

(1998) 08 KL CK 0049

In the High Court Of Kerala

Case No : Income-tax Reference No's. 179 and 180 of 1991

Asian Development Service

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 27-08-1998

Acts Referred:

Income Tax Act, 1961 — Section 44D, 9, 9(1)

Citation : (1999) 239 ITR 713

Hon'ble Judges : K.K. Usha, J;G. Sivarajan, J

Bench : Division Bench

Advocate : C.N. Ramachandran Nair, for the Appellant; P.K.R. Menon and N.R.K. Nair, for the Respondent

Judgement

G. Sivarajan, J.—The following two questions are referred to us at the instance of the assessee u/s 256(1) of the Income Tax Act, 1961, for opinion by this court :

"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the consideration received by the applicant for services rendered under the contract with the Fertilisers and Chemicals Travancore Ltd. was to be assessed as fees for technical know-how within the meaning of Section 9(1)(vii) of the Income Tax Act, 1961, and not under the head "Profits and gains of business" ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the amount of tax payable by the non-resident shall be added to the income remitted to the non-resident and the tax payable by the non-resident should be determined with reference to the gross figure arrived at as above ?"

2. The assessment years concerned are 1980-81 and 1981-82. The applicant-assessee is a non-resident company. It is incorporated in Indonesia and is a wholly owned subsidiary of Rope River Ltd. incorporated in Hongkong which is engaged in the business of undertaking rectification of different fertiliser plants

throughout the world. It received certain amounts from FACT Ltd., Cochin Division, under a contract. The questions involved herein relate to the assessment of the said amount to tax under the Act. According to the assessee, the said amount is liable to be assessed under the Act treating it as business income whereas according to the assessing authority, it is liable to be assessed treating it as income falling u/s 9(1)(vii) read with Section 44D(b) of the Act. The assessing authority by annexures A-1 and A-2 orders treated the receipts accordingly and completed the assessment without allowing any deductions. The Appellate Assistant Commissioner of Income Tax as well as the Income Tax Appellate Tribunal dismissed the appeals filed by the assessee and confirmed the assessments. It is against the order of the Income Tax Appellate Tribunal that the assessee sought reference of the two questions set out in the first paragraph of this judgment.

3. The brief facts necessary for deciding the questions referred are as follows : The FACT experienced certain difficulties in respect of their newly set up N. P. K. Granulation Plant in Cochin Division. They entered into an agreement with the assessee whereby the assessee was to render technical and management assistance in bringing the plant to its full designed capacity, to provide expert assistance in the form of day-to-day operational and maintenance guidance and also to give guidance for granulation and to provide specific engineering know-how in de-bottle-necking and upgrading the performance of the plant. The details of the services to be rendered by the assessee are contained in the agreement dated January 18, 1979, executed between the assessee and the FACT, which is included in the paper book and marked as annexure-D.

4. According to learned counsel appearing for the assessee, the services rendered by the assessee though can be characterised as technical service still they will fall under the excluded category specified in Explanation 2 to Section 9(1)(vii) of the Act and, therefore, the main provisions of Section 9(1)(vii) are not attracted. In support of the said submission, counsel relied on various Clauses of the agreement and submitted that on a fair reading of the agreement as a whole it is evident that the technical services rendered by the assessee are in connection with the construction, assembly or like project undertaken by the assessee. According to him, the work undertaken by the assessee would include dismantling of the whole plant and re-construction or re-assembly of the said plant for the purpose of finding out the defect and for rectifying the same and that is what happened in the instant case.

5. Learned senior Central Government standing counsel, Sri. P. K. R. Menon, appearing for the respondent, submitted that the agreement in the case (annexure-D) was only for the purpose of rendering technical service and the assessee has not undertaken any construction or assembly of the plant, for, according to him, the plant was already in existence and what was required was only rectification of the defects and to bring it to the expected capacity. Counsel accordingly submitted that the amounts received by the assessee will squarely

