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**(1995) 02 RAJ CK 0004**

**In the Rajasthan High Court**

**Case No : Income Tax Reference No. 37 of 1984**

Commissioner of Income Tax

APPELLANT

Vs

Harmann and Breau

RESPONDENT

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**Date of Decision : 23-02-1995**

**Acts Referred:**

Income Tax Act, 1961 — Section 5

**Citation : (1995) 02 RAJ CK 0004**

**Hon'ble Judges : Y.R. Meena, J;V.K. Singhal, J**

**Bench : Division Bench**

**Advocate : G.S. Bafna, for the Appellant; N.M. Ranka and Raj Kumar Yadav, for the Respondent**

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## **Judgement**

V.K. Singhal, J.—The Income Tax Appellate Tribunal has referred the following question of law arising out of its order dated July 12, 1982, in respect of the assessment years 1977-78 and 1978-79 :

" Whether, on the facts and circumstances of the case, the Appellate Tribunal was justified in holding that the absence fees of Rs. 11,280 for the assessment year 1977-78 and of Rs. 12,766 for the assessment year 1978-79 were not taxable in the hands of the assessee as revenue receipt and also in further holding that the tax paid by the Indian company on behalf of the assessee amounting to Rs. 12,466 for the assessment year 1977-78 and of Rs. 14,109 for the assessment year 1978-79 could not be grossed up and included in the income of the assessee ?"

2. The brief facts of the case are that the assessee is a company (nonresident) and entered into an agreement with Instrumentation Limited on March 23, 1976, for supplying technical know-how to the latter. As per the terms of the agreement, the assessee was to depute its employees at the installation works in India for a period of 15 months. The journey expenses from Germany to Kota were to be borne by the Indian company and free accommodation and transport facility plus daily assistance allowance at the rate of Rs. 100 per day were to be

given by the Indian company. For the first five months, the services of the technicians were free of charge and for the balance ten months the Indian company was to pay to the assessee-company at the rate of Rs. 3,000 D. M. per month as compensation towards loss incurred on account of salary to be paid by the assessee to the substitutes of such technicians in the Federal Republic of Germany, for short, the FRG, due to the latter's absence. The sums of Rs. 11,280 and Rs. 12,766 were to be paid by the Indian company to the assessee in the assessment years 1977-78 and 1978-79, respectively. The Inspecting Assistant Commissioner of Income Tax (Assessment) treated these sums as income of the assessee in India and brought to tax the same through the Indian company. The said incomes were grossed up by adding to them the tax of Rs. 12,466 for the assessment year 1977-78 and Rs. 14,109 for the assessment year 1978-79 which was borne by the Indian company in respect of the payment of tax on the sums. The Inspecting Assistant Commissioner of Income Tax computed the total income of the company at a figure of Rs. 23,746 for the assessment year 1977-78 and Rs. 26,875 for the assessment year 1978-79.

3. The assessee preferred an appeal to the Commissioner of Income Tax (Appeals) and it was considered that the amount paid on behalf of the employee should be deemed to be the income of the employee under the provisions of Section 9(1)(ii) of the Act. Since the company has not rendered any service in this country by sending its employees to India, business connection cannot be said to have been established. The additions so made were deleted. The appeal preferred before the Income Tax Appellate Tribunal was also dismissed.

4. The matter was considered by this court in the case of Commissioner of Income Tax Vs. Yamatake Honeywell Co. Ltd., D. B. Income Tax Reference No. 13 of 1984 decided on November 10 1993, and this court came to the conclusion that the absence fee is in the nature of reimbursement or compensation of the amount which the assessee may be required to pay to its employees in Japan. It is not the exact amount which the assessee is paying by way of salary to its employees but the amount fixed under the agreement irrespective of the actual payment and, therefore, so far as the assessee-company is concerned, it will be deemed to be income in the hands of the assessee-company liable to be included in the total income for the purpose of taxation. The assessee-company has not made the payment in India and, therefore, the expenditure could not be allowed.

5. Mr. Ranka, learned counsel for the respondents, has submitted that the said decision requires reconsideration as the income should not be computed after deducting the salary paid outside India and that grossing has not been correctly made and it should be on the actual tax due and not the tax ascertained.

6. We have considered over the arguments of learned counsel for both the parties. So far as the question of treating the receipt as a revenue receipt and taxable in the hands of the assessee, is concerned, the matter stands covered by the decision given by this court in the case of Commissioner of Income Tax Vs. Yamatake Honeywell Co. Ltd., D. B. Income Tax Reference No. 13 of 1984

(referred to above). The submission of learned counsel for the petitioner is that the decision of Carborandum Co. Vs. Commissioner of Income Tax, Madras, is based on its own facts as, in that case, the technical information was provided by post and was considered as service rendered outside India. The use of such service which was put in India was not considered relevant and the foreign personnel who were deputed by the company, it was found that it did not amount to a business activity carried on by the assessee. The services of the foreign personnel available to the Indian company were outside India and they were considered as its employees and they work under the direct control of the Indian company and the services rendered were wholly outside India. It was in these circumstances that the apex court came to the conclusion that the fee received by the appellant shall be deemed to have accrued or arisen to it in India and, therefore, taxable in India.

