Molasses Co. Ltd. v. Commissioner of Income-tax, that as nothing was provided for the contingency of the dismissal of Hook the trust would fail and the trustees could not provide for any annuity in such circumstnaces. the Tribunal held that though clause 14 of the service agreement provided for payment of pension either on account of termination or earlier determination of service for any reason whatsoever and therefore even if Hook was dismissed he would be entitled to pension and there was no question of the trust amount reverting to the assessee and that there was no contingency.Counsel for the Commissioner contended before us first that contingent liability was not deductible under section 10(2)(xv) of the Income-tax Act and he further contended that on the construction of the November 1948 agreement there was not promise to pay pension in the event of the dismissal of Hook with the result that the liability to pay pension was contingent. Secondly, it was contended that if money was paid to Mrs. Hook in the event of the death of her husband it would not be an expenditure laid out or expended wholly and exclusively for the purpose of the business or trade of the assessee. Counsel for the assessee on the other hand contended first that the effect of the entire agreement was that pension was payable to Hook if his services were terminated for any reason whatsoever and therefore, there was no contingency and, secondly that the Commissioner should not be allowed to contend that the payment to Mrs. Hook in the event of the death of her husband was not an expenditure wholly and exclusively for the purpose of the business, because it was a question of fact as to whether it was so required and the Commissioner had not raised the contention as to this fact before the revenue authorities.I shall first deal with the content as to whether there was any contingent liability, namely, whether there was any agreement to pay pension in the event of dismissal. In clause 7 of the agreement it is stated that the engagement of the manager shall be determined (a) if the manager shall cease to be the director of the company

and (b) if the company shall at any time give the manger six months notice determining his engagement. In clause 8 of the agreement it is stated that if the agreement shall be terminated under clause 7(a) the manager shall be entitled to salary and commission up to the end of six months after the date of determination and if the agreement is terminated under clause 7(b) the manager shall at the option of the company work out his notice or receive salary and commission lieu of notice. In clause 9 it is stated that in the event of the manager being compelled to retire at an earlier date than the 31st March, 1955, by reason of ill-health or if his services are terminated prior to 31st March, 1955, under clause 7 or for any other reason whatever a pension of 1000 sterling per annum shall be paid to the manager with effect from the date of such earlier retirement or determination of the services as aforesaid. In clause 14 of the agreement is is stated that in case the manager commits any breach of stipulation on his part of observe and perform as are herein contained or if he should in any way misconduct himself or neglect his duty then in any of such cases it shall be lawful for the company by a resolution of the directors to dismiss the manager summarily from his employment as such manager as aforesaid and determine this agreement without any notice or payment of salary and commission for any period beyond the date of such dismissal.Counsel for the assessee contended that clauses 8, 10 and 14 of the agreement relate to modification of salary and commission on the happening of certain events whereas clause 9 which provided for payment of pension did not undergo any modification thereof in any other clause. To illustrate, it was contended on behalf of the assessee, that under clause 8 in the event of the termination of the agreement under clause 7(a) or clause 7(b) salary and commission were payable in accordance with the term provided in that clause. Similarly, in the event of determination of agreement on account of the illness of the manager clause 10 provided for salary and commission in accordance with the term contained in clause 10. Again it was contended that clause 14 provided for modification of salary and commission in the event of dismissal. Emphasis was laid by counsel for the assessee on the term occurring in clause 9 "if services are terminated......... for any other reasons whatever, a pension will be payable withe effect from the date of determination of service," to establish the contention that pension was payable even in the event of dismissal because the phrases "for any reason whatever" is wide enough to include dismissal. I am unable to accept the contention. In my opinion termination of the agreement in the event of dismissal would wipe out in the same sweep all benefits under the agreement and therefore pension which is one of the benefits is put out of the field of operation of the agreement. Secondly, the dominant intention of the parties appears in my opinion to be that pension is not payable in the event of dismissal. In clause 16 of the agreement it is provided that in the event of dismissal the company shall have the right to sue for damages. This right to sue for damages cannot co-exist with the obligation to pay pension. It is in my opinion indicative of the inherent intention of the parties that dismissal will extinguish payment of pension.Counsel for the assessee contended that in clause 8 the phrase "if the agreement shall be terminated under

