

U.P.Chalchitra Nigam Ltd. vs Commissioner Of Income Tax Lko. on 31 March, 2014

Bench: Narayan Shukla, Vishnu Chandra Gupta

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Court No. - 03

AFR

Judgement reserved on 11.03.2014

Judgement delivered on 31.03.2014

HIGH COURT OF JUDICATURE AT ALLAHABAD,

LUCKNOW BENCH, LUCKNOW

INCOME TAX APPEAL NO.1 OF 2008

(Assessment Year 2003-04)

U.P. Chalchitra Nigam Ltd.

1/77, Vivek Khand, Gomti Nagar

Lucknow

---- Appellant

Versus

Commissioner of Income Tax,

Ayakar Bhawan, Ashok Marg,

Lucknow

Counsel for Appellant :- Sri Shalabh Singh

Counsel for Respondent :- Sri Manish Misra

Hon'ble Shri Narayan Shukla, J.

Hon'ble Vishnu Chandra Gupta,J.

(Delivered by Hon'ble Vishnu Chandra Gupta ,J) JUDGEMENT

1. This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') has been preferred against the order dated 24.08.2007 passed by Income Tax Appellant Tribunal (in short 'the ITAT') in Income Tax Appeal No.55/LUC/2007 for the assessment year 2003-04, whereby the interest accrued during the said assessment year was treated as income of U.P. Chalchitra Nigam Limited (in short 'the Corporation') and observed that taxability on the aforesaid income of interest cannot be postponed on the ground of alleged impossibility of recovery. The relevant paragraphs i.e. 6 and 7 of the order impugned are as follows:

"6. We have considered the rival submissions and have perused the record of the case. A perusal of the statements regarding accounting of interest in the case of Sikandarabad unit and Dariabad unit would reveal that assessee had accounted for interest and only in such years where it had received the amounts against the interest accrued to it but did not treat the interest income in those years where there was no recovery. This treatment was opposite to the system of accounting viz mercantile system of accounting regularly followed by the assessee. In mercantile system of accounting, the income accrues as soon as it has become due and it cannot be postponed to subsequent years based on the recovery against this amount. Specific statutory provisions are there in the statute to meet such contingencies. The real income theory has no role to play once the income had accrued to the assessee. In this regard, we may refer to the decision in the case of ITAT Delhi Bench in the case of Poysha Oxygen (P) Ltd vs Dy. CIT, 91 ITD 616, wherein after examining various case laws, the Tribunal has observed as under:

"From the combined reading of the case law, the following legal position emerges:

(1) If the income does not result at all to the assessee then it cannot be taxed even though (i) such income might have hypothetically accrued; or (ii) entries are made in the books of account of such hypothetical income; (2) If the income, on mutual

understanding is given up or surrendered by the assessee before its accrual then the income surrendered cannot be taxed on the principle of real income theory. However, if such surrender is made after the accrual of such income then such income would be taxable though the assessee may be entitled to claim bad debt on the basis of evidence; (3) If the income has accrued or arisen from the transactions, then its taxability cannot be postponed on the ground of improbability of recovery; (4) The issue, whether income has resulted or not to the assessee, should be decided after considering all the facts and circumstances of the case including the subsequent events; (5) Considering the genuine hardship of the assessee, if the Board exercise its option under section 119 and issues a circular to mitigate the hardship then the above legal position shall not be applied and the assessee would be entitled to relief in terms of the circular instructions of the Board (Para 19)"

7. Thus, from the above, it is clear that if the income had accrued or arisen from the transaction, then its taxability cannot be postponed on the ground of impossibility of recovery. We, therefore, do not find any infirmity in the orders of the lower Revenue authorities. The grounds are dismissed."

2. The present appeal was admitted by this Court vide order dated 18.01.2008 on the following substantial questions of law:

"1. Whether on the facts and in the circumstances of the case the learned ITAT erred in law by treating hypothetical interest income of Rs.627969/- as taxable income?

