
(2003) 05 MP CK 0043
In the Madhya Pradesh High Court
Case No : M.A. (IT) No. 18 of 2002

Commissioner of Income Tax

APPELLANT

Vs

HEG Ltd.

RESPONDENT

Date of Decision : 05-05-2003

Acts Referred:

Income Tax Act, 1961 — Section 5(2), 9(1), 90(2)

Citation : (2003) 182 CTR 353 : (2003) 263 ITR 230 : (2003) 130 TAXMAN 72

Hon'ble Judges : Dipak Misra, J; A.K. Shrivastava, J

Bench : Division Bench

Advocate : Rohit Arya, for the Appellant; Ajay Vohra and P. Shandilya, for the Respondent

Final Decision : Partly Allowed

Judgement

Dipak Misra, J.—In this appeal preferred u/s 260A of the IT Act, 1961 (hereinafter referred to as "the Act"), by the Revenue a short but interesting question arises for adjudication.

2. The facts which are essential to be adumbrated for the disposal of the present appeal are that the assessee-company filed its return for the asst. yr. 1993-94 on 30th Dec., 1993, declaring total loss of Rs. 70,83,568. Upon processing, adjustments in respect of certain claims were made and loss was determined at Rs. 17,48,715 and accordingly, an intimation u/s 143(1)(a) of the Act was served on the assessee-company on 31st March, 1996. The AO also directed to deduct TDS at the prescribed rate on the remittance of US \$ 25,000 to M/s PCI Kingwood, USA, as the payment was made for purchase of data of confidential nature which was in the form of monthly compilation called "executive overview" containing data on carbon graphite electrodes industry in which the assessee is dealing and hence it was a payment for royalty. The payment was also for passing information of confidential nature on telephone as evincible from the FAX message dt. 29th Jan., 1996 and, therefore, the transaction involved imparting of information concerning technical, industrial, commercial or scientific

knowledge, experience or skill and the relevant transaction is the payment of royalty by the assessee to the firm at USA, according to Clause (iv) of Expln. 2 to Clause (vi) of Sub-section (1) of Section 9 of the IT Act and Article 12(3) of Avoidance of Double Taxation Treaty with the United States of America. The AO held that according to Article 12(2) of Avoidance of Double Taxation Treaty, the amount was taxable in India and according to Section 9(1) the income was deemed to accrue or arise to M/s PCI in India.

3. Being dissatisfied with the order of assessment, the assessee-company preferred an appeal before the CIT(A), Bhopal, assailing the levy of TDS on remittance of US \$ 25,000 made in the order of assessment. The appellate authority dismissed the appeal holding that the said remittance was towards payment of royalty for purchase of technical information and hence, liable for TDS u/s 195 of the Act.

4. Being unsuccessful before the first appellate authority, the assessee, to mitigate his grievance, preferred an appeal before the Income Tax Appellate Tribunal, Indore Bench, Indore (in short "the Tribunal"). The Tribunal by the impugned order, dt. 12th April 2002, allowed the appeal in favour of the assessee on the ground that there was nothing secret or confidential in the booklet which has been supplied to the assessee in the form of information for the benefit of the assessee. The Tribunal further came to hold that the correspondences between the assessee and M/s PCI were the information in the form of collection of data on the subject available in the market and it cannot, in any manner be termed as imparting of technical, industrial, commercial or scientific knowledge, experience or skill of the supplier absolutely meant for the assessee. In this backdrop the Tribunal expressed the opinion that it was not royalty as defined in Expln. 2(iv) to Section 9(1)(vi) of the Act and accordingly dislodged the findings recorded by the forums below.

5. This Court at the time of admission of the appeal had framed the following substantial question of law :

"Whether the Tribunal is justified in not accepting the claim of the Revenue that there should have been deduction of tax at source u/s 195 of the IT Act, 1961, in regard to the remittance of 25,000 US \$ to M/s PCI Kingwood, USA, treating the said amount as royalty?"

6. Mr. Rohit Arya, learned counsel for the Revenue, questioning the defensibility of the order passed by the Tribunal has submitted that the Tribunal has grossly erred in coming to hold that the transaction did not convey any sense of confidentiality and it was a general data provided to the assessee. It is urged by him that the service is continuous in nature and the correspondences on record, clearly reveal that from time to time the supplier used to send the material and, therefore, if it is tested on the bedrock of continuity and bulk of information there remains no trace of doubt that it was such information which would come within Clause (iv) of Expln. 2 to Section 9(1)(vi) of the IT Act. It is canvassed by

him that the Tribunal has totally misunderstood the conception by arriving at the conclusion that it is a booklet though the correspondence between the parties do exposit that it is not a booklet but was the information which is confidential in nature.

