

Bombay High Court

Commissioner Of Income-Tax vs M.P. Ponchaj on 8 November, 1994

Equivalent citations: 1995 211 ITR 1005 Bom

Author: . B Saraf

Bench: B Saraf, S Jhunjhunwala

JUDGMENT Dr. B.P. Saraf, J.

1. By this reference under section 256(1) of the Income-tax Act, 1961, made at the instance of the Revenue, the Income-tax Appellate Tribunal has referred the following question of law to this court for opinion :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in accepting the claim of the assessee that his salary income could be computed only after excluding the amount paid to his ex-wife by way of alimony to her and maintenance expenses to their minor son?"

2. The assessee is an individual. The reference relates to the assessment year 1969-70, the corresponding previous year being the previous year ended on March 31, 1969. In the return for the assessment year 1969-70, the assessee claimed deduction from his income from salary of a sum of Rs. 7,800 paid by him to his ex-wife by way of alimony to her and maintenance expenses to their minor son. The above amount was paid to her by the employers under instructions from the assessee out of the salary of the assessee. According to the assessee, it was a case of diversion of income by over-riding title and his income from salary was liable to be] reduced to that extent. The claim of the assessee was rejected by the Income-tax Officer on the ground that there was no diversion of income by overriding title. The order of the Income-tax Officer was confirmed by the Appellate Assistant Commissioner of Income-tax. On further appeal by the assessee, the Income-tax Appellate Tribunal accepted the contention of the assessee and held that the salary income of the assessee could be computed only after excluding the amount of Rs. 7,800 paid to his ex-wife by way of alimony and maintenance expenses to the minor son. The Revenue, being aggrieved by the above finding, has come to this court by way of this reference under section 256(1) of the Act for opinion on the question of law whether it was a case of diversion of income by overriding title or application of income accrued.

3. We have heard learned counsel for the assessee, Mr. Andhyarujina. According to learned counsel, the payment made in the instant case by the employers of the assessee to his ex-wife was diversion of income by overriding title which has the effect of reducing salary income of the assessee at source. Learned counsel highlighted the following facts :

(i) A suit was filed by the assessee in the Parsi Chief Matrimonial Court at Bombay, claiming divorce from his wife. A decree dated April 8, 1968, was passed by the court by the consent of the parties granting divorce to the assessee whereby he was required to pay to his wife with effect from April 1, 1968, a sum of Rs. 300 per month by way of permanent alimony plus a sum of Rs. 290 per month for maintenance of his minor son, Jamsheed, whose custody was given to his wife and sum of Rs. 60 per month as salary for the servant of the minor child. Total sum thus payable amounted to Rs. 650

per month or Rs. 7,800 per annum. No specific charge was created for payment of this amount by the consent decree.

(ii) The assessee was employed as general manager of Premier Auto Electric Ltd. and derived his salary from the said company. He also had income from dividends, interest, etc. After the passing of the consent decree, the assessee wrote a letter to his employers informing that he has been granted divorce by the Parsi Chief Matrimonial Court and he had to pay sum of Rs. 650 per month to his ex-wife, Mini Poncha, and requesting them to deduct a sum of Rs. 650 per month from his salary for payment to her. In the said letter, it was also stated that his ex-wife wanted to secure the said payment by creating a first charge on his salary and he agreed to the creation of the first charge on the salary. Later, on January 7, 1969, by an agreement with the employers, the assessee agreed to the creation of the first charge on his salary in favour of his ex-wife for the payment of a monthly sum of Rs. 650. The employers undertook to deduct the sum of Rs. 650 per month from his salary and "to deal with the same in such manner as directed by the said M. P. Poncha (assessee)."

4. According to learned counsel for the assessee the above facts clearly go to show that there was a diversion of income by overriding title. It was submitted by counsel for the assessee that by the agreement with the employers, the assessee had bound himself to the payment of Rs. 650 per month to his ex-wife. It was also contended that the intention of the assessee to pay Rs. 650 out of his salary to his ex-wife was clear and unequivocal. According to learned counsel, the agreement between the assessee and the employers itself amounted to diversion of income from salary at source. Reliance was placed on the decisions of this court in Seth Motilal Manekchand v. CIT [1957]

31 ITR 735; CIT v. C. N. Patuck [1969] 71 ITR 713; CIT v. Crawford Bayley and Co. [1977] 106 ITR 884 and CIT v. Mulla and Mulla and Craigie, Blunt and Caroe [1991] 190 ITR 198.

5. According to learned counsel for the Revenue, there is no diversion of income by overriding title in the instant case. It is clearly a case of application of income by the assessee for payment of alimony to his wife. Deduction from his salary or the payment of the amount by the employers to his ex-wife after deduction from his salary is only the manner of payment of the alimony to his ex-wife. The question of diversion of income by overriding title does not arise in the instant case. In support of his contention reliance is placed on the decision of this court in CIT v. V. G. Bhuta [1993] 203 ITR 249.

6. We have carefully considered the rival contentions. We have perused the facts of the case and the decisions referred to by learned counsel for the parties. We find that the ratio of the decisions of this court referred to by learned counsel for the assessee has no application to the facts of this case. This case is squarely covered by the ratio of the decision of this court in the case of CIT v. V. G. Bhuta [1993] 203 ITR 249 wherein following the decision of the Supreme Court in CIT v. Sitaldas Tirathdas [1961] 41 ITR 367, it was held that the true test for finding out if there has been diversion of income by overriding charge, is whether the amount sought to be deducted, in truth, never reached the assessed as his income. It was observed that obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive factor. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation

income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence in law, does not follow. Applying the above ratio, we find that in the instant case there is no diversion of income by overriding title. This is a clear case of application of income by the assessee for payment of alimony to his ex-wife and maintenance of his minor child. The direction to the employers or the agreement with the employers to pay the agreed amount of Rs. 650 per month to the ex-wife every month is only a mode of payment. It does not in any way amount to diversion of salary income before it accrues to the assessee. The employers are obliged to pay the amount only after the salary income accrues to the assessee and becomes payable to him. It is at that point of time that the employers have agreed or undertaken to pay as per the wishes of the assessee the sum of Rs. 650 per month to his ex-wife. The employers have only agreed to deal with the amount of salary accrued to the assessee in such manner as directed by him. It is, in our opinion, a clear case of application of income which has accrued in the hands of the assessee. This is not a case of diversion of income by overriding title. The ratio of the decision of this court in V. G. Bhuta's case [1993] 203 ITR 249 squarely applies.

7. Accordingly we answer the question referred to us in the negative, i.e., in favour of the Revenue and against the assessee.

8. In the facts and circumstances of the case, there shall be no order as to costs.