
(2003) 02 RAJ CK 0037

In the Rajasthan High Court

Case No : IT Ref. Application No. 13 of 1994

Commissioner of Income Tax

APPELLANT

Vs

Foss Electronic

RESPONDENT

Date of Decision : 25-02-2003

Acts Referred:

Income Tax Act, 1961 — Section 115A(1)

Citation : (2003) 182 CTR 542 : (2003) 263 ITR 125 : (2003) 130 TAXMAN 483

Hon'ble Judges : Y.R. Meena, J;Khem Chand Sharma, J

Bench : Division Bench

Advocate : R.B. Mathur, for the Appellant; None, for the Respondent

Judgement

1. On this application u/s 256(1) of the IT Act, 1961, (hereinafter referred to as "the Act"), the Tribunal, Jaipur Bench, Jaipur (for short "the Tribunal") vide its order dt. 29th July, 1992, has referred the following question for the opinion of this Court :

"Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the technical fees of Rs. 1,13,572 and Rs. 1,79,775 were required to be charged @ 20 per cent as per provisions of Section 115A(1)(b)(ii) of the IT Act, 1961, as it stood at the relevant time ?"

The facts of the case are that the assessee M/s Foss Electronic, is a nonresident foreign company, developer of milko tester minor and designer and manufacturer of milk analysers (hereinafter referred to as "the foreign company") agreed on 31st Oct., 1980, to supply technical Know-how to the Rajasthan State Industrial Development and Investment Corporation Ltd. (hereinafter referred to as "the Indian company"), which was to undertake manufacture of electronic milk analyser (milk tester minor) in the State of Rajasthan by forming a public sector company jointly with Instrumentation Ltd., Kota. As per the terms and conditions of the said agreement, the foreign company was to supply technical information, drawings, specifications, quality control, test procedure and to train the officers

of the Indian company against payment of royalty/fees and remuneration. The agreement was admittedly, duly approved by the Government of India for the year under consideration.

2. The foreign company, assessee, received a sum of Rs. 1,13,572 and Rs. 1,79,775 during the asst. yrs. 1985-86 and 1986-87, respectively, from the Indian company on account of technical information furnished and technical services rendered i.e., training Indian engineers abroad, deputation of foreign personnel to India to assist the Indian company in initial production of electronic milk analyser. The ITO charged the tax @ 20 per cent as per the provisions of Section 115A(1)(b)(iii) of the Act.

3. On perusal of the records for the asst. yrs, 1985-86 and 1986-87, the CIT was of the view that the order of AO was erroneous and prejudicial to the interests of Revenue and, therefore, he issued notice to the assessee, foreign company, why the assessment should not be revised in relation to the aforesaid assessment years. After hearing the assessee, the CIT took a view that the amount received by the assessee foreign company was received as a fee towards know-how instalments and technical services rendered i.e., training of Indian engineers abroad, deputation of foreign personnel to India to assist in the initial production and the relevant clause is Section 115A(1)(b)(ii) of the Act and the tax should have been charged @ 40 per cent and not 20 per cent.

4. That order of the CIT passed u/s 263 of the Act was challenged by the foreign company-assessee before the Tribunal. The Tribunal took the view that as for the asst. yrs. 1983-84 and 1985-86 tax was charged @ 20 per cent considering the amount as royalty for technical know-how fees and that has not been revised. Therefore, the Tribunal has set aside the order of the CIT passed u/s 263 of the Act vide order, dt. 29th July, 1992.

5. None appeared for the assessee in spite of the fact, that the reference has been listed for hearing on various dates.

6. Heard, Mr. R.B. Mathur, learned counsel appearing for the Revenue.

7. Mr. Mathur has drawn our attention to the various clauses of the agreement and submits that the amount paid was as technical know-how fees and not as a royalty and, therefore, the CIT has rightly revised the order of the AO and that the tax should be charged @ 40 per cent u/s 115A(1)(b)(iii) of the Act.

8. We agree with the contention of Mr. Mathur that by mistake of the officer of the Department if wrong order has not been challenged that does not give any right or confer any legal authority in favour of the assessee that in subsequent years also that mistake should perpetuate. That mistake should be rectified as early as possible. Therefore, we find no justification in the order of the Tribunal in holding that as in the earlier years, the rate of tax was @ 20 per cent u/s 115A(1)(b)(ii) of the Act, the same rate should be charged in the subsequent years.

9. The main question for our consideration is whether the relevant provision for

tax in the case of the assessee is 115A(1)(b)(ii) of the Act or 115A(1)(b)(iii) of the Act. For that we have to go through the articles of agreement entered into in between the Indian company and the assessee foreign company.

10. Clause (4) of the recitals provides that the Indian company licensee wishes to enter into an agreement with Foss (assessee). The relevant para reads as under :

"(4) Licensee wishes to enter into an agreement with Foss for the purchase of technical information and technical assistance relating to milko-tester minor, including licenses under patents relating thereto, owned or controlled by Foss. In particular, licensee intends to manufacture the milko-tester minor in phases mutually agreed upon and approved by the Government of India."

11. Clause (7) provides that, the licensee wishes to form a new public sector company jointly with Instrumentation Ltd., Kota, to undertake manufacture of electronic milk analyser (milk-tester minor) in the State of Rajasthan and this will be floated for the purpose of this agreement.

12. In Article 1.2 the meaning of "Technical Information" in the agreement has been given. Under Article 3.1 Foss i.e., the foreign company has granted to the licensee i.e., the Indian company, exclusive licence to use the technical information to manufacture, sell and service the contract products in India.

13. Article 6 provides assistance by Foss technicians. As per this article, Foss will make available to licensee i.e., the Indian company the services of Foss engineers for training of Indian company's engineers/technicians in the design, and manufacturing processes relating to the contract products.

14. Article 6.2 provides deputation of its engineers/technicians at the request of the Indian company to work in India for a period up to maximum of six months to facilitate operation of the agreement.

15. Article 7 provides the amount payable as compensation to Foss i.e., the foreign company for supply of technical information and also provides the payment which is required to be paid to the engineers of the Foss in case they are deputed in India to train the Indian engineers. It further provides the modes of payment in lieu of supply of technical know-how.

16. Article 14 provides for rights to continue to use the technical informations. As per Article 14 of the agreement, the licensee i.e., the Indian company will continue to use the technical know-how after expiry of agreement period and if there was no default in payment, the licensee i.e., the Indian company can use that technical know-how after expiry of that period at free of cost.

17. If we go by the conditions of the agreement, the amount which has been paid in lieu of supply of technical know-how, it cannot be said that the amount which has been paid for technical know-how or for the assistance provided by the assessee foreign company is payment against royalty. The entire clauses of the

agreement as a whole reveal that the amount, paid by the Indian company to the assessee foreign company as a fees for supply of technical know-how services. Therefore, the CIT was justified in revising the order of the AO who has applied Section 115A(1)(b)(ii) of the Act. The Tribunal was, in our opinion, has committed error in holding that in the earlier years the tax was charged @ 20 per cent considering the amount received as royalty, therefore, in the subsequent years also, the same amount should be treated as royalty. The Tribunal has committed error in taking the view following the view taken in earlier year by the AO. If some wrong view has been taken, that should not be allowed to perpetuate in the subsequent years.

18. In the result, we answer the question in negative i.e., in favour of the Department and against the assessee. The reference application stands disposed of accordingly.