Elkem Technology, by GPA Sponge Iron India Limited Vs The Deputy Commissioner of Income Tax, (Assts)

Court: Andhra Pradesh High Court

Date of Decision: April 12, 2001

Acts Referred: Income Tax Act, 1961 â€" Section 260A, 9(1)

Citation: (2001) 169 CTR 49 : (2001) 250 ITR 164 : (2001) 117 TAXMAN 382

Hon'ble Judges: S.R. Nayak, J; S. Ananda Reddy, J

Bench: Division Bench

Advocate: A.V. Krishna Koundinya, for the Appellant;

Judgement

S.R. Nayak, J.
This Appeal is directed against the Order of the learned Income Tax Appellate Tribunal, Hyderabad, Bench `A'' dated

12.05.2000 in I.T.A.No.669/Hyd/1995.

2. The facts leading to the filing of this appeal be noted briefly as under :

The appellant is a non-resident company based in Norway. It entered into a contract with an Indian Company i.e., M/s.Sponge Iron India Limited,

Hyderabad, Andhra Pradesh on 19.04.1990 for supply of equipments as well as engineering data besides personnel services for establishing a

sub-merged Arc Furnace at Kothagudem in Andhra Pradesh. In terms of the contract, total amount of Rs.6.257 million NCK (Norwegian

Currency) was payable by the Indian Company. The Indian Company deducted tax at source of Rs.20,95,500/- before remitting the consideration

payable to the appellant company. The Indian Company filed a return of income as agent of the foreign company claiming that the amount received

by the non-resident is not liable for Indian taxation. During the accounting year under consideration, the Indian Company remitted Rs.69,85,000/-

towards charges for engineering and other services. The assessee claimed this amount as not taxable in its hands on the ground that the payment

was for construction, assembly undertaken by the recipient and the same being business profits is not taxable in its hands since it did not have a

permanent establishment in India in terms of the provisions of the Double Taxation Agreement between India and Norway. The assessee referred

to Explanation 2 of Section 9(1)(vii) of the Income Tax Act,1961 (for short ""the Act""), to claim that the payment does not come under the

definition of `fees for technical services''.

The Assessing Officer has rejected the above contention of the assessee stating that in terms of Clause II(1)(b) of the Contract between the

assessee and the Indian Company, the consideration is `mainly on account of provisions of the services of technical personnel''. The Assessing

Officer pointed out that the appellant company was merely placing at the disposal of the Indian Company, the recommended engineers who will be

assisting the Indian Company in establishing the furnace. The appellant company itself has not undertaken any construction, assembling, mining or

like project so as to claim that the same is not taxable in terms of Double Taxation Agreement. The Assessing Officer completed the assessment

u/s 143(3) on 28.12.1993 and held that the amount of Rs.69,85,000/- is liable for Indian Income Tax at 15%. The Order of the Assessing Officer

was carried in appeal before the Commissioner of Income Tax (Appeals-3), Hyderabad, who confirmed the assessment order. In further appeal,

the learned Income Tax Appellate Tribunal in its order dated 12.05.2000 confirmed the order of the Commissioner of Income Tax - 1st

respondent appellate authority. It is against the said order, the above appeal is preferred in terms of Section 260A of the Act.

3. Sri A.V.Krishna Koundinya, learned counsel appearing for the appellant would submit that the Indian Company remitted Rs.69,85,000/-

towards charges for engineering and other services and that amount is not taxable in its hands because the payment was for construction, assembly

undertaken by the recipient and the same being business profits is not taxable in its hands. The learned counsel would also contend that the

payment made by the Indian Company is not to the appellant company, but to the personnel supplied by the appellant company.

4. Before dealing with the contention of the learned counsel for the appellant, it has to be noticed at the threshold that there is no pleading at all in

support of the contention of the learned counsel that the payment made was not to the appellant company, but to the personnel supplied by it.

5. Section 9 of the Act deals with the income deemed to accrue or arise in India. That Section among other things provides :

9. Income deemed to accrue or arise in India :- (1) The following incomes shall be deemed to accrue or arise in India -

(i)xxx

.....

(vii) income by way of fees for technical services payable by -

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such

person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person

in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an

agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1 - For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have

been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2 - For the purposes of this clause, ""fees for technical services"" means any consideration (including any lump sum consideration) for

the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not

include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of

the recipient chargeable under the head ""Salaries"".

