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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jun-11-1986

Reported in : (1986)18ITD213a(Mum.)

Judge : T Sugla, K Vishwanathan, S Rajendra

Appellant : Kodak Ltd.

Respondent : inspecting Assistant

Judgement :

1. This Special Bench was constituted to consider the question whether the expenses incurred on repairs and maintenance of the flats provided rent-free by the employer-company to its employees is to be included under Section 40A(5)(a)(ii) of the Income-tax Act, 1961 ('the Act').

There was a difference of opinion between some Benches of the Tribunal on this point.

2. The assessee-company had incurred expenditure of Rs. 26,952 on (a) repairs, (b) paintings and (c) maintenance charges of flats (paid to housing societies) in respect of three flats (in multi-storeyed buildings) which had been taken on lease by the assessee-company. The details of the expenditure are as under :Description of Rent Maintenance Replastering Miscellaneous building charges paid and painting Repairs to society charges and Daisyle 10,761 3,600 6,415) 755 + 3,630) Darshan 10,730 1,800 2,480) 1,622 Cynthia 16,354 1,800 4,760 90 The

IAC treated both the rent of said accommodation as well as the aforesaid expenses on repairs, etc., at Rs. 26,952 as includible for calculating disallowance under Section 40A(5). As per para 6 of the assessment order, the IAC followed his order for the assessment year 1976-77 (the said order has not been made available to us).

3. The Commissioner (Appeals) vide para 4 upheld the IAC's order on this point after distinguishing the Tribunal 'A' Bench decision in John Wyeth & Brother Ltd. [IT Appeal No. 4628 (Bom.) of 1970-71, dated 28-1-1972] for the assessment year 1969-70 (P.B. 2) on the ground that the expenses on repairs to the flats in John Wyeth & Brother Ltd.'s case (supra) were nominal and that in John Wyeth & Brother Ltd.'s case (supra) as per lease agreement, the employer company, as the lessee had undertaken to keep the flats in good and tenantable condition and, therefore, the said expenditure having been incurred by the employer company under the contractual liability to lessor, the Tribunal had held that no benefit or amenity was provided to the employees who were occupying the flats and in any case, the benefit was too remote.

4. We further note that in the said case of John Wyeth & Brother Ltd. (supra) there was no controversy that the painting charges of the flats were a benefit or amenity. In respect of wages paid to servants for upkeep of the said three flats, the Tribunal had held that while one-fourth of the wages were incurred by the employer company to discharge its contractual obligation under the lease agreement with lessor, remaining 75 per cent of the expenditure was a benefit or amenity provided by John Wyeth & Brother Ltd.'s case (supra) to its employees.

5. The Commissioner (Appeals), in the present case, noted that the total repair expenditure of Rs. 26,952 on the three flats was much higher than in the case of John Wyeth & Brother Ltd. (supra) and that normally it was the responsibility of lessor to repair the flats and keep it inhabitable condition and if under the lease agreement, this responsibility was taken over by the lessee, rent was reduced proportionately and, therefore, the expenditure on maintenance and repairs of flats added to the rent would represent the perquisite given by the employer to the employee which would be covered by Section 40A(5). The Commissioner

(Appeals) accordingly held that whole of said expenditure of Rs. 26,952 would be includible for considering the disallowance under Section 40A(5).

6. At the hearing before us, the learned counsel for the assessee filed before us a copy of the lease agreement dated 29-11-1973 in respect of the flat in Darshan Apartments, which agreement was silent regarding the repairs and maintenance of the said flat. Agreements in respect of other two flats were not filed but it was claimed that similar was the position in respect of the said two flats.

