

PETITIONER:
COMMISSIONER OF INCOME TAX. BOMBAY

Vs.

RESPONDENT:
INDIAN ENGINEERING AND COMMERCIAL CORPN.PVT. LTD.

DATE OF JUDGMENT 13/04/1993

BENCH:
JEEVAN REDDY, B.P. (J)
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JEEVAN REDDY, B.P. (J)
VENKATACHALA N. (J)

CITATION:
1993 AIR 1540 1993 SCR (3) 86
1993 SCC (3) 246 JT 1993 (2) 683
1993 SCALE (2) 496

ACT:
Income Tax Act. 1961:-S.40(a)(v)/140(A)(5)--constitution sales in addition to salary paid to Directors at a prescribed percentage of sales-Held, is not "perquisite:"-Cash payment not contemplated by the provision.

HEADNOTE:
The respondent-assessee was a private limited company trading in tractors and earth-moving equipment. During the relevant the assessee paid commission on sales in addition to salary to its directors at a prescribed percentage of the sales effected by the assessee. The Income Tax Officer treated the commission on sales as perquisites' and disallowed the same applying section 40 (a) (v) for the year 1971-72 and section 40 (A) (5) for the assessment year 1972-73. Which are the concerned assessment years herein. On appeal, the Appellate Assistant Commissioner held that commission on sales cannot be treated as perquisites. The Tribunal dismissed the Revenue's appeal. The question before this court was whether commission on sales (paid in cash) falls within the four corners of section 40 (a) (v) ,Section 40 (A) (5). Dismissing the appeal, this court.

HELD: 1. Regarding Section 40 (1) (v) /40 (A) (5) as a whole, the cash payment of the nature concerned in this case does not fall within any of the situations/clauses contemplated by sub-section (5). (92-D)

Payment of a certain cash amount by way of commission on sales, directly to an employee cannot be said to fall with the words "where the assessee incurs an expenditure which results directly or indi-

87

rectly" in Section 40 (A) (5). (92-F)

Nor can such a payment fall within a provision which speaks of an expenditure or allowance in respect of any assets of the assessee used by the employee DE. (92-F)

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1583 & 1584

(NT) of 1977.

From the Judgment and Order dated 22.11.1976 of the Bombay High Court in I.T. Application No. 191 of 1976.

S.C. Manchanda, Dr. K.P. Bhattacharjee, C. Ramesh, T.V. Rathnam for P. Parmeswaran for the Appellant.

Mrs. A.K. Verma, S.V. Pathak, for J.B.D. & Co. for the Respondent.

The judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. These appeals are preferred by the Revenue against an order of the Bombay High Court rejecting an application under section 256 (2) of the Income Tax Act, By means of the said application the Revenue sought to raise the following three questions:

" (1) Whether, on the fact and in the circumstances of the case, the Tribunal was right in holding that the commission paid by the assessee company to its directors was an additional remuneration forming part and parcel of the salary allowed to them and that the said remuneration would not be covered by section 40 (a) (v) of the Income-tax Act and thereby allowing the assessee's claim for allowing the deduction of the whole amount of commission paid to the directors ?

(ii) Whether the Tribunal was right in their view that the words "whether convertible into money or not" used in section 40 (a) (v) of the Act postulated that, the

88

benefit, amenity or perquisite mentioned therein covers benefit, amenity or perquisite allowed in kind but not in cash?

(iii) Whether the Tribunal was right in holding that the expenditure of Rs. 19,386 for the assessment year 1971-72 and Rs. 29,283 for the assessment year 1972-73 did not represent entertainment expenditure within the meaning of section 37 (ii) of the Income-tax Act ?"

The assessment years concerned here in are 1971-72 and 1972-73. The first two questions go together. The provision applicable for the A.Y. 1971-72 was Section 40 (a) (v) whereas for the A.Y. 1972-73, the provision applicable is Section 40 (a) (5) which is a successor provision to Section 40 (a) (v).

