
(2014) 03 DEL CK 0005

In the Delhi High Court

Case No : Writ Petition (Civil) No. 597 of 1996

M/s. Dewan Chand Ram Chandra Industries P. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 10(15)(iv) 10(15)(iv)(c) 44BB 9(1)(vii)

Citation : (2014) 270 CTR 569 : (2014) 364 ITR 70 : (2014) 223 TAXMAN 161

Hon'ble Judges : Sanjiv Khanna, J;Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Rabindra Kapoor, for the Appellant; Sanjeev Sabharwal, Senior Standing Counsel, for the Respondent

Judgement

Sanjiv Khanna, J.—Petitioner is a company with limited liability. Petitioner responded to the tenders floated by Oil and Natural Gas Commission (ONGC) and on acceptance, was awarded contracts for deployment of work over rigs and other auxiliary operation services in the oil fields in the western region. Three identical contracts were executed by the petitioner with ONGC under the heading "Charter Hiring of one work over rig". The petitioner with prior approval of Government of India entered into a loan agreement with State Bank of India, Singapore to avail of a foreign currency loan of 9,00,000/- USD and Rupee loan of Rs. 1,92,00,000/-. The loan was taken to finance the purchase of three work over rigs for drilling activities in relation of the said contract.

2. As per paragraph 10.3 of the loan agreement dated 21st July, 1994 with State Bank of India, Singapore, the petitioner was liable to pay principal, interest and other sums as required in full without deduction of tax, fee, duty premiums and any other charge whatsoever imposed by revenue authorities and in the event, the petitioner was compelled to make any such payment or deduction, the petitioner as the borrower was required to bear and pay the additional sum as necessary to ensure that the bank received payment in full in respect of the principal, interest or otherwise.

3. By letter dated 25th July, 1994, the petitioner applied for exemption u/s 10(15)(iv)(c) of the Income Tax Act, 1961 (Act, for short) with the Central Board of Direct Taxes (CBDT). The CBDT by their letter dated 3rd August, 1994 asked the petitioner to clarify whether it was an "industrial undertaking" under the Act, to which the petitioner responded vide letter dated 11th August, 1994.

4. By letter dated 9th September, 1994, the petitioner was directed to show cause why their application should be approved as the petitioner was engaged in giving on hire the equipments but was not engaged in manufacturing or processing activities. The application was rejected by letter dated 17th October, 1994 on the ground that the petitioner was not an industrial undertaking which only means an undertaking engaged in manufacturing or processing of goods. It was observed that the petitioner was not engaged in manufacture or processing of goods but was only supplying equipment to be used in the manufacturing process. It is obvious that the reasoning given in the letter dated 17th October, 1994 was wrong as it did not take into account the Explanation to Section 10(15)(iv)(c) of the Act which we have reproduced hereinafter. Thereupon, the petitioner made a detailed representation dated 1st March, 1995 referring to their earlier letter dated 17th November, 1994 explaining that the petitioner was engaged in the process of drilling of oil and was covered by part (c) of Explanation to Section 10(15)(iv) and hence was an "industrial undertaking". Detailed submissions in support were made. This was followed by letter dated 14th June, 1995 in which reference was made to the Oil Fields (Regulation and Development) Act, 1948, meaning of the term "Mine" and "Mining Lease" in the said Act and dictionary meaning of the term "Mining" etc. Petitioner also explained the work undertaken by them, which was in nature of work over rigs.

5. The respondents by their letter dated 23rd May, 1995 rejected the application for review but recorded that submissions, if any, may be made in writing within 15 days of receipt of the letter. The said letter records that duties of the petitioner had been mentioned in chapter 2 of the agreements and work over/servicing to be undertaken was also specified in the said chapter. It was observed that the contracts entered into by the petitioner, dealt with performance services which were ancillary to the work of ONGC and the petitioner was not per se engaged in mining. Petitioner created conditions favourable for mining operations which were then performed by ONGC. Repair of the wells by casing leakages and body cement jobs and bottom cleaning and fishing operations did not by themselves amount to be engaged in mining activities. Operations undertaken by the petitioner were such that they aided the operator i.e. ONGC, who was actually engaged in mining operations. Processes undertaken by the petitioner resulted in enhancing production but this did not mean that the petitioner were themselves engaged in mining. This was followed by another letter dated 31st July, 1995 stating that the petitioner's contention had been reexamined but were not acceptable. Petitioner was not an industrial undertaking as defined in Explanation to Section 10(15)(iv) of the Act as the petitioner was not engaged in mining but was only carrying on activities, that helped in actual mining

operations carried on by ONGC.

