(2001) 08 CAL CK 0015

Calcutta High Court

Case No: IT Reference No. 43 of 1994 30 August 2001

Chloride Group Plc.		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: Aug. 30, 2001

Acts Referred:

- Income Tax Act, 1961 - Section 256(2)

Citation: (2001) 119 TAXMAN 283

Hon'ble Judges: Y.R. Meena, J; Meena, J; Arun Kumar Mitra, J

Bench: Full Bench

Advocate: Dr. Pal, for the Assessee Mullick, for the Revenue, for the Appellant;

Judgement

Meena, J.

On an application u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as the Act") this court has directed the Tribunal to refer the following questions set out at pages 15 and 16 of the Paper Book :

"1. Whether on proper interpretation of article 13(2) of the Double Taxation Avoidance Agreement between India and U.K., the Tribunal was right in law in rejecting the assessee"s claim for concessional rate of tax of 30 percent on the royalty income received by it in pursuance of the agreement signed on 10-12-1981 ?

2. Whether on proper interpretation of the Indian Contract Act and the agreements entered into by Chloride Group Ltd. with Chloride India Ltd. from time to time, the Tribunal was correct in law in holding that the agreement dated 10-12-1981 was not a separate and new agreement and even assuming that it was a separate agreement, the effective date of signing of the contract was to be treated as 1-1-1980 in the light of the decision in the case of Commissioner of Income Tax Vs. Continental Commercial Co. Ltd., ?

3. Whether the Tribunal was correct in law in interpreting the provisions of article 13(2) of the Double Taxation Avoidance Agreement between India and U.K. and, therefore, legally justified in holding that even though the contract dated 10-12-1981 was signed after the date of entry into force of the convention for avoidance of double taxation between India and U.K the appellant would be deprived of the concessional rate of 30 per cent provided in the said article only because the right under the agreement dated 10-12-1981 accrued to the assessee with effect from 1-1-1980 ?"

2. In compliance of the direction of this court, the Tribunal has referred the aforesaid questions for opinion of this court.

3. The assessee is a non-resident company. It has a collaboration agreement dated 28-6-1971 with Chloride India Ltd. known at that time as Associated Battery Makers (Eastern) Ltd. The said agreement was to commence on 4-1-1970 and to expire on 31-12-1974. Before the expiry of the said agreement, the assessee entered into another agreement dated 1-6-1976 which was for a period of 5 years commencing on 1-1-1975 up to 31-12-1979. Thereafter again the assessee entered into another agreement with the Chloride Group on 10-12-1981. The agreement was made effective from 1-1-1980 which is to be terminated on 31-12-1985.

4. For this purpose application for extension of the foreign collaboration was made to the Government of India and the Government of India by its letter dated 27-2-1981 gave interim approval for the extension of the agreement which shall be for a period of 5 years from 1-1-1980 to 31-121984.

5. During the relevant previous year, the assessee had only royalty income, which arose by virtue of clauses 9 and 14 of the agreement dated 10-12-1981. It offered this amount for taxation at the rate of 40 per cent u/s 115A of the Act. Thereafter by a letter dated 26-12-1985 the royalty income was offered for the period from 16-4-1981 to 31-12-1984 at the rate of 30 per cent, as provided in article 13 of the Double Taxation Avoidance Agreement dated 16-4-1981 (the Convention) between India and the U.K.

6. The assessing officer has not accepted the claim and levied the tax on the entire royalty amount at the rate of 40 per cent u/s 115A. According to him, the royalty income received by the assessee arose in pursuance of the original agreement dated 28-6-1971 and the agreements dated 1-6-1976 and 10- 12-1981 are merely an extension of the agreement entered into on 28-6-1971 and he, accordingly, taxed the royalty income at the rate of 40 percent plus surcharge. The assessing officer also did not allow the expenditure claimed u/s 44D of the Act. In appeal before the Commissioner (Appeals), the Commissioner (Appeals) has taken the view that even in the case of extension of the old agreement, unless assessee opted for old law, the new provisions of the law would be applicable, which are in existence on the date of the extension of the agreement. He further took the view that as the agreement has been made effective from l-1-1980, the assessee is not entitled for the benefit under article 13 of the convention. In appeal before

the Tribunal, the Tribunal also has taken the view that as the agreement has been made effective from 1-1-1980, the assessee is not entitled for the benefit of the provisions of convention, that is, Double Taxation Avoidance Agreement with the U.K. which comes into effect from 23-11-1981.

7. Heard the learned counsels for the parties. Dr. Pal submits that there are three agreements. First agreement was entered into in 1971, second agreement entered into was in 1974 and third agreement was entered into on 10-12-1981. The last agreement was made effective for the period from 1-1-1980 to 31-12-1984. He submits that as per article 13 of the convention, the tax rate in case of the fees for technical services will be taken at the rate of 30 per cent if the fee is paid in respect of a right or property which is first granted or under a contract which is signed after the date of entry into force of this convention and this convention has come into effect from 23-11-1981 and the agreement has been signed in December, 1981. Therefore, the assessee is liable to pay tax at the rate of 30 per cent of gross amount of the royalties and fees for technical services.