7. The learned counsel for the assessee relied on the Tribunal, Bombay Bench 'C's order in IAC v. Mercantile Bank Ltd. [1984] 7 ITD 198, where it was held that Section 40A(5)(a)(ii) contained a special provision relating to expenses incurred directly or indirectly in the provision of perquisite. The said Sub-section thereafter had a general provision dealing with expenditure in respect of any asset of the employer company used by the employee. As rent-free accommodation will be covered by definition of 'perquisite' under Explanation 2(b)(i) of the said section, therefore, such expenditure could not be considered as an expenditure in respect of any asset of the assessee-company used by the employees, because the special provision in respect of rent-free accommodation would apply in view of rule generalia specialibus non derogant. The Bench, thus, held that the expenditure incurred on maintenance of flats should be considered only under 'perquisite' and that this aspect was not considered by the Full Bench of the Kerala High Court in CIT v. Forbes Ewart & Figgis (P.) Ltd. [1982] 138 ITR 1.

The Bench held that the repairs and maintenance do not per se provide rent-free accommodation but are normally incurred by the employer company as owner of the premises and, therefore, they did not add to the perquisite in the shape of rent-free accommodation.

8. A distinguishing feature of the case before us as compared to Mercantile Bank Ltd.'s case (supra) is that the assessee-company (Kodak) is not the owner of the three flats in question and, therefore, Kodak did not have any liability as owner of the premises to incur expenditure on maintenance or repairs of the said flats.

9. The learned counsel for the assessee pointed out that the aforesaid decision in Mercantile Bank Ltd.'s case (supra) was followed by the Tribunal, Special Bench, Bombay in Schradar Scovill Duncan Ltd. v. ITO [1986] 16 ITD 18 (at page 25 vide paras 16-17). We note that in the said case also, the flat was owned by the employer company and it was held in that case that municipal taxes were includible for computing the disallowance under Section 40(c) of the Act but the flat maintenance expenses and the telephone expenses were not includible.

10. The revenue relied on the Tribunal 'A' Bench, Bombay's decision in Sandoz (India) Ltd. [IT Appeal No. 2421 (Bom.) of 1983] for the assessment year 1979-80 where in paras 8-12, the Tribunal discussed this matter and following the decision in Bombay Burmah Trading Corpn.

Ltd. v. CIT [1984] 145 ITR 793 (Bom.) held that the actual expenditure incurred by the employer company on the flats was includible for working out the disallowance under Section 40A(5) and that the said Bombay High Court decision in Mercantile Bank Ltd.'s case (supra) was not brought to the notice of the Bench. The Bench noted that the Kerala High Court in Forbes Ewart & Figgis (P.) Ltd.'s case (supra) had held that the actual expenditure on maintenance of the building was includible for computing the disallowance. The Bench rejected the assessee's reliance on Britannia Industries Co. Ltd. v. CIT [1982] 135 ITR 35 (Cal.) in view of the said Bombay High Court decision in Bombay Burmah Trading Corpn. Ltd.'s case (supra). The Bench noted that Explanation 2 to Section 40A(5) had given a definition of 'perquisite' and had not followed the definition of perquisite' given in Section 17(2) of the Act and, therefore, a reading of the said definition of 'perquisite' in Clause (b) of Explanation 2, read with Section 40A(5)(a), clearly showed that the disallowance under the said section is on actual expenditure incurred by the employer company and not on the value of the said perquisite as computed under Section 17(2), read with Rule 3 of the Income-tax Rules, 1962 ('the Rules'), in the hands of the employee.

11. At this point, we may refer to the aforesaid decision in Bombay Burmah Trading Corpn. Ltd.'s case (supra). In the said decision, the Bombay High Court (at page 799) explained the Calcutta High Court decision in Britannia Industries

Co. Ltd.'s case (supra) that as both the parties before the Calcutta High Court were unable to apportion the expenditure on personal use of car, therefore, the Calcutta High Court took recourse to Rule 3. The Bombay High Court observed that the aforesaid Calcutta High Court decision cannot be read as an authority that in all cases, the value of perquisite in the hands of the employee is to be computed in accordance with relevant rule of the Rules. The Bombay High Court, accordingly, held that, considering plain language of Section 40(c)(iii), the entire expenditure incurred by the employer has to be taken into consideration as value of benefit, amenity or perquisite. In this respect provisions of Section 40(c)(iii) and 40A(5) are para materia.

