BOMBAY HIGH COURT

Tejaji Farasram Kharawalla

Vs

Commissioner of Income-Tax

(M Chagla, C.J. Tendolkar, J.)

23.03.1948

JUDGMENT

M.C. Chagla, C.J.

1. The assessee in this case is a representative of the Ciba (India), Ltd., and by an agreement entered into between the assessee and Ciba on October 29, 1928, it was agreed that Ciba (India), Ltd., should pay to the assessee 12 per cent commission on various articles of Ciba which the assessee was to sell. On August 20, 1935, Ciba (India), Ltd., wrote a letter to the assessee making it clear that out of this commission of 12 per cent 7 per cent was to be the representative's own commission and 5 per cent was to be taken by him as compensation in lieu of the contingency expenses he has to meet with, such as commission to dyeing masters, agents, etc. For the account year relevant to the assessment year 1940-41 the assessee received a sum of Rs. 78,573 which represents this 5 per cent commission. The Income-tax Officer allowed as an admissible item of expenditure only a sum of Rs. 27,342. This sum was allowed because according to the Income-tax Officer the assessee proved that that amount had actually been spent for that particular purpose, viz. the purpose of paying secret commission to dyeing masters and others. This order of the Income-tax Officer was passed on February 17, 1941. On April 28, 1941, the assessee executed five deeds of agreement in favour of five of his salesmen. These agreements went to show that this 5 per cent commission was given over by the assessee to his salesmen. On the strength of these agreements the assessee claimed that the entire amount represented by the 5 per cent commission was actually spent by him and he claimed the whole sum of Rs. 78,573 as a deductible allowance. The Tribunal took the view that these five agreements were not genuine agreements and discarded them totally. But the two members of the Tribunal Mr. Malhotra and Diwan Bahadur Gundil differed as to what was the amount that should be permitted to the assessee to be deducted as a permissible deduction. Mr. Malhotra took the view that the assessee should be allowed one-third of the 5 per cent commission and Diwan Bahadur Gundil took the view that he should be allowed the whole of the 5 per cent. On that the matter went to the

President. The President took the view that the assessee's case fell within the ambit of Section 4(3)(vi) of the Act, but he also took the view that it was incumbent upon the assessee to prove the actual amounts spent by him for the purpose and on that he agreed with Mr. Malhotra that only one third of the 5 per cent commission should be allowed to the assessee.

2. The question that is now referred to us by the Tribunal is whether the assessee's claim to exclude from his income the 5 per cent commission received by him from the Ciba (India), Ltd., can be allowed under Section 4(3)(vi) of the Indian Income-tax Act, without proof by him that the whole commission received by him was spent by him in the performance of his duties as representative of the Ciba (India), Ltd.? It is true indeed that implicit in the question itself is the finding, of fact that this allowance was granted to the assessee for the purpose of meeting expenses wholly and necessarily incurred in the performance of the duties of his office. Mr. Joshi has attempted to argue before us that it was open to him to contend that on the facts of this case what was paid to the assessee was not a special allowance at all within the meaning of Section 4(3)(vi). I am afraid that as the record stands, it is not open to the Commissioner to take up that contention. Mr. Joshi has asked us to reformulate the question so as to make the issue clear which arose between the parties. Mr. Joshi is perfectly right that if the Commissioner and the assessee were at issue on this question as to whether what was paid to the assessee was an allowance within the meaning of Section 4(3)(vi), we might have acceded to the request of Mr. Joshi and either reformulated the question or sent the matter back to the Tribunal to raise the proper question and state the necessary facts for that purpose. But we have been satisfied from the record by the Advocate General that before the Tribunal this issue was never raised. All that was contended was whether in fact the amount was paid or not. If that was the issue between the parties, then undoubtedly the question arose in the form raised by the Tribunal and we, therefore, proceed to consider and answer that specific question.