fall under the definition of fees for technical services in Explanation 2 and, therefore, the provisions of Section 9(1)(vii) of the Act are attracted. In support of his submission, counsel referred to the agreement (annexure-D) and relied on the preamble and Clauses 1.1, 1.2 and 1.5 under article 1 regarding employment Clauses 2(1)(a) and (b) particularly and also Clause (c), 2(2)(a) of article 2 regarding performance of time and further relied on article 6 in that regard. He further submitted that Clause 2(1)(b) of article 2 clearly shows that the responsibility of purchase of the material and the installation of the same is that of the FACT and, therefore, it is evident that the construction or assembly, if any, is that of FACT only. With reference to Clauses 1(1) and 1(3) of article 1 and Clauses 2(1)(a) and 2(2)(a) counsel submitted that the responsibility of the assessee is only to render technical services in the form of advice and assistance in rectifying the defects in the existing plant. It is accordingly submitted that the services rendered by the assessee are purely technical services of the nature specified in Explanation 2 of Section 9(1)(vii) and are not of the nature excluded in the said Explanation. He alternatively submitted that, in the instant case, the Tribunal has entered a categoric finding in paragraph 3 of its order that there was neither any construction nor any assembly and that the work undertaken by the assessee is not even remotely connected with construction and that there is no remote relation with the assembly. He submitted that this finding of the Tribunal has not been challenged by the assessee by raising a specific question in that regard. He also submitted that this finding not being challenged, the conclusion is irresistible that the amounts received by the assessee are in the nature of fees for technical services falling within the main provision of Explanation 2 and, therefore, the question of law raised by the assessee is only academic as the answer is self-evident. Learned standing counsel relied on two decisions of the Supreme Court in *Karam Chand Thapar and Bros. P. Ltd. Vs. Commissioner of Income Tax, (Central), Calcutta*, and *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, in that regard.

6. We have considered the matter. In order to decide the controversy involved in this case, the material available on record is the agreement entered into between the assessee and the FACT, which is annexure-D in the paper book. Regarding the question in issue this is what the assessing authority has stated in the assessment for the year 1980-81 :

"The income and expenditure account has been furnished along with the return. I am not examining the veracity of expenses incurred because in my view in respect of agreements entered into after April 1, 1976, no expenses can be allowed in arriving at the income of a foreign and nonresident company. This is because of insertion of Section 9(1)(vi) and (vii). By these amendments the resident of remitter of royalties and any fees has been made the basis of charge of tax. The payment made by resident to a non-resident by way of royalty and technical service fees becomes income deemed to accrue or arise in India. In the instant case it is to be observed that the provisions of Section 5(2) is applicable in that there is no dispute about the place where services were rendered by the

assessee-company, and as such it is income accruing in India. Once the provisions of Section 9(1)(vi) and (vii) are invoked the question of deduction of expenses does not arise."

7. Absolutely no discussion is seen made by the assessing authority with reference to the agreement in the assessment order for 1980-81. But in the assessment order for 1981-82, it is seen that another assessing authority has considered the question with reference to the agreement and observed that the exemption from the definition contained in Explanation 2 is with regard to the consideration for construction, assembly, mining or like project. It is stated that the scope of work by Asian Development Services given in annexure-II to the agreement indicates that their role is purely to assist with design, inspection and supervision. The alterations that are necessary for the machinery already installed are to be carried out by the FACT, Cochin Division, itself and not by the Asian Development Services. No payment has been made to the assessee for construction, assembly, mining or like project. Therefore, according to the assessing authority, the assessee's claim that the fees received by the assessee are to be treated as a business receipt and that the income should be computed with reference to Sections 28 - 43 cannot be accepted. It is further stated that the fee has been received by the assessee as fee for technical services and, therefore, the same has to be subjected to tax as per the provisions of Section 44D of the Income Tax Act, i.e., without allowing deduction for any expenses incurred in relation to rendering of the services as per the contract. The appellate authority, namely, the Commissioner of Income Tax (Appeals), considered the matter in the light of certain Clauses in the agreement and held that the work undertaken by the assessee will not fall under the excluded category, namely, for any construction, assembly or mining. The Income Tax Appellate Tribunal also considered the questions in the light of the preamble to the agreement executed between the assessee and the FACT and held that the work undertaken by the assessee is not one for construction or for assembly. According to the Tribunal, what was contemplated under the agreement was only de-bottlenecking and upgrading the performance of the plant to the designed target and the assessee was only to provide the technical and management assistance to the FACT for the same. It was further observed that the work undertaken was in respect of an existing plant which has developed some snags and troubles affecting day-to-day production. It was also stated that it is conceded that it required massive investment and massive technical skill and the agreement between the Indian company and the assessee-company was to take care of the latter. We find that the authorities and the Tribunal have come to the conclusion that the work undertaken by the assessee will not fall under the excluded category only on the basis of the reading of the preamble of the agreement. It is not seen that any of these authorities including the Tribunal have considered the terms of the agreement in its entirety for arriving at the conclusion that the work undertaken by the assessee was for rendering any managerial, technical or other services unconnected with any construction, assembly, mining or the like project.