8. When the third agreement is signed after commencement of this convention, the assessee is liable to pay the tax at the rate of 30 per cent on the total receipt of royalties and fees. He also pointed out the changes of the terms and conditions in the second agreement and third agreement, which are pointed out by the Tribunal in paras 9 and 17 of its order. According to Dr. Pal, when the agreement dated 10-12-1981 is air independent agreement and which is signed after the commencement of the convention, the rate of tax on royalty and fees should be taken at the rate of 30 per cent. On the other hand, the learned counsel for the revenue, Mr. Mullick, submits that the agreement dated 10-12-1981 is nothing but an extension of the agreement entered into by the assessee on 28-6-1971. Therefore, as per clause 13(2) of the convention the assessee is liable to pay tax at the rate of 30 per cent.

9. The facts are not in dispute that the agreement dated 3-12-1981 has been entered into between the Chloride Group of India and Chloride India Ltd. On 10-12-1981 clause 14 of this agreement provides that this agreement was made effective from 1-1-1980 and shall continue until 31-12-1984. That makes it clear that this agreement has been signed on 10-12-1981 but made effective from 1-1-1980. Clause 15 of this agreement further provides that this agreement will become valid and come into force when the countries of both the parties give consent.

10. Article 27 of the convention provides that the convention shall come into force on the date of notification. For enforcing this convention the notification has been issued on 23-11-1981. Article 13(2) of the convention provides that if the right or property, which is first granted, or under a contract, which is signed after the date of entry into force of this convention, the tax rate shall be 30 per cent. The relevant part of article 13 reads as under :

"Royalties and fees for technical services.(1) Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other state.

(2) However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that state; provided that where the royalties or fees for technical services are paid to a resident of the other Contracting State who is the beneficial owner thereof and they are paid in respect of a right or property, which is first granted, or under a contract which is signed, after the date of entry into force of this convention, the tax so charged shall not exceed 30 per cent of the gross amount of the royalties or fees for technical services."

11. The perusal of sub-article (2) of article 13 of the convention shows that if any right or property which is first granted or under a contract which is signed after the date of entry into force of this convention, the tax so charged shall not exceed 30 per cent of the gross amount of royalties or fees for technical services.

12. The income in question of the assessee here is on account of royalties or fees for technical services and that income accrued as per agreement on 10-12-1981. Before signing this agreement on 10-12-1981, there was no question of accrual of any income though after signing of this agreement on 10-12-1981, some income also accrued from 1-1-1980 under this agreement as agreement was made effective from 1-1-1980. The assessee has not claimed the rate of 30 per cent on income, which accrued before commencement of convention, that is, 23-11-1981.

13. He claimed the rate of 30 per cent tax only for the income which accrued after 23-11-1981. The words in sub-article (2) of article 13 are: "in respect of a right or property which is first granted, or under a contract which is signed after the date of enforcement of this convention." Thus, the tax so charged shall not exceed 30 per cent for the period from 23-11-1981.

14. Admittedly in the case at hand the Double Taxation Avoidance Agreement with the UK which is called convention has come into force on 23-11-1981 and agreement between Chloride Group Ltd. and Chloride India Ltd. has been signed on 10- 12-1981, that is, after commencement of the convention.

15. Whether agreement dated 10- 12-1981 is just an extension of agreement of 1971 or an independent agreement Dr. Pal has pointed out that the agreement dated 10-12-1981 is not an extension of the agreement dated 28-6-1971 but an independent agreement and even the terms and conditions of this agreement dated 28-6-1971 and agreement dated 10- 12-1981 are different. Those are pointed out by the Tribunal in the case of ITO v. Chloride India Ltd. (2000) 75 ITD 69 (Cal) in paras 9 and 7 of its order. In view of the different terms and conditions of the agreement dated 28-6-1971 and the agreement dated 10-12-1981, it cannot be said that the agreement dated 10-12-1981, just an

extension of agreement on 28-6-1971.

16. The perusal of the agreement dated 10-12-1981 though made effective from 1-1-1980 does not mean that it is merely an extension of agreement, dated 28-6-1971. The terms and conditions are different. The rate of royalty is different. Therefore, the agreement dated 10-12-1981 cannot be said to be a mere extension of agreement dated 28-6-1971 and when the agreement dated 10-12-1981 has been signed on 10- 12-1981, that is, after commencement of the convention as per sub-article (2), the assessee is liable to pay tax at the rate of 30 per cent on the income accrued for the period after commencement of the convention, that is, after 23 -11-1981.

17. In view of the facts and law discussed above, the Tribunal has committed error in holding that assessee is not entitled for the benefit of tax rate given in article 13 of the convention.

18. In the result, we answer all the questions in the negative, that is, in favour of the assessee and against the revenue.