
(2007) 03 MP CK 0072
In the Madhya Pradesh High Court

Commissioner of Income Tax

APPELLANT

Vs

Frontline Software and Services (P) Ltd.

RESPONDENT

Date of Decision : 26-03-2007

Acts Referred:

Constitution of India, 1950 — Article 2, 366

Citation : (2007) 210 CTR 407 : (2008) 301 ITR 396 : (2008) 167 TAXMAN 290

Hon'ble Judges : R.K. Gupta, J;Dipak Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.K. Gupta, J.—The present appeal has been preferred by the Revenue u/s 260A of the IT Act, 1961 (for brevity "the Act") assailing the order passed by the Income Tax Appellate Tribunal, Indore (in short "the Tribunal") on 26th May, 2006.

2. The facts in a nutshell are that the assessee by filing the return for the accounting year 1996-97, in the P&L a/c had debited a sum of Rs. 6,20,000 under the head of "Technical know-how". The aforesaid amount was paid to NET Ltd., New Delhi in pursuance of the agreement dt. 10th Feb., 1995. According to the Revenue, the sum so paid, being a fee, is in the nature of capital expenditure and assessee ought to have debited only 1/6th of the above sum in the P&L a/c in terms of Section 35AB of the Act and the balance should have been spread into subsequent five years.

3. The assessee had started a computer training centre in collaboration with NET Ltd., New Delhi. Pursuant to the agreement dt. 10th Feb., 1995, the assessee had to give a technical know-how fee to M/s NIIT Ltd. The assessee paid the technical know-how fee in terms of the agreement for getting technical assistance from NIIT Ltd. in the field of processes, practices, techniques, procedures relating to site selection and evaluation, architectural plans and drawings, equipment specifications, assistance in selection of marketing and

technical staff, support during the launch of operation etc. scheduling and administering education and methods and procedures of examining the standards attained by students, ongoing marketing and technical support, special methods of using certain common educational aids, provision of technical reference material relating to the form and content of education and pre-commencement training of faculty, which is confidential to and owned by the licensor.

4. By virtue of Article 2 of the agreement, the licensor is the NIIT Ltd. and the licensee is the present assessee. The AO has not permitted to debit the said amount and treated the same as capital expenditure u/s 35AB of the Act. Consequently, the said amount of Rs. 6,20,000 was added to the total income and penalty proceedings u/s 271(1)(c) of the Act were initiated for furnishing inaccurate particulars of income. The AO permitted deduction of 1/6th of the above amount in the year for which account was furnished.

5. Being aggrieved by the aforesaid order, the assessee preferred an appeal before the CIT(A) and the appellate authority allowed the said debit as claimed by the assessee. The appellate authority decided the said issue in favour of the assessee on the basis of the assessment of the predecessor M/s A.K. Computers & Services Ltd. of the assessee with regard to the asst. yr. 1990-91 in terms to the appellate order dt. 4th Aug., 1993, a detail of which is given in para 7.1 of the order.

6. The Revenue preferred an appeal before the Tribunal. The Tribunal dismissed the appeal preferred by the Revenue and held that the investment of the amount of Rs. 6,20,000 cannot be treated to be a capital expenditure. The reasons which have been given by the Tribunal are that the Explanation appended to Section 35AB shall have no application in the present case as the activities of the assessee do not come within the purview of the Explanation as aforesaid. Under the circumstances, the stand taken by the assessee was accepted that the said amount is paid for educational institution imparting training in computer operation, therefore, it would not fall within the definition of technical know-how "as per Explanation to Section 35AB".

7. The present appeal has been preferred by the Revenue alleging that in the present appeal a substantial question of law is involved inasmuch as the Explanation attached to Section 35AB shall have full application if the activities of the assessee are properly scrutinized and understood.

8. Before considering the arguments canvassed by learned Counsel for the appellant, it would be profitable to refer to the Explanation to Section 35AB of the Act. The Explanation reads as under:

Explanation--For the purposes of this section, "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil well or other sources of mineral deposits (including the searching for, discovery or testing of deposits or the winning of

access thereto).

