

(2016) 06 KL CK 0028

In the High Court Of Kerala

Case No : I. T. A. Nos. 131,132 and 331 of 2002, 11 of 2003, 294, 437, 652, 751, 752, 761 and 771 of 2009)

Commissioner of Income-Tax

APPELLANT

Vs

Ramnath And Co.

RESPONDENT

Date of Decision : 09-06-2016

Acts Referred:

Income Tax Act, 1961 — Section 800

Citation : (2016) 289 CurTR 355 : (2016) 388 ITR 307

Hon'ble Judges : Antony Dominic and Dama Seshadri Naidu, JJ.

Bench : Division Bench

Advocate : P. K.R. Menon, Senior Counsel, Government of India (Taxes) and George K. George, Standing Counsel, for the Appellant in I. T. A. Nos. 131 and 331 of 2002 and 11 of 2003; P. K.R. Menon, Senior Counsel, Government of India (Taxes), George K. George and Jose

Final Decision : Disposed Off

Judgement

Dama Seshadri Naidu, J.—In this batch of Income-tax appeals, an identical question of law arises : the scope and ambit of section 80-O of the Income-tax Act, 1961 ("the Act"), as the provision was existing during the assessment year 1993-94.

2. Since all the other appeals have been decided based on the order of the Tribunal in the matter of the assessee who is the appellant in I. T. A. No. 132 of 2002, we shall refer to the facts of the said case for discussion and elucidation. Further, given a common question of law under identical fact situation arises, we also deem it appropriate to render a common judgment in all the appeals.

Facts:

3. The facts in brief, in the words of the appellant, are that the appellant firm is an assessee engaged, mainly, in the business of providing commercial services to certain foreign enterprises. For the assessment year 1993-94, the Assessing

Officer disallowed the assessee's claim for deduction under section 80-O of the Act on the premise that the assessee has not fulfilled the conditions laid down in the said provision. Aggrieved by the denial of deductions, the assessee filed an appeal. We may, however, add that in I. T. A. No. 437 of 2009, the dispute concerns the assessment year 1995-96.

4. Through annexure-B order, the appellate authority upheld the assessee's claim and allowed the appeal declaring that the assessee is eligible for deduction under section 80-O. Then, it was the turn of the Revenue to assail annexure-B appellate order before the Income-tax Appellate Tribunal ("the Tribunal"). As seen, the Tribunal concurred with the appellate authority and rendered annexure-C order dismissing the second appeal. Further aggrieved, the Revenue has filed before this court an appeal in I. T. A. No. 132 of 2002. Similarly, it has filed other appeals involving other assesseees under identical circumstances.

Submissions:

Revenue's:

5. In the above factual background, Mr. P.K.R. Menon, the learned senior counsel for the Revenue, has taken us through section 80-O of the Act as well as the agreements the respondent firm entered into with two foreign companies : Gelazur, a French company, Hoko Fishing Co. Ltd., a Japanese company.

6. The principal contention raised by the learned senior counsel is that the assessee is, straight and simple, an agent of the foreign enterprises procuring marine products from India, all its services are incidental to its main functioning as a fish-procuring agent. He has further contended that the assessee rendered its services "in India", contradistinguished with the expression "from India", and as such the Tribunal has misdirected itself in affirming the findings of the Appellate Tribunal.

7. When faced with a query that both the companies to which the assessee has acted as an agent are situated outside India, the learned senior counsel would contend that mere communication between the assessee based in India and the principal based abroad does not bring their inter se transactions within the purview of section 80-O .

8. In the end, the learned senior counsel for the Revenue has laid much emphasis on the phraseology employed in annexures-D and E agreements between the assessee on - one hand and the two foreign companies respectively on the other to hammer home his contention that the assessee was engaged as an agent to do a particular business in India on behalf of those foreign companies. To support his submissions, the learned senior counsel has placed reliance on the CIT v. Thomas Kurien I. T. A. No. 254 of 2009, unreported judgment) dated February 8, 2012, rendered by a learned Division Bench.

Assessee's:

9. Per contra, Mr. Pardi Wala, the learned senior counsel for the respondent-assessee has, to begin with, raised a technical plea concerning the maintainability of the appeals. According to him, the Government of India issued Circular No. 21 of 2015, dated December 10, 2015, 379 ITR (St) 107 deciding, as a matter of policy, not to fire appeals/special leave petitions in cases where the tax effect does not exceed the limit given in the said circular. He contends that, as is evident from clause-10 of the circular, it is retrospective in its operation.

