C.I.T Central-Iii vs M/S Excel Industries Ltd on 8 October, 2013

Equivalent citations: AIRONLINE 2013 SC 175, (2010) 10 SCALE 497, (2010) 10 SCALE 498, (2013) 12 SCALE 582, (2013) 358 ITR 295, (2013) 4 KER LT 88, 2014 (13) SCC 459

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Bench: Kurian Joseph, Madan B. Lokur, R. M. Lodha

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JUDISDICTION

CIVIL APPEAL NO.125 OF 2013

Commissioner of Income Tax ...Appellant

Versus

M/s Excel Industries Ltd. …Respondent

WITH

CIVIL APPEAL NO.5195 OF 2011

WITH

CIVIL APPEAL NO. 9101 OF 2013
(Arising out of SLP(C) No.l9897 of 2012)

AND

CIVIL APPEAL NO. 9100 OF 2013
(Arising out of SLP(C) No.l9898 of 2012)

J U D G M E N T

Madan B. Lokur, J.

1. Leave granted in the Special Leave Petitions.

2. The question for consideration in all these appeals is whether the benefit of an entitlement to make duty free imports of raw materials obtained by the assessee through advance licences and duty entitlement pass book issued against export obligations is income in the year in which the exports are made or in the year in which the duty free imports are made.

3. In our opinion, the income does not accrue in the year of export but in the year in which the imports are made.

4. The facts pertaining to Civil Appeal No. 125 of 2013 (M/s Excel Industries Limited for the Assessment Year 2001-02) are referred to for convenience.

5. The assessee maintains its accounts on a mercantile basis. In its return (revised on 31st March 2003) the assessee claimed a deduction of Rs.12,57,525/- under the head advance licence benefit receivable. The assessee also claimed a deduction in respect of duty entitlement pass book benefit receivable amounting to Rs.4,46,46,976/-. These benefits related to entitlement to import duty free raw material under the relevant import and export policy by way of reduction from raw material consumption. According to the assessee, the amounts were excluded from its total income since they could not be said to have accrued until imports were made and the raw material consumed.

6. During the assessment proceedings, the assessee relied upon a decision of the Income Tax Appellate Tribunal in Jamshri Ranjitsinghji Spinning and Weaving Mills v. Inspecting Assistant Commissioner [1992] 41 ITD 142 (Mum) and also the order of the Commissioner of Income Tax (Appeals) in its own case for the assessment years 1995-96 to 1997-98.

7. By his order dated 24th March 2004, the Assessing Officer did not accept the assessee's claim on the ground that the taxability of such benefits is covered by Section 28(iv) of the Income Tax Act, 1961 (for short 'the Act') which provides that the value of any benefit or perquisite, whether convertible into money or not, arising from a business or a profession is income. According to the Assessing Officer, along with an obligation of export commitment, the assessee gets the benefit of importing raw material duty free. When exports are made, the obligation of the assessee is fulfilled and the right to receive the benefit becomes vested and absolute, at the end of the year. In the year under consideration, the export obligation had been made and the accounting entries were based on such fulfilment. The Assessing Officer distinguished Jamshri on the ground that it pertained to the assessment year 1985-86 when the export promotion scheme was totally different and the taxability of such a benefit was examined only with reference to Section 28(iv) of the Act but "in the present case the taxability of such benefit is to be examined from all possible angles as it forms part of the profits and gains of business according to the ordinary principles of commercial accounting."

8. The assessee took up the matter in appeal and by an order dated 15th September 2008 the Commissioner of Income Tax (Appeals) referred to an earlier appellate order in the case of the assessee relevant to the assessment years 1999-2000 and 2000-01 and following the conclusion arrived at in those assessment years, the appeal was allowed and it was held that the advance licence benefit receivable amounting to Rs.12,57,525/- and duty entitlement pass book benefit of Rs.4,46,46,976/- ought not to be taxed in this year. Reliance was also placed on the order of the

Income Tax Appellate Tribunal in the assessee's own case for the assessment year 1995-

96.

9. Feeling aggrieved, the Revenue preferred a further appeal before the Income Tax Appellate Tribunal (for short 'the ITAT) which referred to the issues raised by the Revenue and by its order dated 29th April 2011 dismissed the appeal upholding the view taken by the Commissioner of Income Tax (Appeals).

10. The Tribunal held that the issues were covered in favour of the assessee by earlier orders of the Tribunal in the assessee's own cases. It had been held by the Tribunal in the earlier cases that income does not accrue until the imports are made and raw materials are consumed by the assessee. As regards the accounting year under consideration, it was found that there was no dispute that it was only in the subsequent year that the imports were made and the raw materials consumed by the assessee.

11. The Tribunal also took the note of the fact in the assessee's own cases starting from the assessment year 1992-93 onwards these issues had been consistently decided in its favour. It was also noted that for some of the assessment years namely 1993-94, 1996-97 and 1997-98 appeals were filed by the Revenue in the Bombay High Court but they were not admitted.

