
(2011) 12 KAR CK 0414
In the Karnataka High Court
Case No : IT Appeal No. 589 of 2006

Commissioner of Income Tax, Central Circle

APPELLANT

Vs

Infosys Technologies Ltd.

RESPONDENT

Date of Decision : 08-12-2011

Acts Referred:

Income Tax Act, 1961 — Section 143 (1), 143 (2), 80 HHE

Citation : (2012) 206 TAXMAN 247 : (2012) 205 TAXMAN 59 : (2012) 205 TAXMAN 250

Hon'ble Judges : V.G. Sabhahit, J;S.N. Satyanarayana, J

Bench : Division Bench

Advocate : E.S. Indrakumar and G. Kamalakar, for the Appellant; K.P. Kumar, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal is filed by the revenue being aggrieved by the order passed by the income tax Appellate Tribunal, Bangalore Bench "B" in ITA. No. 627/Bang/2003, dated 9.9.2005, wherein the appeal filed by the assessee has been allowed. The material facts leading up to this appeal for considering the substantial questions of law that would arise for consideration in this appeal are as follows:-

The assessee is an exporter of software. It filed its return of income on 22.12.1999 admitting a total income of Rs. 8,45,80,130/-. The return was processed u/s 143(1) on 27.11.2002 accepting the income returned. Thereafter, on scrutiny, a notice was issued u/s 143(2) on various occasions. In response to the notice, the representative of the respondent appeared and it was proposed that a sum of Rs. 1,62,74,62,818/- had been excluded in the expenditure in foreign currency from export turnover when rendering technical services outside India while computing deduction u/s 80HHE of the income tax Act, 1961 (hereinafter referred to as the "Act"). Having regard to the contention of the assessee and the material on record, the assessing officer disallowed the claim of the assessee u/s 80HHE of the Act. Being aggrieved by the order of assessment

the assessee preferred an appeal before the Commissioner of income tax, Appeals-I, Bangalore in ITA. No. 103/R-11/CIT(A)I/02-03.

2. The first appellate authority by order dated 3.2.2003 confirmed the order of the assessing officer. Further, since it was found that the deduction u/s 40(a)(i) of the Act was not permissible and as no deduction has been made u/s 195 of the Act, a show cause notice was issued to the assessee. In pursuance of which the assessee appeared before the first appellate authority and explained that no part of the said payment pertaining to services rendered for permanent establishment at USA was chargeable to tax in India and therefore, there is no obligation to deduct tax u/s 195 of the Act, However, the first appellate authority held that in view of the provisions of Section 195(1) of the Act it is mandatory in respect of every payment made outside India to make deductions at source unless a certificate of exemption has been obtained u/s 195(2) of the Act and accordingly, negated the contention of the assessee and enhanced the assessment by Rs. 17,35,363/- as payment made to non-resident company. Being aggrieved by the said order the assessee preferred ITA. No. 627/2003 before the income tax Appellate Tribunal (hereinafter called as the "ITAT"), Bangalore.

3. The ITAT by the impugned order dated 9.9.2005 held that the reasoning given by the first appellate authority for not making deduction u/s 195(1) of the Act without obtaining an exemption certificate u/s 195(2) of the Act or a declaration obtained that no income is chargeable to tax in India, the deduction is ought to have been made, is erroneous. The Tribunal further held that payments were made to overseas consultants for the professional services rendered by them and these payments were made from the permanent establishment outside India and such payments were made out of sources of income generated outside India. Hence, the same income could not be deemed to accrue in India and therefore, not chargeable to tax in India and the assessee is justified in not making deductions u/s 195 of the Act. Since the tribunal held that the expenditure in foreign currency from export turnover and total turnover has to be excluded when rendering technical services outside India while computing deduction u/s 80HHE of the Act. The revenue being aggrieved by the said order of the tribunal filed this appeal.

4. This appeal was admitted and posted along with ITA. No. 574/2006, which in turn was admitted for consideration of substantial questions of law raised in ITA. No. 3232/2005. Wherefore, after hearing the learned counsel appearing for the parties the following substantial questions of law arise for consideration in this appeal:

(1) Whether the finding of the tribunal in excluding the expenditure in foreign currency from export turnover and total turnover when rendering technical services outside India for computing deduction u/s 80HHE of the Act, is justified in the facts and circumstances of the on hand?

(2) Whether the finding of the Tribunal that disallowance made u/s 40(a)(i) of the Act by the assessing officer for non-deduction of TDS u/s 195 of the Act in respect of amount paid towards consulting services rendered abroad, is not correct, is justified?