10. Referring to the quantum involved in the appeals, the learned counsel would contend that all the appeals fall within the mischief of the circular and as such, the appeals are not maintainable. The learned senior counsel has further submitted that, on the issue of maintainability, the judgment of the hon'ble Supreme Court in CIT v. Surya Herbal Ltd. (2013) 350 ITR 300 (SC) , (2011) 243 CTR (SC) 327 is distinguishable.

11. Adverting to the merits, the learned senior counsel, having taken us through section 80-O of the Act once again, has submitted that the provision contemplates two contentions : (i) Services or the information provided by an Indian company being used by a non-resident outside India in its decision-making process , (ii) An Indian rendering a technical service outside India.

12. According to the learned senior counsel, once the principal provision is read with clause (iii) of the Explanation appended to the section, it lends itself to no other interpretation that what has been stated above. Once the sendee is "used" by a foreign entity outside India, contends the learned senior counsel, the fact that the advice is rendered from the Indian soil hardly makes any difference. Illustratively, the learned senior counsel has drawn an analogy from a lawyer's providing professional advice to an entity or individual, based outside India.

13. Faced with a query whether all the services mentioned in the agreement would come within the purview of section 80-O, the learned senior counsel has emphatically stated that if the recipient of services is situated outside, all the services rendered by the assessee in terms of the agreement come within the sweep of the provision. Ipso facto, the assessee's establishing, according to the learned senior counsel, which of its services qualifies for the deduction is of no consequence, rather unnecessary. In further elaboration, he has submitted that all along neither of the adjudicating authorities has entertained any doubt whether the assessee has actually rendered the services.

14. Referring to the precedential position on the issue, the learned senior counsel has further contended that using the information supplied by the assessee , the foreign companies have taken a decision outside India as regards how they can purchase the merchandise-fish. The learned senior counsel, referring to Thomas Kurien (supra) relied on by the Revenue, has asserted that the judgment is easily distinguishable on facts. Further, he has also submitted that in paragraph 7 of the judgment it has been specifically observed that the assessee therein was engaged only in verification of quality and fitness of marine products but

provided no commercial or technical information from India to the foreign buyers. In the present instance, since the assessee has been supplying commercial and technical information, by implication even Thomas Kurien, according to him, has accepted the proposition : providing commercial or technical information to an entity outside India falls within the sweep of section 80-O .

15. To support his submissions, the learned senior counsel has placed reliance on Circular No. 700, dated March 23, 1995, 213 ITR (St.) 78. Continental Construction Ltd. v. CIT (1992) 195 ITR 81 (SC), CIT v. Mittal Corporation (2005) 272 ITR 87 (Delhi), Li and Fung India P. Ltd. v. CIT (2008) 305 ITR 105 (Delhi), CIT v. Chakiat Agencies P. Ltd. (2009) 314 ITR 200 (Mad), CIT v. Inchcape India P. Ltd. (2005) 273 ITR 92 (Delhi), E.P.W. Da Costa v. Union of India (1980) 121 ITR 751 (Delhi) and CBDT v. Oberoi Hotels (India) P. Ltd. (1998) 231 ITR 148 (SC).

16. The learned counsel for the other assesseees have adopted the learned senior counsel's submissions.

Issues:

1. Whether the appeals filed by the Revenue are maintainable in the face of Circular No. 21 of 2015, dated December 10, 2015 ?

2. Whether the services rendered by the assesseees are from India or in India ?

Issue No. 1

17. The Central Board of Direct Taxes, Government of India, has revised its policy of litigation by fixing monetary limits for filing the appeals by the Department before the Income-tax Appellate Tribunal, the High Courts, and the Supreme Court. As seen from paragraph No. 3 of the Circular No. 21 of 2015, the monetary limit of the tax dispute before any High Court shall be Rs. 20,00,000 and above. Admittedly, in none of the appeals before us the dispute crosses Rs. 20,00,000. Further, from paragraph 10 it is explicit that the circular operates retrospectively.

