
(1999) 07 AP CK 0031

In the Andhra Pradesh High Court

Case No : Case Referred No. 180 of 1990

Commissioner of Income Tax

APPELLANT

Vs

Sri Krishna Oil Complex Ltd.

RESPONDENT

Date of Decision : 26-07-1999

Acts Referred:

Income Tax Act, 1961 — Section 115A, 163, 163(1), 9, 9(1)

Citation : (2000) 242 ITR 48

Hon'ble Judges : S.V. Maruthi, J;S. Ananda Reddy, J

Bench : Division Bench

Advocate : S.R. Ashok, for the Appellant; S. Ravi, for the Respondent

Judgement

S.V. Maruthi, J.—The following questions are referred by the Tribunal u/s 256(1) of the Income Tax Act, 1961 (for short "the Act"), at the instance of the Revenue for the opinion of this court :

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in holding that Section 9(1) is not applicable to the facts of the present case and that the lump sum payment made by the assessee to Trade McNair was not assessable u/s 9(1)(i) read with Section 163(1) ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in their finding that what was approved by the Government of India is the agreement dated December 16, 1975, and that the agreement dated September 20, 1976, was nothing but a modified form of agreement after incorporating the suggestions and modifications proposed by the Government of India ?

3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in holding Trade McNair was not taxable u/s 9(1)(vi) read with the proviso and Explanation thereunder ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was

correct in law in holding that as Section 9(1)(vi) is applicable specifically to payments of royalty, the applicability of Section 9(1)(i) to royalty payments is altogether excluded ?"

The facts in brief are as follows :

The assessment years are 1979-80, 1981-82, 1982-83 and 1983-84. The Tribunal by a common order disposed of four appeals for the above assessment years filed by the Revenue. The assessee-Sri Krishna Oil Complex Limited (hereinafter referred to as "SKOCOM"), entered into a collaboration agreement with the American companies called Trade Managers International, Inc., and McNair Seed Company (hereinafter referred to as "Trade McNair"), on December 16, 1975. The terms of the agreement entered into on December 16, 1975, were modified on September 20, 1976. The Central Government approved the collaboration agreement on August 24, 1976. Under the collaboration agreement, SKOCOM agreed to pay a lump-sum of 2,50,000 US dollars to Trade McNair in consideration of providing technical know-how, design of expeller unit, advice on drawings, documentation, erection and commissioning of the castor oil mill, etc. The payment was agreed to be made subject to the applicability of the Indian taxes and the lump-sum was agreed to be paid in three instalments, viz., 1/3rd after the agreement had been taken on record ; 1/3rd at the time of transfer of technical documentation and 1/3rd at the time of commencement of commercial production.

SKOCOM was treated as an agent of Trade McNair u/s 163 of the Act by an order passed by the Income Tax Officer on June 29, 1981, for the assessment year 1979-80. Section 148 notice was served on the assessee on July 2, 1981, and it was called upon to file a return of income for the assessment year 1979-80 for and on behalf of Trade McNair. On June 24, 1983, the assessee filed its return declaring nil income. Notices under Sections 143(2) and 142(1) of the Act have been issued to the assessee from time to time. According to the Income Tax Officer, out of Rs. 5,35,732 forty per cent. of it representing Rs. 2,14,293 should be deducted towards tax payable by Trade McNair and only 60 per cent. which is equivalent to Rs. 3,31,439 should have been remitted to Trade McNair. It is also the view of the Income Tax Officer that the Government of India had taken note of the agreement dated September 20, 1976, which is an agreement approved after April 1, 1976, only and, therefore, the assessee is not entitled to any exemption u/s 9(1)(vi), proviso, as well as the Explanation under the said section. Therefore, on March 14, 1983, a draft assessment order was passed and the assessee was directed to file its objections. The draft assessment order along with the objections filed by the assessee were forwarded to the Inspecting Assistant Commissioner of Income Tax. The Inspecting Assistant Commissioner after affording an opportunity to the assessee held that the agreement is dated September 20, 1976, and he gave necessary directions to the Income Tax Officer to complete the assessment in pursuance of his directions for the assessment year 1979-80. Accordingly, the Income Tax Officer completed the assessment

against which the assessee filed an appeal.

