
(1976) 04 CAL CK 0026

In the Calcutta High Court

Case No : Income-tax Reference No. 78 of 1970

Commissioner of Income Tax

APPELLANT

Vs

Indian Oxygen Ltd.

RESPONDENT

Date of Decision : 06-04-1976

Acts Referred:

Income Tax Act, 1961 — Section 37(1)

Citation : (1978) 112 ITR 1025

Hon'ble Judges : S.C. Deb, J;Dipak Kumar Sen, J

Bench : Division Bench

Advocate : B.L. Pal and A. Sengupta, for the Appellant;Debi Pal and Manisha Seal, for the Respondent

Judgement

Deb, J.—The following question is involved in this reference u/s 256(2) of the Income Tax Act, 1961:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs. 2,97,480 paid by the assessee to the British Oxygen Co. Ltd., London, in pursuance of the agreement dated October 1, 1959, was a permissible deduction u/s 37(1) of the Income Tax Act, 1961 ?"

2. The assessment year involved is 1962-63 for which the relevant accounting year ended on September 30, 1961.

3. The assessee is an Indian company (hereinafter referred to as the "Indian company"). It is engaged in the manufacture and sale of oxygen and other products both in gases and liquid forms, including the manufacture and sale of electrodes, welding rods, welding equipment, medical equipment and accessories. The Indian company was a 100 per cent. subsidiary company of the British Oxygen Co. Ltd., London (hereinafter referred to as "the English company"). During the year under consideration the Indian company ceased to be a 100 per cent. subsidiary company of the English company and the English company held about 51 per cent. of the capital of the Indian company.

4. Under the agreement dated October 1, 1959, the Indian company was to pay to the English company 2.5 per cent. of the total expenditure incurred by the English company in running a scientific establishment inasmuch as certain processes, informations, inventions and rights of the English company were to be utilised by the Indian company free of charge. Pursuant to this agreement and during the accounting year Rs. 2,97,480 was paid to the English company by the Indian company and this amount was claimed by the Indian company as a deduction, but it was rejected by the Income Tax Officer.

5. In the appeal filed by the Indian company this deduction has been allowed u/s 37(1) of the Income Tax Act 1961, by the Appellate Assistant Commissioner and the appeal filed by the department has been dismissed by the Tribunal by following the decision of the Supreme Court in the case of Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., .

6. The submission made before us by Mr. B.L. Pal, the learned counsel for the revenue, are as follows: The instant agreement does not provide for return by the Indian company to the English company of all or any information, processes and inventions supplied to the Indian company by the English company on the termination of the agreement; by this agreement the English company has sold those information, processes and inventions to the Indian company and the Indian company is entitled to use those information, processes and inventions even after the termination of this agreement; therefore, it should be held that the Indian company has obtained an enduring advantage of a permanent nature under this agreement and accordingly it should also be held that the above expenditure incurred by the Indian company is in the nature of a capital expenditure, and hence, the present case is not covered by Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., , but by the decision of the Madras High Court in the case of Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax, .

7. Dr. Debi Pal, the learned counsel for the assessee, has disputed the above submissions of Mr. Pal and has submitted that the present case is fully covered by the decision of this court in the case of Commissioner of Income Tax (Central) Vs. Hindusthan General Electrical Corporation Ltd., .

8. Mr. Pal has relied on the following clauses of the agreement in support of his above contentions :

"2. The English company hereby continue to grant to the Indian company the right to manufacture, use and sell within the Indian company's territory the products now being manufactured by the Indian company and the right to use the processes, inventions and information which the English company has communicated to the Indian company up to the date of execution of this agreement but subject to any limitation or restriction imposed by or upon the English company.

3. In consideration of the foregoing the Indian company shall, as and when it

shall from time to time be requested by the English company so to do at the expenses of the English company, continue to communicate and make available to the English company all information, processes and inventions which have been applied or which the Indian company intend from time to time to apply to products manufactured by the Indian company and which relate to or may conveniently be used by the English company in connection with the manufacture, use and sale of any products for the time being manufactured by the English company or by any of its subsidiary companies other than the Indian company and the Indian company hereby grants to the English company and its nominees the right to use all information, processes and inventions so communicated and made available to the English company and the right to manufacture, use and sell the products of the Indian company in the English company's territory subject to any limitation or restriction to which such use and the manufacture of such products by the Indian company may be subject.

5. The English company shall, accordingly, from time to time, at the expense of the Indian company, communicate and make available to the Indian company-

(i) All information, processes and inventions resulting from the said research, and (ii) all information, processes and inventions acquired under agreements with others, save in so far as the English company is prohibited from communicating or making available such information, which relate to or may conveniently be used by the Indian company in connection with the manufacture, use and sale of the products by the Indian company and the Indian company shall be entitled to use such information, processes and inventions in the manufacture, use and sale of the products in the Indian company's territory subject to any restrictions and limitations imposed upon the English company.