7. Mr. Ajay Vohra, learned counsel appearing for the assessee, sounding a contra note, has submitted that to appreciate the whole scenario Sections 5(2) and 90(2) are to be appreciated. It is his further submission that the supplier had submitted a compilation of data and such supply do not, in any manner, show any experience. It is urged by him that according to the various clauses of the treaty the information relatable to the industrial, commercial, technical or scientific, but in the obtaining factual matrix said test is not met with and, therefore, the order passed by the Tribunal cannot be flawed. The learned counsel further submitted that when there is discrepancy between the statutory provision and the treaty relating to avoidance of double taxation the treaty has to prevail. It is also canvassed by him that every information supplied does not come within the ambit and sweep of information as defined under statute or under the article of the treaty and, therefore, the Tribunal is absolutely correct in its approach and the finding recorded by it based on facts should not be unsettled or overturned as no substantial question of law is involved.

8. To appreciate the contentious issue involved in this case it is appropriate to refer to Section 5(2) of the Act. It reads as under:

"5(2). Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which--

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1 : Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2 : For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

9. Our attention has also been drawn to Section 90(2) of the Act which we think it apposite to reproduce. The same reads as under:

"90(2) Where the Central Government has entered into an agreement with the Government of any country outside India under Sub-section (1) for granting

relief of tax, or, as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to the assessee.

Explanation : For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company, where such foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends (including dividends on preference shares) payable out of its income in India."

10. Mr. Vohra, learned counsel appearing for the assessee has placed reliance on these provisions and the decision rendered in the case of Commissioner of Income Tax Vs. Davy Ashmore India Ltd., . It is worth noting here that Section 90(2) was inserted by Finance (No. 2) Act, 1991, with retrospective effect from 1st April, 1972. In the case of Davy Ashmore India Ltd. (supra) it has been held as under:

"Our attention has been drawn to a decision of the Andhra Pradesh High Court in the case of Commissioner of Income Tax, Andhra Pradesh Vs. Visakhapatnam Port Trust, . There, the Andhra Pradesh High Court, while considering the Indo-German Double Taxation Avoidance Agreement, held that in cases of inconsistency between the Agreement and the Act, the Agreement will prevail. In our view, where an express provision to the contrary is made in this Agreement, the transaction will be governed by such Agreement. Expln. 2 of Section 9(1)(vi) cannot have any application inasmuch as the definition of royalty has been specifically provided in the Agreement. Thus, an express provision to the contrary has been made in the Agreement. There is also another aspect of the matter. The charging provisions in Sections 4 and 5 of the Act defining "total income" of either residents or non-residents are expressly made "subject to the provisions of the Act" which will include the Agreement made u/s 90 of the Act. That apart, Expln. 2 to Section 9(1)(vi) makes it quite clear that "royalty" as defined in Expln. 2 is only for the purpose of Clause (vi). The said meaning assigned to royalty cannot be made applicable in an Agreement which is made u/s 90 of the Act.

The conclusion is inescapable that, in case of inconsistency between the terms of the agreement and the taxation statute, the agreement alone would prevail."

11. Mr. Rohit Arya, learned counsel for the Revenue, per contra, has submitted that the said question is absolutely academic in the present case inasmuch as there is no incompatibility between the statutory language and the treaty. It is also highlighted by him that the decision rendered in the case of Davy Ashmore India Ltd. (supra) is not applicable to the present case inasmuch as the decision was rendered when Section 90(2) of the Act was couched in different language and the earlier instructions were quite different. Whether the aforesaid facet

needs advertence we think it seemly to refer to Expln. 2 to Section 9(1) in entirety. The said provision reads as under:

"Explanation 2 : For the purpose of this clause, "royalty" means consideration including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains" for--

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade-mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade-mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or process or trade-mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iva) the use or right to use, any industrial, commercial or scientific (equipment but not including the) amounts referred to in Section 44BB:

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in Sub-clause, (i) to (vi), (iva) and (v)."

12. In this context it is also relevant to reproduce Clause 3 of Article 12 of the treaty. The said article deals with royalties and fees for included services and Clause 3 of the same reads as under:

"3. The term "royalties" as used in this article means :

(a) payments of any kind received as consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade-mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use or disposition thereof; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than payments

derived by an enterprise described in para 1 of Article 8 (shipping and air transport) from activities described in para 2(c) of 3 of Article 8."