2. Whether on the facts and in the circumstances of the case there was a no such real income, in spite of the fact that mercantile system of accounting was adopted and the amount of Rs.627969/- was shown as Interest Suspense A/c, in the Books of A/c of the Appellate Corporation?

3. Whether on the facts and in the circumstances of the case the learned ITAT grossly erred in law by assuming that income had accrued, when there was no real accrual of income and where the accrual of income had to be decided on the basis of interpretation given to the term accrual through the settled law as pronouncements made by the Hon'ble Supreme Court and binding decisions of the various High Courts?"

3. The facts necessary for deciding this appeal in short are that the Corporation was constituted for promoting cinematic activities in State of Uttar Pradesh. This Corporation was owned by the State Government to implement a scheme as per policy decision of the State of U.P. vide Government Order dated 24.03.1993. The State Government by the said Government Order envisaged selling-off certain properties, which was non-viable Cinema-Houses and constructed by the Corporation in suburban/ mofussil towns. The scheme under which these cinema houses sought to be sold were under deferred payment plan, for which the tenders were invited. The prospective purchasers purchased the property after executing an agreement on deferred payment plan which includes the payment of instalments of part consideration along with interest at the rate given under the

agreement/sale deed. In the relevant accounting year, the income of interest was of three units, known as Sikandarabad, Bharwari and Dariyabad Unit. In all these three units, the first instalment of principal amount to the extent of 25% was received in assessment year 2002-03. The accumulated interest was not actually paid but was shown to be accrued during the assessment year in question which was credited in interest suspense account for the reason that the same was not realised in relevant assessment year.

4. It is not in dispute that the assessee is maintaining the account books regularly after adopting the mercantile system of accounting. The Revenue authorities were of the view that in mercantile system of accounting, the income accrues as soon as it has become due and it cannot be postponed to subsequent year based on recovery against the amount. The real income theory has no role to play if once the income has accrued to assessee. Relying upon the judgement in Poysha Oxygen (P) Ltd vs Dy. CIT, 91 ITD 616, the authorities found that the interest income accrued is not hypothetical income and the same is arisen from transaction, therefore, the taxability over it cannot be postponed on the ground of improbability of recovery.

5. We have heard Sri Shalabh Singh, learned counsel for the appellant and Sri Manish Misra, learned counsel for the Revenue.

6. Learned counsel for the appellant submits that irrespective of adopting any system of accounting income which could not be realised shall not be subject to liability of tax. In support of his contention, learned counsel for the appellant relied upon several judgements of the Apex Court as well as jurisdictional High Court of Allahabad and other courts, the reference of which are as under:

"1. Godhra Electricity Co. Ltd vs Commissioner of Income Tax; (1997) 225 ITR 746 (SC)