7. (a) If any of the products of the English company or its subsidiary companies are now or at any time during the currency of this agreement protected by design restriction owned or controlled by the English company within the Indian company's territory the English company will, subject to Sub-clauses (b), (c) and (d) of this clause, grant or cause to be granted to the Indian company a non-exclusive licence under such design registration for the whole or the unexpired residue of the term thereof or for the duration of any licence or permission granted to the English company by any third party or for the period of this agreement whichever period may be the shorter.

(b) The Indian company shall pay to the English company in respect of each and every licence or permission granted to it by the English company pursuant to Sub-clause (a) of this clause a proportionate part of the cost of the acquisition by the English company of the registered design in respect of which such licence or permission is granted. The cost of acquisition shall mean the price paid by the English company to any other party for the registered design and all costs and expenses in connection with such acquisition from any other party and any costs and expenses of the English company of applying for and obtaining design registration in the Indian company's territory in respect thereof. The

proportionate part of such cost of acquisition shall be mutually agreed or, failing agreement, shall be fixed by M/s. Cooper Brothers & Co.

11. Each of the parties hereto hereby covenants with the other of them that save in so far as it may be necessary to apply for patent protection or to incorporate any information, improvements or inventions in its products it will not disclose and shall procure that there shall not be disclosed to any third party whatsoever (except to the English company's subsidiary companies or persons in the employ of the covenanting party) any information, improvements or inventions communicated to the covenanting party hereunder by the other party hereto and the covenanting party shall so far as may be reasonably possible bind all such persons not to make any such disclosure except as aforesaid. If either of the said parties hereto shall at any time commit any breach of the provisions of this clause the other party hereto shall be discharged from any further obligation to communicate such information, improvements or inventions.

20. This agreement is personal to the parties and shall not be assignable by either of them without the previous consent in writing of the other of them.

22. This agreement (other than Clause 11 hereof) and all licences and permissions granted under this agreement shall cease to have effect and shall determine upon the happening of one or more of the following events:--.....

(c) The agreement being determined by either party under Clause 23 hereof.

23. This agreement shall take effect from the First day of October One Thousand Nine Hundred and Fifty-nine and shall continue to be in force for a period of ten years from such date or until determined earlier by either party on giving to the other not less than six calendar months" notice in writing and expiring on the thirtieth day of September, in any year."

9. We are not impressed by the submissions of Mr. Pal in view of the above clauses of the agreements. The English company did not sell any information, processes and inventions to the Indian company. Under Clause 22 of the agreement the Indian company is not entitled to use them after the termination of this agreement. The Indian company is prohibited from disclosing these information, processes and inventions during the currency and also after the determination of this agreement in view of its Clause 11. Though this agreement is for a period of ten years, it can be terminated earlier as provided in Clause 23. Therefore, it cannot be said that the Indian company has incurred the expenditure for the purposes of bringing into existence any asset or advantage of an enduring nature. It must also be held that this expenditure is not a capital but a revenue expenditure, for it was incurred by the Indian company for running its business or working it with a view to produce profits.

10. Reliance on the said decision of the Madras High Court Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax, was misplaced by Mr. Pal, for in that case the assessee-company acquired a permanent right in respect of the

technical "know-how" information, scientific data or materials supplied to it by the foreign collaborators in view of Clause 10(b) of the agreement set out at page 670 of the report and, therefore, in that case there could be no provision for return of all copies of information, scientific data or materials by the assessee to the foreign collaborators after the termination of their agreement, and the assessee was entitled to use them forever, whereas in the case before us the Indian company has not acquired any such permanent right and though the agreement makes no provision for return of those information, processes and inventions by the Indian company to the English company after the termination of the agreement, the Indian company cannot use them for the purpose of its business after their agreement comes to an end.

11. The present case, in our opinion, is fully covered by the decision of this court in the case of Commissioner of Income Tax (Central) Vs. Hindusthan General Electrical Corporation Ltd., for in the agreement of that case, like the agreement in our case, there was no provision for return by the assessee of all copies of information, processes and scientific data or materials to the supplier company after the termination of their agreement and the terms of both these agreements are substantially the same.

12. And this court, after considering Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., , accepted the contention made on behalf of the assessee that the expenditure in question was a revenue expenditure and the deduction claimed by the assessee was allowable u/s 10(2)(xv) of the Indian Income Tax Act, 1922.

13. Accordingly, we return our answer to the question in the affirmative and in favour of the assessee, with no order as to costs.

Dipak Kumar Sen, J.

14. I agree.