13. We have been addressed at length by the learned counsel for the parties with regard to finer aspects of the language used in the Act as well as in the treaty. It is canvassed by Mr. Arya that when the statute language uses imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill the concept of royalty gets attracted. To elaborate : the proponment of the learned counsel for the Revenue is that the word "information" is concerned with technical, industrial and commercial and the terms "scientific", "knowledge", "experience" or "skill" are to be read disjunctively. Referring to the treaty it is also proponed by him that similar language is used in the treaty. Pyrarmdding the aforesaid submission it is submitted by him that the informations concerned with industrial, commercial or scientific experience have their independent base but the term "experience" need not be connected with the terms "information concerned with technical, industrial and commercial". Mr. Vohra would like us to read the treaty in exact and precise manner to show that unless the information is exclusive and based on any scientific experience or scientific knowledge or skill it would neither come under the statute nor under the treaty. If the submission of learned counsel for the parties are understood in proper perspective the real controversy that really emerges is whether scientific knowledge or experience or skill should govern any information concerning industrial or commercial spectrum or sphere. We are conscious that the use of the language in the enactment is slightly different than that has been used in the treaty. But, in the present case whether the enactment would prevail or the treaty is not required to be answered inasmuch as the facet which has been highlighted before us is that every kind of information cannot be regarded as royalty. It is contended by Mr. Vohra that if the information is gathered from time to time which is available in the market it has a status of a book and, therefore, it would be a plant as per statutory definition but cannot earn the status of royalty. On the contrary, Mr. Rohit Arya would like to press into service the correspondences entered into between the parties to highlight that it is not the data simpliciter, as is put forth by the assessee, but the data or information which has immense signification with the industrial concern.

14. In this context we think it apposite to refer to the decision rendered in the case of Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, . In the aforesaid case the assessee, a manufacturer of the scientific instruments and apparatus, entered into collaboration agreement with an Hungarian trading company for undertaking manufacture of microscopes under which the foreign collaborator in consideration of payment of Rs. 1,60,000 and the foreign company agreed to supply to the assessee all the technical know-how required for manufacture of the instruments. In that context the apex Court came to hold that the payment made by the assessee to the foreign collaborator was attributable wholly towards the acquisition of a depreciable asset. Their Lordships in para 13 held as under:

"13. If the aforesaid test is applied to the drawings, designs, charts, plans, processing data and other literature comprised in the "documentation service" as specified in Clause 3 of the agreement it will be difficult to resist the conclusion that these documents as constituting a book would fall within the definition of "plant". It cannot be disputed that these documents regarded collectively will have to be treated as a "book", for, the dictionary meaning of that word is nothing but "a number of sheets of paper, parchment, etc. with writing or printing on them, fastened together along one edge, usually between protective covers; literary or scientific work, anthology, etc., distinguished by length and form from a magazine, tract, etc." (vide Webster's New World Dictionary). But apart from its physical form the question is whether these documents satisfy the functional test indicated above. Obviously the purpose of rendering such documentation service by supplying these documents to the assessee was to enable it to undertake its trading activity of manufacturing theodolites and microscopes and there can be no doubt that these documents had a vital function to perform in the manufacture of these instruments; in fact it is with the aid of these complete and up-to-date sets of documents that the assessee was able to commence its manufacturing activity and these documents really formed the basis of the business of manufacturing the instruments in question. True, by themselves these documents did not perform any mechanical operations or processes but that cannot militate against their being a plant since they were in a sense the basic tools of the assessee's trade having a fairly enduring utility, though owing to technological advances they might or would in course of time become obsolete. We are, therefore, clearly of the view that the capital asset acquired by the assessee, namely, the technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature falls within the definition of "plant" and, therefore, a depreciable asset."

15. Mr. Rohit Arya, learned counsel for the Revenue, has submitted that the aforesaid decision is distinguishable inasmuch as it was one-time supply and, therefore, the agreement was totally different in nature which pertained to giving services as per documentation list and, therefore, their Lordships treated it as a plant. But in the present case there is continuous supply of data which is information and has a different connotation.

