

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

IA NO: GA/2/2017
(OLD NO. GA/3682/2017)
IN
ITAT/378/2017

PRINCIPAL COMMISSIONER OF INCOME TAX-2, KOLKATA
VS.
MCLEOD RUSSEL INDIA LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date: November 30, 2021.

Appearance :
Mr. P. K. Bhowmik, Adv.
Mr. Soumen Bhattacharjee, Adv.
... for the appellant

Mr. Asim Chaudhury, Adv.
...for the respondent

The Court : This appeal by the Revenue filed under Section 260A of the Income Tax Act, 1961 (the Act, in brevity) is against the order dated 8th October, 2015 passed by the Income Tax Appellate Tribunal "C" Bench, Kolkata in ITA Nos. 262 & 263/Kol/2013 for the Assessment Years 2008-09 and 2009-10.

The Revenue has raised the following substantial questions of law for consideration:

1. Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal “C” Bench, Kolkata erred in law in holding that for the purpose of computation of Fringe Benefits Tax, the expenses incurred by the employer towards payment of Fringe Benefit to its employees in case of Tea Company is subjected to Rule 8 of the Income Tax Rules?
2. Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal “C” Bench, Kolkata erred in giving relief at 40% of the taxable value of the Fringe Benefit as against 100% by allowing the benefit of Rule 8 of the Income Tax Rules which has no relevance at all in computing the Fringe Benefit Tax?

We have heard Mr. P. K. Bhowmik, learned senior standing counsel for the appellant/Revenue and Mr. Asim Chaudhury, learned counsel for the respondent/Assessee.

It is not disputed that the identical substantial questions though slightly differently framed decided by this Court in the assessee's own case for the assessment year 2006-07 in ITAT 147 of 2011 and for the assessment year 2007-08 in ITA No. 75 of 2012. The Hon'ble Division Bench followed an earlier decision of this Court in the case of M/S. APEEJAY TEA LTD. -VS- COMMISSIONER OF

INCOME TAX, CENTRAL-I & ANR. in ITA No.165 of 2013 dated 3rd July, 2014. The operative portion of the judgement for the assessment year 2007-08 is as follows:

The subject matter of challenge in this appeal is a judgment and order dated 26th June, 2013 by which the learned income tax appellate tribunal rejected the contention of the assessee that Rule 8 of the Income Tax Rules has any application in arriving at a valuation of the fringe benefits under Chapter XII H. The learned tribunal as a matter of fact in rejecting the contention of the assessee relied on an earlier judgment in the case of the assessee itself in ITA No.557/Kol/2010 wherein the following view was expressed:

“7. We have carefully considered the submissions of the Ld. Representatives of the parties and the orders of the authorities below. We have also considered the relevant provisions i.e. Section 1125WA, 115WB & 115WE of the Income Tax Act. We observe that an employer assessee is liable to pay Fringe Benefit Tax u/s. 115WA of the Income Tax Act, in relation to Fringe Benefits provided by him to its employees, Sub-section (2) of Section 115WA starts with a non obstante clause and states that notwithstanding that no income-tax is payable by an employer to its total income computed in accordance with the provisions of the Act, the tax on Fringe Benefits shall be payable by such an employer. Therefore, an employer is liable to pay Fringe Benefit Tax

even when no income-tax is payable by an employer on his total income computed in accordance with the provisions of the Income Tax Act. Therefore, the contention of the Ld. Authorised Representative for the assessee that value of Fringe Benefit should be computed by applying Rule 8 of the Income Tax Rule has no merit as Fringe Benefit Tax is not payable on the income of the assessee but only Fringe benefits provided by an employee to its employees. In view of the above, we agree with the Ld. Departmental Representative that the contention of the Ld. Authorised Representative for the assessee has no merit and accordingly, we uphold the order of the Ld. CIT(A) by rejecting grounds of appeal taken by the assessee.”

Aggrieved by the aforesaid order of the learned tribunal the present appeal has been preferred. The sole question for consideration is “whether Rule 8 is applicable for the purpose of computing valuation of the fringe benefits for the purpose of Chapter XII H of the Income Tax Act?” Rule 8 provides as follows:

“8. (1) Income derived from the sale of tea grown and manufactured by the seller in India shall be computed as if it were income derived from business, and forty per cent of such income shall be deemed to be income liable to

tax.

