
(1999) 07 AP CK 0018

In the Andhra Pradesh High Court

Case No : Case Referred No. 180 of 1990 27 July 1999 A.Y. 1979-80

COMMISSIONER OF INCOME TAX

APPELLANT

Vs

SRI KRISHNA OIL COMPLEX LTD.

RESPONDENT

Date of Decision : 27-07-1999

Acts Referred:

Income Tax Act, 1961 — Section 115A, 139, 142, 143, 148

Citation : (2000) 107 TAXMAN 100

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

Bench : Full Bench

Advocate : S.R. Ashok, for the Revenue and S. Ravi, for the Assessee, for the Appellant;

Judgement

Maruthi, J.

The following questions are referred by the Tribunal u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "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 was tire agreement dated 16-12-1975 and that the agreement dated 20-9-1976 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 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

2. 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 Ltd. (hereinafter referred to as "SKOCOM") entered into a collaboration agreement with American Companies called Trade Managers International Inc. and McNair Seed Co. (hereinafter referred to as 'Trade McNair') on 16-12-1975. The terms of the agreement entered into on 16-12-1975 were modified on 20-9-1976. The Central Government approved the collaboration agreement on 24-8-1976. 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., one-third after agreement had been taken on record, one-third at the time of transfer of technical documentation, and one-third at the time of" commencement of commercial production.

3. 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 29-6-1981 for. the assessment year 1979-80. Section 148 notice was served on the assessee on 2-7-1981 and it was called upon to file return of income for the assessment " year 1979-80 for and on behalf of Trade McNair. On 24-6-1983, 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 20-9-1976 which is an agreement approved after 1-4-1976 only and, therefore, the assessee is not entitled to any exemption u/s 9(1)(vii) proviso as well as the Explanation under the said section. Therefore, on 14-3-1983, 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 was forwarded to the Inspecting Assistant Commissioner. The Inspecting Assistant Commissioner after affording an opportunity to the assessee held that the agreement is dated 20-9-1976 and he gave necessary directions to the Income Tax Officer to complete the assessment in pursuance of his direction for the assessment year 1979-80. Accordingly, the Income Tax Officer completed the assessment against which the assessee filed an appeal.

The Commissioner (Appeals) held after referring to several letters exchanged between the SKOCOM and the Government of India that the agreement dated 20-9-1976 is not a new agreement. It is only the modified form of the earlier agreement dated 16-12-1975 and, therefore, the collaboration agreement was entered into prior to 1-4-1976. The Commissioner also relied on a letter of the Government of India dated 24-8-1976 wherein the Government of India has stated that "it was prepared to approve the terms of the collaboration agreement, dated 16-12-1975 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 24-8-1976 has approved all the terms of the agreement dated 16-12-1975 and, therefore, the collaboration agreement which was approved by the Government of India is the agreement executed on 16-12-1975 which was before 1-4-1976. Under these circumstances, the Commissioner (Appeals) held that section 9(1)(vi) inserted by the Finance Act with effect from 1-6-1976 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).

4. 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, Trade McNair by his orders dated 13-10-1983. On appeal, the Commissioner (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.

5. Aggrieved by the orders of the Commissioner (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. Before dealing with the arguments of the learned standing counsel for Income Tax Shri S.R. Ashok and the 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 16-12-1975 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 of 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 16-12-1975. On 20-9-1976, the Central Government approved the said agreement as a modified form and, therefore, the agreement dated 20-9-1976 is not a new agreement and the

relevant date of agreement is 16-12-1975. If the relevant date of agreement is dated 16-12-1975, 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 (Appeals).

6. The main argument of the learned standing counsel for Income Tax Shri S.R. Ashok is that though there is an agreement on 16-12-1975, the final agreement was entered into in September 1976 and, therefore, the real agreement is agreement dated 20-12-1976 and not the agreement dated 16-12-1975. Therefore, if the agreements entered into in September 1976, the proviso to section 9(1)(vi) is not applicable and the assessee cannot escape the liability under the said proviso. At any rate the 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), the income has arisen or accrued to the foreign company and, therefore, the assessee is liable.

