

(1979) 01 DEL CK 0006

In the Delhi High Court

Case No : Civil Writ Appeal No. 901 of 1975

J.K. (Bombay) Ltd.

APPELLANT

Vs

Central Board of Direct Taxes and Another

RESPONDENT

Date of Decision : 17-01-1979

Acts Referred:

Citation : (1979) ILR Delhi 407 : (1979) 118 ITR 312

Hon'ble Judges : V.S. Deshpande, J;N.N. Goswamy, J

Bench : Division Bench

Advocate : S.P. Mehta, Ravnder Narain, A.N. Haksar, B. Kirpal and M.L. Varma, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) The question for decision raised by these writ petitions is whether the services of managing agents rendered by an Indian Company to a foreign company are "technical services" within the meaning of section 80-0 of the Income Tax Act, 1961 (the Act). Messrs. J. K. (Bombay) Ltd., an Indian Company, that is the managing agents, entered into two agreements with two foreign companies, namely, (1) The Raymond Woollen Mills (Kenya) Limited, and (2) Raymond (Mauritius) Limited. As the foreign companies were desirous of setting up Woollen Spinning and Weaving Plants and the managing agents were the managing agents of a woollen mill in India and possessed technical information and expert industrial, A commercial and scientific knowledge, experience and skill with regard to the setting up and working of woollen spinning and weaving plants, the managing agents agreed to act as the managing agents of the foreign companies for certain fixed terms. The managing agents were to be remunerated for their services by payment of 10 per cent of the net profits of the foreign companies. The managing agents were to be responsible for the design, lay-out, engineering and initial operation of the plant, for the detailed specifications of the machinery and the procurement thereof and shall make available to the company all technical information and expert

industrial, commercial and scientific knowledge, experience and skill to the foreign company. In short, the managing agents were to run these foreign companies by performing the functions of management. The agreement with the foreign companies were submitted by the managing agents for approval to the Central Board of Direct Taxes. By the impugned orders, dated 17th July, 1974 in the present writ petition and 17th March, 1976 in the connected writ petition (No. 570 of 1976), the Board declined to grant its approval to these agreements. The main reason for rejecting the applications was that the role of the managing agents was primarily to manage and run the plant and not to provide or render technical services or supplying technical information of the nature provided for in Section 80-0 of the Act. The petitions seek quashing of these orders.

(2) Section 80-0, which is to be construed is as follows : "(1) Where the gross total income of an assessed, being an Indian company, includes any income by way of royalty, commission, fees or any similar payment received by the assessed 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 assessed, or in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessed, under an agreement approved by the Board in this behalf, and such income is received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India having been converted into convertible foreign exchange outside India, is brought into India, by or on behalf of the assessed 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 the whole of the income so received in, or brought into, India in computing the total income of the assessee : Provided that the application for the approval of the agreement referred to in this sub-section is made to the Board before the last day of October of the assessment year in relation to which the approval is first sought : Provided further that approval of the Board shall not be necessary in the case of any such agreement which has been approved for the purposes of the deduction under this section by the Central Government before the 1st day of April, 1972, and every application for such approval of any such agreement pending with the Central Government immediately before that day shall stand transferred to the Board for disposal.

"EXPLANATION: The provisions of the Explanation to section 80-0 shall apply for the purposes of this section as they apply for the purposes of that section."

(3) The total scheme of the provisions of the Act in the context of which section 80-0 has to be construed may first be considered. Chapter VI-A of the Act is entitled "Deductions to be made in Computing Total Income". The object of

