

Dena Bank Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Nov-19-1987

Reported in : (1988)25ITD109(Mum.)

Judge : I Nigam, L Aggarwal

Appellant : Dena Bank

Respondent : inspecting Assistant

Judgement :

1. These four appeals relating to the assessment years 1973-74, 1974-75, 1975-76 and 1978-79, filed by the assessee against the consolidated order of the Commissioner of Income-tax (Appeals) VII, Bombay, deal with the same issue and are, therefore, for the sake of convenience, disposed of by a common order.

2. The assessee is a nationalised bank, which is administered by the Chairman and Managing Director, Directors representing the Reserve Bank of India, Ministry of Finance, etc., all appointed by the Government of India. The method of accounting was mercantile and the previous year was the calendar year. In the account books of the calendar year 1971 relevant to the assessment year 1972-73, the assessee-bank had made a provision for bonus amounting to Rs. 30 lakhs according to the guidelines issued by the Reserve Bank of India. However, as a result of negotiations with the union of the bank workers, the actual bonus, which had to be paid for this year in the calendar year 1972, happened to exceed the provision by Rs. 3,45,505. This excess was debited in the account books of the

calendar year 1972 relevant to the assessment year 1973-74. In the return that was filed for the assessment year 1972-73 the assessee-bank in the course of the assessment proceedings claimed not only the provision for bonus amounting to Rs. 30 lakhs but also the excess of Rs. 3,45,505, which was the liability relating to that year but actually paid in the subsequent year. Here it will be necessary to point out that the claim of deduction of Rs. 3,45,505 was also made for the assessment year 1973-74 based on this amount being debited in the account books for the calendar year 1972 relevant to the assessment year 1973-74. The Inspecting Assistant Commissioner (Assessment) allowed the entire claim of bonus amounting to Rs. 33,34,505 (comprised of Rs. 30 lakhs provision and additional Rs. 3,34,505 actual payment relating to that year made in the subsequent year) while making the assessment for the assessment year 1972-73 on 27-2-1975. However, the claim of the additional amount of Rs. 3,34,505 paid in the calendar year 1972 which, as already, described, was claimed as a deduction in addition to provision of Rs. 30 lakhs for the assessment year. 1972-73 remained even in the subsequent assessment year 1973-74 and was allowed by the IAC (Asst.). on completion of the assessment for 1973-74 on 16-8-1976. Similar double claims of deduction were allowed for the assessment years 1974-75 and 1975-76, Which amounted to Rs. 12,05,342 and Rs. 25,06,000 respectively We were given to understand that this mistake was detected in the course of proceedings for the assessment year 1978-79 when the assessments for 1973-74, 1974-75 and 1975-76 had already been completed. The IAC (Asst.), therefore, disallowed the claim of double deduction for the assessment year 1978-79, which amounted to Rs. 13,11,536, reopened the assessments for 1973-74, 1974-75 and 1975-76 in the course of which the assessee-bank filed returns wherein the doubly deducted amounts were added back and offered for assessment. While making the supplementary assessments for the assessment years 1973-74, 1974-75 and 1975-76 and the Original assessment for 1978-79, the IAC (Asst.) initiated action for penalty under Section 271(1)(c) for concealment of income. The IAO (Asst.) was not satisfied with the explanation of the bank in response to the showcause notice. Penalties under Section 271(1)(c) were, therefore, imposed, which amounted to Rs. 6,91,010 for the assessment year 1973-74, Rs. 25,48,684 for the assessment year 1974-75, Rs. 50,12,000 for the assessment year 1975-76 and

Rs. 31,27,433 for the assessment year 1978-79. On appeal, the Commissioner of Income-tax (Appeals) while upholding the imposition of penalty reduced the penalty to the minimum prescribed with reference to the concealed income for the assessment years 1973-74, 1974-75 and 1975-76 and thus reduced the penalties to Rs. 3,45,505; Rs. 12,05,342 and Rs. 25,06,000 respectively for these three assessment years. For the assessment year 1978-79 the Commissioner of Income-tax (Appeals) held that the penalty should be equal to the tax on the concealed income of Rs. 13,11,536 only. The result was that penalty for the assessment year 1978-79 was reduced from Rs. 31,27,433 to Rs. 6,66,551. The assessee-bank was not satisfied with the order of the Commissioner of Income-tax (Appeals) and has, therefore, come up in farther appeal before us.