5. So far as the first substantial question of law is concerned, the same has been considered in respect of the same assessee arising in ITA. No. 3232/2005 and by order dated 4.11.2011 has been answered against the assessee and in favour of the revenue. Accordingly, following the reasons assigned in ITA. No. 3232/2005 dated 4.11.2011 the first substantial question of law is answered in favour of the revenue and against the assessee.

6. The learned Counsel appearing for the appellant submitted that when admittedly payments have been made to the non-resident company, there was an obligation to deduct tax at source u/s 195(1) of the Act unless the assessee is able to show that the said payment was not subject to tax in India. The learned Counsel has taken us through the reasons assigned by the first appellate authority and the tribunal and submitted that those reasons are erroneous and in view of the Explanation to Section 9(2) deduction ought to have been made u/s 195(1) of the Act and therefore, the order passed by the first appellate authority was justified and the tribunal was not justified in reversing the same. Explanation to Section 9(2) of the Act reads as under:

9(2)...

Explanation - For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not-

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India.

7. The learned counsel appearing for the respondent submitted that so far as the payment of Rs. 17,35,363/- paid to the Power solve Corporation USA for the services rendered abroad to their office in USA which is permanent establishment in DTAA no TDS has been made and as the said expenditure has been considered while computing the tax payable to USA Government in respect of their permanent establishment abroad and since said payment did not involve any amount chargeable to tax in India, the question of deduction u/s 195(1) would not arise. In support of this contention he has relied upon the decision of the Hon'ble Supreme Court in G.E. India Technology Centre Private Ltd. Vs. Commissioner of Income Tax and Another,

8. We have given careful consideration to the contentions of the learned Counsel appearing for the parties and scrutinised the material on record.

9. The material on record would clearly show that the question about non-deduction u/s 195 of the Act in respect of the payments made in a sum of Rs. 17,35,363/- to Power solve Corporation USA was raised by the first appellate authority and a show cause notice was also issued to the assessee. The same has been explained by the assessee saying that the said payment do not attract payment of tax in India and wherefore, there was no liability to tax in India on the said payment and question of deduction would not arise. The reasoning assigned by the first appellate authority that on payments made to the non-resident deduction should be made u/s 195(1) unless an exemption certificate has been obtained u/s 195(2) of the Act, is clearly erroneous. The said contention has been considered and rejected by the Hon''ble Supreme Court in the decision cited by the learned Senior Counsel appearing for the respondent. Further, the material on record would clearly show that the said payment of Rs. 17,35,363/- paid to the Power solve Corporation USA was for the services rendered abroad to their office in USA, which is a permanent establishment in DTAA and hence there is no liability to tax in India and even as per the DTAA tax was paid in USA and no amount out of the said payment was chargeable to tax in India and wherefore, the question of applying Explanation relied upon by the learned Counsel appearing for the appellant would not arise.

10. The Hon''ble Supreme Court in GE India Technology Centre (P.) Ltd. case (supra) has observed as follows after analysing the provisions of Section 195 of the Act: It may also be noted that section 195(1) is in identical terms with section 18(3B) of the 1922 Act. In Commissioner of Income Tax, Bombay City 1 Vs. Cooper Engineering Ltd., it was pointed out that if the payment made by the resident to the non-resident was an amount which was not chargeable to tax in India, then no tax is deductible at source even though the assessee had not made an application u/s 18(3B) (now section 195(2) of the income tax Act)....

The application of section 195(2) pre-supposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the income tax Officer (TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the income tax Officer (TDS) that the question of making an order u/s 195(2) will arise.

The Supreme Court further held as under:

Therefore, this court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct tax arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the income tax Officer (TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident.

The Hon''ble Supreme Court has further observed that when the payment is not made within India then the question of making deduction u/s 195(1) of the Act do not arise and the reasoning of the revenue that every payment would attract tax as all payments made to non-residents would attract deduction at source u/s 195(1) unless a certificate has been obtained by making an application u/s 195(2) of the Act regarding exemption for payment of tax in India or that no amount out of such payment, made is chargeable to tax in India has been clearly negated by the Hon''ble Supreme Court in GE India Technology Centre(P.) Ltd., referred to supra. Accordingly, we hold that, the finding of the Tribunal in setting aside the deduction made by the first appellate authority is justified and accordingly, we answer the 2nd substantial question of law in favour of the assessee and against the revenue and pass the following: ORDER

The appeal is allowed in part. The finding of the tribunal in excluding the expenditure in foreign currency from export turnover and total turnover when rendering technical services outside India while computing deduction u/s 80HHE of the Act is confirmed.