

Drill Well Associates Co-op. Vs. Income-tax Officer

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Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : May-07-1999

Reported in : (2000)73ITD240(Ahd.)

Judge : G Chowdhury, T Joice

Appellant : Drill Well Associates Co-op.

Respondent : income-tax Officer

Judgement :

1. This appeal by the assessee has been preferred against the order of the CIT(A), dated 11-2-1992 for assessment year 1987-88.

2. The assessee is a Registered Society, registered under the provisions of the Gujarat Co-op. Societies Act and came into existence in view of the Office Memorandum dated 29-4-1985 of Oil & Natural Gas Commission (O.N.G.C.), Delhi. The Society was formed by the eleven members who were employees of the O.N.G.C. and who were having a lien on their jobs with ONGC for a period of three years. While filing the return of income, the Society claimed a deduction of Rs. 6.44 lakhs under section 80P(2)(a)(vi) of the Income-tax Act, 1961. The Assessing Officer negated the claim of the assessee on the following grounds :-
(i) Though the society has engaged 40 to 60 labourers, but none of them has been made a member of the society though the actual labour work is done by these labourers. 40 to 60 daily wages labourers have been employed by the said society to whom the labour expenses amounting to Rs. 8,85,000 have been paid towards

pay by the said society. The work done by the Co-op. Society, i.e. Borewell Drilling is impossible without the physical manual labour of the labourers, who are neither made members of the appellant-society nor have been given any voting rights.

(ii) Since none of the daily wages labourers who have done the actual physical labour has been made a member the said-society assessment year 1987-88, the following conditions of section 80P(2)(a)(vi) and its proviso are not satisfied : "Provided that in the case of a Co-op. Society falling under sub-clause (vi), the rules and bye-laws of the society restrict the voting rights to the following classes of its members, namely - (1) the individuals who contribute their labour." (iii) Relying on the CBDT Circular No. 72, dated 6-1-1972 explaining the provisions of section 80P, the Assessing Officer observed that the exemption contemplated by section 80P(2)(a)(vi) was with a view to promote self-help among persons of small means. The Assessing Officer was of the view that the Co-operative Society having been formed by Senior Class-I employees of ONGC who had drawn total salary and benefits amounting to Rs. 8.07 lakhs from the Co-op.

Society during the assessment year 1987-88 and the scale of operation of the assessee Society and the total contract receipts of Rs. 50.15 lakhs cannot be termed as 'of small means' by any stretch of imagination. The Assessing Officer therefore held that the following conditions laid down in Circular No. 72 as well as section 80P(2)(a)(vi) were not satisfied :- (b) The persons who have actually contributed labour, i.e.

labourers, have neither been made members of the co-op. society nor have any voting rights in violations of proviso to section 80P(2)(a)(vi). The proviso to section 80P(2)(a)(vi) must be read so as to advance the object of the provisions and not to defeat its object which is to encourage labour-oriented co-operatives of people of small means. Since the present society is one of the professionals and technocrats who have developed technical expertise in drilling technology with ONGC they cannot be termed as 'persons of small means' and those who constitute the labour force contemplated in Circular No. 72.

3. Aggrieved by the above observations of the Assessing Officer and the consequent disallowance of the claim of deduction under section 80P(2)(a)(vi), the

assessee approached the CIT(A) who in the impugned order considered the arguments of the assessee's representative vide para 2.1 of his order. However, the CIT(A) upheld the order of the Assessing Officer in this regard by relying on the decision of the Tribunal Ahmedabad Bench 'A' in the case of Orient Borewell Co-op.

Society Ltd. v. ITO [IT Appeal No. 1232 (Ahd.) of 1991 dated 23-8-1991] for the assessment year 1987-88. The CIT(A) found that the arguments advanced in that case before the Tribunal were similar. The Tribunal in that case after considering the rival submissions at length held that the disallowance made by the Assessing Officer under section 80P(2)(a)(vi) was done correctly. The facts of the present case being similar, the CIT(A) followed the above said decision of the Tribunal while upholding the order of the Assessing Officer.