section 80-0 is apparently to encourage Indian companies to earn foreign exchange in consideration of the use outside India of information concerning industrial, commercial or scientific knowledge, experience or skill made available or In consideration of technical services rendered to a foreign Government or enterprise. The royalty, commission, fees or any similar payment received as such consideration by the assessed would be entitled to be deducted from the total income of the assessed for the purpose of assessment of Income Tax in India. For the purpose of construction. the following significant features of section 80-0 may be noted : (1) The provision of deduction applies only to royalty, commission, fees or any similar payment. These payments are received by a company either for supplying information or for rendering technical services. This postulates that the Indian company does not become a part of the foreign enterprise. If the two merge together then the identity of the Indian company would be lost and what would be paid would be not royalty or commission or fees, but rather a share in the profits. (2) The identity of the Indian company being distinct from that of the foreign enterprise, the Indian company must not under the foreign company. If it does so, it is difficult to separate the management function exercised by the Indian Company from the day to day working of the foreign company. (3) This necessity of the Indian company having a separate identity explains why the meaning of "technical services" to be rendered by an Indian company u/s 80-0 would have to be different from the meaning of technical services rendered by an individual. An individual would not become a part of the company under which he is serving. He would remain an employee. He cannot run a company as a whole. It would appear ,Therefore, that the definition of "technician" in section 80RRA(2), Explanation (c) is much wider than the scope of "technical services" envisaged in Section 80-0. The same reason explains why the definition of ""technician" in section 10(6)(vii) Explanation includes industrial or business management techniques. For the same reason technical services in section 9(l)(vii). Explanation 2 includes managerial services, while such services are not included in Section 80-0.

(4) It is true that wider definitions of technical services or services rendered by technicians given in these provisions are restricted to the construction of those provisions only. These definition are artificial meanings given to these words for particular purposes. They cannot be used to construe Section 80-0. Nevertheless, the question which arises is why broader meanings are given to the words "technician" and "technical services" in connection with services rendered by individual and why the same broad meaning should not be given to the words "technical services" rendered by a company u/s 80-0. The reasons seems to be that if such a broader meaning is given to these words in Section 80-0, it would be difficult to exclude remuneration obtained by an Indian company for the running of a foreign company or for the management of a foreign company from qualifying" for deduction u/s 80-0. If the very object of Section 80-0 as that the identity of the Indian company must be different from that of the foreign company, this object is likely to be defeated by the adoption

of such broad construction of these words. It is not the A object of section 80-0 that any income made by an Indian company by carrying on business abroad is to qualify for deduction u/s 80-0. If the running of a foreign company is not rendering of technical services, then the management of a foreign company would also not amount to rendering of technical services.

(5) The second question that also arises in the construction of section 80-0 is the difference between the mere communication of information and the rendering of technical services. The information may be industrial, commercial or scientific, while the services must be technical and would not, Therefore, include commercial .services. The. difference seems to be deliberate. For, if technical services were to include commercial services, these are the very services which a company would be rendering in running a foreign company or in managing a foreign company. There is hardly any difference between the management of the company and running the company itself. In law the management represents the company. Since the object of section 80-0 seems to be not to qualify for deduction profits earned by an Indian company by working abroad in running a foreign company or in managing a foreign company, a narrower meaning seems to have been intended to be conveyed by the words "technical services". On the other hand, mere transfer of information can be made by aa Indian company in any field without becoming a part of the foreign company. Therefore, the information conveyed may include many kinds of information though technical services rendered would not include commercial services rendered by a company.

(6) It may be asked whether management is not a technical service. According to an Article on "Management Sciences", in 14 Encyclopedia Britannica 747, the management in organisations include at least the following : "(a) discovering, developing, defining and evaluating the goals of the organization and the alternative policies that u will lead toward the goals, (b) getting the organization to adopt the policies. (c) scrutinizing the effectiveness of the policies that are adopted, (d) initiating steps to change policies when they are judged to be less effective than they ought to be." Management thus pervades all organisations. Traditionally administration was distinguished from management, but it is now recognised that management has a role even in civil services. According to the Fontana Dictionary of Modern Thought, page 366, management was traditionally identified with the running of business. Therefore, management as a process is practiced throughout every organization from top management through middle management to operational management. On the other hand, technical services occupy much narrower field than the field occupied by the management. In Shorter Oxford English Dictionary, Vol. II, page 2140 the word "technical" is given two relevant meanings. The broader meaning is "belonging to or relating to an. art or arts; appropriate or peculiar to, or characteristic of, a particular art, science, profession, or occupation". But the narrower meaning is "also, of or pertaining to the mechanical arts and applied sciences generally, as in t. education, t. school." In the broader sense, technical services may include managerial services, but in the narrower sense the word "technical" would

exclude the managerial services. Pursuing the example of technical education given in the dictionary, we find that technical education is concerned with teaching applied sciences, special training in applied sciences, technical procedures and skills required for practice of trade or profession, especially those involving the use of machinery or scientific equipment. Technical education may also be distinguished from professional education which places major emphasis upon the theories, understanding, and principles of a wide body of subject matter designed to equip the graduate to practice in such fields as medicine, law and engineering." (21 Encyclopedia Britannica 746). It would appear that managerial service may be professional service like legal or medical service, but they would not be technical services like engineering service.