(2) In computing such income an allowance shall be made in respect of the cost of planting bushes in replacement of bushes that have died or become permanently useless in an area already planted, if such area has not previously been abandoned, and for the purpose of determining such cost, no deduction shall be made in respect of the amount of subsidy which, under the provisions of Clause (30) of Section 10, is not includible in the total income.”

Mr. Majumdar, learned advocate appearing in support of the appeal submitted that fringe benefit tax is an additional income tax as would appear from Section 115WA. Therefore, the rules applicable for the purpose of assessing income tax would also be applicable for the purpose of arriving at a valuation of the fringe benefits. Before tax can be assessed, taxable income has to be arrived at. Similarly before fringe benefit tax can be assessed the valuation of the fringe benefits has to be arrived at. When the fringe benefit tax is an additional income tax, there can hardly be any doubt, according to him, that Rule 8 shall apply with full force. He, in support of his submission, drew our attention to a judgment of the Apex Court in the case of CIT Vs. Doom Dooma India Limited reported in 310 ITR 392(SC) wherein the question cropped up as to whether the assessee

was entitled to apply Rule 8 for the purpose of claiming depreciation.

The Supreme Court answered the question as follows:

“16. In our view, in cases where rule 8 applies, the income which is brought to tax as “business income” is only 40 per cent of the composite income and consequently proportionate depreciation is required to be taken into account because that is the depreciation “actually allowed.” Hence we find no merit in the civil appeals filed by the Department.”

The next judgment cited by Mr. Majumdar in the case of Jayshree Tea and Industries Limited vs. Union of India reported in 285 ITR 506 (Cal) wherein a Division Bench of this Court held that Rule 8 was applicable to the additional income tax payable under Section 115-O. The Division Bench clarified its opinion by the following illustration:

“If a tea company has a net income of Rs.100, Rs.40 would be liable to income tax at the prescribed rate and the assessee would be assessed accordingly. By virtue of Section 115-O if the company declares Rs.50 for distribution amongst the shareholders it would have a proportionate liability. It is true that in case of company decides to distribute a part of the income it would be impossible to find out whether that part of the income included the whole of the agricultural income or a part of it. This exercise now, in our view, is not at all relevant in view of the provision of rule 8 of the Income-tax Rules. In such event the company would be charged on Rs.40 for income-tax and on Rs.50 for additional income-tax on proportionate basis.”

The third judgment relied upon by Mr. Majumdar is in the case of *Hindustan Unilever Ltd. vs. Dy. Commissioner of Income-tax(1), Mumbai*, reported in 325 ITR 102 (Bom). The question which cropped up for consideration in the aforesaid case was whether Rule 8 was applicable to the losses suffered by a tea company. The question was answered in the affirmative. The view expressed by Bombay High Court to be

precise is as follows:

“ 13. Now, what rule 8 postulates is the process of segregating the income derived from the sale of tea upon its computation as if it were income derived from business. Rule 8 creates a legal fiction, as a result of which the income which is derived from the sale of tea which is grown and manufactured by the assessee is to be computed as if it were income derived from business. It needs no line of elaborate reasoning to state the well-settled position in law that once a legal fiction is created by the Legislature or, as in this case, in subordinate legislation, the legal fiction has to be given force and effect so as to operate within the area in which it was intended to operate. In applying a legal fiction, it is trite law that one cannot allow the imagination to boggle. A legal fiction has to be carried to its logical conclusion. In computing the income from the sale of tea as if it was income derived from business, for the purposes of rule 8, it is impossible to comprehend as to how the expenditure incurred by an assessee, wholly and exclusively, for the purposes of business should be disregarded. Obviously, the expenditure cannot be disregarded. The principle which must govern is well-settled and only a brief reference to authority on the subject would be necessary.

