

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 435-450 OF 2008

COMMISSIONER OF INCOME TAX-III,
SURAT, GUJARAT

... Appellant

VERSUS

PATEL GRUH NIRMAN FLAT YOJNA 5

... Respondent

O R D E R

and
are

The respondent herein is in the business of development and sale of developed plots. The plots normally sold on installment basis with the purchaser paying the consideration in monthly installments.

To provide incentives to the purchasers to pay the installments on time, respondent herein promoted a scheme wherein those who pay installments on time become entitled to participate in lucky draw.

Department herein contended that the respondent herein did not deduct any tax on the prizes awarded in such draws.

rify

Spot verification was made on 20.12.1999 to verify whether the respondent/assessee is making any deduction of tax at source under Section 194B of the Income Tax Act, 1961(hereinafter referred to as 'Act') on prizes distributed

Signature Not Verified

to lucky winners decided out of the monthly basis lucky draw.

Digitally signed by
ASHWANI KUMAR
Date: 2015.12.11
15:08:29 IST
Reason:

Show Cause Notice was issued to the assessee as to why

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an order under Section 201(1) for non deduction of tax should not be passed and as to why interest under section 201(A) should not be charged on the due TDS amount from the date of

tax deductible.

Assessee herein replied to the Show Cause Notice contending that they are not engaged in business of lottery. Their main business is sale of plot and this lucky draw is made to promote business thereof; that it is a sale promotion expenses and that there is no consideration paid to get the right of participation in lottery.

Learned Assessing Officer concluded that the entire scheme was so devised that it had all the ingredients of lottery and the assessee had distributed prizes to lucky winners, as a result of monthly lucky draws and taxes were liable to be deducted at source under the provisions of Section 194B of the Act and since the respondent had failed to deduct the tax at source under Section 194B of the Act, the Assessing Officer had treated the assessee in default and raised demand under Section 202(1) of the Act and charged interest under Section 201(1A) thereon, accordingly, for the Assessment Years involved.

Demand was, accordingly, confirmed vide order dated 29.03.2000.

On appeal, Commissioner of Income Tax (Appeals) (hereinafter referred to CIT (Appeals)) allowed the appeal

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vide order dated 12.10.2000 on the grounds that the scheme of the assessee for lucky draw is different from typical lottery business; the scheme cannot be properly called a lottery and thereby provisions of section 194B are not attracted.

Against the said decision, Revenue went before the Income Tax Appellate Tribunal (ITAT) wherein the ITAT, vide its order dated 20.04.2005, dismissed the appeal holding that the assessee's scheme was promotion of sale of plots of land and it was only to attract the customers and the intention

was not to do business of lottery.

Aggrieved, Revenue filed appeal and the High Court vide its impugned judgment and final order dated 18.07.2006 dismissed the appeal filed by the Revenue.

The High Court by short order upheld the order of the ITAT and dismissed the appeal of the Revenue-appellant herein. The order of the High Court would reveal that it has followed the view taken by it in its earlier judgment rendered in the case of 'Commissioner of Income Tax v. Jhaveri Industries [2008 (300) ITR 300].

Section 194B of the Act reads as under: -

"194B - The person responsible for paying to any person any income by way of winnings from any lottery or crossword puzzle or card game and other game of any sort in an amount exceeding ten thousand rupees shall, at the time of payment thereof, deduct income-tax thereon at the rates in force:

Provided that in a case where the winnings are wholly in kind or partly in cash and partly in kind but the

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part in cash is not sufficient to meet of deduction of tax in respect of winnings, the person responsible for before releasing the winnings, ensure been paid in respect of the winnings."

the liability whole of the paying shall, that tax has

A perusal of the aforesaid provision would disclose that the tax at source is to be deducted by the person who is responsible for paying to any person any income by way of winnings from any lottery or crossword puzzle or card game and other game of any sort if the amount of said winning exceeds Rs.10,000/-.

Section 2(24) defines income and there are many components thereof which are included in the definition.

Clause (ix) was inserted vide Finance Act, 1972 with effect from 01.04.1972, which added certain earnings making them taxable. It reads as under: -

"(ix) any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever.

Explanation.--For the purposes of this sub-clause,--

(i) "lottery" includes winnings from prizes awarded to any person by draw of lots or by chance or in any other manner whatsoever, under any scheme or arrangement by whatever name called;

(ii) "card game and other game of any any game show, an entertainment television or electronic mode, in which to win prizes or any other similar game sort" includes programme on people compete ;"

Thus, winning from lotteries, crossword puzzles, races, etc. is treated as income which is liable for tax. It is in

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this backdrop one has to consider as to whether the prizes given under the aforesaid scheme floated by the assessee would be treated as winning from lotteries.

Though there are three Assessment Orders pertaining to the aforesaid three Assessment Years, the rational given by the Assessing Officer in all these orders remained the same.

The Assessing Officer was of the opinion that the members who received the prizes got the same by way of lucky draw and therefore, winning was by chance. He also mentioned that in order to participate in the said lucky draw, the members had to pay the full amount of purchase price of plot as agreed with the assessee herein and thus, there was consideration for participating in the lucky draw. It was also held by him that these prizes distributed are not a chit fund or a kitty where the liability is discharged in advance.

The prizes were decided by way of lucky draw by way of chance. On that basis, he concluded that all the ingredients/ constituents of the word 'lottery' were satisfied in the instant case.