12. We have carefully considered the submissions of both the parties.

On the plain reading of Section 40A(5), we are of the opinion that the perquisite of rent-free accommodation provided to the employee by the employer, as per Clause (b) to Explanation 2 to Section 40A(5), read with Sub-clause (ii) of Clause (a) of the said Sub-section, would embrace all the expenditure incurred by the employer on providing rent-free accommodation to the employee. This would cover not only the rent but also all other expenditure incurred by the employer, for example, society charges paid to the housing society, cost of painting as also other repairs, because that would represent the full measure of the benefit or amenity or perquisite provided by the employer to the employee, who has been given a rent-free accommodation, provision of such accommodation means that all the expenses on the said accommodation are to be borne by the employer because the employer has undertaken to bear all the burden in respect of the said flats.

Sub-clause (ii) of Section 40A(5)(a) takes in its sweep 'any expenditure which results directly or indirectly in the provision of any perquisite'. Thus, even the expenditure on painting, repairs and society charges would be covered by the said Sub-clause. We are, therefore, unable to accept the assessee's contention that perquisite of rent-free accommodation would cover only the rent and not any other expenditure incurred by the employer company providing rent-free accommodation to the employee.

13. Even otherwise, the cases are distinguishable where the employer as owner of the property has necessarily to incur some expenditure on the property in his capacity as a owner irrespective of the fact whether the said property is occupied or not. In this category may fall municipal taxes and necessary repairs to keep the property in a habitable condition. Though we are inclined to take the view that even such expenditure would be covered by Section 40A(5) yet, as it is not necessary to express any final opinion on this point for disposal of the present appeal, we leave this matter open.

14. However, where an employer as a lessee of a property incurs any expenditure in respect of the property made available to the employee as rent-free accommodation then we are unable to see any distinction between the rent paid by the employer as a lessee to lessor and the other expenses incurred by the employer in respect of the said flat for convenience or benefit of the employee. Both the rent and other expenditure would fall in the same category, namely, all expenditure which results directly or indirectly in the provision of any perquisite to the employee.

15. In this background, we would respectfully follow the Bombay High Court decision in Bombay Burmah Trading Corpn. Ltd.'s case (supra) for taking the view that actual expenditure incurred by the employee has to be taken into consideration for the purpose of applicability of Section 40A(5). To the same effect are the observations of the Full Bench of the Kerala High Court in Forbes Ewart Figgis (P.) Ltd.'s case (supra) which has been followed in Travancore Tea Estates Co. Ltd. v. CIT [1 985] 154 ITR 745 (Ker.).

16. The Calcutta High Court's decision in CITv. Davidson of India (P.) Ltd. [1984] 148 ITR 544 is distinguishable because in that case the employer company as a lessee had undertaken to maintain the flats in a good habitable condition and the Tribunal gave a finding of fact that employer would have to undertake the repairs to flats in the normal course and that there was no evidence to show that repairs increased the value of flats. On these facts, the Calcutta High Court held that the expenditure on repairs to the flats did not confer any benefit or amenity or perquisite to the employee within the meaning of Section 40(c)(iii) (which was

repealed by Finance Act, 1968 with effect from 1-4-1969). Thus, the Calcutta High Court's decision was based on finding of fact by the Tribunal. In para 12 above, we have given a finding that the expenditure (by Kodak) like society charges, cost of painting and other repairs is part of full measure of the benefit or amenity or perquisite provided by the employer company to the employees. In arriving at this finding, we have taken into account the decision of the Bombay High Court in Bombay Burmah Trading Corpn.

Ltd.'s case (supra).