3. The learned counsel for the assessee-bank, Shri Palkhivala, submitted to us that the method of accounting adopted by the assessee-bank was mercantile and, therefore, one view was that the bonus in excess of the provision relating to a particular year was an admissible deduction in working out the business income for that year and not for any other year. On the other hand, there was another view that since the actual liability for bonus was determined only as a result of settlement with the union of the bank workers in the subsequent year, the excess over the provision can only be allowed in the year in which the actual liability was ascertained. It was in these circumstances, according to Shri Palkhivala, that the assessee-bank had to make a claim of actual liability for bonus in excess of the provision made in the account books both in the year to which it related and in the subsequent year in which the actual liability was ascertained. A chart was filed before us to show that on the dates on which the returns or the revised returns were filed for the assessment years 1973-74, 1974-75, 1975-76 and 1978-79, the assessments for the immediately preceding assessment years were pending and, therefore, the assessee-bank could not be sure in which year the excess of the actual liability for bonus over the provision for bonus will be held by the income-tax authorities to be an admissible deduction. Elaborating on his arguments, Shri Palkhivala submitted to us that if it was open to the income-tax authorities to make protective assessments or additions of the same amount in two assessment years where the income-tax authorities were not sure in which year the amount will ultimately be held, as a result of appeal, to be liable to tax and unless this was

done the assessment year in which it was ultimately found to be taxable may have become time barred, it was equally open to the assessee to make a claim in two assessment years where it was not sure in which year the claim will ultimately be allowed as a result of assessment or appeals and unless this was done the claim, in the assessment year in which it was ultimately found to be admissible, may become barred by limitation. Shri Palkhivala pointed out that unlike in the case of a bad debt where there was a specific provision that if a claim of bad debt was not allowed in the year of claim it may be allowed in the year in which, according to the Income-tax Officer, it had been established to have become a bad debt, there is no such provision for allowance of the claim of bonus if it was not allowed in the year of claim. In these circumstances, according to Shri Palkhivala, there was nothing wrong if the assessee-bank made the claim of the entire bonus, i.e., the provisions made in the account books as well as the excess liability determined in the subsequent year as a result of settlement with the workers in the year to which it related and of the excess over the provision in the year in which the liability crystallized as a result of settlement with the workers as a protective measure. Shri Palkhivala submitted to us that all the facts relating to the protective claim were before the IAC (Asst.) and there was no suppression of any facts.

In fact, according to Shri Palkhivala, the assessee-bank itself detected the double claim of deduction in the proceedings for the assessment" year 1978-79, once for the assessment year 1977-78 when the claim was allowed in full at the time of completion of the assessment and the claim was still standing when the assessment for the assessment year 1978-79 was still to be completed and, therefore, brought it to the notice of the income-tax authorities who made enquiries not only for that assessment year but also for the earlier assessment years 1973-74, 1974-75 and 1975-76. Shri Palkhivala brought to our notice that the assessee-bank was very forthright in admitting that there had been a double deduction for these assessment years and agreed to be assessed on the amount for which the deduction was doubly allowed.