18. In Surya Herbal (supra), the hon"ble Supreme Court has given the liberty to the Department to move the High Court concerned pointing out that any such circular should not be applied ipso facto, particularly when the matter has a cascading effect. The court has also further observed that there can be cases in which a common principle may be involved affecting many matters that may fall for adjudication in due course.

19. To distinguish the observations of the Supreme Court, the learned senior counsel for the respondents has submitted that the present batch of matters has no cascading effect because the provision stood amended subsequently. Nor can there be a chance of any other large number of matters coming up for consideration involving the common question of law. Nevertheless, the learned

senior counsel for the Revenue has stoutly defended the Department's pressing on with the proceedings.

20. Any" discussion on the enforceability of the circular, in our view, is obviated : Initially, in I. T. A. No. 131 of 2012 the Tribunal passed an order , later, it followed the said order in many other cases, some of which are being disposed of now. By any reckoning, there is no gainsaying the fact that the order impugned has a cascading effect. We, therefore, proceed to decide the issue on the merits.

Issue No. II:

Statutory Scheme:

21. To weigh the rival contentions, we reckon section 80-O of the Act to be the fulcrum of the legal lever. As such, it is essential to examine the provision, which reads, as it stood during the assessment year 1993-94. thus :

"80-O. Deduction in respect of royalties, etc., from certain foreign enterprises. Where the gross total income of an assessee, being an Indian company or a person (other than a company) who is resident in India, includes any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, and such income is received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India, is brought into India, by or on behalf of the assessee in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction of an amount equal to fifty per cent, of the income so received in, or brought into, India, in computing the total income of the assessee :

Explanation -. . .

(iii) Services rendered or agreed to be rendered outside India shall include services rendered from India but shall not include services rendered in India."

22. When analysed, section 80-O of the Act stipulates these conditions for any assessee to be entitled to the deductions provided in the provision : (1) the assessee must be an Indian or a person residing in India, (2) the assessee must receive income by way of commission from a foreign enterprise , (3) the assessee's receiving the commission must be in consideration of technical or professional services being rendered by it, (4) the rendering of services shall be outside India , (5) the income, thus, received must be in convertible foreign

exchange in India. By any reckoning the statutory" stipulation is unambiguous, if the provision has ended there. But it has not. The third Explanation appended to the provision introduces a legal fiction - the services can be rendered from India, but shall not include the services rendered in India.

23. Viewed analytically, it is essential for us to examine whether the propositional phrases "from India" and "in India" have any semantic significance, apart from their usual syntactic rule.

24. In the present instance, all the assesseees in the batch of appeals are business entities based in India, they have been rendering services to foreign enterprises territorially situated outside India, the services are rendered based on validly executed agreements, and the assesseees are being paid in convertible foreign exchange.

25. That said, the conclusion is seemingly simple and straight that the assesseees are entitled to the benefit of a deduction, but there lies a catch : Whether the services are rendered "from India" or "in India" ?

Semantic significance:

26. In his book, Connectives of English Speech, James C. Femald has explained the semantic significance of both "from" and "in" at page 96 and 102. We may consider the commentary only on the special aspect of the terms. "From" : "From" represents the Anglo-Saxon from, fram, used in the same sense, denoting primarily removal or separation in space or time, and then cause, reason, or instrumentality. The learned author wonders how difficult it is to define the term without using the word itself in its own definition. The preposition "from" is so ubiquitous that it is needed even to define itself.

From : 1. Of place or space : having as a starting point of motion, actual or implied, out of, starting at, leaving behind, opposed to into, to, or unto, as, he sailed from New York to Liverpool, the student went from home to college, the town is five miles from the city, the view from the summit is fine, keep away from the machinery.

"In" is the Anglo-Saxon in, and stated by Maetzner, "seems to point to a local abiding" It may be termed specifically the preposition of inclusion. Of its definitions :

"In" : I. Of place or space : 1. Denoting the object as surrounding or including in space : (a) within the bounds of, within the contour, surface, or exterior of, enveloped or restrained by, contained or included within, pertaining to or connected with the interior of, within, inside, as, the stars in the sky, the prisoner in chains, a story in a book, a room in the house, she clasped the child in her arms.