17. In the present case, we have already noted above that there was no (contractual or otherwise) liability of the assessee-company as a lessee to repair the flats. Further, expenditure on repairs of the three flats was only nominal and the main expenditure was on account of society charges paid for common services like lift, water, etc., painting and replastering of the three flats. In these circumstances, we uphold the orders of lower authorities directing that the expenditure of Rs. 26,521 was includible for considering the disallowance under Section 40A(5).18. We now deal with the other grounds in the cross appeals by the assessee and by the department.

19. Ground No. I(a) : The I AC had included for the purpose of computation under Section 40A(5) the actual rental expenditure incurred by the assessee-company in providing rent-free accommodation to its three employees. The assessee's contention is that the value of the said perquisite should be computed under Rule 3 of the Rules. The Commissioner (Appeals) had rejected this contention vide para 5 observing that while Rule 3 applied in the case of employee, Section 40A(5) applied in the case of employer and under the latter section, only the actual expenditure incurred by the employer was to be considered.

20. In Bombay Burmah Trading Corpn. Ltd.'s case (supra) it was held that while considering the applicability of Section 40(c)(iii) in the case of expenditure by the employer company resulting in benefit or amenity to the employee, the entire expenditure has to be taken into account and the value of benefit in the hands of employee computed in accordance with the relevant rules need not be ascertained. The Tribunal, Special Bench, Bombay in American Express

International Banking Corporation v. IAC [1983] 6 ITD 373 at pages 388-389 (vide paras 19-22) followed the aforesaid Bombay High Court decision in Bombay Burmah Trading Corpn. Ltd's case (supra), after noting that the Bombay High Court had distinguished the decision in Britannia Industries Co. Ltd.'s case (supra).

21. Respectfully, following the said decision we uphold the orders of lower authorities in taking into consideration the actual expenditure incurred by the employer in providing rent-free accommodation to the employees.

22. Ground No. 1 (c) : The assessee company had sold some cars to its employees. One such car was sold to Mr. S.P. Trehan for Rs. 9,000 (9,500). The IAC noted that a car of similar model was sold to an outsider for Rs. 17,500. The IAC rejected the certificate filed by the assessee- company from a supervisor of Ram Service Station, Delhi supporting the said sale price. The IAC estimated at Rs. 17,000 the market value of car sold and considered under Section 40A(5) the balance of Rs. 8,000 as perquisite to Mr. Trehan. The Commissioner (Appeals) upheld the IAC's action.

23. At the hearing before us, it was urged that Section 40A(5)(a)(n) did not apply in the circumstances of the case because no expenditure was incurred by the assessee-company in respect of any of its assets used by the employee wholly or partly for his own benefit. We accept this contention because what is contemplated for disallowance under Section 40A(5) is an expenditure incurred by the assessee which would have been normally allowable. In selling the car at price less than market value, no expenditure has been incurred by the company.

24. In respect of balancing diarge of Rs. 634, the assessee relied on the Tribunal, Bombay, Bench 'E's decision dated 30-4-1985 in I.B.M.World Trading Corpn. [IT Appeal No. 4080 (Bom.) of 1983] for assessment year 1978-79 wherein paras 11-12, it was held that terminal allowance under Section 32(1)(iii) of the Act is not an allowance for the user of the car but was an allowance given for the loss incurred on sale below the written down value and, therefore, terminal allowance does not spring from user but from the factum of sale. It was, therefore, urged that even terminal loss of Rs. 634 claimed under Section 32(1)(iii) on the sale of the said car to Mr. Trehan which was allowed by the IAC was not hit by Section 40A(5). We

accept the assessee's contention and hold that the IAC was not right in treating Rs. 8,000 as a perquisite under Section 40A(5) on the sale of car to Mr. Trehan.

25. Ground No. 2 : The assessee-company had made a provision of Rs. 30,000 for legal expenses which was disallowed by the IAC vide para 10 of his order after noting that similar provision of Rs. 46,500 was made in last year but the same was not utilised and had been written back this year and the assessee had again claimed the aforesaid amount of Rs. 46,500 in this year. The IAC, accordingly, disallowed both the items of Rs. 30,000 and Rs. 46,500.