The respondent is a private limited company trading in tractors and earth moving equipment. During the accounting years relevant to the aforesaid assessment years, the assessee paid to three of its Directors commission on sales in addition to salary as follows:

Assessment year	Director	Salary	Commission
1971-72	Sh.S.B Lal	39,000	36,171
	Sh. S.B. Mathur	18,000	36,171
	Sh. A.B. Mathur	7,800	36,171
1972-73	Sh. S.B Lal	39,000	40,792
	Sh. S.B. Mathur	18,000	40,792
	Sh. A.B. Mathur	7,800	40,792

The 'commission' in the above table means the commission paid to the said Directors on the sales effected by the assessee, at a prescribed percentage. The Income Tax Officer treated the commission on sales as "perquisites" and

disallowed the same applying Section 40 (a) (v) for the year 1971-72 and Section 40 (A) (5) for the assessment year 1972-73. It also disallowed the expenses referred to

89

in question No. (iii) as entertainment expenses. On appeal, the Assistant Appellate Commissioner held that the commission on sales cannot be treated as "perquisites". He also held that the expenditure on dinner and tea cannot be characterised as entertainment expenditure and ought not to have been disallowed. The Revenue preferred appeals before the Tribunal against the orders of the A.A.C., which appeals were dismissed by the Tribunal following its order dated August 25, 1973 relating to assessment years 1967-68 to 1968-70. The order dated August 25, 1973 dealt *inter alia* with the questions arising herein and held the same against the Revenue. An application under section 256 (1) was dismissed by the Tribunal.

The first question urged before us—which was also the question urged before the Tribunal—is whether commission on sales (paid in cash) falls within the four corners of Section 40 (a) (v)/Section 40(A) (5). It would be appropriate to set out the said provisions in so far as they are relevant:

" Section 40—Amounts not deductible:—Notwithstanding anything to the contrary in section 30 to 38 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.....

" (v) any expenditure which results directly or indirectly in the provision of any benefit or amenity or perquisite, whether convertible into money or not, to an employee (including any sum paid by the assessee in respect of any obligation which but for such payment would have been payable by such employee) or any expenditure or allowance in respect of any assets of the assessee used by such employee either wholly or partly for his own purpose or benefit, to the extent such expenditure or allowance exceeds one-fifth of the amount of salary payable to the employee, or an amount calculated at the rate of one thousand rupees for each month or part thereof com-

90

puted of his employment during the previous year, whichever is less:"

Note:—(The two provisos and the two explanations are omitted as not necessary for the purpose of this case.)

Section 40 (A) (5), which in so far as it is material, is substantially in the same terms, reads as follows:

"Section 40 (A) Expenses or payments not deductible in certain circumstances.

(5) (a) Where the assessee—

(i) incurs any expenditure which results directly or

indirectly in the payment of any salary to an employee or a former employee, or

(ii) incurs any expenditure which results directly or indirectly in the provision of any perquisite (whether convertible into money or not) to an employee or incurs directly or indirectly any expenditure or is entitled to any allowance in respect of any assets of the

assessee used by an employee either wholly or partly for his own purposes or benefit. then, subject to the provisions of clause (b), so much of such expenditure or allowance as is in excess of the limit specified in respect thereof in clause (c) shall not be allowed as a deduction:"

Explanation 2: In this sub-section-

(b) "perquisite" means-

(i) rent-free accommodation provided to the em-

ployee by the assessee;

(ii) any concession in the matter of rent respecting any

91

accommodation provided to the employee by the assessee:

(iii) any benefit or amenity granted or provided free of cost or at concessional rate to the employee by the assessee:

(iv) payment by the assessee of any sum in respect of any obligation which, but for such payment, would have been payable by the employee. and

(v) payment by the assessee of any sum whether directly or through a fund other than a recognised provident fund or an approved superannuation fund, to effect an assurance on the life of the employee or to effect a contract for an annuity."

Incidentally Section 40 (A) (5) which was inserted repealing section 10 (a) (v) has itself been deleted with effect from April 1, 1989 by the Direct Tax Laws (Amendment) Act, 1987. The sister provision contained in sub-clauses (i) and (ii) of clause (c) of section 40, applicable to directors of a company (and other persons mentioned therein) has also been deleted by the very same enactment with effect from April 1, 1989.