According to us, in order to decide the question as to whether the service rendered by the assessee under the agreement was for construction, assembly or the like project and/or any managerial, technical or other services unconnected with the same, it is necessary to consider the Entire terms of the agreement and further to see what the assessee in fact had done pursuant to the said agreement. The assessee-company was engaged by the FACT for the purposes of rectifying the defects and the nature of the defect is mentioned in the preamble of the agreement, namely, NPK granulations plant at Ambalamedu, is not giving the designed performance and, therefore, the company intended to make necessary alterations and thereby bringing the plant to full production/designated performance. In order to rectify the defects in the NPK granulations plant and to bring the same to full production/designated performance, the company itself thought that alterations may be required. In order to find out as to what exactly are the defects, it may even be necessary to dismantle the whole plant and reassemble or reconstruct the same. As already stated, alterations are also contemplated in the agreement. But in order to determine the matter effectively and satisfactorily, it is necessary to ascertain as to whether in fact any such dismantling, reassembling or like project was done in the instant case. None of the authorities have considered the matter in that perspective also. As already stated, even all the terms of the agreement were not considered.

8. Now we will deal with the contention of the parties. According to the assessee, a reading of the agreement as a whole will clearly show that what was contemplated by the parties was for rectification of the defects in the existing plant and to alter the same and thereby to bring the plant to full production/designated performance which clearly contemplated dismantling and reconstruction/reassembly of the entire plant and at any rate, it is a project undertaken by the assessee of the nature similar to construction or assembly. They relied on the various clauses in the agreement particularly the first clause in the preamble which refers to making necessary alterations "for technical and management assistance in bringing the aforesaid plant to full designed capacity and to provide the expert assistance in the form of day-to-day operational and maintenance guidance" used in the second clause of the preamble. Reference was made to Clauses 1.1 and 1.3 of article 1 to state that the work undertaken by the assessee was to render services to the project as set out herein which also provided that the technical advisers will be responsible to the company for making sure, by exercise of all reasonable care, skill and diligence within the limits imposed by the agreement without any hindrance by the company, that technically and economically sound, easily operable and up to date facilities are designated and installed at the lowest cost consistent with the needs of the project, that all aspects of the work comply with the requirements of the company and that facilities in acceptable operating conditions are finally turned over to the company in accordance with the designed criteria. Counsel pointed out that it also provides for assisting the company for purchase of correct materials required for the plant and to test their performance before erection and

assist in installing the same. Reference is also made to Clause 2.1(b) of article 2 under which the company agreed that in case the technical advisers supplied the aforesaid details within the time limit stipulated, the necessary materials/equipments would be purchased and installed by the company and also the necessary modification completed within a specified time. Clause 2.2(b) of the agreement was also relied on to show that the power to employ additional personnel or to reduce or alter the period of service of personnel so employed as the progress of the work demands is vested in the assessee, of course, subject to approval by the company. Article 3 deals with technical advisers' personal supervision. Counsel laid particular emphasis on article 4 which deals with guarantees and also article 5 which deals with compliance with applicable laws and regulations. According to them, a reading of articles 3, 4 and 5 will clearly show the nature and the work undertaken by the assessee. Clause 5.2 of the agreement provides, it is stated, that the assessee shall assume complete responsibility for compliance with the provisions of all applicable laws relating to social security, workmen's compensation and unemployment, insurance or other measures for the protection of workers as may now be effective or hereafter be applicable to the services to be furnished by the assessee or by their sub-contractors, if any, and also that they shall have exclusive liability for the preparation and filing of reports required under such laws, and shall hold the company harmless from any penalties imposed as a result of failure to comply with such laws. Added to this counsel relied on article 7 which provides for inspection of work by the company and article 14 which deals with the company's responsibilities. All these, according to the assessee, will support the contention of the assessee that the fees paid by the FACT to the assessee are for services rendered in connection with the construction, assembly or like project. On the other hand, the Revenue relied on the preamble to the agreement and also Clauses 1.1., 1.3., 2.1(a), 2.1(b), 2.2(a), 2.2(c) and also article 6. With reference to Clause 1.1 it was pointed out that what the assessee has undertaken was to render services to the project and further with reference to Clause 1.3 it was submitted that it is for the company to purchase correct materials required for the plant and to test their performance before erection and assist in installing the same. Particular emphasis is laid on Clause 2.1(b) which provides that the necessary materials/equipment would be purchased and installed by the company and also the necessary modifications completed within a period of 15 months thereafter. This, according to the Revenue, would clearly show that the work part, if any, was the obligation of the company alone. With reference to article 6 it is stated that the duty of the assessee was only to draw up plans, drawings, specifications, designs and other like evidence of work.