4. In the present appeal before us, the Id. counsel for the assessee reiterated the submissions made before the lower authorities. The Id.counsel pointed out that the appellant society was formed in response to the Scheme issued by ONGC with specific aims and objects and in consonance with the guidelines of Bureau of Public Enterprises, Ministry of Finance, Government of India, which envisages that there should be an ancillary unit in each public enterprise as a rule. It was contended that this society is registered as a Labour Contract Society under the Co-op. Societies Act, 1961 for the collective disposal of the labour of its members in response to a Scheme issued by ONGC with specific aims and objectives and in consonance with the guidelines of Bureau of Public Enterprises, Ministry of Finance, Government of India.

The profits of the appellant-society are divided amongst its members as per bye laws No. 47 and 48 of the Society which stipulate that net profit will be divided as under :- (ii) Payment of dividend at a rate not exceeding 12% of the paid up share capital.

(iii) Contribution towards education fund of the Gujarat State Co-op. Union as prescribed under Gujarat Co-op. Societies Act and Rules.

(c) 80% among the members in proportion to the labour put in by each member.

5. It was further contended that section 65 of the Co-op. Societies Act of Gujarat State stipulates that assets and reserve funds with the Co-op. Society cannot be divided amongst the members of the Co-op.

Society and only the dividend equalization fund can be distributed amongst members.

6. Hence, members are entitled for only fruits and not the stems and roots of the society. It was further contended that section 115 of the Gujarat Co-op. Societies Act provides that in case of winding up of the society, whole assets and surplus funds shown in the final report of the liquidator will be taken up either by the Registrar and will be utilised for the particular purpose specified in the bye-laws. Since no such particular provision has been made in the bye-laws of the appellant-society, all the assets and funds will be taken away by the Registrar and the member of the appellant-society will not be entitled to any part of the assets and funds. The conclusion arrived at by the Assessing Officer that the interpretation as is sought to be canvassed if accepted, no contractor or professional will pay any tax and will form similar co-operative society and claim total exemption which was never the intention behind such exemption is totally incorrect. The Assessing Officer has erred in concluding that none of the casual labourers engaged by the society on daily wages has been made a member of the society when the scheme of the ONGC, the bye-laws of the Society (framed to conform to ONGC's scheme and the Co-op. Act) and the contract signed with ONGC restrict the right of membership to the employees of a particular discipline of ONGC, i.e. the employees of the Shot Hole Drilling discipline who are technically qualified to carry out Shot Hole Drilling and allied jobs. This is not disputed by the Assessing Officer also, then how could anybody else other than those eligible to become members as per the Scheme of ONGC and the Bye-laws of the Society can be enrolled as members who are not technically qualified to carry out Shot Hole Drilling and allied jobs as per Bye-law No. 6(b). Secondly, it is not practicable as the Society undertakes Shot Hole Drilling in different parts/areas of the state moving from one village to another and employs the local people as casual labourers depending upon the requirement of work. It was further contended that if the labourers are enrolled as members, the society will be economically unviable. The Id. Assessing

Officer has erred in holding that the Society has not been formed by the people with small means as the Co-operative is meant for promotion and amelioration of economic condition of those whose resources are limited or insufficient to undertake any activity of their own.

7. On the basis of these arguments, the Id. counsel stated that the Assessing Officer erred in negating the claim of the total exemption of the appellant-society under section 80P(2)(a)(vi) of the Income-tax Act.

8. Coming to the decision of the Tribunal relied by the CIT(A) while upholding the order of the Assessing Officer, the Id. counsel submitted that even though the said order of the Tribunal in the case of Orient Borewell Co-op. Society Ltd. (supra) was approved by the Hon'ble Gujarat High Court in Reference Application, the facts of the present case can be distinguished in the light of the High Court decision and the assessee is justified in pressing the claim for deduction under section 80P(2)(a)(vi). In the circumstances, the Id. counsel pressed that the matter may be set aside for reconsideration by the Assessing Officer for fresh examination.

9. On the other hand, the Id. D.R. submitted that the decision of the Hon'ble Gujarat High Court in the case of Orient Borewell Co-op.