4. Shri Palkhivala referred to the order of the Income-tax Appellate Tribunal in the case of ITO v. Hindustan Petroleum Corporation Ltd. [1986] 16 ITD 574 (Bom.), at page 593 where the Appellate Tribunal held that there could be no deliberate

intention on the part of a wholly-owned Government company to underestimate its income and advance tax payable based thereon in the first two instalments with any motive whatsoever. Proceeding further, Shri Palkhivala submitted that the assessee under consideration here was a nationalised bank wholly-owned by the Government and, therefore, there could be no intention on the part of the assessee-bank to conceal its income or furnish inaccurate particulars thereof with a view to avoid payment of proper tax payable to the Government with any motive whatsoever. He then referred to the ruling of the Hon'ble Supreme Court in the case of CIT v. Anwar Ali [1970] 76 ITR. 696 in support of the contention that before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that not only the disputed amount represented income but also that the assessee had consciously concealed the particulars of income or had deliberately furnished inaccurate particulars thereof.

According to Shri Palkhivala, this meant that the element of mens rea has to be established by the department before penalty for concealment, of income could be imposed. Our attention was drawn, to the ruling of the Hon'ble Supreme Court in the case of Anantharam Veera singhaiah & Co. v. CIT [1980] 123 ITR 457 wherein their Lordships of the Hon'ble Supreme Court following their earlier ruling in the case of Anwar Ali (supra) held that the burden, was on the revenue for proving the existence of material leading to the conclusion that the assessee had concealed the particulars of income or had: deliberately furnished inaccurate particulars thereof. Shri Palkhivala then referred to the ruling of the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. v. State of Orissa [1972] 83 ITR 26 where their Lordships laid down that penalty for failure to perform a statutory obligation should not be imposed merely because it was lawful to do so and whether penalty should be imposed was a matter of discretion to be exercised judicially and on a consideration of all the relevant circumstances and where the default was only technical or venial breach of the provisions of the Act, the authority competent to impose penalty will be justified in refusing to impose penalty even if a minimum penalty was prescribed.

Summing up, Shri Palkhivala vehemently argued before us that the penalties under Section 271(1)(c) for all the four assessment years under consideration in

the present appeals were not justified and should be cancelled.

5. On the other hand, the learned departmental representative, Shri Subramanian, submitted to us that the rulings cited by the learned counsel of the assessee-bank, Shri Palkhivala, related to Section 271(1)(c) as it stood prior to its amendment by the Finance Act, 1964 with effect from 1-4-1964, Section 271(1)(c) was amended with effect from 1-4-1964 and the word 'deliberately' was omitted and, therefore, the arguments of Shri Palkhivala will not be applicable to the assessment years 1973-74, 1974-75, 1975-76 and 1978-79 under appeal before us. The authority of the Hon'ble High Court of Punjab and Haryana in the case of CIT v. Ravail Singh & Co. [1986] 157 ITR 747 was cited before us in support of the contention that the ruling of the Hon'ble Supreme Court in the case of Anwar AH (supra) does not apply and the element of mens rea is not important after the amendment of Section 271(1)(c) in 1964. Reference was also made by him to the ruling of the Hon'ble High Court of Kerala in cases of CIT v. India Sea Foods [1976] 105 ITR 708 and CIT v. Gujarat Travancore Agency [1976] 103 ITR 149 (FB) and the Hon'ble High Court of Orissa in the case of CIT v. Puranmal Prabhudayal [1977] 106 ITR 675 in support of the contention that a fraudulent claim of deduction also amounts to concealment of income or furnishing inaccurate particulars thereof, where there are two defaults, one of which was punishable by imposition of penalty and another, which was punishable with imprisonment for a term and fine, the element of mens rea in the sense in which it was required for an offence under the criminal law applies only for the default, which is punishable with imprisonment and fine and not to a default, which is punishable with a mere penalty and it is wrong to place the burden of proof on the revenue before penalty can be imposed for concealment of Income or furnishing of inaccurate particulars thereof. Viewed in this context, according to Shri Subramanian, it was not under dispute that the assessee-bank had made a double claim of deduction of the amounts, which formed the basis of the charge of concealment of income or furnishing inaccurate particulars thereof and the amounts in respect of which the penalty had been imposed as reduced in appeal by the Commissioner of Income-tax (Appeals) had been admitted by the assessee-bank to have been wrongly claimed as a deduction. In these circumstances, according to Shri Subramanian, the penalties under consideration here as reduced in appeal by the Commissioner of Income-