14. *In CIT v. Harprasad & Co. (P). Ltd. [1975] 99 ITR 118 (SC), the question which came up before the Supreme Court was whether a capital loss could be determined and carried forward, in accordance with the provisions of section 24 of the Act of 1922, when the provisions of section 12B were not applicable during the course of assessment year 1955-56. The Supreme Court held that from the charging provisions of the Act it is discernible that the words 'income' or 'profits and gain' should be understood as including losses also, so that, in one sense 'profits and gains' represent 'plus income' whereas losses represent 'minus income'. The Supreme Court observed as follows:-*

“From the charging provisions of the Act, it is discernible that the words “income” or “profits and gains” should be understood as including losses also, so that, in one sense “profits and gains” represent “plus income” whereas losses represent “minus income”. In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although section 6 classifies income under six heads, the main charging

provision is Section 3 which levies income-tax, on the “total income” of the assessee as defined in Section 2(15). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the “total amount of income, profits and gains referred to in section 4(1)”. Secondly, it must be “computed in the manner laid down in the Act.” If either of these conditions fails, the income will not be a part of the total income that can be brought to charge.”

The Supreme Court held that if the capital was not chargeable to tax during the period between 1-4-1948 to 1-4-1957, the assessee did not possess an independent right to carry forward his capital loss even if it could not be set off, owing to the non-taxability of the capital gains, against profits in subsequent years. The decision of the Supreme Court emphasizes that under the charging provisions of the Act, income must be comprehensively understood as including a loss. The principle that income would include a loss has also been re-affirmed in a subsequent judgment of the Supreme Court in CIT v. J.H. Gotla [1985] 156 ITR 323.

15. In the present case, the Assessing Officer, while issuing a notice for re-opening the assessment

observed that the provisions of rule 8 are applicable “only in the case of income” and the claim of the assessee to set off 40 per cent of losses against normal business profits could not be allowed. On the basis, the Assessing Officer has formed the opinion that the loss of Rs.10.84 crores attributable to the business activity of the assessee involving the manufacture and sale of tea was liable to *be disallowed. It must be noted here that it is not the contention for the Assessing Officer that the loss which has been computed by the assessee by applying the proportion of 40 per cent is not a fair estimate of the actual loss sustained, by the assessee in its business operations. On the contrary, it is on the basis of rule 8 that the Assessing officer seeks to postulate that the loss attributable to the business activity of the assessee would have to be disregarded on the ground that it is not allowable expenditure. The inference which is sought to be drawn by the Assessing Officer is contrary to the plain meaning of the charging provisions of the Act; and to rule 8, besides being contrary to the position in law laid down by the Supreme Court. The assessee was lawfully entitled to adjust the loss which arose as a result of the business activity under rule 8.*”

Mr. Majumdar concluded by saying that the judgment

and order under challenge should be reversed and the question formulated above should be answered in favour of the assessee.

Ms. Gutgutia, learned advocate appearing for the revenue, submitted that -

- (a) Chapter XII H is a complete code in itself in the matter of taxation on fringe benefits. She drew our attention to sub-section 2 of Section 115 WA and contended that the sub-Section starting with a non-obstante clause makes it clear that the provisions contained in the aforesaid Chapter are applicable to fringe benefits made available to the employees by an employer. She contended that no concession has been made in the statute for applicability of Rule 8. It is, therefore, not possible to hold that Rule 8 would be applicable in assessing the fringe benefit tax.
- (b) She submitted that the expenditure incurred by the assessee in providing fringe benefits to the employees has already been taken into account for the purpose of arriving at the total taxable income. There is as such no reason why the apportionment should once again be allowed by applying Rule 8.

(c) The judgments cited by Mr. Majumdar are not applicable. The judgments cited by Mr. Majumdar are with respect to topics other than the question with which we are concerned in this appeal. Therefore, those judgments have no manner of application.

(d) She contended that there is no question of any double taxation and in support of her submission she drew our attention to paragraph 18 of the judgment in the case of *R & D Falcon (A)_ Pvt. Ltd. vs. C.I.T., reported in AIR 2008 SCW 4096.*

We have considered the rival submissions advanced by the learned advocates. For the purpose of resolving the disputes, we would like to refer to the illustration appearing from the judgment of the Apex Court in the case of *CIT vs. Doom Dooma India Ltd.* (supra). The illustration in paragraphs 12 and 13 of the judgment reads as follows:

“12. Be that as it may, we can give the following illustration(s) which will give an example of how the “written down value” needs to be computed:-

Illustration ‘A’

Rs.