2. Tuticorin Alkali Chemicals and Fertilizers Ltd. Vs. Commissioner of Income Tax; (1997) 227 ITR 172 (SC)

3. Commissioner of Income Tax, Bombay City Vs. Messrs. Shoorji Vallabhdas and Co.; (1962) 46 ITR 144 (SC)

4. UCO Bank Vs. Commissioner of Income Tax; (1999) 237 ITR 889 (SC).

5. Mercantile Bank Ltd. Vs. Commissioner of Income Tax; (2006) 283 ITR 84 (SC)

6. State Bank of Travancore Vs. Commissioner of Income Tax, Kerala; (1986) 158 ITR 102 (SC)

7. National Handloom Development Corporation Ltd. Vs. Deputy Commissioner of Income Tax; (2004) 266 ITR 647 (Allahabad)

8. Commissioner of Income Tax Vs. Abbas Wazir (P) Ltd.; (2005) 274 ITR 448 (Allahabad)
9. Beni Prasad Sidh Gopal Vs. Commissioner of Income Tax, Kanpur; (1984) 148 ITR 760 (Allahabad)
10. Commissioner of Income Tax Vs. Giriraj Udyog (P) Ltd; (2005) 273 ITR 495 (Allahabad)
11. Commissioner of Income Tax Vs. Govind Agencies (P) Ltd.; 2007 (10) MTC 805 (Allahabad)
12. Commissioner of Income Tax Vs. Sikaria Sons and Co.; (1995) 216 ITR 440 (Gauhati)
13. H.M. Kashiparekh & Co. Ltd. Vs. Commissioner of Income Tax, Bombay North, Kutch and Saurashtra; (1960) 39 ITR 706 (Bombay)
14. Kedarnath Jute Mfg. Co. Ltd. Vs. Commissioner of Income Tax (Central), Calcutta; (1971) 82 ITR 363 (SC)
15. Commissioner of Income Tax, West Bengal I Vs. India Discount Co. Ltd.; (1970) 75 ITR 191 (SC)
16. B.S.C. Footwear Ltd. Vs. Ridgway (Inspector of Taxes); (1970) 77 ITR 857 (Court of Appeal)
17. Commissioner of Income Tax Vs. Eicher Ltd.; (2010) 320 ITR 410 (Delhi)
18. Poysha Oxygen (P) Ltd. Vs. Deputy Commissioner of Income Tax; (2004) 91 ITD 616 (Delhi)
19. FGP Ltd Vs. Commissioner of Income Tax; (2010) 326 ITR 444 (Bombay)
20. Commissioner of Income Tax Vs. Shiv Prakash Janak Raj and Co. Pvt. Ltd.; (1996) 222 ITR 583 (SC)
21. Commissioner of Income Tax Vs. Tamilnadu Mercantile Bank Ltd.; (2007) 291 ITR 137 (Madras)
22. Morvi Industries Ltd. Vs. Commissioner of Income Tax (Central), Calcutta; (1971) 82 ITR 835 (SC)"

7. Learned counsel for the appellant by relying upon the latest judgement of the Apex Court in Commissioner of Income Tax Vs. M/s Excel Industries Ltd.; (2013) CTR 262 page 261 invited the attention of this Court to paragraphs 26 and 27 of the said judgement, which reads as under:

"26. This Court then considered the facts of the case and came to the conclusion (in Godhra Electricity) that no real income had accrued to the assessee in respect of the enhanced charges for a variety of reasons. One of the reasons so considered was a letter addressed by the Under Secretary of the Government of Gujarat, to the assessee whereby the assessee was "advised" to maintain status quo in respect of enhanced charges for at least six months. This Court took the view that though the letter had no legal binding effect but "one had to look at things from a practical point of view." (See R.B. Jodha Mal Kuthiala v. Commissioner of Income Tax [1971] 82 ITR 570 (SC)). This Court took the view that the probability or improbability of realisation has to be considered in a realistic manner and it was held that there was no real accrual of income to the assessee in respect of the disputed enhanced charges for supply of electricity. The decision of the High Court was, accordingly, set aside.

27. Applying the three tests laid down by various decision of this Court, namely, whether the income accrued to the assessee is real or hypothetical; whether there is a corresponding liability of the other party to pass on the benefits of duty free import to the assessee even without any imports having been made; and the probability or improbability of realisation of the benefits by the assessee considered from a realistic and practical point of view (the assessee may not have made imports), it is quite clear that in fact no real income but only hypothetical income had accrued to the assessee and Section 29(iv) of the Act would be inapplicable to the facts and circumstances of the case. Essentially, the Assessing Officer is required to be pragmatic and not pedantic."

8. On the strength of these authorities, learned counsel for the appellant submits that the interest income in this case is virtually a hypothetical income as held in Excel Industries Ltd. (supra) and as such the same is not an income chargeable within the meaning of the Act.

9. On the contrary, learned counsel for the Revenue has relied upon the judgements of State Bank of Travancore Vs. Commissioner of Income Tax, Kerla; (1986) 2 SCC 11 and Commissioner of Income Tax Vs. Excel Industries Ltd.; (2013) 262 CTR (SC) 261, which has also been relied upon by learned counsel for the appellant. Sri Manish Mishra, learned counsel for the Revenue has also relied upon the following judgements in support of his arguments:

"1. Commissioner of Income Tax Vs. Mahavir Plantations Pvt. Ltd.; (2014) 360 ITR 22 (Kerala).