16. As far as the nature of the list in question is concerned, it is submitted by Mr. Vohra, learned counsel for the respondent, that the information obtained by the assessee is in the nature of book and in any case it is not an information which would show any kind of experience, skill or expertise. It is contended by him that any information relating to the commercial venture cannot be regarded as information as understood in the context of provision or that of the treaty to earn the status of royalty. It is also put forth by him that there has to be something else to earn the status of information. Mere data or a calculation-sheet would not have the status of royalty. Mr. Arya has contended that any information should be regarded as royalty. On a perusal of the provisions we are of the considered opinion that any information cannot earn the status of royalty. To have the status

of royalty it has to have some special features. We are not entering into the debate whether the statutory provision or the treaty would prevail. In the case at hand what has been given is information. It is also submitted by the learned counsel for assessee that it is information which is available in the market. On the contrary the proponement of the Revenue is that it is confidential and secret and has the flavour of expertise. In this regard we think it appropriate to refer to para 6 of the order of the Tribunal which reads as under:

"6. We have considered the arguments advanced by the parties in view of the material available on record and have also gone through the order impugned as well as the decisions cited by the learned authorised representative. From the material available on record especially the correspondence between the supplier of the booklet in USA and the assessee placed at pp. 3 to 7 of the paper book, it appears that the booklet consisted monthly data with analisation which the supplier used to make available to others as well in the same business on agreed price. Though it is written in the letter of the supplier that the material of the booklet was confidential in nature, but it was not the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill of the supplier to meet the definition of royalty laid down under Clause (iv) of Expln. 2 to Section 9(1)(vi) of the IT Act. There was nothing so secret or confidential in the booklet which had been supplied to the assessee in the form of information for the benefit of the assessee, rather it appears from the correspondence between the two that the supplier had been supplying this information to other similar industries in the business of steel graphite electrodes and electro coke. We thus, are of the view that the booklet was of course informative but that information was in the form of collection of datas on the subject available in the market. And the information with commentary furnished in the booklet in any manner cannot be termed as imparting of technical industrial, commercial or scientific knowledge, "experience of skill of the supplier absolutely meant for the assessee. We thus, cannot term the amount paid by the assessee to supplier in anyway as "royalty" as defined in Expln. 2(iv) to Section 9(1)(vi) of the Act. We, therefore, do not find force in the argument advanced by the learned Departmental Representative supporting the orders of the lower authorities on the issue. This ground is allowed in favour of the assessee."

17. On a scrutiny of the aforesaid it appears that the information was in the form of collection of the data in the subject available in the market. Contrary to this, Rohit Arya has submitted that the correspondences between the assessee-company and the department situated in the USA is quite different. He has referred to a FAX message which reads as under:

"It has been some time now that you have had the Carbon Databank material. I sincerely hope that you have found it very useful and will become a subscriber very soon. The benefits of information in this area is very important. I believe, and more information would be passed between us by telephone because of the confidential nature of material that cannot be published."

18. The learned counsel for the appellant has also drawn our attention to certain other correspondences between the assessee and the foreign company that have been brought on record. We think it appropriate to reproduce a letter from PCI, USA. It reads as under;

"1 think we are slightly confused on the definitions. What we have got as a sample from you is (a) a booklet entitled "Executive-Overview--St.... Graphite Electrodes, Electrode Coke--December, 1995 consisting of approx. 150 pages, (b) some loose sheets entitled "Graphite Electrode Exports, wherein there is monthwise and countrywise data on quantities and prices, (c) Graphite Electrode Imports, wherein there is some data as (b) above, (d) Needle Coke Imports, wherein you have given monthwise and countrywise data on quantity and prices and (e) a set of documents entitled "Economics"

19. There is also another letter in reference to Carbon Databank Subscription.

20. We have been informed at the Bar that the compilation of the data which was received by the assessee was not produced before the Tribunal and it had no occasion to scrutinise the same. When it was not produced, we are not in a position to appreciate how the Tribunal could arrive at the conclusion that the correspondence between the parties is only information which is in the sphere of collection of data in the subject available in the matter. That apart we have already indicated that every information would not have in the status of royalty. There are various kinds of categories of information. Solely because an entry of the commercial nature would not make it a royalty. That cannot be the exclusive base or foundation. Some sort of exertise of skill is required. The aforesaid factor would be the requisite one. We are not inclined to accept the submission of Mr. Arya that every information if it concerns the industries or commercial venture would be a royalty. That would tantamount to state the law quite broadly. That does not seem to be the purpose of the statute or that of the treaty. As the booklet was not produced before the Tribunal and a finding has been recorded we are inclined to set aside the order of the Tribunal and remit the matter to the Tribunal and accordingly we so direct. The assessee shall produce the entire records relating to the data received and such other relevant material and the Tribunal shall keep in view the law in field and the observations made hereinabove and decide the matter.

21. Accordingly, the appeal is allowed to the extent indicated above without any order as to costs.