clause 7" occurred and yet it is provided in clause 9 that pension will be payable in the event of such termination of the agreement and therefore it was not the intention of the parties that pension would be wide out in the event of termination of the agreement. This contention of the assessee is fallacious inasmuch as termination of the agreement under clause 7 means determination of engagement of services and it specifically provided for payment of salary and commission in clause 8 and again provides for payment of pension in clause 9 in the event of termination under clause 7, whereas in clause 14 it is stated that the company shall have the right to dismiss and terminate the agreement without any notice or payment of salary and commission. The termination of agreement under clause 7 keeps alive benefits of salary and commission in clause 8 and pension in clause 9. The termination of agreement in clause 14 is on the other hand without any reservation. I am unable to hold that the phrase "for any reason whatever" includes dismissal in the eventualities contemplated in clause 14. For all these reasons, I am of opinion that there is a contingent liability with regard to pension and there is no express promise to pay pension which in the event of dismissal. It is now well settled on the authority of the decision of the Supreme Court in the case of India Molasses Co. (Private) Ltd. v. Commissioner of Income-tax, that an expenditure to be deductible under section 10(2)(xv) must be towards a liability actually existing at the time and putting aside of the money which may become expenditure on the happening of a an even is not an expenditure. Therefore, the payments made in the present case are not in my opinion expenditure to meet any actual existing liability.Counsel for the Commissioner contended on the authority of the decision in Alexander Howard & Co. Ltd. v. Bentley that the provision of payment of pension to Mrs. Hook was not an expenditure incurred wholly and exclusively for the purpose of the business. In Howards case a service agreement was entered into by Howard which provided for the payment to his widow, if any, of an annuity of Pounds 1,000 per annum. Howard surrendered all rights to the annuity in consideration of the payment by the company to him of a sum of Pounds 4,500. The company there contended that the sum of Pounds 4,500 was allowable as a deduction. It was held there that in the event of the annuity becoming payable to the wife of Howard it would not have been money wholly and exclusively laid out for the purpose of trade. The wife was not an employee and had nothing whatever to do with the company. Counsel for the assessee contended in the present case that once the money left the hands of the assessee it would be an expenditure and if it again came back to the hands of the assessee it would be income in the hands of the assessee in the year when it came back and therefore if the element of expenditure were satisfied the assessee was entitled to deduction under section 10(2)(xv). Counsel for the assessee further contended that it involved examination of facts as to whether the expenditure was incurred wholly and exclusively for the purpose of the business and relied on the decision of the Supreme Court in Indian Molasses case, where the contention of payment to the wife as being not wholly and exclusively for the purpose of bonuses was not allowed to be raised. He also referred to the decisions of the

Supreme Court in Commissioner of Income-tax v. Chandulal Keshavlal & Co. and Commissioner of Income-tax v. Royal Calcutta Turf club for the proposition that the question whether the item of expenditure was wholly and exclusively laid out for the purpose of business depends on facts. Counsel for the Commissioner distinguished Indian Molasses case on the reasoning that there the Tribunal had merely found expenditure did not find the other ingredients in section 10(2)(xv) in order to allow the expenditure as a deduction and the case had to go back to the Tribunal to decide all the elements present in section 10(2)(xv), whereas in the present case the Tribunal allowed the deduction and did not leave anything to be done by the revenue authority. Counsel for the Commissioner invited our attention to paragraph 12 of the decision of the Appellate Tribunal appearing at page 18 of the Paper Book where the Tribunal dealt with the contention of the revenue authorities that the payment by the assessee was not wholly and exclusively for the purposes of the business. Counsel for the Commissioner submitted that the present contention of the Commissioner that payment of pension to the wife was not an expenditure incurred wholly and exclusively for the purpose of business was open to be raised on the order of the Tribunal which allowed the amount in question as a deduction which involved the determination of a question of expenditure incurred wholly and exclusively for the purpose of business. Another reason was advanced before us as to why the provision and that was the authorities in Howards case. In my opinion the contention on behalf of the Commissioner does not challenge any finding of fact but assails the conclusion of the Tribunal on the ground that payment of pension to the wife is not incurred wholly and exclusively for the purpose of business. To my mind, it appears that the Tribunal was not justified in allowing the deduction inasmuch as there is no finding of fact to support the contention that payment of pension to Mr. Hook was incurred wholly and exclusively for the purpose of business and secondly, that the decision in Howards case in an authority for the proposition that provision for payment of pension to the wife is not an expenditure for the purposes of trade For the following reasons, I reach the conclusion that the answer to the question is in the negative. The assessee is to pay costs. Certified for two counsel.

Question answered in the negative.