6. During the course of hearing before us, we have asked the respondents to examine and verify whether any other party undertaking similar work has been granted benefit u/s 10(15)(iv)(c) of the Act. Respondents have filed letter dated 19th December, 2013 written by Ministry of Finance, Department of Revenue, Foreign Tax & Tax Research Division-II, stating that benefit of Section 10(15)(iv)(c) was available for money borrowed and debt incurred before 1st June, 2001. The record pertaining to exemption under the said Section was very old and as per the record available no case pertaining to exemption for work over rigs was found.

7. Section 10(15)(iv)(c) of the Act along with Explanation applicable at the relevant time read as under:-

10. In computing the total income of a previous year of any person, any income falling within in any of the following clauses shall not be included:-

1. to 14

15.

(i)

(ii)

(iii)

(iv) Interest payable

(a)

(b)

(c) by an industrial undertaking in India on any moneys borrowed or debt incurred by it in a foreign country in respect of the purchase outside India or raw materials or components or capital plant and machinery (to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan or debt and its repayments.);

(Explanation:-

For the purposes of this sub-clause, the expression "Industrial Undertaking" means any undertaking which is engaged in

(a) the manufacture or processing of goods; or

(b) the business of generation or distribution of electricity or any other form of power; or

(ba) the business of providing telecommunication services; or

(c) Mining; or

(d) The construction of ships; or

(da) the business of ship-breaking; or

(e) The operation of ships or aircrafts or construction or operation of rail systems;

(Explanation quoted above is as it existed prior to 1.4.1996)

8. Sub-clause (c) to Section 10(15)(iv) applies when an industrial undertaking in India incurs debt or borrows money in a foreign country for purchase outside India of raw material, components or capital plant and machinery to the extent to which the interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf. The requirement of sub-clause (c) is that the interest should be payable by an industrial undertaking located in India for money borrowed or debt incurred in a foreign country in respect of specified items. There is no dispute that the petitioner had purchased capital plant and machinery in form of work over rigs and had incurred debt for which it had to pay interest in a foreign country. But, the question is whether the petitioner was an industrial undertaking within the meaning of sub-clause (c) to Section 10(15)(iv). The expression "industrial undertaking" has been defined in the Explanation enacted for the said purpose. The Explanation stipulates that "industrial undertaking" means any undertaking which was engaged in mining.

9. The short question is whether the petitioner was an undertaking which was engaged in mining. The words "engaged" and "mining" have not been defined in the Act and have to be read and interpreted as they are understood in normal parlance. The word "mining" in common parlance means working on mines for ores, oil and other minerals. "Mining" as defined in Black's Law dictionary, Sixth Edition means process or business of extracting from earth precious or valuable metals, either in their native state or in their ores. Extracting or excavating mineral oils could be included in the term "mining". The petitioner in the writ petition has referred to the expression "mining" as defined in the Oil Fields (Regulation & Development) Act, 1948 etc. However, we do not think it necessary to refer to the definition clause in a particular enactment which has not been made applicable to the Act. We have no doubt in our mind that extracting mineral oil could be covered within the meaning of mining activities. An industrial undertaking having oil fields and excavating or winning oil from oil fields would be engaged in mining. (The question whether extraction of gas is mining is not an issue in the present case and has not been examined).

10. The expression used in the Explanation as noticed above is that a person who was "engaged in mining" was treated as an industrial undertaking for the purpose of clause (c) to Section 10(15)(iv) of the Act. The word "engaged" is rather ambiguous as was observed by the Supreme Court in *The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara*, . In the said case, it was held that while dealing with a provision/

clause capable of two constructions, it might not be easy to make a choice particularly, when both constructions would lead to some anomaly. While interpreting the expression "a person engaged in any business", it was held that it shall mean to be engaged mainly or usually in that business. This was a common sense view consistent with current and accepted denotation to the words "engaged in". Primary and dominant purpose as the decision signifies is encompassed in the word "engaged". This decision only partly helps us understand and interpret the word "engaged" or the expression "engaged in".

