

(1998) 10 AP CK 0072

In the Andhra Pradesh High Court

Case No : Case Referred No"s. 71 and 149 of 1990

Clouth Gummiwerke Aktiengesellschaft and Mannesmann
Demag Lauchhammer

APPELLANT

Vs

Commissioner of Income Tax
 Commissioner of Income
Tax Vs Clouth Gummiwerke Aktiengesellschaft and
Mannesmann Demag Lauchhammer

RESPONDENT

Date of Decision : 16-10-1998

Acts Referred:

Income Tax Act, 1961 — Section 17(2), 2(24), 9, 9(1)

Citation : (1999) 238 ITR 861

Hon'ble Judges : T. Ranga Rao, J;S.V. Maruthi, J

Bench : Division Bench

Advocate : Y. Ratnakar and S.R. Ashok, for the Appellant;

Judgement

S.V. Maruthi, J.—These two RCs are disposed of by a common order as the questions referred are similar.

2. The following questions are referred by the Tribunal for the opinion of this court in R. C. No. 71 of 1990 :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that Rs. 1,19,459 was fees for technical services and would be deemed as income u/s 9(1)(vii) ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that only Rs. 1,19,459 could be treated as taxable and not Rs. 1,76,116 which figure includes the incidental expenses in bringing the engineer to India ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in upholding the grossing up of income by calculating tax on tax until zero difference is arrived at and not merely restricting the grossing up of income to the tax on the net amount and no further ?"

3. In R.C. No. 149 of 1990, the following questions are referred :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that Rs. 1,32,072 was fees for technical services and would be deemed as income u/s 9(1)(vii) ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that only Rs. 1,32,072 could be treated as taxable and not Rs. 1,70,933 which figure includes the incidental expenses in bringing the engineer to India ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in upholding the grossing up of income by calculating tax on tax until zero difference is arrived at and not merely restricting the grossing up of income to the tax on the net amount and no further ?"

4. The facts in brief are as follows :

The assessee is a non-resident company by name Clouth Gummiwerke ("NR" for short). The return has been filed by National Mineral Development Corporation Limited ("NMDC" for short), an Indian company as the agent of NR. The NMDC entered into a contract with the NR for erecting certain conveyor belts at their Bailadilla project. The NR agreed to do the job of erection of conveyor belts through their engineers. As per the agreement, the NR was to depute two supervisors for a period of two working days for belt changing and erection of new belts, the lump sum amount of DM. 33,000 should be paid towards the charges, the engineers should be provided free boarding, lodging and transport facilities apart from air fare.

5. Accordingly, the NR carried out the erection and issued a bill for DM. 33,000 on October 20, 1978, in R.C. No. 71 of 1990 and DM. 32,542 in R.C. No. 149 of 1990. The Income Tax Officer held that the amounts of DM. 33,000 and DM. 32,542 would be subject to taxation and advised the assessee to deduct the tax. The assessee had paid a tax of Rs. 1,19,450 and Rs. 1,20,674, respectively. The amount was remitted thereafter. The amount of DM. 33,000 paid was understood to be free of Indian Income Tax. The NMDC thereafter filed the return in which it was claimed that these amounts were not taxable. The Income Tax Officer held that it was taxable since the payments were covered by Section 9(1)(vii) of the Income Tax Act (for short "the Act"). The Commissioner agreed with the assessee. On appeal, the Tribunal held that the payments are taxable u/s 9(1)(vii) of the Act. However, at the instance of the assessee, question No. 1 set out in the earlier paragraph was referred for the opinion of this court.

6. The Income Tax Officer had brought to tax a sum of Rs. 1,76,116 which includes air fare, DA, etc. The Tribunal held that the air fare paid by the NMDC to the employees of the assessee-NR is not taxable for the purpose of Income Tax. The Tribunal also held that the technical fees has to be grossed up for the purpose of Income Tax. At the instance of the Revenue, the other two questions

set out in the earlier paragraph were referred for the opinion of this court.

7. It is not disputed that the employees of the non-resident company were deputed to supervise the erection of the conveyor belts. u/s 9(1) of the Act, the following incomes shall be deemed to accrue or arise in India :

"(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India (vii) income by way of fees for technical services payable by--(a) the Government ; or . . ."

8. Explanation 2 under Clause (vii) of this section says :

"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"."

9. From the above, it is clear that any fees paid for technical services is income within the meaning of Section 9 of the Act and, therefore, it is taxable. Under Explanation 2, as stated above, fee offered for technical services means any consideration paid for technical services and excludes consideration paid for any construction, assembling, mining or like project undertaken by the recipient. In other words, any fees paid for technical services is income, if it does not include any consideration paid for any construction undertaken by the recipient.

10. The argument of learned counsel for the NR company-assessee is that the two supervisors belonging to the NR company have not only to supervise erection of the plant but have to participate in the construction of the plant and, therefore, the activity taken up by the two supervisors includes construction and the amount paid towards technical services is not income for the purpose of Section 9 of the Act.

11. It is difficult to agree with the arguments of learned counsel for the assessee. The two supervisors were deputed only for the purpose of rendering technical services and nowhere is it disclosed that they were engaged for the purpose of constructing the plant. Therefore, the amounts of DM 33,000 and DM 32,542, respectively, are income u/s 9(1)(vii) of the Act and are taxable.