12. Under the circumstances, the Tribunal affirmed the decision of the Commissioner of Income Tax (Appeals) on the issues raised.

13. The Revenue then preferred an appeal under Section 260-A of the Act in respect of the following substantial question of law:

> "Whether on facts and in circumstances of the case and in law ITAT is justified in law in holding by following its decision in the case of Jamshri Ranjitsinghji Spinning & Weaving Mills Ltd. (41 ITD 142), that advance license benefit and DEPB benefits are taxable in the year in which these are actually utilized by the assessee and not in the year of receipts."

14. By the impugned order, the High Court declined to admit the appeal filed by the Revenue under Section 260-A of the Act.

15. It was submitted before us by learned counsel for the Revenue that in view of the provisions of Section 28(iv) of the Act, the value of the benefit obtained by the assessee is its income and is liable to tax under the head "Profits and gains of business or profession". We are unable to accept the contention of learned counsel for the Revenue for several reasons.

16. Section 28 (iv) of the Act reads as follows:-

> "Profits and gains of business or profession.

> 28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession" -

... .

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;

....."

17. First of all, it is now well settled that income tax cannot be levied on hypothetical income. In Commissioner of Income Tax v. Shoorji Vallabhdas and Co., [1962] 46 ITR 144 (SC) it was held as follows:-

> "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

18. The above passage was cited with approval in Morvi Industries Ltd. v. Commissioner of Income-Tax (Central), [1971] 82 ITR 835 (SC) in which this Court also considered the dictionary meaning of the word "accrue" and held that income can be said to accrue when it becomes due. It was then observed that: "..... the date of payment ..... does not affect the accrual of income. The moment the income accrues, the assessee gets vested with the right to claim that amount even though it may not be immediately."

19. This Court further held, and in our opinion more importantly, that income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount."

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.

21. In so far as the present case is concerned, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement pass book, there was no corresponding liability on the customs authorities to pass on the benefit of duty free imports to

the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is therefore not the income of the assessee.

22. In Godhra Electricity Co. Ltd. v. Commissioner of Income Tax, [1997] 225 ITR 746 (SC) this Court reiterated the view taken in Shoorji Vallabhdas and Morvi Industries.

23. Godhra Electricity is rather instructive. In that case, it was noted that the High Court held that the assessee would be obliged to pay tax when the profit became actually due and that income could not be said to have accrued when it is based on a mere claim not backed by any legal or contractual right to receive the amount at a subsequent date. The High Court however held on the facts of the case that the assessee had a legal right to recover the consumption charge in dispute at the enhanced rate from the consumers.

24. This Court did not accept the view taken by the High Court on facts. Reference was made in this context to Commissioner of Income Tax v. Birla Gwalior (P.) Ltd., [1973] 89 ITR 266 (SC) wherein it was held, after referring to Morvi Industries that real accrual of income and not a hypothetical accrual of income ought to be taken into consideration. For a similar conclusion, reference was made to Poona Electric Supply Co. Ltd. v. Commissioner of Income Tax, [1965] 57 ITR 521 (SC) wherein it was held that income tax is a tax on real income.

25. Finally a reference was made to State Bank of Travancore v. Commissioner of Income Tax, [1986] 158 ITR 102 (SC) wherein the majority view was that accrual of income must be real, taking into account the actuality of the situation; whether the accrual had taken place or not must, in appropriate cases, be judged on the principles of real income theory. The majority opinion went on to say:

> "What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realisation in a realistic manner and dovetailing of these factors together but once the accrual takes place, on the conduct of the parties subsequent to the year of closing an income which has accrued cannot be made "no income".

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 to 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 has 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 decisions 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 28(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.

28. Secondly, as noted by the Tribunal, a consistent view has been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee. Consequently, there is no reason for us to take a different view unless there are very convincing reasons, none of which have been pointed out by the learned counsel for the Revenue.

29. In Radhasoami Satsang Saomi Bagh v. Commissioner of Income Tax, [1992] 193 ITR 321 (SC) this Court did not think it appropriate to allow the reconsideration of an issue for a subsequent assessment year if the same "fundamental aspect" permeates in different assessment years. In arriving at this conclusion, this Court referred to an interesting passage from Hoystead v. Commissioner of Taxation, 1926 AC 155 (PC) wherein it was said:

> "Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

30. Reference was also made to Parashuram Pottery Works Ltd. v. Income Tax Officer, [1977] 106 ITR 1 (SC) and then it was held:

> "We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

> "On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter — and if there was no change it was in support of the assessee — we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand should have been taken."

31. It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it.

32. Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers.

33. For the aforesaid reasons, we dismiss the civil appeals with no order as to costs, but with the hope that the Revenue implements its litigation policy a little more practically and a little more seriously.

.....J (R. M. Lodha) .....J (Madan B. Lokur) .....J (Kurian Joseph) New Delhi, October 8, 2013