7. While the learned counsel for the assessee Shri S. Ravi contended that the original agreement was entered into on 16-12-1975 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 16-12-1975. 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 16-12-1975. 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) is applicable. In other words, the counsel for the assessee contends that as long as the agreement is prior to 1-4-1976, 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. The counsel also submitted that the Commissioner (Appeals) as well as the Tribunal gave a finding that the real agreement is the agreement dated 16-12-1975 which is a finding of the fact and the revenue has not challenged the said finding. Even if they have challenged, this being a finding of fact cannot be interfered within a reference u/s 256(1) unless it is a finding based on no evidence. The Central Government in effect approved all the terms of the agreement dated 16-12-1975 and the only modification is with reference to the payment of royalty. The 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 1-4-1976. The expression "deemed agreement" contemplated under the Explanation (1) to the 1st proviso u/s 9(1)(vi) means a post 1-4-1976 agreement, the proposal of which was approved prior to 1-4-1976 by the Central Government. In other words, if there are proposals already approved by the Central Government prior to 1-4-1976, the fact that the agreement was actually entered into after 1-4-1976 does not debar the assessee from claiming the

benefit of the 1st proviso u/s 9(1)(vi). The 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 1st question that arises for consideration is whether the agreement is pre-1-4-1976 or post-1-4-1976. The fact that it was entered into on 16-12-1975 is not in dispute. From the correspondence extracted by the Commissioner (Appeals) and relied on by him, it indicates that there was a suggestion by the Central Government to modify the agreement as far as quantum of the royalty payable to the foreign company is concerned. The said suggestion was accepted and it was incorporated in the agreement-dated 16-12-1975. The said agreement was approved by the Central Government on 24-8-1976. In other words, the Central Government has approved all the terms of the agreement dated 16-12-1975 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 the 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 16-12-1975 since it was approved on 24-8-1976 by the Central Government, does it make any difference for the purpose of section 9(1)(vi) ? In other words, does the approval of the agreement by the Central Government on 24-8-1976 make it a post-1-4-1976 agreement thereby attracting section 9(1)(vi) ? At this stage it is necessary to refer to section 9(1)(vi) and the relevant proviso and Explanation thereto which reads as under:

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

(vi) income by way of royalty payable by-

(a)

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(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;

(c)

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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 of trade mark or similar property, if such income is payable in pursuance of an agreement made before 1-4-1976, and the agreement is approved by the Central Government.

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Explanation 1.-For the purposes of the first proviso, an agreement made on or after the 1-4-1976, 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 subsection (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 1-4-1977, 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 all option by furnishing a declaration in writing to the assessing officer (such option being final for the assessment year and for every subsequent assessment year) that the agreement may be regarded as an agreement made before 1-4-1976."

10. 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 country is deemed to have accrued or arisen in India and is liable to be taxed u/s 9(1)(vi). 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 1-4-1976 and the agreement is approved by the Central Government.

11. In other words, if an agreement is entered into prior to 1-4-1976, the royalty payable under the agreement is not liable to be taxed under clause (vi) of section 9(1) 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 1-4-1976, namely, on 24-8-1976, is irrelevant as long as the agreement is entered into before 1-4-1976. 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 1-4-1976; in view of the finding arrived at by the Tribunal which confirms the finding of the Commissioner that the agreement was entered into prior to 1-4-1976, the proviso to clause (vi) of section 9(1) is applicable though it was approved by the Central Government on 24-8-1976; i.e., subsequent to 1-4-1976, and it cannot be said that the income has arisen or accrued to the foreign company.

12. The argument of the learned standing counsel for the revenue is that the agreement is actually entered into in September 1976 and not on 16-12-1975 as there is modification of the terms of the agreement and the actual agreement approved is the agreement dated 20-9-1976 and if it is held that the Central Government has approved the agreement dated 16-12-1975, there is no approval of the agreement dated 20-9-1976. We regret to accept the contention of the standing counsel for the revenue as the agreement dated 16-12-1975 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 16-12-1975. Therefore, the effect of the approval by the Central Government is the approval of the agreement dated 16-12-1975.

13. The Gujarat High Court in Meteor Satellite Ltd.'s case (supra) was also of a similar view and it was held that where there were changes in the agreement entered into on 26-9-1974 with regard to quantum of payment to foreign company, in truth and substance the agreement was entered into on 26-9-1974 although the agreement was approved on 24-8-1976. We are, therefore, of the view that in view of the 1st proviso to section 9(1)(vi), 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.

14. The next question is whether the agreement can be treated as a deemed agreement under the 1st Explanation to the proviso to section 9(1)(vi). 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 1-4-1976, but the proposals are approved by the Central Government prior to 1-4-1976 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 1-4-1976. Therefore, the question of applicability of said Explanation does not arise.

15. In view of the above, we reject the contention of the learned standing

counsel for the revenue that the assessee is liable under Explanation 1 to the proviso u/s 9(1)(vi). In the light of the above, the 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. Question Nos. 3 and 4 are also answered in favour of the assessee and in the affirmative. The reference is, answered, accordingly.