(7) To sum up, the main reason why the word "technical" in section 80-0 cannot be given a wider meaning to include "managerial" or "commercial" is that the performance of managerial or commercial services by an Indian company for a foreign enterprise would amount to virtually managing or running the foreign company and remuneration obtained by the running or managing a foreign company would be in the nature of profits, while section 80-0 deliberately restricts itself to income by way of royalty, commission or fees and excludes other types of remunerations.

(8) It is also to be borne in mind that section 80-0 makes it necessary for the assessed to get the agreement under which these fees are earned approved by the Board. It would appear that the requirement of the approval has a purpose. The object of section 80-0 is best known to the Ministry of Finance who conceived the idea of giving this incentive to Indian companies. It is the Ministry of Finance through the Central Board of Direct Taxes which administers this provision. Considerable importance has. Therefore, to be given to the understanding of this provision by the Board. Circular No. 187, dated 23rd December, 1975, issued by the Board, published in Commissioner of Income Tax Vs. P.N. Nagaraj and Another, (Statutes Section), explains what the Board understands to be the scope of technical services contemplated by section 80-0. In paragraph 3(v) it is stated in the circular that "The technical services rendered or agreed to be rendered to the foreign party should relate to productive fields such as (a) mining, or (b) generation or distribution of electricity or any other form of power, or (c) constructional, industrial or manufacturing operations, or (d) engineering services. Services such as those relating to management, organisation, sales, finance and accounts, will not qualify for this purpose". Similarly, in paragraph 3(vii) "agreements which provide for participation in business or management operations abroad simplicities in return for a specified percentage of commission or profit will not be eligible for approval."

(9) The scope of judicial review under Article 226 of the constitution in respect of an order passed by the Board is not that of an appeal. The very fact that the Board has been given the power to approve or refuse to approve the agreement under which alone the deduction can be claimed by the assessed would show

that the legislature intended to give the Board a say in the construction of section 80-0. It is only if the understanding of section 80-0 by the Board shows an error of law apparent on the face of the record that the court would have to interfere with the rejection of an application for approval by the Board u/s 80-0. On the other hand, if the way in which the Board understands the meaning of technical services in section 80-0 is in keeping with the object of section 80-0 and is a reasonable construction of the words, this court would not be called upon to interfere. We have shown above that adopting the wider meaning of the word "technical" would defeat the object of section 80-0 by enabling the remuneration for management or running of a foreign company to be eligible for deduction u/s 80-0. On the other hand, the narrower meaning of the word "technical" seems to be more in keeping with the object of the section. It has to be remembered that the word "technology", which has affinity with the word "technical" is concerned with the control of material environment by man. This is done by two means. Firstly, by the use of tools, and secondly, by the application of reason to the properties of matter and energy, (21 Encyclopedia Britannica 750). It would appear, Therefore, that it would be reasonable to think that technical services should include the use of tools and machinery in addition to the use of reason. Managerial services which do not include any use of tools and machinery may not be regarded as technical services.

(10) Professor Louis L. Jaffe and Professor Nathaniel L. Nathanson have classified questions which arise for judicial review as questions of fact, questions of law and questions of judgment (Administrative Law, Cases and Materials, 4th Edition, 1976) Chap : It would appear that the view expressed by the Board as to the meaning of "technical services" is both a question of law and a question of judgment. This is because the Board is the primary authority in giving meaning to the words "technical services". They have to construe these words not only as a question of law, but in case of doubt or ambiguity or with a view to implement the object of section 80-0 and in the light of policy considerations they have also to exercise a judgment of their own in doing so. If this judgment has to be ordinarily of the Board and if this court is not sitting in appeal over that judgment in judicial review, interference with the judgment of the Board would not be called for unless that judgment is apparently wrong. If a reasonable view is adopted by the Board no reason would warrant interference with it.

(11) For the above reasons, we are of the view that the impugned orders do not call for any interference. The writ petitions are dismissed with no order as to costs.