IN THE HIGH COURT OF DELHI

ITR Nos.195/80,88/81,101/81,199/82 & 248/82

Date of Decision:07.12.2000

The Commissioner of Income-tax ..... Petitioner

Through: Mr. Sanjiv Khanna with
Mr.Ajay Jha, Advocates.

VERSUS

Shri Jatinder(in ITR Nos.195/80 and 101/81)
Shri D.R.Bhagat(in ITR No.88/81)
Late Shri P.S.Bhagat through L.Rs(in ITR No.199/82)
Smt. Maya Devi(in ITR No.248/82)
..... Respondents

Through: None.

CORAM:

THE HON'BLE MR. JUSTICE ARIJIT PASAYAT, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE D.K.JAIN

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

Arijit Pasayat, C.J.(Oral)

All these cases involve an identical issue and, therefore, are taken up together to be governed by this common judgment.

2. The assessee in each case was Director of a company, M/s Bhagat Construction Company (P) Ltd. The assessment years involved are 1970-71 and 1971-72. The company was incorporated on 19th October, 1965. It followed the accounting year on the Diwali day basis. The question as to whether the fixed salary or commission on net profit or sales or partly by one or partly by the other in respect of the Directors, was to be decided by the Board of Directors as laid down

in Articles 25 and 29 of the Memorandum and Articles of Association of the company. By resolution passed at an Extra Ordinary meeting of the shareholders held on 8th March, 1966, D.R. Bhagat was appointed as the Managing Director and three other persons, namely, Jatinder Kumar, Prem Sagar Bhagat and Vidya Sagar Bhagat were appointed as Directors. D.R.Bhagat was to be paid fixed salary of Rs.2,500/- per month w.e.f. 1st November, 1965 and commission @ 1-1/2% of the total contractual receipts, and other Directors were to be paid salary of Rs.2,000/- per month and a commission of 2%. For the previous year ending on 20th October, 1968, corresponding to Assessment Year 1969-70 assessee claimed to have adopted a resolution on 1.9.1969 to reduce the rate of commission payable to the Managing Director and Directors. This was done on the ground that loss was suffered by the company. For the Assessment Year 1969-70, company claimed commission @ 1% of the contractual receipts. Assessee in each case also declared in his return of income to have received commission at the reduced rate of 1%. For the previous year ending on 8th November, 1969 relevant to the Assessment Year 1970-71 assessee in each case claimed that there was a further resolution on 12th September, 1970 reducing the commission from 1% to 1/2% purportedly on the basis that further loss was incurred during the Assessment Year 1970-71. On

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the basis of this resolution company claimed commission paid to Directors at the reduced rate of 1/2%. Assessee in each case filed return indicating the fixed salary and the commission on the basis of resolution dated 12th September, 1970. Income-tax Officer completed assessment on the basis of return filed. For the previous year ending on 28th October, 1970 relevant to the Assessment Year 1971-72, the Board of Directors of the company again passed a resolution on 21st August, 1972 reducing the commission to 1/4% of the payments received. It was purportedly done on the basis that the company had suffered a loss of Rs.7.83 lakhs. Accordingly returns were filed. It appears that for the Assessment Year 1971-72 assessee in each case filed a return of income showing commission receivable at 1/2% but subsequently revised return was filed indicating a revised commission of 1/4%. Assessments for two years were completed by the Income-tax Officer accepting the claims. Commissioner of Income-tax(in short the Commissioner) was of the view that the assessments so done were prejudicial to the interest of revenue and, therefore, initiated proceedings under Section 263 of the Act and issued notice. The foundation of Commissioner's notice was that purported resolutions were passed after the income had accrued and, therefore, they were in-consequential. Orders of the

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Commissioner were challenged before the Income-tax Appellate Tribunal, New Delhi(in short the Tribunal) by the assessee. There was divergence of view between the two members who originally heard the matter. While the Accountant Member was of the view that the resolutions were passed prior to accrual of income, the Judicial Member held otherwise. Matter was referred to the third Member and was heard by the Vice-President, who agreed with the Accountant Member. On being moved for reference, common questions have been referred for opinion of this Court. Relating to Assessment Year 1970-71, the question reads as follows:

> "Whether on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that only 1/2% commission on the business receipts accrued to the assessee during this year and thereby cancelling the order passed by the Commissioner of Income-tax under Section 263 of the Income-tax Act?"

For Assessment Year 1971-72 following question has been referred:

> "Whether on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that only 1/4% commission on the business receipts accrued to the assessee during this year and thereby cancelling the order passed by the Commissioner of Income-tax under Section 263 of the Income-tax Act?"

3. We have heard learned counsel for the revenue. There is no appearance on behalf of the assessee in

spite of notice. Learned counsel for revenue submitted that the pivotal question is whether the income had accrued prior to the purported resolutions. Assessee's stand was based on an oral agreement. The Judicial Member with reference to the subsequent resolutions has factually recorded that there was no reference to any oral agreement in the subsequent resolutions. In fact he also noticed about the original return which was filed on the basis of commission fixed by the previous resolution. Unfortunately though the Vice-President agreed with Accountant Member he did not refer to these aspects which were noticed by the Judicial Member to hold that the plea of oral agreement was an after-thought.

4. We find that in C.I.T. v. Shiv Prakash Janak Raj & Co.,(1996) 222 ITR 583 guidelines to be followed in such matters have been indicated in detail. Various decisions of the Apex Court rendered earlier were referred to and the essence of the decisions has been noted in the said case. In the light of those decisions determinative question would be the date of accrual of income. This aspect has to be determined on consideration of factual aspects with reference to materials and evidence brought on record by the parties. Though the Vice-President agreed with the Accountant Member and differed with the view expressed by the Judicial Member, he did not discuss as to how

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the conclusion of the Judicial Member was not in order. It was open to him to hold that factual position noted by Judicial Member was one of the factors to be considered and not determinative. Nevertheless he was required to consider that aspect. In view of this position we feel the best course would be to direct the Tribunal to re-hear the appeals and adjudicate the matter afresh keeping in view the decision of the Apex Court in Shiv Prakash Janak Raj's case (supra). Ordered accordingly. We make it clear that we have not expressed any opinion on the factual aspects as the Tribunal has to re-adjudicate the matter.

All the references are accordingly disposed of.

CHIEF JUSTICE.

D.K.JAIN,J.

7th December, 2000
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