

(1987) 08 BOM CK 0029

In the Bombay High Court

Case No : Appeal No. 752 of 1986 in Writ Petition No. 538 of 1982

Petron Engineering Construction (P.) Ltd. and another

APPELLANT

Vs

Central Board of Direct Taxes and others

RESPONDENT

Date of Decision : 11-08-1987

Acts Referred:

Income Tax Act, 1961 — Section 80

Citation : (1987) 89 BOMLR 383 : (1987) 65 CTR 314 : (1988) 171 ITR 80

Hon'ble Judges : V.P. Tipnis, J;Bharucha, J

Bench : Division Bench

Judgement

Bharucha, J.—The Judgment and the order of Jahagirdar J. (See Petron Engineering Construction (Pvt.) Ltd. and another Vs. Central Board of Direct Taxes and others,) dismissing the appellant's writ petition is the subject matter of this appeal.

2. The appellants applied to the Central Board of Direct Taxes for approval u/s 80-O of the Income Tax Act, 1961, of the agreements dated April 5, 1980, and August 14, 1980, entered into between them and Toyo Engineering India Ltd. (now called "Toyo India"). After giving the appellants a hearing, the Board rejected the appellants application by its letter dated March 27, 1981. The Board held that the agreements could not be approved u/s 80-O because they were not made with the Government of a foreign state or a foreign enterprise and because the payments thereunder were payments from the Government of a foreign state or a foreign enterprise.

3. The order of the Board was impugned in the writ petition filed by the appellants. The learned single judge upheld the contention of the appellants that, under the terms of section 80-O of the Income Tax Act 1961, it was not necessary that the agreement should be with the Government of a foreign state or a foreign Enterprise. He however, rejected the writ petition on the ground that the payments under the agreements were not made to the appellants by the Government of a foreign State or a foreign enterprise. They clearly showed that

the payments were made, though in foreign country and in foreign currency by Toyo India which was, beyond dispute, an Indian Company.

4. It is necessary to set out briefly the terms of what are, in any case brief agreements. They are stated to be between "TOYO ENGINEERING INDIA LIMITED" a company organised and existing under the laws of "INDIA and having its registered office at... New Delhi", and the appellants. The agreement recite that Toyo India "has been engaged by Toyo Engineering Corporation, a company organised and existing under the laws of Japan and having its registered office at ... Japan... for the Project of Storage Terminal of State Organisation for Oil Project, a public organisation organised and existing under the laws of Iraq." Article 3 of the agreement deal with the contract price and states that the contract price to be paid by Toyo India to the appellants thereunder was attached therewith.

5. Section 80-O of the Income Tax Act, 1961, so far as it is material reads thus :

"80-O Where the gross total income of an assessee, being an Indian company, includes any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign Enterprise in consideration for 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, appearance or skill made available or provided to such Government or enterprise by the assessee, or in consideration of the technical services rendered or agreed to be rendered outside India to such Government or Enterprise by the assessee, 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, or having been converted into convertible foreign exchange outside India, is brought into India, by or behalf of the assessee in accordance with the law for the time being in force for regulating payments and dealings in foreign exchange, there shall be allowed, in accordance with and the subject to the provisions of this section a deduction to an amount equal to fifty per cent of the income so received in, or brought into, India in computing the total income of the assessee."

6. Mr. Dwarakadas, learned counsel for the appellants, pointed out that Toyo India had an establishment or undertaking or branch or unit in Iraq. This is not in dispute.

7. Mr. Dwarakadas submitted that, therefore, this establishment or undertaking or branch or unit had to be regarded as a foreign enterprise for the purpose of section 80-O of the Income Tax Act, 1961. Mr. Dwarkadas drew our attention to the judgment of Gannon Dunkerley and Co. Ltd. and another Vs. Central Board of Direct Taxes and others, , wherein, in substantially similar circumstances, it was held that the agreement ought to be approved u/s 80-O. In regard to "foreign enterprise", this is what the learned judge said (p. 164) : "still further,

EPI, a Government company registered in India, also had its branch office in Kuwait. One cannot ignore the fact that the enterprise also was in a foreign country, namely, at Kuwait, and that it was in all materials respects a foreign enterprise."