9. As already stated, none of the authorities nor the Tribunal adverted to the various Clauses in the agreement other than the preamble to arrive at the conclusion that the consideration received by the assessee under the contract fell within the main part of Section 9(1)(vii) of the Act. We have scanned through the agreement annexure-D and we find that the various Clauses in the agreement

relied on by the parties are relevant in deciding the issue. The authorities and the Tribunal ignored the same. Further, as already stated, that by itself is not sufficient for satisfactorily deciding the question as to whether the payment effected by the FACT to the assessee under the contract is for the technical and other services rendered in connection with the construction, assembly or like project referred to in Explanation 2 to Section 9(1)(vii) of the Act. It is necessary, according to us, to verify the records maintained by the assessee and the FACT in connection with the execution of the work under the contract and also the correspondence resting between the parties in this regard. The agreement also provides for the assessee to maintain all records connected with the execution of the project, as is evident from clause 7(C) of Schedule A and also from clause 2 regarding terms of payment in Schedule B. We do not find that the assessing authority or the appellate authority has considered any such documents while considering the question of applicability of Section 9(1)(vii) of the Act with particular reference to Explanation 2 thereof. We also find that the Tribunal without adverting to any of those documents has entered a finding that there was neither any construction nor any assembly, that the work undertaken by the assessee is not remotely connected with construction and that there is no remote relation with the assembly. This factual finding, it would appear, was entered by the Tribunal purely on a consideration of the preamble to the agreement. No factual details were available on record to show the nature of the work actually done by the assessee in relation to the agreement. The above finding arrived at by the Tribunal without considering the aforesaid documents and simply relying on the preamble to the agreement can only be characterised as unreasonable and perverse. The High Court of Orissa had occasion to consider the scope of the provisions of Section 9(1)(vii) with particular reference to Explanation 2 thereof in *Orissa Synthetics Ltd. Vs. Income Tax Officer and Others*, . In that case, one of the questions which came up for consideration was whether, though the payment in question can come within the concept of "income by way of fees for technical services" u/s 9(1)(vii), it would come within the exclusion part of Explanation 2 to Section 9(1)(vii). The contention taken by the assessee in that case was that though the payment in question was the consideration for rendering technical services, the said consideration, being for the construction undertaken by the recipient, would be excluded under Explanation 2 to Section 9(1)(vii) and, therefore, it will not be chargeable to Income Tax. The Income Tax Officer has held that the payment in question having been made for provision of services by technical and other personnel, it would attract the provisions of Section 9(1)(vii) and accordingly, he has directed deduction of tax on the same. Considering the said contention, the court observed as follows (pages 40) :

"Explanation 2 to Section 9(1)(vii) clearly provides that, for the purposes of Clause (vii), "fees for technical services" means any consideration for the rendering of managerial, technical or consultancy services, 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". We have already held that the income is not chargeable under the head "Salary". Dr. Pal, however, argues with emphasis that a bare reading of Clauses V and VI of the agreement would unequivocally indicate that the payment of 350 U.S. dollars towards technical services of technicians is a consideration connected with the construction work of the project and, accordingly, it would be excluded from the chargeable income, in view of Explanation 2 to Section 9(1)(vii). Whether the payment would come within the exclusion part or not will have to be established by the person who claims the exclusion in question. Either the petitioner or the seller, namely, Chemtex will have to establish the nature of technical services rendered by those technicians for which the payment is required to be made and whether such technical service was in connection with the construction, assembly or any like project taken by Chemtex. Whether the exclusion part of Explanation 2 would at all be attracted to the facts and circumstances of the present case would depend upon the nature of work for which those technicians had come to India and the particular nature of the work they did in India. Since no materials have been adduced before the Income Tax Officer in that regard and, consequently, the matter has not been considered from the said angle, it would be meet and proper for us to remit the matter to the Income Tax Officer with a direction that he would give liberty to the petitioner to adduce relevant evidence with regard to the nature of services rendered by the foreign technicians for which the payment in question is sought to be made and to find out whether it would come within the exclusion part of Explanation 2 to Section 9(1)(vii) of the Income Tax Act. The Income Tax Officer, after giving opportunity to the petitioner and on consideration of the materials to be produced before him, would hear and decide the same in accordance with law."