2. The Commissioner of Income Tax (Appeals) held after referring to several letters exchanged between the SKOCOM and the Government of India that the agreement dated September 20, 1976, is not a new agreement. It is only the modified form of the earlier agreement dated December 16, 1975, and therefore, the collaboration agreement was entered into prior to April 1, 1976. The Commissioner also relied on a letter of the Government of India dated August 24, 1976, wherein the Government of India has stated that "it was prepared to approve the terms of the collaboration agreement dated December 16, 1975, subject to certain modifications relating to the quantum of lump sum payment to be made to the foreign collaborator". The Commissioner also held that the Government of India's letter dated August 24, 1976, has approved all the terms of the agreement dated December 16, 1975, and therefore, the collaboration agreement which was approved by the Government of India is the agreement executed on December 16, 1975, which was before April 1, 1976. Under these circumstances the Commissioner (Appeals) held that Section 9(1)(vi) of the Act inserted by the Finance Act with effect from June 1, 1976, is not applicable and, therefore, the royalty payable to Trade McNair cannot be deemed to accrue or arise in India. As a natural corollary, he also held that there was no case for assessing Rs. 4,30,635 as tax and interest u/s 115A. The Commissioner also held that there was no scope to treat SKOCOM as the agent of Trade McNair a non-resident company, u/s 163(1) of the Act.

3. For the assessment years 1981-82 to 1983-84 the Income Tax Officer held that SKOCOM is liable to be treated as an agent of the non-resident company, viz., Trade McNair, by his orders dated October 13, 1983. On appeal, the Commissioner of Income Tax (Appeals), Hyderabad, held that the collaboration agreement cannot be treated as giving rise to a business connection with a non-resident. He followed his order for the assessment year 1979-80 and held that in view of Section 9(1)(vi), the income has neither accrued nor arisen in India and, therefore, the assessee cannot be treated as an agent of the non-resident company.

4. Aggrieved by the orders of the Commissioner of Income Tax (Appeals), Hyderabad, for the assessment years 1979-80 and 1981-82 to 1983-84, the Revenue filed appeals before the Tribunal. The Tribunal agreed with the view of the Commissioner. However, at the instance of the Revenue, the questions set out in the above paragraph are referred for the opinion of this court.

5. Before dealing with the arguments of learned standing counsel for Income Tax, Sri S. R. Ashok, and learned counsel for the assessee, Mr. S. Ravi, it is necessary to refer to the findings of the Tribunal. The Tribunal held that the agreement dated December 16, 1975, was forwarded to the Central Government for its approval. The Central Government suggested certain modifications to the terms of the agreement. One of the modifications suggested by the Central Government was that instead of a lump sum payment in US \$ 4,80,000, the

amount should be US \$ 2,50,000. The said amendment suggested by the Central Government was accepted and the same was incorporated in the agreement dated December 16, 1975. On September 20, 1976, the Central Government approved the said agreement as a modified form and, therefore, the agreement dated September 20, 1976, is not a new agreement and the relevant date of agreement is December 16, 1975. If the relevant date of agreement is dated December 16, 1975, the proviso to Section 9(1)(vi) of the Act is attracted. If the said proviso is attracted it cannot be held that the income has arisen or accrued to the foreign company. In other words, the Tribunal has confirmed the view expressed by the Commissioner of Income Tax (Appeals).

6. The main argument of learned standing counsel for Income Tax, Sri S. R. Ashok, is that though there is an agreement on December 16, 1975, the final agreement was entered into in September, 1976, and therefore the real agreement is the agreement dated September 20, 1976, and not the agreement dated December 16, 1975. Therefore, if the agreement is entered into in September, 1976, the proviso to Section 9(1)(vi) of the Act is not applicable and the assessee cannot escape the liability under the said proviso. At any rate, learned standing counsel submits that since it is a post-April, 1976, agreement, it should be treated as a deemed agreement and under the Explanation to the first proviso to Section 9(1)(vi) of the Act, the income has arisen or accrued to the foreign company and, therefore, the assessee is liable.

