CIVIL REFERENCE

Before Falshaw and Bishan Narain, JJ.

M/s B. GUHA AND Co.,—*Appellant*

versus

THE COMMISSIONER OF INCOME-TAX, DELHI,—*Respondent*

Civil Reference 3 of 1954.

1957

Feb. 6th

Income-tax Act (XI of 1922)—Section 7—Assessee receiving Rs. 38,937 as commuted value of half of the renewal commission to which he was entitled under the agreement—Whether receipt in the nature of a revenue receipt—Point not urged in appeal before Appellate Tribunal—Whether can be decided in proceedings under section 66.

Held, that the renewal commission was income within the Income-tax Act, if it had been paid as it accrued from time to time, and its commutation cannot affect the nature of such a payment. After all commutation in reality and in substance merely amounts to substitution of a single payment for a number of successive payments even if some of those payments be uncertain or be payable after irregular intervals. A commuted amount is payable immediately and merely represents the present value of successive payments to which a party is entitled in future. This commuted amount is calculated according to actuarial principles and such a commutation of renewal commission must for the purposes of income-tax be regarded as merely revenue receipt.

Held, that if a point is not urged before the Appellate Tribunal at the stage of appeal, it cannot be decided in proceedings under section 66(1) or under section 66(3) of the Income-tax Act.

Commissioner of Income-tax, Delhi, Ajmer, Rajasthan and Madhya Bharat, Delhi, v. *S. B. Ranjit Singh* (1), *Mash Trading Co.* v. *Commissioner of Income-tax* (2), *Van Den Baghs Limited* v. *Clark* (3), *Glasson* v. *Rougier* (4), and *Prendergast* v. *Camerson* (5), relied on; In re *P. D. Khosla* (6), and *Godrej and Co.* v. *Commissioner of Income-tax Bombay City* (7), distinguished.

(1) 1955 P.L.R. 415.
(2) 1956 P.L.R. 356 (F.B.).
(3) 19 Tax Cases 390.
(4) 26 Tax Cases 86.
(5) 23 Tax Cases 122.
(6) 1945 I.T.R. 436.
(7) 1954 I.T.R. 108.

Case referred by the Income-tax Appellate Tribunal, Bombay under section 66(1) of the Indian Income-tax Act, XI of 1922, as amended by section 92 of the Income-tax (Amendment) Act 1939 (Act VII of 1939) for orders of the High Court.

KIRPA RAM BAJAJ and J. L. BHATIA, for Appellant.

A. N. KIRPAL and D. K. KAPUR, for Respondent.

ORDER.

Bishan Narain, J. BISHAN NARAIN, J.—The facts leading to the present reference under section 66(1) of the Income-tax Act, may be briefly stated. Messrs B. Guha and Co., New Delhi (the assessee), were the chief agents of the Bombay Mutual Life Insurance Company, Limited, for certain areas in Northern India for several years under an agreement of agency which was renewed from time to time. The last agreement was executed in 1949, and was effective from the 1st of July, 1947, to the 31st of December, 1951. Under this agreement the assessee Company was entitled to receive a certain percentage of premiums paid to the Insurance Company as "renewal commission". This agreement was terminated with effect from the 31st of August, 1950. A fortnight later, i.e., on the 14th of September, 1950, the assessee was reappointed chief agent of the Insurance Company on certain new terms which conformed to the provisions of the Insurance Act as amended in the year 1950. At the time of the termination of the 1949 agreement certain amounts as renewal commission were due to the assessee and the Insurance Company agreed to pay half of this commission in a lump sum which was calculated at Rs. 38,937. This amount was paid during the assessment year 1951-52. The agents, however, represented that the amount was an inadequate and incorrect actuarial valuation

of half of the commuted renewal commission payable to them. The Insurance Company then reconsidered the matter and paid an additional amount of Rs. 13,628 to the assessee. This payment was made during the assessment year 1952-53, but the present case is not concerned with that assessment year. Apparently, the other half portion of the renewal commission remained payable to the assessee as and when it accrued under the terms of the terminated agreement. At the request of the assessee the Appellate Tribunal has drawn up a statement of the case under section 66(1) of the Indian Income-tax Act and has referred the following queston of Law to this Court for decision:—

> "Whether on the facts and in the circumstances of this case, the sum of Rs. 38,937 received by the assessee during the relevant accounting period as commuted value of half of the renewal commission to which he was entitled under the terms of the agreement, was receipt in the nature of a revenue receipt?"