10. The above observations equally apply to the present case also. For all these reasons, we are of the view that the matter must go back to the assessing authority for fresh consideration.

11. The second question referred for the opinion of this court is regarding gross income or the total income that should be considered for the purpose of applying the rate as provided u/s 115A of the Act. The total amount paid to the assessee during the years under consideration was Rs. 18,84,026 and Rs. 13,02,689, respectively. The assessing authority has grossed up the tax liability with reference to the rates prescribed in Section 115A at 40 per cent, for technical service fees and arrived at the total income at Rs. 31,40,040 for the year 1980-81 and Rs. 21,71,148 for the year 1981-82. This method adopted by the assessing authority was affirmed by the first appellate authority. But the Tribunal relied on the decision of the Andhra Pradesh High Court in Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, , where it was held that where under a contract, the tax that would be leviable on the profit in the hands of the non-resident was to be paid by the Indian company, the Income Tax Officer would be justified in adding to the net payment made only

the amount of tax payable by the non-resident and the tax deductible at source should be determined with reference to the gross figure arrived at as above. Such arrangement entered into between the non-resident and the Indian company did not admit of a system of tax on tax. Following the principles laid down in the said decision, the Tribunal held that the assessee could be taxed only on the gross income earned by it. It is against this finding of the Tribunal that the assessee sought reference of the question as to whether the Tribunal was right in law in holding that the amount of tax payable by the non-resident shall be added to the income remitted to the non-resident and the tax payable by the non-resident should be determined with reference to the gross figure arrived at as above.

12. Learned counsel appearing for the assessee submitted that the only provision under which the grossing up of the tax payable on the amount paid to the assessee is Section 28(iv) of the Act as perquisite. In order to apply Section 28(iv), the income which is received by the assessee must be the income from business for which the computation has to be made under the provisions of Sections 28 - 42 of the Act. In the instant case, the entire amount received by the assessee has been treated as fees for technical services as provided under the Explanation to Section 9(1)(vii) of the Act and by applying the provisions of Section 44D, the entire amount was brought to tax by applying the provisions of Section 115A of the Act. In such circumstances, according to learned counsel, there is no provision available under the Act for grossing up of the total income by applying the formula of 100/60. Counsel, therefore, submitted that in a case where the income is subjected to tax u/s 9(1)(vii) of the Act read with Section 44D there is no scope for applying the grossing up method and that the Income Tax Appellate Tribunal has committed a serious error in holding that the tax liability of the assessee had to be added for the purpose of arriving at the total income exigible to tax under the Act.

13. Learned senior standing counsel appearing for the Revenue on the other hand, submitted that Section 28(iv) is not the only provision under which the grossing up of income is permissible. According to him, even if the income sought to be taxed is not business income still Section 115A of the Act enables the Revenue to gross up the total income by adding the tax liability of the assessee and, therefore, the Income Tax Appellate Tribunal was perfectly justified in sustaining the method of gross income by adding the tax liability to the total income. Standing counsel, in support of his contention, relied on the decision of the Andhra Pradesh High Court in Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, , Commissioner of Income Tax Vs. Barium Chemicals Ltd., and A. Sanyasi Rao and Another Vs. Government of Andhra Pradesh and Others, . In Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, , the Andhra Pradesh State Electricity Board made certain payments to non-residents against the purchase of machinery and equipment and also against the work executed by the non-residents in India of erecting and commissioning the machinery and

equipment. The question which arose in that case was as to whether the Electricity Board was under an obligation to deduct tax at source from these payments u/s 195 of the Income Tax Act, 1961. The Electricity Board made payments without deduction of tax at source. Owing to the failure of the Electricity Board to deduct such tax, the Electricity Board was deemed to be an assessee in respect of the tax deductible at source u/s 195. Consequently, the Income Tax Officer passed orders determining the tax, which, according to him, was deductible at source u/s 195 and required the Electricity Board to pay such amounts. The Appellate Assistant Commissioner and the Tribunal cancelled the assessment on the ground that the provision of Section 195 of the Act is not applicable to payments of sums to non-resident which are not "pure income profits". It is in this connection the matter has come up before the High Court. The High Court after considering the various decisions of other courts held that the person who pays the amount to the non-resident is liable to deduct Income Tax u/s 195 of the Act on the payment made to the non-resident company.