<i>Income from sale of tea</i>	1000	<i>Less : Expenses-</i>
<i>Depreciation</i>	(100)	
<i>Others</i>	(300)	
<i>Business Profit & Loss A/c.</i>	600	

*Income subject to charge under the
Income-tax Act by application of
Rule 8 (40% of 600)*

Illustration 'B'

	<i>Rs.</i>
<i>Income from sale of tea (40% of 1000)</i>	400
<i>Less:Expenses –</i>	
<i>Depreciation</i>	(40)
<i>Others (40% of 300)</i>	(120)
<i>Business Profit subject to charge of 240 Income-tax (40% of 600)</i>	

13. Analysing the above two charts, we find that at the end of computation the income chargeable to tax by applying rule 8 comes to Rs.240. Under Illustration 'A', the normal depreciation is Rs.100 which is deductible from Rs.1,000 being the income from sale of tea. On the other hand, under Illustration 'B', we have taken 40 per cent of each of the items, namely, income from sale of tea, depreciation and other expenses. Accordingly, on comparison it may be noted that whereas income from sale of tea is Rs.1,000 under Illustration 'A', proportionately it comes to Rs.400 under Illustration 'B'. Similarly, depreciation under Illustration 'A' which is normal depreciation is Rs.100 whereas in Illustration 'B' at 40 per cent the pro rata depreciation is 40. What is important to be noted is that at

the end of computation under both the Illustrations, the Income taxable by applying rule 8 comes to Rs.240 in both the cases. The only difference is that in Illustration 'B' we have gone by pro rata basis."

The question for consideration before Their Lordships was whether deduction on account of depreciation is allowable from the business income arrived at after applying Rule 8. This question was answered by Their Lordships in the affirmative. From illustration (a) it would appear that business profit after taking into account the expenses was computed at Rs.600/-. Applying the Rule 8 taxable income on account of business was computed at Rs.240/-, that is to say, 40% of Rs.600/-. From illustration (b) it would appear that 40% of the total income from sale of tea was taken into account. From illustration (a) it would appear that total depreciation is Rs.100/-. For the purpose of computing business Profit & Loss of 40% of the total depreciation was taken into account. From illustration (a) it would appear that other expenses were computed at Rs.300/- and illustration (b) would show that other expenses were computed at Rs.120/-, in other words, 40% of Rs.300/- had been taken into account.

We shall take assistance of the illustration to resolve the issue. Let us assume that the other expenses in illustration (a) amounting to Rs.300/- include Rs.100/- spent by the employer on account of fringe benefits made available to its employees. In that case, 40% of the aforesaid sum of Rs.100/-

would also be includible in illustration (b). Therefore, the question posed before us has really been answered by the illustration given by the Apex Court in the aforesaid judgment. It cannot be disputed that the amount of expenditure incurred by the assessee in extending fringe benefits to its employees was not solely for the purpose of business. The expenditure incurred is both for the purpose of business and for the purpose of agriculture. The submission made by Mrs. Gutgutia that the expenditure on account of fringe benefits has already been taken into account is not correct. The net profit and loss of the business has to be arrived at after deducting all the expenses as indicated in illustration 'A' in the case of Doom Dooma (supra). Once that is done 40% of the net profit and loss has to be worked out which shall be chargeable to tax. Once this is done the expenditure on account of fringe benefits would automatically stand reduced to 40% as would appear from illustration "B" in the case of Doom Dooma [supra]. The revenue is interested in contending as would appear from the impugned orders that the expenditure on account of fringe benefit cannot be reduced to 40% for the purpose of computing fringe benefit tax. If that is done, the result would be that the agricultural income itself would become liable to tax, which is not permissible under sub-Section 1 of Section 10 of the Income Tax Act. The provisions contained in Chapter XII H of the Income Tax Act have to be read subject to Section 10 of the Income Tax Act.

For the aforesaid reasons, we are of the opinion that the judgment of the learned Tribunal cannot be sustained. The submissions advanced by Ms. Gutgutia naturally do not help the revenue. The judgment cited by her was with regard to the question as to whether fringe benefit tax amounts to double taxation. That question was answered by Their Lordships in the negative. Before us, the question of double taxation has not arisen for consideration.

The question formulated above is, therefore, answered in the affirmative and in favour of the assessee.

The appeal is, therefore, allowed.”

Thus, following the aforesaid decision, the appeal filed by the Revenue is dismissed and the substantial questions of law are answered against the Revenue.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)