Society Ltd. v. CIT [IT Reference No. 200 of 1992, dated 26-10-1994] is squarely applicable to the present case also as the facts are almost identical in both the cases. The Id. D.R. has given a written submission drawing the parallel factors between the Orient Borewell Co-op. Society Ltd. on the one hand and the present assessee namely - Drill Well Associate Co.op Soc. Ltd. on the other hand. The submissions of the Id. D.R. are as under :-1. The Society is formed by the 1. The Society is formed by themembers who are employees of members who are employees ofthe ONGC. All the 13 members of the ONGC. All the 11 members ofthe Society are Sr. Class-I the Society are Sr. Class-IOfficers of the ONGC and who have officers of the ONGC and who havetheir lien with the ONGC for a their lien with the ONGC for aperiod of three years.

period of three years.tract with the ONGC to carry out tract with the ONGC to carry out seismic shot hole drilling in the seismic shot hole drilling in the area allotted to the society by area allotted to the society by the3. Only employee of the ONGC and 3. Only employee of the ONGC and no one else could become the no one else could become the members of the society.

members of the Society.4. The society had employed 40 to 4. The society had employed 40 to 60 labourers per daily wage 60 labourers per daily wage basis for which a sum of Rs. 6.37 basis for which a sum of Rs. 8.85 lakhs was paid during the lakhs was paid during the previous year.

previous year.5. The members of the society 5. The members of the society receive a sum of Rs. 8.71 lakhs as received a sum of Rs. 8.07 lakh salary which were claimed as de- as salary which were claimed as deduction in calculating net tax- deduction in calculating net tax-able income before claiming able income before claiming deduction under section 80P. deduction under section 80P.6. The daily wage labourers were 6. The daily wage labourers were not made members of the co-op.

not made members of the co-op.society.

society.7. The members of the society are 7. The members of the society are professional technocrats who professional technocrats who have developed technical exper- have developed technical exper-tise in drilling technology with tise in drilling technology with ONGC. ONGC.rigs which are very heavy and cum- Rs. 17 lakhs which are very heavy and cumbersome mechanical apparatus and cumbersome mechanical requiring at least 6 to 7 persons apparatus requiring at least 6 to operate the same. Hence the 7 persons to operate the same.assessee cannot take shelter in Hence the assessee cannot take the argument that the technical shelter in the argument that the members of the co-op. society technical members of the co-op.themselves operated the drilling society themselves operated the rigs without the aid of daily wage drilling rigs without the aid of labourers.

daily wage labourers.9. Managing and supervising the 9. Managing and supervising the highly technical activity of carr- highly technical activity of carry-ing

out the skilled and precision ing out the skilled and precision job of shot-hole drilling according job of shot-hole drilling according arranging the required funds and arranging the required funds and plant and machinery for carry- plant and machinery for carry-ing out such precision and ing out such precision and technical job work.

technical job work. an income derived by ancillary an income derived by ancillary unit like any well managed unit like any well managed industrial undertaking by carry- industrial undertaking by carry-ing a job work of a highly preci- ing a job work of a highly precision and technical nature with sion and technical nature with the aid of sophisticated plant and the aid of sophisticated plant and machinery (drilling rigs) and with machinery (drilling rigs) and with the aid of regular 40 to 60 daily the aid of regular employment of wage earning labourers, who are 40 to 60 daily wage earning not the members of the society.

labourers, who are not the members of the society. income derived by an ancillary an income derived by an ancillary unit like any well managed industrial undertaking by carrying industrial undertaking by carry-out the job work of highly preci- ing out the job work of high precision and technical nature with precision and technical nature the aid of regular employment of with the aid of regular 40 to 60 daily wage earning employment of 40 to 60 daily labourers. Gujarat High Court wage earning labourers. has held that Tribunal was right 10. Gujarat High Court has held in the case of Orient Borewell Co-op.

Society Ltd. (supra) that Tribunal was right by taking into consideration the totality of circumstances considered by it that the society was an ancillary unit of the ONGC like any other well managed industrial undertaking for carrying out the job work for ONGC and therefore, the income of the society was not covered by section 80P.11. In view of the identical facts of both the society and decision given by the ITAT and which was confirmed by the Guj. High Court I request your honour to confirm the stand taken by the Assessing Officer and which was confirmed by the CIT (Appeal) in this case.