11. In *Hindustan Lever Ltd. Vs. Ashok Vishnu Kate and others*, Supreme Court referred to Black's Law Dictionary to interpret the term "engaged" and held that it means: to employ or involve one's self to take part in; or embark upon. It was further held:

30. In Stroud's Judicial Dictionary, 5th Edition, at page 847, the term "engaged in discharging" has been dealt with as under:

A lighter or craft is "engaged in discharging" ballast or goods, within an exemption from dock dues, if she goes to the place of discharge in the dock with the real intention of discharging there, although, from the place getting too full to take the ballast or goods, the vessel has to depart without making any discharge *London & India Docks Co. v. names Steam Tug, Etc., Co.* (1909) A.C. 15

31. It becomes, therefore, obvious that if an employer is alleged to be engaged in discharging any employee then even before the actual order of discharge is passed he can be said to be engaged in such discharge if it is shown that an attempt is made towards such a discharge with an intention to ultimately discharge the employee.

12. In the said case, the expression "engaged", was held would include not only finished, complete or continuous action but also an incomplete continuous action. The said word means more than a single act or transaction and it involves some continuity of action. It connotes to take part in or to be employed in the said continuous transaction. It refers to involvement of oneself or employment in specified activities in relation to which the expression is used. Thus, significantly the word "engaged" does not refer to the entire or the whole but even part thereof or participating in the specified activity.

13. An industrial undertaking will be engaged in mining if the activities undertaken by the said undertaking are an integral and an inseparable part and substantial or predominantly devoted to mining. In such an event, the undertaking in question is engaged in mining, even when the said undertaking does not itself extract minerals, ores or oil. The words "engaged in" tends to broaden the meaning attached to the activities specified in the Explanation to mean and include the said activities which would be continuous and should be integral and directly associated with mining.

14. It is necessary and important to give wide interpretation while interpreting the expression "engaged in..... mining" as it would further the legislative intent and the purpose behind enacting Section 10(15)(iv)(c) of the Act. Mining activities are normally capital intensive and involve specialization. An undertaking may deal with specific aspects of mining, which are integral and necessary for extracting minerals, ores or oil. A narrower interpretation could be contrary and negate the legislative purpose behind using the expression "engaged". A narrow interpretation that the undertaking must extract minerals/oils and an undertaking though involved and exclusively dealing with a part of mining, would not be treated as an undertaking engaged in mining would be contrary to the legislative intent and purpose which can be gathered and is luminescent from the wide scope and ambit of the Explanation. A word or expression used in a legislative provision should be interpreted in the context in which the expression or the word is used to be in consonance and to further the legislative intent. The word "engaged" if it includes as held by us to mean "part of" would include activities which are integral and directly connected with mining but may not by themselves result in earning of income by the said undertaking by way of winning or extraction. Extraction itself may be undertaken by a third person though the acts/actions facilitates and are associated with mining. Mining itself is complex and capital intensive and may require inter play and activities by several persons which may be involved in different parts/aspects of mining and accordingly paid for the part played or activities undertaken by them. The said undertaking would be "engaged in mining".

15. Having interpreted the term "engaged in mining" in this manner, we will now examine the factual matrix and whether the petitioner was engaged in mining i.e. whether the activities of the petitioner could be considered to be an integral part of mining.

16. As already noticed above, the petitioner had purchased or acquired capital equipment in the form of work over rigs and for this purpose had obtained loan from State Bank of India, Singapore in foreign currency and Indian rupees. Work over rig is a rig which undertakes repair of terminally unsuitable oil wells. Oil wells can become unoperational, damaged due to operational factors such as corruptions, mal-functioning etc. There are also cases of decline in productivity as the reservoir cannot support stable flow through the earlier wide bore. Before any work over, the well must be killed and thereafter the work over specialist takes over to carry out intensive operation which often requires skills of no lesser capacity than drilling a rig. The work over begins by removing the well head and possible flow line etc and then it is completed by adopting various methods including setting up new packer or running new tubing down to the top of the old. Such operations are complex and have to be planned well in advance.

17. It would be important here to reproduce the work which were assigned to the petitioner as per the contract which reads:

A. Completion Jobs:

i) Single Horizon Completion

ii) Dual/Multiple horizons completion.

iii) Completion with artificial lift system.

iv) Gravel pack completion.