26. The Commissioner (Appeals) vide para 7 of his order noted that the provision of Rs. 46,500 had not been allowed in the assessment year 1976-77 and that the assessee had accepted the said disallowance. He further noted that the legal expenses in this year were Rs. 89,050 which he directed the IAC to verify Subject to his observations regarding disallowance (under Section 80VV) out of Rs. 13,500 paid to A.F. Fergusons & Co. for taxation services. We are unable to see any infirmity in the order of the Commissioner (Appeals) which we accordingly confirm.

27. Ground No. 6 of the assessee's appeal and ground No. 3 of revenue's appeal: The IAC had treated Rs. 13,500 paid to A.F. Fergusons & Co. as payments for taxation matters which was hit by Section 80VV of the Act under which Section only Rs. 5,000 was allowable on expenditure incurred in respect of any proceedings before any income-tax authority relating to determination of any liability under the Act by way of tax, penalty or interest. The IAC had accordingly allowed Rs. 5,000 and disallowed the balance of Rs. 8,500. The Commissioner (Appeals) vide para 14 of his order noted that out of the said expenditure, Rs. 5,000 was not relatable to proceedings before any income-tax authority and was, therefore, allowable. Before us, it is further contended that some more deduction should have been allowed in respect of proceedings under the Companies (Profits) Surtax Act, 1964. We accept this contention and hold that Rs. 1,500 was relatable to surtax liability. Taking into consideration the reduction allowed by the Commissioner (Appeals), only disallowance of Rs. 2,000, therefore, stands confirmed.

28. In the result, while the assessee's ground is partly allowed, revenue's ground is rejected.

29. Ground No. 3 : Rs. 4,180 was disallowed by the IAC on account of fines paid to customs authorities for clearance of certain goods. The Commissioner (Appeals) vide para 9 allowed deduction of Rs. 3,750 on account of delay in clearance of a particular shipment of goods.

Regarding the balance of Rs. 430, the assessee-company is unable to give any details before us. In these circumstances, this ground is rejected.

30. Ground No. 4 : This ground regarding the bonus of Rs. 13,366 paid in the succeeding assessment year is not pressed and is, therefore, rejected.

31. Ground No. 5 : This ground relates to Rs. 26,370 being the sundry credit balances written off by credit to profit and loss account of the assessee-company. Before the Commissioner (Appeals) the assessee claimed that the said amount should not be treated as part of its income because the assessee's liability to creditors still subsisted.

The Commissioner (Appeals) vide para 13 noted that the list of items furnished by the assessee (P.B. 31) showed that no details were available in respect of Rs. 13,464 which consisted of individual items of less than Rs. 500 each. Remaining amount consisted of five items in which the major items were of Rs. 9,000 of Sonia Films, Bombay and Rs. 1,487 of Indian Express (Madurai) Ltd. The Commissioner (Appeals) further observed that no evidence was produced to show that said credit balances were in fact a liability of the assessee-company just because there was a credit balance, it does not necessarily follow that the amount in question is liability of the assessee-company. The Commissioner (Appeals), therefore, held that in the absence of any evidence to show that the said credit balances were in fact the liability of the assessee-company he could not accept the assessee's reliance on the general proposition that mere transfer of credit balance to profit and loss account does not result in ceasing of the assessee's liability. The Commissioner (Appeals) observed that the fact that the assessee had itself treated the said credit balances as its income, by transferring to profit and loss account, proved that the

items in question were part of assessee's income.