The question, therefore, that requires determination in this case is whether the amount of Rs. 38,937 was paid as a revenue receipt or as a capital receipt. Now, the assessee's case before us was that this amount was received as compensation for loss of employment and the fact that the assessee was subsequently re-employed by the Insurance Company would not affect the nature of the payment under consideration in this case. In the alternative it was argued that this payment was receipt in the nature of capital receipt. In the present case it may be stated that we are concerned with the receipt of a certain amount by the assessee and, therefore, we have to look at it from the point of view of the recipient and not that of payer.

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I proceed to deal with the first point raised by the learned counsel. Under the 1949 agreement the assessee was entitled to receive renewal commission. The payment of this commission was not dependent on continuation or cessation of this agreement. This commission by the nature of things was payable during the continuation of the agreement and also after its termination. Admittedly, the assessee could recover this amount from the Insurance Company by process of law whether the right was enforced during the currency of the agreement or thereafter. On the 31st of August, 1950, when the agreement was terminated, admittedly renewal commission was due to the assessee from the Insurance Company. The parties concerned then agreed to commute half of this renewal commission to which the assessee was entitled. There is nothing in the statement of the case under consideration, nor is there any material before us to suggest that this agreement relating to commutation could not be arrived at during the currency of the 1949 agreement or that this commutation was a consideration for terminating the agency agreement at that time. Indeed, such a case was not made out before the Appellate Tribunal at the stage of the appeal before it, nor has it been mentioned in the present statement of the case. It is settled law at least in this Court that if a point is not urged before the Appellate Tribunal at the stage of appeal, it cannot be decided in proceedings under section 66(1) or under section 66(3) of the Income-tax Act (*Commissioner of Income-tax, Delhi Ajmer, Rajasthan and Madhya Bharat, Delhi* v. *S. B. Ranjit Singh* (1), and *Mash Trading Company* v. *Commissioner of Income-tax* (2)). On the merits also there is no substance in this contention. It is admitted that during the currency of the 1949 agreement the parties

(1) 1955 P.L.R. 415.
(2) 1956 P.L.R. 356 (F.B.).

could agree to commutation of the renewal commission wholly or in part and, therefore, it cannot be said that the commutation in the present case was compensation for terminating the 1949 agreement. There is no suggestion that the assessee would not have agreed to the termination of the agency if the Insurance Company had not agreed to commute half of the renewal commission.

The learned counsel for the assessee, however, relied on the decision in *In re P.D. Khosla* (1), and characterised it as on all fours with the facts of the present case. I regret I am unable to agree with the learned counsel. The facts of that case were very different. Khosla had joined the Bharat Insurance Company, Limited, on the 22nd June, 1936. The terms of his employment were that as manager of the Company he would receive a salary of Rs. 1,500 per mensem plus commission on the first year's premium at 5 per cent and on all renewals at one per cent and also at one per cent on all lapsed policies renewed during his term of office subject to a maximum of Rs. 20,000 per annum as aggregate commission. The agreement was for five years. On the change of the directors a fresh agreement was executed with effect from the 1st of October, 1938, by which Khosla was to receive payment of full dues up to the 30th of September, 1938, and he was also to receive in addition a lump sum of Rs. 1,10,000 in four instalments as consideration for his resignation as manager. The High Court, after considering all the attending circumstances, came to the conclusion that Khosla's employment was terminated by the Board and he was paid Rs. 1,10,000 solely as compensation for loss of employment and that this amount did not include any remuneration for past services. On this finding it was held that this amount was

(1) 1945 I.T.R. 436.

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exempt from income-tax under the provisions of Explanation 2 to subsection (1) of section 7 of the Income tax Act. Obviously, the present case has no analogy to Khosla's case (1). In the present case the assessee was entitled to receive renewal commission for past services, and, in any case, this payment was not made as compensation for terminating the 1949 agreement or for loss of employment.

The learned counsel on behalf of the assessee then brought to our notice the decision in *Godrej and Company* v. *Commissioner of Income-tax, Bombay City* (2). That case also is easily distinguishable. In that case Godrej and Company were appointed as Managing Agents of Godrej Soaps, Limited, in 1933 for thirty years on certain terms. In 1946 the Managing Company found the terms of the Managing Agency rather onerous and asked the Managing Agents to lower its terms of remuneration on receipt of Rs. 7,50,000. The Managing Agents accepted this proposal. It was held by the Bombay High Court that the effect of the 1946 agreement was that the Managing Agents Godrej and Company were paid a lump sum in consideration of the assessee company agreeing to serve the managing company on a reduced salary and this amount of Rs. 7,50,000 represented remuneration paid to the assessee company in advance. On this finding it was held that this amount of Rs. 7,50,000 was a revenue receipt and not a capital receipt. Obviously, the facts of that case have nothing in common with the facts of the case now under consideration. In any case, this judgment is in favour of the Income-tax Commissioner. On the reasoning of this judgment even if the Insurance Company in the present case had agreed to commute the renewal commission as a consideration