27. In section 80-O of the Act, the constants are the Indian agent, the foreign principal, and the Indian agent rendering services from India. The variable is,

how and where are the services used ? Indeed, if words are plain and unambiguous, it ill behoves us to put a strained meaning on them in the name of interpretation. Here, the expressions employed in section 80-O are deceptively simple , "from India" and "in India".

28. Every" nation meets any measure more than half way if it results in the 28 nation"s augmenting the foreign reserves. India is no exception. It encourages and provides incentives to those who earn foreign exchange. Over and above the incentive is the facility of deduction from the taxable income in foreign exchange- that is what section 80-O is. The legislative intent behind the provision is not far to seek : The Government encourages entrepreneurial initiative and innovation by the Indian companies at the international level. In a measure, the nation encourages any Indian showcasing the Indian intellect internationally. That accepted, if Indian technology, know-how, etc., is used in India itself even by a foreign company, it is an intellectual enterprise not only from India but also in India, We reckon that use means the end use of the information or know-how, but not its mere processing.

29. Before we finally determine the application of the provision to the claims of the assessee, it is apposite for us to survey the precedential position in this regard, especially, based on the authorities cited at the Bar by either of the learned counsel.

Precedential position:

Thomas Kurian:

30. In Thomas Kurian (supra), on which the learned senior counsel for the Revenue has placed reliance, the assessee acted as an agent of certain foreign companies buying marine products from India. The assessee was engaged to examine the quality and stability of the products for the foreign buyers , only on the assessee"s certification could the exporter ship the goods from India to the foreign buyer. In other words, the assessee was rendering professional services to ensure the quality of the product exported to the foreign buyers and the services were rendered in India.

31. In that factual context, a learned Division Bench of this court has held that the assessee admittedly examines the quality and type of fish processed by the exporters in India and certifies the fitness of the product for shipment to the foreign buyers. It represents the main service rendered by the assessee, and that was rendered entirely in India, at that.

32. In our view, the facts of Thomas Kurian are entirely different, and the ratio of the said judgment may not affect our discussion. It may be interesting to note that in Thomas Kurian, the learned counsel for the assessee has placed reliance on Li and Fung and Inchcape (here too relied on) but the court has concluded that they have no relevance.

E.P.W. Da Costa:

33. Concerning interpretation of section 80-O of the Act, E.P.W Da Costa (supra) is one of the earliest judgments cited at the Bar by the learned senior counsel for the respondents. As is evident from the judgment rendered by the High Court of Delhi, the assessee is a consultant "engaged in conducting specialised economic and public opinion research on an all-India basis to assess the attitudes of a wide range of political, social and economic subjects. The British Broadcasting Corporation (BBC) is desirous of using the services of the consultants, especially the technical know-how on survey sampling/interviewing/coding tabulation and analysis for use in their country (emphasis supplied). The whole exercise by the BBC is to assess the radio listening habits of the people.

34. In the above factual background, the High Court of Delhi interpreted section 80-O of the Act to hold that BBC can be said to use the information received from the assessee when it formulates or modifies its broadcasting programmes to India. The court has observed that the term "used" is a word of general import.

35. Indisputably, the BBC is in London, it transmits all its programmes from London propagating its waves across the globe through transponders and transmission stations in various countries, India having no transmission station. Further, there may be programmes catering to the specific needs of the Indian audience and viewers, but the programme is accessible, at least, across a part of the globe-to be specific, the South East Asia, for which it has common programming schedule. The transaction involving the assessee and the BBC in Da Costa, as has been held by the High Court of Delhi, fully qualifies to the claim the benefit under the provision. Though the information is provided from India, it is used in another country in its entirety.

Mittal Corporation:

36. In Mittal Corporation (supra), The assessee received a commission as a buying agent of certain foreign enterprises , it claimed deduction under section 80-O of the Act. The assessee's claim was because it earned the commission in foreign exchange by supplying commercial information for the use outside India by the foreign companies. The Department, however, disallowed the claim contending that the assessee rendered neither any technical nor any professional services. The High Court of Delhi repelled the Department's objections. It cannot be said that the assessee must provide, the court held, "technical services" even where it receives consideration for only providing commercial information. We could not, however, gather from the judgment how the commercial information provided by the assessee was used by the foreign enterprises outside India - a crucial aspect for determining the application of the provision.