3. Now, Section 4(3)(vi) deals with an income falling within a class which is exempted from the total income of an assessee under the main sub-clause Section 4(3). The income that is exempted is an income which must be a special allowance, benefit or perquisite and it must be a special allowance, benefit or perquisite which must have been granted to the assessee for a specific purpose and that purpose must be to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit. The condition that has got to be satisfied before an assessee can claim exemption under this sub-clause is that the grant that should be made to him must be for the purpose specified in that sub-clause. What is emphasised in this sub-clause is the purpose of the grant, the object with which the grant was made. In my opinion once it is established that the grant was for that particular purpose, it is no longer necessary for the assessee to prove that in fact he expended that grant for the purpose for which it was given. He may spend more or he may spend less, but quae that grant which is given for a

particular purpose he is entitled to the exemption. What is emphasised before us is the expression "incurred" and it is suggested that that expression conveys the meaning that the amount must have been actually spent before the exemption can be claimed. Grammatically and taking a strict grammatical view of it, "incurred" may mean actually incurred or to be incurred and the proper meaning would depend upon the context, and in this context it is clear that "incurred" does not mean actually incurred by the assessee. In contrast to this provision one may look at Section 10(2)(iv) where in order to claim an allowance the expenditure has to be laid out or expended wholly and exclusively for the purpose of the business, profession or vocation of the assessee. In that case the expenditure has to be actually laid out or expended, and before the allowance can be claimed the assessee has got to prove the actual sum which he has expended. Similarly, under Section 12(2) which corresponds to Section 10(2)(xv) and is an allowance under the head "other sources" just as Section 10(2)(xv) is an allowance under the head "business," the expense has got to be actually incurred for the purpose of making or earning the income, profits or gains which fall under that head under Section 12. I am, therefore, of opinion that an exemption can be allowed under Section 4(3)(vi), without it being incumbent upon the assessee to prove that in fact he had expended the whole allowance received by him. I would therefore answer the question submitted to us in the affirmative. The Commissioner to pay the costs.

Tendolkar, J.

4. The facts giving rise to this reference have been sufficiently stated in the judgment delivered by the learned Chief Justice and I shall not restate them. The only question that arises for determination on this reference is what is the correct interpretation to be placed on Section 4(3)(vi) of the Indian Income-tax Act. Sub-section (3) of that section provides that certain heads of income shall be excluded from the total income of an assessee. One of such heads is in Sub-clause (vi) which is in these terms:

Any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit.

5. It is contended on behalf of the Income-tax Commissioner that where you have a special allowance granted to meet expenses as set out in this sub-clause, only such portion of that allowance should be excluded from the total income of the assessee as is actually spent by him for the purpose for which the grant was made. This contention ignores the language of the section. The key word in this sub-clause to my mind is "granted" and not "incurred." The section deals with the purpose for which the grant is made. That purpose must be to meet expenses wholly and necessarily incurred in the performance of the duty. The section does not deal at all with the user to which the allowance is put. Indeed it may be quite open to the person who receives a special allowance, etc. which falls within the meaning of this sub-clause to expend it

wholly on some other object of his own. If the contention advanced on behalf of the Income-tax Commissioner was correct, it would require our reading into this sub-clause at the end of the clause some words to the following effect : "to the extent to which it is actually expended for such purpose." That clearly cannot be done, because it is interpolating into the sub-section words which are not there, when the sub-section is quite plain as it stands. Moreover, if it were intended that amounts actually expended wholly and necessarily for the performance of the duties of an office should alone be excluded, in so far as the case of the assessee before us is concerned, it would have been fully covered by Section 10(2)(xv) and the enactment of Section 4(3)(vi) would be entirely redundant in the case of any income derived from business. Similarly, if it was the income of a salaried servant, expenses actually incurred would in all cases have been covered by the first proviso to Section 7 and there would again have been no occasion to enact Section 4(3)(vi) at all. The true interpretation to my mind, therefore, of Section 4(3)(vi) is that where the object or purpose for which the grant is made is to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit, the whole of that grant must be excluded from the total income of the assessee, and the income-tax authorities cannot concern themselves with whether any part of such grant was in fact utilised for the purpose for which the grant was made. The answer to the question will be in the affirmative.