(1) 1945 I.T.R. 436.
(2) 1954 I.T.R. 108 (Bombay).

for terminating the 1949 agreement, it would have been considered to be payment of renewal commission in advance. The argument of the learned counsel, therefore, that this payment of Rs. 38,937 was payment of compensation for loss of employment of agency on the 31st of August, 1950, and, therefore, it was exempt from income-tax under explanation 2 to subsection (i) of section 7 as it stood before its 1955 amendment, fails and is rejected.

This brings me to the only contention that arises in the statement of the case referred to us. Shri Kirpa Ram Bajaj argued that the commutation of half of the renewal commission payable under the 1949 agreement amounted to capital receipt. He has, however, failed to advance any cogent reason in support of his contention. There is nothing in the Income-tax Act laying down any legal criterion for distinguishing between capital and revenue receipts, nor does any definite and clear criterion emerge from English or Indian decisions on this subject. It depends on the facts of each case which must be considered for determining whether a particular payment should be held to be chargeable as income under the Income-tax Act or not. It is, therefore, necessary to deal with the facts of the present case to determine in substance the nature of the payment made. It is clear that this renewal commission was payable from time to time to the assessee as it accrued in accordance with the terms of the 1949 agreement. On the 31st of August, 1950, the assessee was entitled to a certain amount of renewal commission which was payable in future and from time to time. The assessee wanted that half of this commission to which he was entitled should be commuted and paid to him immediately. As I have already said, this commutation had nothing to do with the continuance or termination of the agreement under which it was

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payable. It was frankly and rightly conceded before us that the renewal commission was income within the Income-tax Act if it had been paid as it accrued from time to time, and it appears to me clear that its commutation cannot affect the nature of such a payment. After all commutation in reality and in substance merely amounts to substitution of a single payment for a number of successive payments even if some of those payments be uncertain or be payable after irregular intervals. A commuted amount is payable immediately and merely represents the present value of successive payments to which a party is entitled in future. This commuted amount is calculated according to actuarial principles. It appears to me clear that such a commutation of renewal commission must for the purposes of income-tax be regarded as merely revenue receipt. In *Van Den Baghs, Limited* v. *Clark* (1), Lord Macmillan laid down this legal proposition in these words:—

> "If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed".

Lord Macnaghten in *Glasson* v. *Rougier* (2), has said that it is well established that a sum of money paid in commutation of several sums which are "income" for the purposes of income-tax must be held to be chargeable to income-tax. The same view was taken by Lord Romer in *Prendergast* v. *Camerson* (3). It seems to me, therefore, that in the present case the substance of the transaction was merely payment of

(1) 19 Tax Cases 390.
(2) 26 Tax Cases 86.
(3) 23 Tax Cases 122.

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income or remuneration in a lump sum, and, therefore, it must be held to be a revenue receipt. The learned counsel then argued that in this view of the matter the cases in which persons receive lump sums in commutation of their pensions would become liable to income-tax on these amounts. It is, however, not necessary to deal with pension cases in this judgment, nor is it necessary to discuss the nature of pension and the effect of its commutation on the liability of the recipient to pay income-tax on it. This matter will no doubt be decided when it is properly raised.

For all these reasons I am of the opinion that in substance the payment in the present case was made in commutation of "income", and, therefore, it must be held to have been received by the assessee as revenue receipt. Accordingly, I would answer the question referred to us by the Appellate Tribunal under section 66 (1) of the Income-tax Act for decision in the affirmative.

The assessee will pay the costs of the respondent which are assessed at Rs. 250.

FALSHAW, J.—I agree.

Falshaw, J.

APPELLATE CIVIL

Before Tek Chand, J.

PT. JANDHU LAL AND OTHERS,—*Plaintiffs-Appellants.*

versus

THE THAPAR INDUSTRIES CO-OPERATIVE HOUSING SOCIETY, LTD.,—*Defendant-Respondent.*

Regular Second Appeal No. 1007 of 1956.

1957

Feb. 6th

Co-operative Societies Act (XIV of 1955) Section 59—Suit against a Co-operative Society—Suit whether can be instituted without complying with the provisions of Section 59 as to notice—Illegal act of society, whether can be challenged without necessity of notice under section 59.