Oberoi Hotels:

37. In Oberoi Hotels (supra), the factual background to the case is not explicit. What can be gleaned from the judgment is that the assessee contracted with a foreign company agreeing to manage a foreign company for 1. Here printed in italics. 25 years. For the said purpose, the assessee had to loan to the foreign

company the services of its fully qualified and experienced personnel. The agreement was styled as "management services agreement".

38. The Department refused to extend the benefit under section 80-O of the Act to the assessee on the premise that the agreement is nothing but a joint venture and that it has nothing but a service agreement. Since the agreement involves the assessee's training the Nigerian personnel, the hon'ble Supreme Court has held that the assessee undoubtedly under the contract must make use of its commercial and scientific expertise as well as experience and skill, outside India.

Inchcape India:

39. In Inchcape India (supra), the High Court of Delhi has affirmed the findings of the Tribunal. On facts, it has held that the assessee was providing two types of services involving its dyeing and testing divisions. It concurred with the findings of the Tribunal that the assessee had to work in textile testing, inspection of soft lines, electrical and electronics products according to the existing standards of European and American markets, etc. Of all things, the Delhi High Court has noted that the issue arose much before the insertion of Explanation (iii) to section 80-O of the Act.

Li and Fung:

40. In Li and Fung (supra) the assessee claimed to have rendered technical services out of India as a buying agent and thus claimed to be eligible for deduction under section 80-O of the Act. The Assessing Officer, however, concluded that the assessee merely rendered managerial services, not of technical nature. Placing reliance on Mittal Corporation (supra), the High Court of Delhi has held that clearly the services rendered by the assessee required knowledge, expertise, and experience, and, therefore, the fee it received from foreign enterprises for supply of commercial information sent from India for use outside India was eligible for deduction under section 80-O of the Act.

41. Pertinently, Li and Fung has squarely considered the issue whether the benefit of section 80-O of the Act would be available if the technical and professional services, though rendered outside India, are used by the foreign Government or enterprise in India. The court gave judicial imprimatur to the Board's clarification, it is to the effect that if an assessee renders technical or professional services from India to a foreign Government or enterprise outside India, it can claim deduction even if the foreign recipient utilises the "benefit of such services in India".

Chakiat Agencies:

42. In Chakiat Agencies (supra), the assessee, a shipping agent, ensures that the ship owner picks up the cargo and transports it within time and at the agreed rates. The information regarding the availability of cargo to ship owners and its destinations at frequent intervals enables the ship owners to program the ships' travel touching the Indian coasts. The assessee contacts the ship owners

whenever they send the cargo, and in that process they exchange various types of special information with the ship owners or the parties concerned. For such services as rendered by the assessee, it receives a commission from its foreign principals.

43. The assessee's claim is that it receives brokerage from the foreign ship owners in consideration of its furnishing information used by the ship owners outside India. According to the assessee, the information concerns industrial, commercial, or scientific knowledge, experience or skill, the rendering of which is technical and professional service to foreign ship owners. Thus, the assessee claimed deduction under section 80-O of the Act, but was denied. Eventually, the Tribunal allowed the appeal on the ground that the assessee's activity comes within the purview of the provision. The correctness of decision was assailed before the High Court of Madras, a learned Division Bench has surveyed much of the case law on that point.

44. Chakiat Agencies felicitously states the purpose of the provision : To provide, by an Indian assessee, any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill for use outside India and in that process to receive income to augment the foreign exchange resources of the country. The assessee can also provide to the foreign enterprise technical and professional services, which expertise it possesses, for earning foreign exchange for the country". The court went on to hold that indisputably the assessee had rendered commercial service to the foreign shipping owner for his use outside India and received a commission in convertible foreign exchange. Hence, the rendering of the commercial service and receiving a commission in foreign exchange by the assessee would entitle the assessee to the benefit of section 80-O.

The Twin Aspects:

45. With due regard to the above pronouncements, we, however, feel it necessary to point out that in none of them, two crucial aspects of section 80-O of the Act have not fallen for consideration : (i) What type of services rendered by an Indian entity falls within the sweep of the provision, (ii) what is the true import of the expression "use outside India ?

46. In Continental Construction (supra), the assessee is a civil construction company. It has executed many projects overseas and India. It has entered into eight contracts for the construction inter alia, of a dam and irrigation projects in Libya, of Fibre Board Factory and huge water supply projects in Iraq. For these contracts, the assessee obtained the approval of the Central Board of Direct Taxes (CBDT) in terms of section 80-O of the Act.