7. In the case of GRINDLAYS BANK LTD. Vs. COMMISSIONER OF Income Tax., the Calcutta High Court was considering the case of the employees of the bank working in India. The provisions of Section 9(1)(ii) were interpreted to mean that the income which falls under the head "Salaries", if it is earned in India, shall be deemed to accrue or arise in India. In that case the labour or service, which entitled the employees to the furlough pay was rendered in India and the assessee was held liable to deduct income tax at the source u/s 192 from the furlough pay.

8. After taking into consideration all the relevant facts and the terms of the agreement entered into, this court came to the conclusion that the absence fee was taxable in India in the hands of the assessee as a revenue receipt. In the present case also it has not come on record that the employees of the assessee-company were the employees of the Indian company or that the payment was made by the Indian company to the employees of the assessee-foreign company. Even the amount of payment of the absence fee has not been directly linked with the actual payment to the technicians and as such, the facts being the same and not in any way distinguishable, we are of the opinion that the decision given in the case of Commissioner of Income Tax Vs. Yamatake Honeywell Co. Ltd., does not require any consideration.

9. Another point has also been taken by learned counsel for the assessee that there should not be any grossing up of the tax amount. In order to understand the actual dispute it may be observed that a sum of Rs. 12,466 was added to the amount paid to the assessee which was to the extent of Rs. 11,280 for the year 1977-78. In respect of the assessment year 1978-79, an amount of Rs. 14,109 of tax deducted and paid to the Department was added to the amount of Rs. 12,766 paid to the assessee. It was in this manner that the total income for the two years 1977-78 and 1978-79 was computed at a figure of Rs. 23,746 and Rs. 26,875. The contention that the amount of tax deducted should not be added or grossed up cannot be considered in accordance with law inasmuch as the assessee was to get the payment tax free, i.e., the tax was to be borne by the

Indian company.

10. In the decision of the Delhi High Court in the case of Frank Beaton and another Vs. Commissioner of Income Tax, Delhi-VI, and others, it was observed that the scope of the company's liability to pay tax has to be determined on an interpretation of the agreement between the assessee and the company, according to the normal canons of construction of deeds and instruments, particularly those of a commercial nature. It has to be found out as to what is the taxable salary of the assessee if it was not tax free. On the amount so determined, the tax had to be calculated and only this amount of tax the company had to pay. Any additional tax due, as a result of the addition of the tax payable by the company, had to be paid by the assessee as there was no agreement on the part of the company to pay tax on tax. In the case of Commissioner of Income Tax, Andhra Pradesh Vs. Superintending Engineer, Upper Sileru, the Andhra Pradesh High Court also came to the conclusion 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 an arrangement entered into between the non-resident and the Indian company did not admit of a system of tax on tax. In the case of Commissioner of Income Tax Vs. American Consulting Corporation, it was observed that the tax liability which was undertaken by the Indian company was not assessable as profits and gains in the absence of the requisite statutory provisions.

11. Section 5 of the Act determines the scope of total income and the amount of tax which has been deducted by the Indian company from the total amount to be paid to the assessee-company has to be added and grossed up to determine the total income. As such, the contention that the tax amount cannot be added to the actual payment has no substance. The amount which has been deducted as tax was the liability of the assessee-company and the Indian company being the agent was under an obligation to deduct the tax amount of such payment. Out of the total payment, i.e., gross amount, the tax which has been deducted and paid was added in the income of the assessee and this gross amount was considered as the amount received or deemed to be received/accrued or arisen or deemed to accrue or arisen by the assessee-company. In view of the specific provisions of Section 5, we are of the opinion that the amount of tax deducted and deposited from the total amount payable by the Indian company to the assessee-company has to be grossed up. A contention was also raised that grossing up of the amount is based on wrong calculations.

12. The question of any calculation is not gone into as the question which has been referred to this court is only with regard to the grossing up and including the amount of tax deducted in the income of the assessee and we are of the opinion that the amount of tax which has been deducted has to be added up and

that is the total amount which will be deemed to be the total income of the assessee.

13. In these circumstances, we are of the view that the Income Tax Appellate Tribunal was not justified in holding that the absence fees of Rs. 11,280 for the assessment year 1977-78 and of Rs. 12,766 for the assessment year 1978-79 were not taxable in the hands of the assessee as revenue receipts and also erred in further holding that the tax paid by the Indian company on behalf of the assessee amounting to Rs. 12,466 for the assessment year 1977-78 and of Rs. 14,109 for the assessment year 1978-79 could not be grossed up and included in the income of the assessee.

14. The reference is, therefore, answered in favour of the Revenue and against the assessee. No order as to costs.