32. At the hearing before us, the assessee-company has still not produced any evidence to show the origin of the said amounts and the reasons for writing off the said amounts in the year under consideration by transfer to profit and loss account. In the absence of any evidence, normal presumption would be that the amounts in question were received as part of trading receipts (of dealing in photographic goods, etc.) of the assessee- company and were the unclaimed balances out of the said trading receipts. Thus, decision in CIT v. Batliboi & Co. (P.) Ltd. [1984] 149 ITR 604 (Bom.), would apply in the assessee's case where it was held that the excess deposits received by the said dealer in machinery from the intending purchasers of machinery were not held by the said dealer for the benefit of the depositors and that the deposits were in respect of its specific transactions of sale and was adjusted towards purchase price of the machinery sold and had a close connection with the transactions of sale and since the assessee transferred the excess deposit remaining in its hand to profit and loss account, it was assessable to tax as a trading receipt in the hands of the assessee. The Bombay High Court had followed decisions in CIT v.Motor & General Finance Ltd. [1974] 94 ITR 582 (Delhi) and Pioneer Consolidated Co. of India Ltd. v. CIT [1976] 104 ITR 686 (All). In the Delhi High Court case, it was observed : ... Receipts of money or deposits for adjustment in the price of goods to be supplied or services to be rendered, may be mere advance payments and, therefore, revenue receipts and not borrowed money.

They are an integral part of a commercial transaction of sale or service and are related to the price of goods or to the charges for services rendered. They are trade receipts and money of the assessee and hence, his revenue or income....(p. 589) In the Allahabad High Court's case refunds of customs and other duties paid on behalf of the customers and surplus remaining (after paying transit insurance of the customers) was held to be the income of the assessee when it was not claimed by the customers and the assessee chose to treat those amounts as its income. Similar were the observations of the Allahabad High Court in Indian Motor Transport Co.

v. CIT [1978] 114 ITR 677.

33. The Punjab and Haryana High Court in CIT v. Earyana Co-operative Sugar Mills Ltd. [1985] 154 ITR 751 observed that when the assessee had transferred certain amounts to its profit and loss account as amounts forfeited and the question was of assessability of the said amounts under Section 41(1) of the Act, onus was on the assessee to show that the said amounts were not assessable.

34. In the case before us, the assessee has not led any evidence before the lower authorities or before us to show that the amount in question of Rs. 26,370 was not relating to its trading receipts or was not assessable. In these circumstances, we uphold the order of the Commissioner (Appeals) on this point.

36. Reimbursement of medical expenses : The IAC vide para 6 has included the said item for disallowance under Section 40A(5) but the Commissioner (Appeals) vide para 5, at page 2 following the Tribunal's order in the assessee's case for the assessment year 1975-76 held that reimbursement of medical expenses of Rs. 3,396 was not a perquisite.

The Tribunal, Special Bench, Bombay in Glaxo Laboratories (India) Ltd. [IT Appeal No. 2253 (Bom.) of 1983] for the assessment year 1976-77 vide order dated 30-5-1986, lias held that reimbursement of medical expenses was part of salary. Respectfully, following the said decision, we modify the Commissioner (Appeals)'s order on this point.

37. Club Fees : Club fees of Rs. 3,095 in the case of three employees were included by the IAC for considering applicability of Section 40A(5). The Commissioner (Appeals) following the aforesaid Tribunal's order in the assessee's case for the assessment year 1975-76, held that the said club fees were not perquisite. We uphold the Commissioner (Appeals)'s order on this point by following Tribunal's decision for the assessment year 1975-76 in the assessee's case.

38. Gratuity of Rs. 1.31 lakhs : Contribution for gratuity of Rs. 1.31 lakhs was made in the assessment year 1974-75 and though the said payment was

disallowed in the assessment, it was allowed in appeal. The IAC, accordingly, rejected the assessee's claim of deduction of this amount again in the assessment year under consideration (assessment year 1977-78). The Commissioner (Appeals) vide para 10, noted the assessee's contention that in the assessment year 1974-75, the Tribunal had reversed the Commissioner (Appeals)'s order and had upheld the disallowance. In these circumstances, the Commissioner (Appeals) directed the IAC to verify the correct position and decide the matter afresh. We see no reason to interfere with the said direction.

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