47. Concerning the dispute that has arisen based on the assessee's claim for the benefit under section 80-O of the Act, the Supreme Court has held that the assessee was undoubtedly rendering services to the foreign Government by

executing the water supply project. These services were no doubt technical sendees, as they required specialised knowledge experience and skill for their proper execution. The Department's argument seems that the services in the present case would not be covered by the section because there was no privity of contract between the employees of the assessee and the foreign Government. The apex court has, however, repelled the said contention by observing that the assessee is a company and any technical services rendered by it can only be through the medium of its employees, skilled and unskilled.

48. As regards the claim for a deduction based on labelling of the receipts, Continental Construction holds that it is a well-settled principle that exigibility of an item to tax or tax deduction can hardly be made to depend on the label given to it by the parties. An assessee cannot claim deduction under section 80-O regarding certain receipts merely because they are described as royalty, fee or commission in the contract between the parties. By the same token, the absence of a specific label cannot destroy the right of an assessee to claim a deduction, if, in fact, the consideration for the receipts can be attributed to the sources stated in the section. It further holds that it is the duty of the Revenue and the right of the assessee to see that the consideration paid under the contract legitimately attributable to such information and services is apportioned, and the assessee is given the benefit of the deduction available under the section to the extent of such consideration.

49. In CIT v. Khursheed Anwar (2009) 311 ITR 468 (Mad), a learned Division Bench of the Madras High Court has observed that, for entitlement on the deduction under section 80-O, it is for the assessee to satisfy the Revenue firstly that it has received commission, second, that the commission was received from a foreign enterprise outside India, and third, that the commission was regarding the information relating to the commercial transaction provided by the assessee.

50. On facts, Khursheed Anwar reveals that the assessee has an exclusive agency for promoting and concluding sales contract in the territory of India for machinery and equipment for the leather industry manufactured by M/s. Baggio Technology s.r.l., Italy. On the strength of the agreement, the assessee worked with the foreign enterprise and also Italy very often. The assessee has produced no materials except the statement.

51. In that context, the court has observed that the benefit under section 80-O of the Act is not available to the assessee for mere asking. Records and materials must support the claim. Absent any materials, the benefit of the said section cannot be claimed as a matter of right, as it is purely a question of fact, which could be considered by the Assessing Officer on the basis of the records. In fact, the Commissioner of Income-tax (Appeals) has rendered a specific finding that the assessee has simply effected the sale of machinery and spares manufactured by the foreign enterprise , and, therefore, the assessee received only the sales commission. The appellate authority also found that the sales commission received by the assessee is not for any activities relating to technical or

professional services to the principals. Absence of any materials to show that what was passed on to the foreign enterprise was the information concerning with commercial or technical or scientific aid, merely because the assessee and the foreign enterprise entered into an agreement, the court declared, the assessee is not entitled to the claim of deduction under section 80-O.

52. Both from Continental Construction and Khursheed Anwar (supra) we gather that not every receipt from a foreign enterprise in convertible foreign exchange does not automatically get qualified for deduction under section 80-O the nomenclature notwithstanding. The burden, in fact, is on the assessee to prove before the Revenue through cogent material that the commission is for the services it rendered falling within the scope of the section. Neither of the facts-the existence of the contract and the receipt of convertible foreign exchange-leads to a presumption that the commission is deductible as provided in section 80-O of the Act.

53. Veering back to the facts of the matter, the assessee in I. T. A. T. No. 131 of 2002 has agreements with Gelazur, a French company, Hoko Fishing Co. Ltd., a Japanese company. The Gelazur's agreement requires the assessee to perform the following duties :

(i) To negotiate with the local packers for the purchase of the frozen seafood products which "GEELAZUR" requires.

(ii) To give "GEELAZUR" all the accurate information in respect of the standard, quality, price, time of shipment, etc. promptly, whenever the purchase of the products is made.

(iii) To carry out technical guidance for processing and for quality control and inspection of the products, and to advise "GEELAZUR".

(iv) To inform "GEELAZUR" regularly about the market situation, i.e., fishing situation prices paid by other markets, prices made by French competitors, business opportunities, monthly supplies of seafood-data.