The CIT (Appeals), however, deferred with the aforesaid opinion as, according to him, the ingredients to establish a thing as lottery were not satisfied in the instant case.

It is not in dispute that in order to satisfy that a particular scheme amounts to lottery, following three ingredients should be established: -

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- "(a) The members pay in order to try his luck of chance. This is the primary requirement. The whole intention is to try his luck and not to buy any particular item.
- (b) The entire scheme is normally a matter of luck or chance.
- (c) The members loses his monies if the prize is not declared to him.
- (d) The organizer also intends to make profits out of such draw/scheme."

However, in the instant case, it was found that there was no consideration paid by any of the members and that the following essential features of a typical lottery was missing in the instant case: -

- "(i) the participants are not required to purchase a ticket and they don't stand to lose anything and
- (ii) the scheme is not a business at all in the sense a lottery business typically is and the scheme is only a business promotion activity."

The ITAT discussed the position and clarified the same in the following manner: -

"On a bare look of the aforesaid terms and conditions, it is evident that it is a promotional scheme to sell the plots of land, a business which is being carried on by the assessee. It is only to attract the customers and the intention is not to do any business in lottery like draw. As per the terms and conditions. A person is to pay the price of the plot either in full or in monthly installments. The moment a person becomes a party to the plot allotment scheme, he is entitled to be taken in to the lucky draw. There is no separate contribution or the amount is paid by the assessee to be entitled to the draw. If he is not purchasing a plot or does not become a member for the allotment to a plot he is not entitled to any draw. Similarly, if he fails to make the payment of installments for the purchase of plot he becomes disentitled to the draw. In these circumstances, in our opinion, the matter stands covered in favour of the assessee by the decision of Kerala High Court in the case of Sampanna Kuries (P)

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Ltd. v. ITO 141 Taxman 815 (Ker) wherein also the assessee was conducting kuries or conducting business in consumer goods and were giving prizes by taking lots either for prompt payment of kuri installments or for increasing sale of consumers products. There

also, the Assessing Officer held that the assessee was liable to deduct tax u/s. 194 B. In the appeal, the Tribunal held that the assessee was conducting kuries in order to ensdure prompt payment of kuri installments by subscribers framed a scheme as per which every month lots were taken among subscribers who were promptly remitting kuri installments and a prize was given to a person in whose favour lot was taken; that in the matter of awarding such gift, there was no independent consideration other than prompt payment of kuri installments and that the assessee being dealers in consumer goods, in order to have more sales of their consumer goods had framed a scheme under which certain discounts/incentives were given to persons who won in draw conducted pursuant to scheme. In these circumstances, the Kerala High Court held that while considering the question of applicability of provisions of section 194B with reference to prize schemes introduced by the assessee; the same was required to be considered with reference to three elements which constitute a lottery as laid down namely (1) a prize or some advantage in the nature of a prize, (2) distribution thereof by chance and (3) consideration paid or promised for purchasing the chance. In the present case, there was no independent consideration for purchasing the chance and a customer becomes a member to the lucky draw by opting for purchase of the plot. The said scheme would not properly be called a lottery and it would be only a promotional scheme and the assessee would not be required to deduct tax thereon."

As mentioned above, the High Court has followed its earlier judgment in Jhaveri Industries case.

On going through the said judgment, one finds that the High Court took into consideration the explanation which was inserted under Section 2(24)(ix) of the Act to include the prize by lots in term lottery. This meaning was, however, included by the Finance Act, 2001, and specifically made

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effective from 01.04.2002.

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On that basis, the High Court

stated that since such an explanation is added only w.e.f.01.04.2002, including such prizes by lots under the expression lottery, it would not apply to the cases pertaining to earlier Assessment Years.

In the present case, we are concerned with the Assessment Years 1997-1998 to 1999-2000. For all the aforesaid reasons, we find that there is no error in the judgment rendered by the Authorities below.

We, thus, dismiss the appeals as bereft of any merit.

It is not even necessary to take into consideration the effect of the amendment as from the reading of the aforesaid provision and interpreting the same in the manner discussed above, we find that in the instant case, the prizes which were given under the Scheme in question were not by way of lotteries.

....., J.
[A.K. SIKRI]

....., J.
[ROHINTON FALI NARIMAN]

New Delhi;
November 20, 2015.

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ITEM NO.103

COURT NO.13

SECTION IIIA

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S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal Nos. 435-450/2008

COMMR.OF INCOME TAX-III, GUJARAT

Appellant(s)

VERSUS

PATEL GRUH NIRMAN FLAT YOJANA 5

Respondent(s)

Date : 20/11/2015 These appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Appellant(s)

Mr. Guru Krishna Kumar, Sr. Adv.
Ms. Shweta Garg, Adv.
Mr. Rupesh Kumar, Adv.
Mr. K. L. Janjani, Adv.
Mr. Pankaj Pandey, Adv.
Mr. Jitin Singhal, Adv.
Mr. Pratik Raoka, Adv.
Mr. B. V. Balaram Das, Adv.

For Respondent(s)

Mr. Amar Dave, Adv.
Ms. Nandini Gore, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeals are dismissed in terms of the signed order.

(Nidhi Ahuja)
COURT MASTER

(Rajinder Kaur)
COURT MASTER

[Signed order is placed on the file.]