2. Southern Technologies Limited Vs. Joint Commissioner of Income Tax, Coimbatore; (2010) 2 SCC 548.

3. Commissioner of Income Tax Vs. Shiv Prakash Janak Raj and Co. Pvt. Ltd.; (1996) 222 ITR 583 (SC).

4. Commissioner of Income Tax Vs. Balrampur Commercial Enterprises Ltd.; (2003) 262 ITR 439 (Calcutta).

5. T.R.F. Ltd. Vs. Commissioner of Income Tax; (2010) 323 ITR 397 (SC)."

10. Relying upon the aforesaid judgements, learned counsel for the Revenue/ department submits that if the amount become due to the assessee, the same shall fall within the definition of income as defined in section 2(24) of the Act and is not exempted from inclusion in total income, it shall be deemed to be accrued and would be subjected to tax liability in terms of the provisions of the Act.

11. In the present case, there is no need to discuss the entire authorities cited by the parties as the Apex Court in its latest judgement in Excel Industries Ltd. (supra) has set at rest the controversy after taking into consideration the several judgements of the Supreme Court.

12. Having considered the submissions of learned counsel for the parties, the core question for consideration before this Court is whether the alleged income of interest is virtually the income fall within the meaning of Section 2(24) of the Act and if so, whether the same would be taxable in accordance with the Act?

13. While dealing with the case of Excel Industries Ltd. (supra), their Lordships' of Hon'ble Supreme Court in paragraph 20 ruled as under:

"20. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee."

14. The Apex Court in Excel Industries Ltd. (supra) after considering the several authorities, most of which have been relied upon by both the parties in this case, observed that for taxability of income following are the necessary things which must have occurred:

(a) The income accrues when it becomes due.

(b) Such income must also be accompanied by corresponding liability of the other party to pay the amount to assessee , which is taken to be as income.

15. If these two ingredients are fulfilled, the income would be taxable in terms of the provisions of the Act. In such situation the same cannot be said to be hypothetical income and it really accrues to the assessee as observed by the Apex Court in Excel Industries Ltd (supra).

16. Insofar as, the present case is concerned, the assessee had not actually received any amount of interest income but it actually accrues to the appellant within the provisions of the Act. Therefore, it makes no difference whether income was actually received by the assessee in the relevant year or not.

17. The Corporation is virtually a state owned corporation having 99.9% shares and as such a State Government Undertaking which has been constituted by the State Government to promote the cinematic activities and exhibition of popular cinemas throughout the State. The State Government directed the Corporation to sell off the non workable, non functional cinemas. These properties were of three units, details of which has been given in the earlier part of the judgement. These three properties were sold through a scheme known as 'Deferred Payment Plan' it is not denied that under the deferred payment plan, the purchaser is under obligation to pay the interest on unpaid amount which requires to be paid in accordance with the schedule of payment fixed. It is also not denied from the side of the appellant that this amount of interest was payable by the purchasers to Corporation on the basis of fixed rate of interest as given under the agreement entered into between the purchasers and the Corporation. It is also not in dispute that in case of default, the interest on defaulted amount was also liable to be paid in the form of interest. Admittedly, no circular by Central Board of Direct Taxes (in short 'CBDT') had been issued under Section 119 of the Act to give any protection regarding the taxability of such income on the ground of non realization of the same in the relevant previous year, as has been issued in the case of Nationalized Banks for N.P.A. Accounts. It is also not in dispute that so far as Corporation is concerned, the other party i.e. the purchaser of the property is under a corresponding liability to pay the amount under deferred payment scheme as and when it become due, therefore, the Corporation is entitled to recover the amount which has become due under the liability fasten on the purchaser of the property. Therefore, the income of interest shown is actually due in the assessment year in question is not in dispute because the property was sold in previous assessment year to the present assessment year and if this amount is due, then certainly it become accrues to the appellant as provided under Section 5 of the Act which reads as under:

"5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which -

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year :

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of Section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which -

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1 - Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2 - For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

18. Section 9 of the Act provides that the income deemed to accrue or arise in India which squarely covers that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India shall deemed to be accrued or arise in India subject to restriction mentioned in Section 9 of the Act. No clause of section 9 or section 28 of the Act has been brought to the notice of the Court which allows the assessee to absolve from taxability on such income on the ground of non realization of the same. The placing the interest income in 'Interest Suspense Account' by the assessee is not sufficient to absolve the assessee from taxability of such interest income in absence of any provision of the Act. Therefore, we are of the firm view that in absence of any notification or instructions issued by CBDT under Section 119 of the Act, the income in the present case shall become due for the relevant assessment year and as such the same accrued to the assessee. This income was based on contractual corresponding obligation and liability to pay the interest accrued on unpaid amount of sale consideration by the purchaser to the appellant. The rate of interest is fixed. The realization/recovery of income of interest is not time barred in the relevant assessment year. Nothing has been brought on record to show that the amount of interest was not recoverable due to any legal impediment or due to any statutory provision. The amount has not been declared to be bad debt within the meaning of Section 36(1)(vii) nor the same has been written off. The relevant provisions of Section 36 (1)(vii) read as under:

"36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28-

(i)

(ii)

(iii)

(iv)

(v)

(vi)

(vii) subject to the provisions of sub-section (2), the amount of [any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year];"

19. It has been submitted by learned counsel for the appellant that properties have been purchased by muscle-men and, therefore, the interest as well as the principal amount could not be recovered. Therefore, it shall be presumed that there shall be no income to the Corporation, which is in a bad shape, having financial crunch and the Corporation has no fund even to pay the salary to the employees. This argument is not capable of extending any help to the assessee for the reason that if this situation is accepted in favour of the assessee, it will not be in accordance with the provisions of law and of the Act. Secondly when the Government has decided to sell-off the properties by inviting tenders under deferred payment Plan to the Corporation and now if the Corporation says that the amount could not be recovered because the the properties are in possession of muscle-men, than this situation is nothing but amounts to failure of the legal obligation on part of Corporation which is one of the State Government Undertaking. Therefore the ground taken for non realization of the amount of interest would not be sustainable. We are afraid if such type of pleas are accepted a natural inference shall be drawn by public at large that the persons sitting in Government were interested to settled the property for petty amount to their near and dear and virtually the State Government is not dealing fairly in discharging its sovereign functions. The State Government is not so defunct that it may knee down before the purchasers of the property under Deferred Payment Plan. We trust and hope that The State Government will not allow this situation to prevail.

20. We are not aware whether any proceeding for realizing the amount has ever been initiated by the Corporation or not? The possibility cannot not be ruled out that due to inaction of the part of officers/ officials and concern officer of the State Government the recovery may be barred by time.

21. Before parting with this case we also feel it necessary to observe that in view of the argument advanced on behalf of the State Government undertaking that amount under the Deferred Payment Plan could not be realized from those who are the purchasers of the property and, therefore, the matter is required to be considered by a bench dealing with Public Interest Litigation because a huge public money is involved which is going to be settled in favour of those without any valid consideration and on account of failure in discharging their duties and obligations on the part of Officers/Officials of Corporation and concern Officers of the State Government.

22. In view of above, we find no substance in this appeal and held that no such substantial question of law is involved.

23. The appeal lacks merit and is dismissed. However there shall be order as to costs

24. Let a copy of this order be placed before the Bench dealing with public interest litigation. The Copy of this order be also communicated to the State Government through its Chief Secretary. The Senior Registrar of this Court Shall comply the order passed by this Court within two weeks.

Dated: 31st March, 2014 akverma