7. While learned counsel for the assessee, Sri S. Ravi, contended that the original agreement was entered into on December 16, 1975, and when a suggestion was made by the Central Government to reduce the quantum of royalty payable to the foreign company, the said suggestion was accepted and the same was incorporated in the said agreement dated December 16, 1975. There was no change in the essential terms of the agreement. The original agreement remains as it is except for the reduction of the royalty payable to the foreign company and, therefore, the agreement should be treated as the agreement dated December 16, 1975. When once it is a pre-April 1976, agreement, irrespective of the date of approval of the agreement by the Central Government, the proviso u/s 9(1)(vi) of the Act is applicable. In other words, counsel for the assessee contends that as long as the agreement is prior to April 1, 1976, the date on which the approval is made by the Central Government is not relevant and, therefore, the assessee is not liable under the Act. Counsel also submitted that the Commissioner of Income Tax (Appeals) as well as the Tribunal gave a finding that the real agreement is the agreement dated December 16, 1975, which is a finding of fact and the Revenue has not challenged the said finding. Even if they have challenged it, this being a finding of fact cannot be interfered with in a reference u/s 256(1) of the Act unless it is a finding based on no evidence. The Central Government in effect approved all the terms of the agreement dated December 16, 1975, and the only modification is with reference to the payment of royalty. Counsel also submitted that the question of treating it as a deemed agreement does not arise as it is an agreement entered into prior to April 1,

1976. The expression "deemed agreement" contemplated under Explanation 1 to the first proviso u/s 9(1)(vi) means a post-April 1, 1976, agreement the proposal of which was approved prior to April 1, 1976, by the Central Government. In other words, if there are proposals already approved by the Central Government prior to April 1, 1976, the fact that the agreement was actually entered into after April 1, 1976, does not debar the assessee from claiming the benefit of the first proviso u/s 9(1)(vi) of the Act. Learned counsel for the assessee relied on the judgment of the Gujarat High Court in Meteor Satellite Ltd. Vs. Income Tax Officer, Companies Circle-IX, Ahmedabad, .

8. The first question that arises for consideration is whether the agreement is pre-April 1, 1976, or post-April 1, 1976. The fact that it was entered into on December 16, 1975, is not in dispute. From the correspondence extracted by the Commissioner of Income Tax (Appeals) and relied on by him, it indicates that there was a suggestion by the Central Government to modify the agreement as far as the quantum of the royalty payable, to the foreign company is concerned. The said suggestion was accepted and it was incorporated in the agreement dated December 16, 1975. The said agreement was approved by the Central Government on August 24, 1976. In other words the Central Government has approved all the terms of the agreement dated December 16, 1975, and after the modification suggested by them, it was incorporated in the said agreement. Further, the Commissioner as well as the Tribunal found on a consideration of the correspondence exchanged between the Central Government and the assessee that the agreement is pre-April, 1976. The Revenue has not challenged this finding on the ground that the finding is not based on any evidence or that the finding is perverse. In the absence of challenge by the Revenue that the finding of fact arrived at by the Tribunal is perverse or is based on no evidence, this court in a reference cannot interfere with the said finding of fact though question No. 2 is framed for the opinion of this court. Further, we are of the view that the finding cannot be challenged as it is based on material evidence and is not perverse.

9. The next question that arises for consideration is though the agreement is dated December 16, 1975, since it was approved on August 24, 1976, by the Central Government, does it make any difference for the purpose of Section 9(1)(vi) of the Act ? In other words, does the approval of the agreement by the Central Government on August 24, 1976, make it a post-April 1, 1976, agreement thereby attracting Section 9(1)(vi) of the Act ? At this stage, it is necessary to refer to Section 9(1)(vi) of the Act and the relevant proviso and Explanation thereto which reads as under :

"9. (1) The following incomes shall be deemed to accrue or arise in India . . .

(vi) income by way of royalty payable by-- . . .

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a

business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India : . . .

Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976, and the agreement is approved by the Central Government

Explanation 1--For the purposes of the first proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date ; so, however, that, where the recipient of the income by way of royalty is a foreign company the agreement shall not be deemed to have been made before that date unless, before the expiry of the time allowed under Sub-section (1) or Sub-section (2) of Section 139 (whether fixed originally or on extension) for furnishing the return of income for the assessment year commencing on the 1st day of April, 1977, or the assessment year in respect of which such income first becomes chargeable to tax under this Act, whichever assessment year is later, the company exercises an option by furnishing a declaration in writing to the Assessing Officer (such option being final for that assessment year and for every subsequent assessment year) that the agreement may be regarded as an agreement made before the 1st day of April, 1976."

From a reading of Section 9(1)(vi), it is clear that the income by way of royalty payable by a person who is a resident is deemed to have accrued or arisen in India. Therefore, the royalty payable by the assessee to the foreign company is deemed to have accrued or arisen in India and is liable to be taxed u/s 9(1)(vi) of the Act. However, the proviso says that nothing contained in Clause (vi)(b) shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India, etc., if such income, viz., royalty, is payable in pursuance of an agreement made before April 1, 1976, and the agreement is approved by the Central Government.

10. In other words, if an agreement is entered into prior to April 1, 1976, the royalty payable under the agreement is not liable to be taxed under Clause (vi) of Section 9(1) of the Act irrespective of the date on which the agreement is approved by the Central Government. The fact that the approval of the Central Government was given subsequent to April 1, 1976, namely, on August 24, 1976, is irrelevant as long as the agreement is entered into before April 1, 1976. The date of approval of the agreement by the Central Government is not a relevant consideration as long as the agreement is entered into prior to April 1,

1976, in view of the finding arrived at by the Tribunal which confirms the finding of the Commissioner of Income Tax that the agreement was entered into prior to April 1, 1976, the proviso to Clause (vi) of Section 9(1) is applicable though it was approved by the Central Government on August 24, 1976, i. e., subsequent to April 1, 1976, and it cannot be said that the income has arisen or accrued to the foreign company.

11. The argument of learned standing counsel for the Revenue is that the agreement is actually entered into in September, 1976, and not on December 16, 1975, as there is modification of the terms of the agreement and the actual agreement approved is the agreement dated September 20, 1976, and if it is held that the Central Government has approved the agreement dated December 16, 1975, there is no approval of the agreement dated September 20, 1976. We regret to accept the contention of standing counsel for the Revenue as the agreement dated December 16, 1975, remains as it is except for a change with reference to the quantum of royalty payable to the foreign company and the agreement was actually executed on December 16, 1975. Therefore, the effect of the approval by the Central Government is the approval of the agreement dated December 16, 1975.

12. The High Court of Gujarat in Meteor Satellite Ltd. Vs. Income Tax Officer, Companies Circle-IX, Ahmedabad, was also of a similar view and it was held that where there were changes in the agreement entered into on September 26, 1974, with regard to quantum of payment to foreign company, in truth and substance, the agreement was entered into on September 26, 1974, although the agreement was approved on August 24, 1976. We are, therefore, of the view that in view of the first proviso to Section 9(1)(vi) of the Act, the royalty payable by the assessee to the foreign company is not covered by Section 9(1)(vi) and the said section is not attracted to the royalty payable by the assessee-company to the foreign company.

13. The next question is whether the agreement can be treated as a deemed agreement under the Explanation 1 to the proviso to Section 9(1)(vi) of the Act. We have already extracted the said Explanation above. A perusal of the said Explanation makes it clear that it contemplates an agreement entered into after April 1, 1976, but the proposals are approved by the Central Government prior to April 1, 1976, and it should also satisfy the conditions mentioned therein. On the facts of the present case we are of the view that it is not a case where the agreement was entered into after April 1, 1976. Therefore, the question of applicability of the said Explanation does not arise.

14. In view of the above we reject the contention of learned standing counsel for the Revenue that the assessee is liable under Explanation 1 to the proviso u/s 9(1)(vi) of the Act. In the light of the above, question No. 1 does not arise out of the order of the Tribunal. Question No. 2 is answered in the affirmative and in favour of the assessee. Questions Nos. 3 and 4 are also answered in favour of the assessee and in the affirmative. The reference is answered accordingly.