8. Mr. Dwarkadas also relied upon the judgment of another learned single Judge of this court delivered in Writ petition No. 1764 of 1981, *Indian Hume Pipe Co. Ltd. Vs. Central Board of Direct Taxes and others*, , decided on October 14, 1985. The learned judge held that u/s 80-O of the Income Tax Act, 1961, it was necessary that the agreement should be between the assessee and the foreign part. All that was required was that the assessee should have rendered technical services under the agreement and this agreement should be approved by the Board. It was contended before the learned judge that the payment had been made by an organisation established by the Government of India, pursuant to an agreement between the assessee and the organisation. The learned Judge found out that the payment had been received in foreign exchange on behalf of the assessee. It was, therefore, held that the agreement ought to have been approved u/s 80-O.

9. Upon the plain words of the section 80-O of the Income Tax Act, 1961, we find it difficult to accept the interpretation of the words "foreign enterprise" canvassed by Mr. Dwarkadas.

10. Analysing section 80-O of the Income Tax Act, 1961, we find that it requires that the assessee should be an Indian company. It should receive income by the way of royalty, commission, fee or similar payments. The payments must be received "from the Government of the foreign State or a foreign Enterprise". It must be received in consideration of the use outside India of any patent, invention, model, design, and the like concerning industrial, commercial or scientific knowledge or in consideration of technical services rendered or agreed to be rendered outside India. Such use or service must also be by or to "such Government or enterprise". Such use or service must also be "under an agreement approved by the Board in this behalf". The income must be received in foreign exchange in India or, being received in convertible foreign exchange outside India, must be brought into India, by or behalf of the assessee.

11. In the context of the contention with which we are presently dealing, the words "the Government of a foreign state or foreign enterprise" must be read together. The words "foreign enterprise" must take colour from the words "the Government of a foreign State". The words "foreign enterprise" must, therefore be read to mean an enterprise of a foreign national or of foreign ownership. They cannot be read to mean an enterprise in a foreign land, regardless of its ownership. The words "foreign enterprise" cannot, upon an interpretation of section 80-O of the Income Tax Act, 1961, be held to apply to an establishment or undertaking or branch or unit of an Indian company in a foreign country. Such establishment, branch, undertaking, or unit may well be an "enterprise", but it is not a "foreign enterprise" within the meaning of these words used in section 80-

O.

12. In the judgment in the Indian Hume Pipe Co. Ltd. Vs. Central Board of Direct Taxes and others, , the learned judge held, on the facts that the payments had been received in foreign exchange on behalf of the assessee by the organisation established by the Government of India and, therefore, the agreement was one that ought to have been registered u/s 80-O of the Income Tax Act, 1961. In the case of Gannon Dunkerley and Co. Ltd. and another Vs. Central Board of Direct Taxes and others, , there was, apparently no argument about the import of the words "foreign enterprise".

13. Our attention was drawn by Mr. Dwarkadas to Circular No. 187 of the Board dated December 23, 1975 (See Commissioner of Income Tax Vs. P.N. Nagaraj and Another,) which says that the section 80-O of the Income Tax Act, 1961, has been enacted with the twin object of encouraging the export of Indian Technical Know-how and augmentation of foreign exchange resources of the country. The construction that we have placed upon the section 80-O does not militate against these objects. The foreign exchange resources of a country are augmented when the foreign exchange comes to the country. Foreign exchange already in the hands of an Indian Enterprise in a foreign country will not necessarily augment the foreign exchange resources of the country when paid over to another Indian.

14. In our view, therefore, the learned single judge was right in the view that he took upon this aspect.

15. The other aspect, which was canvassed by the respondent before the learned single judge was that the agreement referred to in section 80-O of the Income Tax Act, 1961, had necessarily to be the Government of a foreign State or a foreign enterprise. The learned Judge disagreed. Mr. Dhanuka, learned counsel for the respondent, sought to support the learned judge's order by submitting that it was a necessary implication of the language employed in section 80-O that the agreement should be with the Government of a foreign State or foreign enterprise, which the present agreements were not.

16. We are unable to accede to this submission because the section does not specify who the part of the other part of the agreement should be, It is, therefore, difficult to imply that the party of the other part must be the Government of a foreign State or a foreign enterprise. This is all the more so when one sees that in relation to the use of patents, inventions, etc., and the utilization of technical services, the section makes it explicit that such use utilisation must be by "such Government or enterprise".

17. Even in the terms of the objects o the sections, there is no reason why the agreement should be restricted to one entered into with the Government of a foreign State or a foreign enterprise. Regardless of the party of the other part is, if the conditions of the section have been complied with, there will be an augmentation of foreign exchange resources of the country.

18. The appeal was dismissed.

19. No order as to costs.