9. Keeping in view the aforesaid Explanation, if the activities of the present assessee are taken into account then the assessing authority has not held in his assessment order that the information which is received is likely to assist in the manufacturing or processing of goods or in the working of a mine, oil well or other sources of mineral deposits, etc. The AO in his order of assessment has taken into account the activities which are carried out by the assessee. The nature of activities carried out by the assessee is reflected in paras 5 and 5.1 of the order of assessment passed by the AO. The said activities have also been considered by the CIT(A) in its order Annex. A-2 and in para 7.1 thereof. Keeping in view the activities run by the assessee the appellate authority concluded that NET provides basic software and also trains their teachers who ultimately are responsible for coaching the students enrolled in their colleges and so Section 35AB was not applicable. This aspect of the matter was also considered by the Tribunal and on such consideration of the activities, the Tribunal has arrived at the conclusion that the activities of the assessee are not covered by the Explanation to Section 35AB of the Act.

10. The definition of the terms "technical know-how" is very specific. According to the said definition, it means industrial information or technique which is likely to assist in the manufacture or processing of goods or in the working of a mine, oil well or other sources of mineral deposits and so on would be covered by the words "technical know-how". In the present case, keeping in view the findings of fact arrived at, the assessee is not carrying out any activity of manufacture or processing of goods. The assessee is also not carrying out any mining activity or other activities which are mentioned in the said Explanation. The assessee is only carrying out the activity of imparting training in computer operation. The information as such is being used for the purposes of coaching the students enrolled in their colleges. There is no scope of ambiguity in the Explanation which defines the words "technical know-how".

11. Learned Counsel for the appellant relied upon the decision of the apex Court in *Southern Switch Gear Ltd. Vs. Commissioner of Income Tax*, . In the said judgment, the collaboration agreement with foreign company for grant of technical aid for setting up factory and right to sell products was treated to be a capital expenditure. In the present case, all the authorities; the AO, the appellate authority and the Tribunal have not recorded any finding that the technical know-how i.e. information which is being received by the assessee is being utilized for the purposes of any assistance in the factory. There is no finding that the assessee is running any factory. There is also not a finding that any manufacturing or processing is being done by the assessee. Therefore, the judgment passed by the apex Court in *Southern Switchgear (supra)* will have no application to the case at hand.

12. Learned Counsel for the appellant further submitted that the apex Court in *Tata Consultancy Services Vs. State of Andhra Pradesh*, has held that intellectual

property is also a goods and is marketable, therefore, intellectual property such as software and medium would be covered under the definition of words "technical know-how". The judgment so relied upon by the learned Counsel for the appellant relates to the case where intellectual property was under consideration for the purposes of Sales-tax Act and also for the purposes of Article 366(12) of the Constitution of India. The apex Court held that intellectual property (software) shall also be "goods". Therefore, for the purposes of sales-tax it being goods, sales-tax is chargeable. In this context, paras 78, 79 and 80 of Tata Consultancy Services (supra) would be relevant. The apex Court has held that once the provision in the statute which has a reference shall be taken into account in a case when there is no ambiguity. The definition of the words "technical know-how" by treating it to be an intellectual property as "goods" may be taxable for the purposes of sales-tax. The question is whether same is permissible for the purposes of taxing it under the IT Act. The definition as such is clear. While interpreting, the language used in a taxing statute which has the context has to be interpreted in the manner in which it is provided with reference to a statute until the language as such is not plain or is ambiguous. The Courts are open to construe them in their ordinary sense with reference to other clauses of the Act or the rules.