Since the relevant provisions in section 40 (a) (v) and 40 (A) (5) are substantially similar, we shall consider the language employed in the latter provision. Sub-clause (5) of section 40 (A) is applicable in the following Situations:

(1) Where the assessee incurs any expenditure which results directed or indirectly in the payment of any salary to an employee or its former employee or

(2) Where the assessee incurs any expenditure which results directly or indirectly in the provision of any perquisite (whether convertible into money or not) to an employee;

(3) (i) Where the assessee incurs directly or indirectly any

92

expenditure or provides an allowance in respect of any assets of the assessee used by the employee either wholly or partly for his own purpose or benefit;

(b) Where an employee of the assessee is provided any allowance ("entitled to any allowance") in respect of any assets of the assessee used by such employee either wholly or partly for his own purposes or benefit.

In either of these situations, so much of such expenditure or allowance as is in excess of the limits specified will not be allowed as a deduction. The question is whether the commission paid to its directors/employees on the sales effected by the assessee falls within any of the situations/clauses mentioned above. The Revenue relies upon the second one among them. According to them, the

commission paid is a 'perquisite. which submission they say is borne out by the words within the brackets " whether convertible into money or not" immediately following the word "perquisite". On the other hand the contention of the assessee which has been accepted by the A.A.C. and situations/clauses contemplated by sub-section 5. Having regard to the language employed in clause (c) we are inclined to agree with the assessee. The language of sub-section (5) is significant. The first two situations, as we have called them start with the words "where the assessee incurs any expenditure which results directly or indirectly.....It is difficult to say that payment of a certain cash amount by way of commission on sales directly to an employee can be said to fall within the words "where the assessee incurs any expenditure which results directly or indirectly". Such a payment cannot also fall within the two sub-clauses of clause (3) in our analysis-since they speak of an expenditure or allowance in respect of any assents of the assessee used by the employee. Learned counsel for the Revenue. Shri Manchanda argued that the words "whether convertible into money or not" bring out the intention of the Parliament and support his contention. He says, there is no reason not to include cash payment within the ambit of sub-section(5) to Section 40 (A). We are, however, not concerned with the generality of cash payments but only with the payment concerned herein. Reading, the Sub-section as a whole and having regard to the language employed therein, the Tribunal is that Such cash payment does not fall within any of the

93

payment concerned herein does not fit into it. The employees concerned herein also happen to be directors. The provision in clause (c) of Section 40 applies to directors among others. Of course. Section 40 (A) (5) is applicable only to companies where as Section 40 (A) (5) is applicable to employees whether of companies or others. In the case of directors, who are also employees, both the provisions will be attracted- the higher of the two ceilings has to be applied.

The learned counsel for the respondent-assessee brought to our notice it circular issued by the Central Board of direct Taxes which inter alia say. "its read is payment of commission to the employees the question whether it forms part of salary or perquisite has to be decided on the facts of each case. If the terms and conditions of service are such that commission is paid not as a bounty or benefit but is paid, is part and parcel of the remuneration for the service renders by the employees. such payment partake the nature of salary rather than as a benefit or perquisite. If, however, on terms and conditions of service either there is no obligation for the employer to pay the commission or it is a matter purely in the discretion of the employer, such payment should be treated, is a benefit by way of addition to salary rather than in lieu of salary." It is not necessary for us to make any comment on the said circular.

For the above reasons. we are of the opinion that the High Court was justified refusing to direct the Tribunal to state question (1) and (2) under section 256 (2).

So far its question No.3 is concerned, it has not been seriously pressed before us having regard to the smallness of the amount involved. It is also stated that the said question is pending consideration is a batch of appeals before this Court. We do not propose to express any opinion on question No. 3 for the reason that the amount involved is

quite small having regard to the income of the assessee-respondent.

The appeals accordingly fail and are dismissed. No costs.

Appeal dismissed.

94

JUDIS