12. The next question is whether the expenditure incurred towards air tare is taxable in the hands of the assessee.

13. Section 2(24) defines "income". Section 2(24), Clause (iii), says "income" includes the value of any perquisite or profit in lieu of salary taxable under Clauses (2) and (3) of Section 17. u/s 17(2)(iii)(c) of the Act the value of any

benefit or amenity granted or provided free of cost or at concessional rate by an employer to an "employee is a perquisite. Therefore, the air fare provided by the NMDC falls within the meaning of "perquisite" and, therefore, income and accordingly it is taxable.

14. As regards the third question, the Tribunal held that the technical fee has to be grossed up. The assessee relying on a judgment of this court in Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, contended that the Tribunal is wrong in grossing up of the technical fee. While learned counsel for the Revenue contended that u/s 2(24)(iva) of the Act, any sum paid by the representative assessee in respect of any obligation which, but for such payment, would have been paid by the beneficiary, is to be added to the income and, therefore, the tax paid by the NMDC is to be added to the income and tax is to be calculated by grossing up the said income. In support of this contention, he relied on the judgment of the Mysore High Court in Tokyo Shibaura Electric Co. Ltd. (By Agents Radio and Electricals Mfg. Co. Ltd., Mysore) Vs. Commissioner of Income Tax, Mysore, . Counsel for the Revenue submitted if the fee paid for technical services is not grossed up by adding the tax element paid by the NMDC, the income would escape assessment.

15. Learned counsel for the assessee submitted that not only the Andhra Pradesh High Court, but also the Orissa and Delhi High Courts have expressed the view that the income cannot be grossed up and this court disagreed with the view expressed by the Mysore High Court in Tokyo Shibaura Electric Co. Ltd. (By Agents Radio and Electricals Mfg. Co. Ltd., Mysore) Vs. Commissioner of Income Tax, Mysore, . Counsel also relied on a judgment of the Delhi High Court in Frank Beaton and another Vs. Commissioner of Income Tax, Delhi-VI, and others, ; Commissioner of Income Tax Vs. Barium Chemicals Ltd., and Commissioner of Income Tax Vs. American Consulting Corporation, .

16. It is true that the Andhra Pradesh, Orissa and Delhi High Courts have taken the view that there cannot be any grossing up of the income. It is relevant to refer to the observations made by this court in Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, : The Bench consisting of Justice B.P. Jeevan Reddy (as he then was) and Justice Y.V. Anjaneyulu observed as follows (at p. 771) :

"The Income Tax Officer observed that, in all these cases, the Electricity Board agreed to pay all the tax liabilities of the non-resident companies arising on account of the supply of materials and the execution of the erection and commission of the equipment at Sileru. The Income Tax Officer, therefore, held that the net payments made had to be grossed up to determine the tax following the Mysore High Court in Tokyo Shibaura Electric Co. Ltd. (By Agents Radio and Electricals Mfg. Co. Ltd., Mysore) Vs. Commissioner of Income Tax, Mysore, . The assessee has questioned the correctness of the grossing up in principle and the AAC as well as the Income Tax Appellate Tribunal upheld the view that the payments made had to be grossed up. We have perused the orders in all the

three cases to find out on what basis the grossing up has been made. There is no guidance in the orders of the Income Tax Officer as to how the figure was arrived at. It is not known whether the Income Tax Officer adopted the system of grossing up by working out tax on tax until he arrived at a "O" figure. If that was the basis followed, we do not think it as proper."

17. While holding the above, the learned judge relied on the judgment of the Orissa High Court in Commissioner of Income Tax Vs. American Consulting Corporation, according to which 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 with reference to the gross figure arrived at as above.

18. While the Mysore High Court in Tokyo Shibaura Electric Co. Ltd. (By Agents Radio and Electricals Mfg. Co. Ltd., Mysore) Vs. Commissioner of Income Tax, Mysore, held as follows (p. 289) :

"The computation of the gross amount of the remuneration varies according to the agreement or arrangement between the employer and the employee ; this will differ widely in detail. The simplest form would be one by which the employer paid the tax at the standard rate upon the net salary, in which case the employee would still be liable to tax on this additional emolument.

Example:

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Salary ... 1,000

Tax thereon at 9s. 6d. ... 475

Gross emoluments ... 1,475

Tax at 9s. 6d. on ?1,475 ... 700-12-6

Less : Tax paid by employer ... 475-0-0

Tax to be paid by employee subject to personal allowances Tax on ?475 at 9s. 6d." ... 225-12-6

19. From the judgment of the Mysore High Court, it is clear that on the total salary the tax that was paid by the employer if added, the gross emoluments would be net salary paid plus the tax paid by the employer. On that amount, the total tax payable would be more. The difference between the actual tax paid by the employer and the tax actually payable is to be paid by the employee, While according to the judgment of this court in Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, the amount of tax payable by the non-resident should be added to the net payment and on that amount the tax deductible at" source is to be determined. The said judgment was again followed by Justice B.P. Jeevan Reddy (as he then was) and Justice Y. Bhaskara Rao in Commissioner of Income Tax Vs. Barium Chemicals Ltd., . It is also true

that the Orissa High Court and the Delhi High Court have expressed a similar view. At this stage, we point out that at the time when the judgment of this court in Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, and the judgment of the Orissa High Court in Commissioner of Income Tax Vs. American Consulting Corporation, were rendered, there was "no express provision similar to Section 2(24) (iva) of the Act. Therefore, in view of the specific provision inserted u/s 2(24) as Clause (iva), we are of the view that the principle laid down in the judgments referred to above are not applicable to the facts of the present case.

20. In view of the above, it follows that the first question is answered in the affirmative and against the assessee ; question No. 2 is answered in the negative and against the assessee and question No. 3 is answered in the affirmative and against the assessee.

21. The reference is answered accordingly.