13. The apex Court in *Sardar Gurmej Singh Vs. Sardar Partap Singh Kairon*, , with regard to interpretation of statutes and construction of the section has held that construction of a section is to be made of all the parts together and not of one part only by itself, and phrases are to be construed according to the rules of grammar. The apex Court in para 9 has held as under:

It is an elementary rule that construction of a section is to be made of all the parts together and not of one part only by itself, and phrases are to be construed according to the rules of grammar. So construed the meaning of the clause is fairly clear. The genus is the "Revenue officer", and the "including" and "excluding" clauses connected by the conjunction "but" show that the village accountants are included in the group of Revenue officers, but the other village officers are excluded there from. If X includes A but excludes B, it may simply mean that X takes in A but ejects B. It is not necessary in this case to consider whether the inclusive definition enlarges the meaning of the words "Revenue officers", or makes them explicit and clear, viz., that the enumerated officers are within the fold of "Revenue officers"; for, in either construction the village accountants would be Revenue officers. But we cannot, accept the argument that what is excluded was not part of that from which it is excluded, and that lambardars were not Revenue officers and yet had to be excluded by way of abundant caution. If so, it follows that the village officers, who included lambardars, were excluded from the group of Revenue officers, with the result that they are freed from the disqualification imposed by the provisions of the said clause.

14. The apex Court in *Kalawatibai Vs. Soiryabai and others*, while dealing with

the principles with regard to interpretation of statutes held in para 6 that while interpreting the statute the section has to be read in its entirety as one composite unit without bifurcating it or ignoring any part of it. On the basis of the same, it is clear that a plain reading of the section and its interpretation has to be taken out with regard to applicability and also to understand expression of the legislature used while enacting the law.

15. The apex Court in *Balasinor Nagrik Cooperative Bank Ltd. Vs. Babubhai Shankerlal Pandya and Others*, , in para 4 held as under:

... It is an elementary rule that construction of a section is to be made of all parts together. It is not permissible to omit any part of it. For, the principle that the statute must be read as a whole is equally applicable to different parts of the same section.

16. The apex Court in *Orient Paper & Industries Ltd. v. State of MP and Ors.* 2007 ILR 170 considering the earlier judgments passed by the apex Court has observed that the plain or unambiguous and clear meaning of the statute which gives only one meaning has to be given effect to irrespective of its consequences. The apex Court in paras 26, 27, 28 and 29 observed as under:

26. When the words of a statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, Courts are bound to give effect to that meaning irrespective of consequences. (See: *State of Jharkhand v. Govind Singh, Nathi Devi v. Radha Devi Gupta*).

27. In *Sussex Peerage case Tindal C.J.* observed as follows:

if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver.

28. When a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself.

29. As observed in *Nathi Devi's case (supra)* if the words used are capable of one construction, only then, it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly be not given effect to in opposition to the plain language of the sections of the Act.

17. On the basis of the aforesaid decisions rendered by the apex Court, we are required to see whether the definition "technical know-how" is applicable in the manner as argued by the learned Counsel for the appellant then the legislative intent which is reflected in the Explanation attached to Section 35AB shall become meaningless. It is so, because the legislature has intended for the purposes of covering the said amount towards the income and the revenue

expenditure. The intention of the legislature would be clear if the Explanation as such is read. The utilization of the technical know-how would only be relevant with reference to the context if the said technical know-how is relevant to assist the assessee with regard to manufacturing or processing of goods or in the working of a mine, oil well or other sources of mineral deposits (including the searching for, discovery or testing of deposits or the winning of access thereto). Having regard to the nature of the Explanation to Section 35AB the chargeable income or allowing a debit or not or to make the payment to be treated as a capital expenditure has to be understood with reference to the context of the legislative intent. It is not the legislative intent that the use of the words "technical know-how" for the purposes other than not covered by the Explanation would also be treated as the capital expenditure on which tax is leviable. The "technical know-how" by itself would not be enough until such technical know-how is likely to assist for the manufacturing or processing of goods. In the present case, the assessee admittedly has not been found to have indulged into the activities of manufacturing or processing of goods which could be said that such technical know-how is likely to assist the assessee with regard to activities including any mine and other activities referred to in the said Explanation. The assessee is utilizing the said technical know-how for imparting training in the computer operation for coaching the students which is neither manufacture nor processing of goods. The activity as such is also not an activity of a mine, oil well or other sources of mineral deposits (including the searching for, discovery or testing of deposits or the winning of access thereto).

18. In view of the aforesaid discussion, we find that no substantial question of law is involved in the present appeal and accordingly the appeal is dismissed being bereft of merit.