14. The aforesaid decision was followed by the very same High Court in *Commissioner of Income Tax Vs. Barium Chemicals Ltd.*, . That was a case where the assessee-company entered into an agreement with a foreign company, whereunder the assessee-company undertook to remit certain amounts to the foreign company from time to time. Clause H of the agreement stated that the amounts would be paid without any deductions for taxes or otherwise. No tax was deducted at source by the assessee-company as required u/s 195 of the Income Tax Act. For that reason, the Income Tax Officer added the tax component and worked out the total taxable income at a particular figure. The Appellate Assistant Commissioner determined the income accruing to the non-resident and directed the Income Tax Officer to gross up the amount by adding the tax component. But the Tribunal held that the actual amount remitted should be taken as the total income and tax should be collected from the agent on that amount. The High Court on a reference held that under Clause H of the agreement, there were no express words to the effect that the assessee had undertaken the liability to deduct tax on the income earned by the foreign company in India. But the said words must be deemed to be implicit in Clause H. It was accordingly held that the proper course was to gross up the figures by adding the tax component to the actual amount remitted as held by the Appellate Assistant Commissioner. For arriving at the said conclusion, the court applied the method of grossing up adopted in *Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru*, . This method is again followed by the same court in *A. Sanyasi Rao and Another Vs. Government of Andhra Pradesh and Others*, . The Orissa High Court in *Commissioner of Income Tax Vs. American Consulting Corporation*, , has taken the view that the tax liability undertaken by the Indian company was not assessable as profits and gains of the assessee in the absence of the requisite statutory provision and that since under article 4 of the contract the tax that would be leviable on the profit in the hands of the corporation was to be paid by the Indian company, the

arrangement entered into between the corporation and the Indian company did not admit of a system of tax on tax. What was available to be added under the contract was addition of that benefit which the corporation had enjoyed by being free from the liability to Income Tax. Accordingly, it was held that the value of the benefit or perquisite which arose to the corporation by way of its tax liability having been met by the company had to be limited to the amount of actual tax due and in the circumstances grossing up was not permissible. The Andhra Pradesh High Court in Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, has specifically adverted to this decision of the Orissa High Court and observed that the said decision sets out the correct principle on which gross income should be arrived at in cases like this. It was observed as follows (page 771) :

"The Orissa High Court held that, in a case where, under the contract, the tax that would be leviable on the profit in the hands of the nonresident was to be paid by the Indian company, the arrangement entered into between the non-resident and the Indian company did not admit of a system of tax on tax. What was available to be added under the contract was addition of that benefit which the non-resident had enjoyed by being free from the liability to Income Tax. In other words, the value of the bene-fit or perquisite, which arose to the non-resident by way of its tax liability having been met by the Indian company, had to be limited to the amount of actual tax due and the gross figure determined accordingly."

15. We are of the view that the decision of the Andhra Pradesh High Court in Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, represents the correct legal position. In a case where a resident company as per an agreement entered into with a non-resident pursuant to which amounts were paid to the non-resident, if the contract provides that tax liability, if any, in respect of the amounts so paid to the non-resident is to be borne by the resident company the assessee is bound to add the tax liability in his total income for the purpose of determining the tax liability of the non-resident. We, therefore, hold that the Appellate Tribunal was perfectly justified in holding that the amount of tax payable by the non-resident has to be added to the income remitted to the non-resident and the tax payable by the non-resident should be determined with reference to the gross figure arrived at as above.

16. However in view of the fact that we are remanding the matter to the assessing authority, to consider the question as to whether the various amounts" received by the assessee under the contract will fall within Explanation 2 to Section 9(1)(vii) of the Act with reference to the various documents and the terms of the contract and since a decision on the said question has a bearing on this question also, we are not answering the second question also, though we have laid down the principles regarding the method of grossing up. Accordingly, we set aside the orders of the Income Tax Appellate Tribunal as well as the orders of the authorities below and remit the matter to the assessing authority to

complete the assessments for the years 1980-81 and 1981-82 afresh in accordance with law and in the light of the directions contained in this judgment. The Income Tax referred cases are disposed of as above. In the circumstances of the case there will be no order as to costs.

17. A copy of this judgment under the seal of this court and the signature of the Registrar shall be sent to the Income Tax Appellate Tribunal, Cochin Bench.