Section 9 applies to both residents and non-residents. Non-residents who may not be assessable in respect of income accruing or received outside

India have been rendered chargeable by virtue of this section in respect of income deemed to accrue or arise in India. Similarly, resident but not

ordinarily resident would also be chargeable in respect of income deemed to be accruing or arising in India under this section which otherwise

would have been exempt by virtue of Section 5(1)(c). Section 9 would not, however, apply to cases where income actually accrues or is received

in India.

6. Clause (vii) of Section 9 was inserted by the Finance Act, 1976, with effect from 1.6.1976 and a proviso was added to it by the Finance

(No.2) Act, 1977, with effect from 1.4.1977. Under cl. (vii), income by way of fees for technical services would be deemed to accrue or arise in

India where it is payable by the following :

(1) the Central Government or the State Government; or

(2) an Indian resident; or

(3) a non-resident where the fees are payable in respect of services, utilized in a business or profession carried on by him in India or for the

purposes of making or earning income from any source in India.

Explanation 2 of Clause (vii) of Section 9 defines ""fees for technical services"" for the purposes of that clause. Accordingly, it means any

consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision

of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by

the recipient or consideration which would be income of the recipient chargeable under the head ""Salaries"". The question whether the payment

would come within the exclusion part of this Explanation or not would have to be established by the person who claims the exclusion as held by the

Orissa High Court in ORISSA SYNTHETICS LTD. vs. ITO1. From a combined reading of clause (vii)(b) and Explanation 2, it becomes

abundantly clear that any consideration, whether lump sum or otherwise, paid by a person who is resident in India to a non-resident for rendering

any managerial or technical or consultancy service would be income by way of fees for technical services and would, therefore, be within the ambit

of ""income deemed to accrue or arise in India"". It is to be noted that u/s 9(1)(vii)(b), the expression used is ""fees for services utilized in India"" and

not the expression ""fees for services rendered in India"". It may be that some of the services are rendered abroad by the personnel employed or

deputed by non-resident company under collaboration agreement with the Indian Company. But if the fees are paid for services utilized by the

Indian company in its business carried on by it in India, irrespective of the place where the services were rendered, the amounts of the fees should

be deemed to accrue or arise in India. In STEFFEN, ROBERTSON & KIRSTEN CONSULTING ENGINEERS & SCIENTISTS vs. CIT2

where fees were paid in respect of preparatory studies carried out in South Africa, it was held that fees would be liable to tax as income accruing

or arising in India, irrespective of whether these payments were made in India or abroad, when the payments were made for services to be utilized

in India or abroad. In COCHIN REFINERIES LTD. vs. CIT3, the Refineries requested a foreign company to evaluate whether coke produced

from a blend of vaccum bottoms and clarified oil from Bombay High crude was suitable for making anode for aluminium industry. The tests were

carried out in USA in regard to which the assessee made a payment of Rs.7,69,614. The assessee also paid Rs.1,19,303 and Rs.38,271 which

were payments in the nature of reimbursement of the payments made to the personnel of the said consultant. It was held that the services rendered

by the foreign company would be in the nature of technical services and would, therefore, consequently be covered fully by the Explanation to

Section 9(1)(vii). Further, it was held even with regard to the two payments of Rs.1,19,303 and Rs.38,271 in the nature of reimbursement of

payments made to the personnel, no different situation would be available because these payments would be part and parcel in the process of

advice of a technical character and would fall for coverage only within the meaning of the above Explanation.

7. In this view of the matter, the payment of Rs.69,85,000/- made by the Indian company to the Norway company towards charges for

engineering and other personnel services, it should be held, would be part and parcel in the process of utilizing those technical services in India and

would fall for coverage within the meaning of Explanation to Section 9(1)(vii). Therefore, the following observation of the learned Income Tax

Appellate Tribunal is well justified.

5. We considered the matter in detail. The subject contract in question was a composite contract for supply of equipments and for providing

engineering and personnel services. The terms and conditions of these two segments have been clearly demarcated in the contract. The

consideration payable by the Indian Company was also demarcated and separately stated in respect of supply of equipments and in respect of

providing engineering and personnel services. Therefore, as observed by the learned Commissioner of Income Tax (Appeals), the entire

consideration for engineering and personnel services would remain independent of the consideration paid for the supply of equipments.

Therefore, there is no merit in the contention of the appellant that in terms of Clause II of the agreement the payments made by the Indian

Company to the non-resident company were for the purchase of equipment and towards consideration for construction of the project and

therefore Section 9(1)(vii) of the Act are not applicable and the Explanation 2 to the said provision would operate.

8. This appeal does not involve any question of law, much less, substantial question of law warranting its admission. In that view of the matter, we

dismissing ITTA No.37 of 2001 with no order as to costs at the stage of admission itself.