tax (Appeals) were perfectly justified and should be upheld.⁶ We have carefully considered the rival submissions. We agree with the learned departmental representative, Shri Subramanian, that after the amendment of Section 271(1)(c) of the Income-tax Act, 1961 by the Finance Act, 1964 the element of mens rea is not important and in any case the onus is not on the revenue to establish mens rea before penalty for concealment of income or furnishing of inaccurate particulars thereof can be imposed. We further agree that a fraudulent claim of deduction in working out the income as such amounts to concealment of income or furnishing inaccurate particulars thereof as suppression of any item of income. It is, however, necessary to bear in mind that we are dealing with the case of a nationalised bank, which is fully owned by the Government of India and administered by its nominees. It would not be an unreasonable presumption that it could not be the intention of an organisation owned and run by the Government of India to conceal its income or furnish inaccurate particulars thereof with a view to evade payment of proper taxes due to the Government of India. We have the authority of the Hon'ble Supreme Court in the case of Brij Mohan v. CIT [1979] 120 ITR 1 that the concealment of income or furnishing of inaccurate particulars thereof takes place when the return of income is filed. We have, therefore, to consider the facts and circumstances at the time the return of income was filed for deciding whether the assessee-bank can be charged with the default of concealment of income or furnishing of inaccurate particulars thereof.

Viewed in this context, it is found in the present case that the assessee-bank was following the mercantile system of accounting and the liability for bonus relating to a particular year for which a provision was made in the account books of that year crystallized in the next year when as a result of negotiations with the union of bank workers the exact amount to be paid as bonus was settled. In these circumstances, if the assessee-bank was in doubt whether the excess amount, i.e., over and above the provision for bonus, which the bank had to pay in the year in which the actual amount was settled after negotiations with the union of the bank workers, will be an admissible deduction in working out the business income of the year to which it related or the year in which the liability crystallized on finalisation of negotiations with the union of bank workers, the doubt of the assessee-bank cannot be said to be frivolous particularly when this issue was a

highly arguable contention, which required serious consideration. It is necessary here to point out that it is not disputed that on the dates on which the claim for deduction as a protective measure was made for the years under appeal the assessments for the immediately preceding years had not been completed and, therefore, the assessee-bank could not be sure of the year in which the claim of deduction will ultimately be held to be admissible. In these circumstances, if the assessee-bank made a claim of deduction of the excess in the year to which it related based on the mercantile system of accounting and as a protective measure in the years in which the liability crystallized, i.e., the assessment years under consideration in the present appeals, we fail to see how the assessee-bank can be said to have made a fraudulent claim of deduction. The Hon'ble Supreme Court in the case of Cement Marketing Co. of India Ltd. v. ACST [1980] 124 ITR 15 has laid down that where a claim was made based on a highly arguable contention, which required serious consideration, it cannot be said that the claim was frivolous and on account of such a claim it would not be right to condemn the return as a false return inviting imposition of penalty. It is true that the assessee-bank ought to have withdrawn the claim of deduction made as a protective measure for the assessment years under consideration before us when the assessments for the immediately preceding assessment years in which the claim was allowed were finalised. This, however, will not affect the default, which had already taken place earlier and which has to be judged, as already described, on the facts and circumstances prevailing on the dates on which the returns were filed. The Hon'ble Supreme Court in the case of Hindustan Steel Ltd, (supra) has laid down that penalty for failure, to perform a statutory obligation should not be imposed merely because it is lawful to do so and whether penalty should be imposed was a matter of discretion to be exercised judicially and on a consideration of all the facts and circumstances. Their Lordships further laid down that if the default was merely a technical or venial breach of the provisions of the Act, the authority imposing penalty will be justified in refusing to impose a penalty. Considering all this and looking to the totality of the facts and circumstances, we have no hesitation in coming to the conclusion that the penalties under Section 271(1)(c) under consideration here were not justified. These penalties are, therefore, hereby cancelled.