12. Guiding factor is utilisation of labour - The exemption under section 80P(2)(a)(vi) is available only when the earning of the society is through the

utilisation of the actual labour of its members. Thus, a society of engineers engaged in collective disposal of labour of members where actual supervision of work in field was done by paid employees, would not be entitled to exemption since there was no direct connection between the work executed and the speciality of members of the society as engineers - Nilagiri Engg. Co-op. Society Ltd. v. CIT [1994] 208 ITR 326 (Ori.).

14. In his rejoinder the Id. counsel for the assessee pointed out that the decision in the case of Orient Borewell Co-op. Society Ltd. (supra) cannot be applied in the case of the present assessee M/s. Drill Well Associate Co-op. Society Ltd. which is the first of its kind in the whole of India. The Id. counsel further pointed out that the assessee's request for permission not to deduct tax at source in respect of payment in pursuance of contract agreement, was favourably disposed of by the Assessing Officer after entertaining the claim for deduction under section 80P. He also pointed out that in the assessment order the Assessing Officer nevertheless has levied interest under section 139(8) and under section 217 and also directed to issue show cause notice for penalty under section 273(2)(b), charging of interest under section 201(1A) and also for initiation of penalty proceedings under section 271C of the Income-tax Act 1961 for failure to deduct and pay tax on interest to ONGC. In this connection the Id. counsel relied on the decision of the Gujarat High Court in the case of CIT v. Bharat Machinery & Hardware Mart [1982] 136 ITR 875/[1981] 7 Taxman 309 in support of the plea that the addition made by the Assessing Officer during the assessment proceedings could not be foreseen by the assessee and, therefore, the assessee should not be burdened with levy of interest penalty and for short payment of taxes.

15. We have considered the rival submissions and the evidence on record. We find that the Id. CIT(A) upheld the order of the Assessing Officer by relying on the decision of the Tribunal, Ahmedabad Bench 'A' in the case of Orient Borewell Co-op. Society Ltd. (supra) for assessment year 1987-88. We also find that the said order of the Tribunal was subject matter of a reference to the Hon'ble Gujarat High Court in which the following question was referred :- "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income earned by the assessee-cooperative society is not earned from the "collective

disposal of the labour of its members" as provided in section 80P(2)(vi) and, therefore not deductible as provided in section 80P(z) of the Income-tax Act ?" 16. The relevant portion of the Hon'ble Gujarat High Court's judgment in so far as it is necessary for deciding the issue in the present case is reproduced below :- "8. It is equally true that the word 'labour' in the aforesaid provision cannot by any stretch of imagination be restricted to unskilled or menial labour to the exclusion of skilled or highly skilled, labour or jobs requiring special skills. The ordinary dictionary meaning of 'labour' as given in the 'Concise Oxford dictionary' is, physical or mental work; exertion; toil; or such work considered supplying the needs of community. Applying this simple definition, it cannot be said that merely because the member are possessed of highly specialised and technical expertise, their work cease to be labour within the meaning of the aforesaid provision. We are supported, in our aforesaid interpretation of the provision by a decision of Orissa High Court in the case of Nilagiri Engg. Co-op. Society Ltd. v. CIT [1994] 208 ITR 326, wherein a Division Bench opined that : "The eligibility to earn exemption is where the whole amount of profits and gains of a business is attributable to the collective disposal of the labour of its members. The words are very clear and only mean that the earning of the society must have been through utilisation of the actual labour of its members. We agree with learned counsel for the petitioner that the labour need not always be manual. But then, be it manual or otherwise, the guiding factor must be that the earning of the society must be through utilisation of the particular kind of labour in which the members are specialised." Keeping in view the aforesaid principles if we look to the facts of the present case, the Tribunal has found as a fact that the income derived by the society is an income derived by ancillary unit like any well managed industrial undertaking by carrying out the job work of a highly precision and technical nature with the aid of sophisticated plant and machinery and with the aid of regular employment of 40 to 60 daily wage earning labours.

While we are of the opinion that the Tribunal was not right in its reasoning that providing of services of 40 to 60 daily wage labourers for supporting the exercise made by the members of the society, the society forfeited its claim to deduction for want of offering membership to those labourers and giving them voting power, we also do not agree with the proposition that skilled labour are excluded from the

purview of operation of the aforesaid provision.