The Hoko's agreement requires the assessee :

(a) To locate reliable source of quality and assured supply of frozen sea foods/marine products for the purpose of import by "HOKO" and communicate its expert opinion and advice to "HOKO".

(b) To keep a close liaison with agencies such as ELA/LLOYDS/SGS especially for organoleptic/Bacteriological analysis and communicates the results of inspection along with its expert comments and advice.

(c) To make available full and detailed analysis of the seafood supply situation and prices.

(d) To advise "HOKO" and keep them informed of the latest trends/processes applications in manufacturing and of all valuable commercial and economic

information about the markets, Government policies, exchange fluctuations, banking law which will directly or indirectly assist "HOKO" to organise, develop control or regulate their import business from India.

(e) To negotiate and finalise prices for Indian Exporters of frozen marine products and to communicate such and other related information to "HOKO"

54. As per the ratio of *Continental Construction and Khursheed Anioar* (supra), some of the above functions said to have been discharged by the assessee cannot qualify for deduction under section 80-O of the Act. In none of the appeals is there any material placed by the assessees as regards which of the services they have rendered to qualify under the provision.

55. To sum up, we wish to conclude that the Tribunal has erred on two counts in holding that the assessees are entitled to the benefit of deduction under section 80-O of the Act: First, mere transmission of the information to a foreign enterprise, evidently, abroad does not go to show that it is a service rendered from India, but not in India. With an element of certainty, we can as well say that once there is a contract, an Indian agent always interacts with and sends information-even technical know-how-to a foreign enterprise abroad. If that alone qualifies for deduction without reference to "the services rendered in India", the very expression in explanation (iii) becomes otiose. Trite it is to observe that statutory surplusage is not a settled canon of construction, rather it is to be avoided.

56. The purpose of the provision is to provide an incentive to the indigenous know-how of whatever nature that reaches the shores of foreign nations and gets applied there. The resultant fruits may percolate to India, too, as is the case in *E.P.W. Da Costa* and *Continental Construction*, even in which the apex court has held that not all receipts can claim the concession. If we refer back to the analogy employed by the learned senior counsel for the assessees, an advocate in India may render services to a foreign client stationed abroad concerning a case pending in India. It is a service rendered not only from India, but also in India. On the other hand, if that piece of professional advice is used abroad, even involving clients of Indian origin or laws of this nation as it happens in international arbitration's, the remuneration is qualified for the benefit.

57. Once we look at the range of services referred to in section 80-O, we can discern the thread of connectivity in all the intellectual endeavours mentioned therein : any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee. It can also be in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee. They cannot be said to be entirely discrete and disparate. The services have an air of intellectuality, as such, all and sundry

services rendered to a foreign enterprise cannot be taken into account, lest it should amount to doing violence to the Explanation (iii).

58. Concise Oxford English Dictionary (COD) defines the term "render" thus :

"Render (verb) : 1. provide or give (a service, help, etc.). Submit for inspection, consideration, or payment. Literary, hand over , surrender. 2. cause to be or become : the rains rendered his escape impossible. 3. represent or depict artistically. Perform (a piece of music). Translate. 4. covertly send (a foreign criminal or terrorist suspect) for interrogation abroad , subject to rendition. 5. melt down (fat) in order to clarify it Process (the carcass of an animal) in order to extract proteins, fats, and other usable parts. 6. cover (stone or brick) with a coat of plaster. 7. Computing process (an image) in order to make it appear solid and three-dimensional. Noun : a first coat of plaster applied to a brick or stone surface.

59. As seen, rendering includes both providing and performing. In the context of section 80-O , the services may be rendered from India, but have to be performed on foreign soil. Any other interpretation renders the Explanation (iii), in our view, otiose.

60. In the alternative, if one were to assume-it is unlikely, though-that the assessee had rendered certain services which qualify for a deduction, they have, however, failed to place any material in that regard. The agreement unfailingly points out that the assessee is marine - product procuring agents for the foreign enterprises without any claim for expertise capable of being used abroad rather than in India.

61. In the above facts and circumstances, we answer the questions of law in the Revenue's favour. As a result, we hold that the orders of the learned Tribunal in all the appeals are unsustainable , accordingly, they are set aside.