B. Work-over for:

i) Water Shut off.

ii) Gas Shut off.

iii) Improving production by stimulations i.e. acidizing, fracturing etc.

C. Repairs of Well for:

i) Casing leaks.

ii) Bad cement jobs.

D. Services job:

i) Bottom Clearing

ii) Transfer of well to new horizon.

iii) Fishing operations.

E. Any other job that may come up during work over/servicing of wells.

18. The contract also stipulates that completion job includes preparation of well for production after the well has been cased, cemented and serviced. Each productive horizon is to be completed by making permanent contact between it and bore well by installing tubing and the appropriate equipment for controlling fluid flow etc. Looking at the nature of the contract undertaken and for which the petitioner had obtained the loan, we have no doubt in our mind that the petitioner was engaged in mining i.e. the activities of the petitioner were integral to and directly related to mining of oil.

19. Learned counsel for the respondents has relied upon Industrial Fuel Marketing Co. Vs. Union of India (UOI), in which reference was made to Mines and Minerals (Regulation and Development) Act, 1957 and it was opined that the expression "any operation" undertaken for the purpose of winning of minerals would include coal particles which had come out from the washeries with the water overflowing from the slurry ponds kept for this purpose and deposited on the river beds belonging to the State of Bihar and on the adjoining fields of private persons. A single Judge of Calcutta High Court held that the word "win" means to get the ore etc. and does not necessarily means minerals by extracted by excavation of earth or soil. It would include every activity by which mineral was obtained, irrespective of whether such activity was carried on the surface or on the bowels of the earth. Therefore, narrow meaning to the word "winning"

was not justified. The said decision is not applicable to the facts of the present case as we are interpreting the word and expression "engaged in mining".

20. Reference was also made to the decision of M-1 Overseas Ltd. in re (2012) 349 ITR 166 . In the said case, the applicant had moved an application before the Authority for Advance Rulings on the question whether earning from mud engineering activities rendered in connection with exploration or extraction of mineral oil were covered u/s 44BB of the Income Tax Act. The question raised in the said case was whether the applicant therein rendering technical services and therefore, payment made was fee for technical services under Explanation 2 to Section 9(1)(vii) of the Act. The said Explanation to Section 9(1)(vii) stipulated that consideration for any construction, assembly, mining or like project undertaken by the recipient would not fall or treated as fee for technical services. It was observed that the petitioner was not undertaking a mining or like project as it was not extracting or winning any ore or oil but was only rendering services in connection or in relation to the mining project. Reference was made to earlier decisions of the (1998) 234 ITR 371 The said decisions proceed on the basis of language of Explanation 2 and the expressions used therein, "construction, assembly, mining or like project undertaken by the recipient". The recipient, therefore, should have undertaken the mining or like project and merely rendering a service to the third party undertaking the mining project did not qualify and come under the exception. It was accordingly held that the consideration/fee was taxable as fee for technical service. The said decision does not deal with or answer the question or issue raised in the present writ petition as language of the Explanation to Section 10(15)(iv)(c) is entirely different. We have held that the expression "engaged in mining" would not only include the actual winning or extraction of minerals or oils but also activities which are an integral part of mining. The last question relates to the relief. As per the petitioner, they have already paid tax at source of Rs. 2,11,836/-, Rs. 3,15,329/- and Rs. 2,28,921/- on 1st/8th March, 1995, 25th September, 1995 and 19th March, 1996, respectively. Therefore, in all Rs. 7,56,086/- stands paid as tax at source on the payments made to State Bank of India, Singapore. The petitioner claims that no certificate for tax deducted in Form 16A was issued to the State Bank of India, Singapore. On 19th September, 1996, the Court passed an interim order and on further payments upto 5th October, 1998 no tax at source was deducted. Petitioner in terms of the interim order has given an undertaking that in case the writ petition stands dismissed they would be liable to pay tax due on subsequent installments with interest as per the Act. The respondent will verify the assessments made in the case of State Bank of India, Singapore within a period of eight weeks from the date when this order is communicated and in case the said Bank has not taken credit of the tax paid at source, the said amount will be refunded to the petitioner with interest @ 8% p.a. from the date of filing of the writ petition till payment. The payment, if due, would be paid within 16 weeks from the date of communication of this decision. As we are allowing the writ petition, TDS would not be deductible on further payments. The writ petition

is accordingly disposed of. No costs.