But in our opinion, the Tribunal was right by taking into consideration the totality of circumstances considered by it that the income derived by the society was as an ancillary unit of the ONGC like any other well managed industrial undertaking for carrying out the job work for ONGC. If that finding is correct and we think it is so, it cannot be said that the income arising out of the aforesaid activity which is in dispute is attributable to activity of collective disposal of labour by the society. It is attributable to its business of carrying out job work of drilling as an ordinary enterprise as distinct from the activity of collective disposal of labour.

In view of the aforesaid, we answer the question referred to us in affirmative, in favour of the revenue and against the assessee with no order as to costs." 17. We have already narrated the facts of the case as appearing from the records of the case and as pointed out by the rival parties. We have also narrated the arguments advanced on behalf of the assessee in support of the plea for deduction under section 80P. Moreover, in para 6 we have reproduced the submissions of the Id. D.R. drawing complete parallel facts between the case of Orient Borewell Co-op. Society Ltd. (supra) and the present case of Drill Well Co-op. Society. Taking into account all the relevant facts and circumstances of the case, we are of the considered view that the ratio decidendi of the decision of the Hon'ble Gujarat High Court in the case of Orient Borewell Co-op.

Society Ltd. (supra) applies with equal force to the facts of the present case. In the circumstances we do not find any merit in the contention of the Id. counsel to the effect that matter may be restored to the file of the Assessing Officer for fresh consideration. The disallowance under section 80P(2)(a)(vi) has been rightly made by the Assessing Officer. The CIT(A) was fully justified in relying on the decision of the Tribunal in the case of Orient Borewell Co-op. Society Ltd. (supra). Since the said decision has been approved by the Hon'ble Jurisdictional High Court and since the facts of the case are identical, we hold that no interference is called for with the impugned order of the CIT(A).

18. As regards the arguments advanced by the Id. counsel for the assessee that the assessee was permitted not to deduct tax at source by the Assessing Officer,

we have to point out that the exemption certificate under section 194C does not by itself conclusively prove that the assessee is entitled for deduction under section 80P. The conclusive finding as to the allowability of the assessee's claim under section 80P(2)(a)(vi) is to be found only in the assessment order under section 143(3) where the detailed reasons are given for the disallowance. On the other hand, while disposing of the application for exemption certificate under section 194C of the Income-tax Act the Assessing Officer issued the certificate peremptorily without examining in depth the merits of the claim which is to be looked into because such an exercise is done only during the assessment proceedings under section 143(3). Nevertheless, there is merit in the assessee's contention that it should not be burdened with the levy of interest under section 217, 201(1A) and penalty proceedings under section 273(2)(a) and under section 271C because non-deduction of tax at source was actually authorised by the Assessing Officer as per the certificate issued. The observation of the Hon'ble Gujarat High Court in the case of Bharat Machinery & Hardware Mart (supra) are quite apposite in this context. In view of this the question of recomputing the interest liability is remitted to the file of Assessing Officer for fresh consideration in accordance with law. However, since penalty proceedings are distinct and separate from the assessment proceedings, it is open to the assessee to raise its objections in this regard to the proposed levy of penalty.

19. There is one more effective ground of appeal arising out of the order of the CIT(A). The Assessing Officer had disallowed a provision for expenses by the Society at Rs. 12.5 lakhs on the ground that it was only in the nature of provision for expenses and the assessee had not incurred any liability to make a payment for the said amount during the relevant accounting period. The CIT(A) upheld the disallowance on the ground that the liability had not crystallised during the relevant accounting year and that it was not quantified precisely on the basis of actual expenditure. The CIT(A) relied on the decisions in Mysore Spg. & Mfg. Co Ltd. v. CIT [1966] 61 ITR 572 (Bom.) which was affirmed by the Supreme Court in CIT v. Mysore Spg. & Mfg. Co. Ltd. [1970] 78 ITR 4 and also on the decisions in CIT v. Gemini Cashew Sales Corpn.

[1967] 65 ITR 643 and in CIT v. Hazaribagh Coal Syndicate (P.) Ltd. [1989] 177 ITR 135/1990] 49 Taxman 259 (Cal.).

20. Since no convincing explanation to rebut the conclusion drawn by the CIT(A) has been placed before us, we uphold the order of the CIT(A) in this regard.

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