(2004) 11 AHC CK 0279

In the Allahabad High Court

Case No : IT Ref. No. 206 of 1984

Commissioner of Income Tax APPELLANT

Vs

Andre Perrian RESPONDENT

Date of Decision : 03-11-2004

Acts Referred:
Income Tax Act, 1961 — Section 256(1), 9(1)

Citation : (2005) 198 CTR 410

Hon'ble Judges : R.K. Agrawal, J;Prakash Krishna, J

Bench : Division Bench

Advocate : Shambhoo Chopra, for the Appellant;

Judgement

Prakash Krishna, J.—The present Income Tax reference is at the instance of the Department u/s 256(1) of the IT Act, 1961, hereinafter referred to as ''the Act'' against the order of the Tribunal, dt. 14th Nov., 1983 for the asst. yrs. 1977-78 and 1978-79.

2. The following substantial questions of law have been referred for the opinion of this Court :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was legally correct in upholding the order of the AAC who accepted that the salary paid to foreign technician was neither earned nor accrued in India and, therefore, it was not taxable in India ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was legally correct in upholding the order of the AAC who held that there is no relationship of employer and employees between the BHEL and the French technician and, therefore, the perquisites were also not taxable ?

3. Whether on the facts and in the circumstances of the case, the Tribunal was legally correct in upholding the order of the AAC who held that the living allowance was taxable under the head of other sources ?"

3. The facts of the case in brief are as follows :

Andre Perrian and Henry Martingngo are the French "non-resident" technicians, deputed by a French collaborator, namely, M/s Creausot Loire of France. The French collaborator has entered into an agreement with BHEL of India. The terms and conditions of deputation of French specialists of French collaborator company with the BHEL under the contract are as follows :

(1) Salary paid by SFAC to the technical personnel for the period beginning from three days prior to their actual date of arrival in India till the end of the third day after their departure from India. Salary shall include, basic salary and all other allowances due and payable to the technical personnel under the SFAC''s conditions of service for the time being in force.

(2) Social charges paid in France on account of the employment of the technical personnel including but not restricted to the following, viz. :

Employer''s contribution for accidents in the course of employment; family allowances, social security retirement benefits, life insurance, accident insurance, unemployment insurance, apprenticeship tax and paid leave allowance.

(3) Nine per cent of the total amount included in (1) and (2) above for covering the French company''s miscellaneous expenses in relation to the administration of the technical personnel.

(4) Cost of railway ticket including sleeper car charges in France from starting point to any European airport and back.

(5) Cost of sea and railway transport of the luggage of the technical personnel and their families from the place of residence in Europe to the place of posting exceeding such free baggage allowance as permitted by air companies.

4. The ITO assessed the aforesaid French technicians through BHEL as agent of foreign collaborator on the amount remitted abroad by the BHEL to the aforesaid collaborator. However, in pursuance of the above contract certain payments by way of living allowances and some perquisites were also paid to the French technicians in India. Free accommodation, free electricity and water and free conveyance were provided by the BHEL, which have been taken as perquisites by the ITO.

5. In appeal, the Asstt. CIT allowed the appeal in part. He was of the opinion that the ITO was not justified in including the salary income and value of the perquisites of any kind in the total income of the French technicians. However, he upheld the inclusion of the living allowances received by the foreign technicians in India in their assessable income, and has followed its earlier order in the case of Mr. Reger Cappolle, W. Burgmans and Jean Pisere Thomas. The Tribunal has confirmed the order passed by the AAC, following its earlier orders passed in the similar cases.

6. Heard Shri Shambhu Chopra, learned standing counsel for the Department.

Nobody has appeared for the assessee.

Learned standing counsel for the Revenue submitted that on correct interpretation of the terms and conditions of the contract entered into by BHEL with the French collaborator, it is crystal clear that the salary paid by the French collaborator to the French technician assessees was in respect of the work done by them in India. Placing reliance upon Section 9(1) of the Act it was submitted that the salary paid to the foreign technicians was earned and accrued in India and, therefore, it was taxable in India. Reliance has been placed by him on the following cases :

(i) Emil Webber Vs. Commissioner of Income Tax, V and M, Nagpur,

(ii) Addl. Commissioner of Income Tax Vs. NEW CONSOLIDATED GOLD FIELDS LTD., and

(iii) Commissioner of Income Tax and Another Vs. Sedco Forex International Drilling Co. Ltd.,

7. For proper appreciation of the controversy involved in the present reference, it is necessary to notice the terms and conditions of the contract entered into between BHEL and its foreign collaborators. Article 1 of Schedule. 4 of the contract provides that the salary paid by the foreign collaborator to the technical personnel shall be reimbursed by the BHEL in Paris. There is no dispute that these foreign technicians worked in India at the site of BHEL.

Section 9(1)(ii) of the Act reads as follows :

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

(i) ******

(ii) income which falls under the head ''Salaries'', if it is earned in India;

Explanation.--For the removal of doubts, ,it is hereby declared that income of the nature referred to in this clause payable for service rendered in India shall be regarded'' as income earned in India;"

8. The aforesaid section inter alia lays down that the income which falls under the head "Salaries" if it is earned in India shall be deemed to accrue in India during ? such years. Section 9 on its plain language is a deeming section. Explanation to Section 9(1)(ii) provides for an artificial place of accrual of income taxable under the head "Salaries". It enacts that the income chargeable under the head "Salaries" is deemed to accrue in India if it is earned in India, i.e., if the services under the contract for employment are rendered in India, meaning thereby that the place of payment of salary or actual place of accrual of salary is meaningless. The relevant consideration is that if the place of service is in India, the payment of salary made at any other place shall be deemed the accrual of salary in India. The said view has been taken by the Uttaranchal High Court in

the case of Sedco Forex International Drilling Co. Ltd. (supra). The Explanation to Section 9(1)(ii) was introduced by the Finance Act, 1983 w.e.f. 1st April, 1979. The Explanation was introduced to get over the judgment of the Gujarat High Court in Commissioner of Income Tax, Gujarat-III Vs. Nathalal Dahyabhai, , wherein it was held by Gujarat High Court that in order to attract Section 9(1)(ii) of the Act, the liability to pay must arise in India. The said "Explanation" was not available for the assessment years under consideration, namely, 1977-78 and 1978-79.

9. In COMMISSIONER OF Income Tax Vs. 1. S. R. PATTON. (I. T. R. NO. 173 OF 1985) 2. H. BALLENGERG AND OTHERS. (I. T. RS. NOS. 52 TO 55 OF 1985)., it has been held by Kerala High Court that the ''Explanation" to Section 9(1)(ii) is operative for and from asst. yr. 1979-80 and cannot be applied for the asst. yrs. 1977-78 and 1978-79.

10. The rulings relied upon by learned Counsel for the Department are not applicable to the controversy in hand. These rulings are with reference to Section 9(1)(i) of the Act. Therefore, it is not necessary to discuss them in detail.

11. Following the aforesaid judgments of the Gujarat High Court in the case of CIT v. S.G. Pgnatale (supra) and of Kerala High Court in the case of S.R. Patton (supra), we answer the question Nos. 1 and 2 in affirmative, i.e., against the Department and in favour of assessee.

12. Question No. 3 does not arise from the order of the Tribunal, therefore, the said question is returned unanswered.

