Pilcom Vs. Commissioner of Income Tax Centralii, Kolkata

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Court : Kolkata

Decided On : Jul-25-2014

Judge : Girish Chandra Gupta

Appellant : Pilcom

Respondent : Commissioner of Income Tax Centralii, Kolkata

Judgement :

ORDER
SHEET IN THE HIGH COURT AT CALCUTTA Special Jurisdiction [Income Tax].ORIGINAL SIDE ITA No.654 of 2004 PILCo.Versus COMMISSIONER OF INCOME TAX CENTRAL-II, KOLKATA BEFORE: The Hon'ble JUSTICE GIRISH CHANDRA GUPTA The Hon'ble JUSTICE SUDIP AHLUWALIA Date : 25th July, 2014.

For Appellant : Mr.R.N.

Bajoria, Senior Advocate with Mr.J.P.

Khaitan, Senior Advocate Mr.Agnibesh Sengupta and Mr.R.K.Basu, Advocates For Respondent : Md.Nizamuddin, Advocate The Court : The subject matter of challenge in this appeal is a judgment and order dated 23rd April, 2004 by which the learned Tribunal disagreeing with the views expressed by the CIT (A) held that the money paid by the assessee was in consideration of rendering technical

service within the meaning of Section 9 sub-section (1) clause (vii) read with explanation (2) thereunder of the Income Tax Act.

Aggrieved by the order of the learned Tribunal, the assessee has come up in appeal.

At the time when the appeal was admitted, the following questions were framed: (a) Whether on a true and proper interpretation of the agreement with M/S.Half Moon SRL, Italy and the provisions of section 9(1)(vii) of the Income Tax Act, 1961, the Tribunal was justified in law in holding that the activities of the said Italian concern amounted to rendering of managerial, technical or consultancy services or that the amount receivable by it was fees for technical services as defined in Explanation 2 to section 9(1)(vii).

(b) Whether and in any event, the Tribunal was justified in law in holding that the amount receivable by the said Italian concern did not constitute business or commercial profits falling under Article 7 of the Double Taxation Avoidance Agreement between India and Italy or that it fell under the residuary Article 23 and was liable to be assessed in India as per provisions of sections 4, 5(2).9(1)(vii) and 44D ?.

(c) Whether the Tribunal was justified in law in upholding the initiation of proceedings under section 147 and issue of notice under section 148 and its purported findings in that behalf are arbitrary, unreasonable and perverse?.

(d) Whether the Tribunal was justified in law in upholding the order appointing the appellant as agent of the said Italian concern under section 163(1) and its purported findings in that behalf are arbitrary, unreasonable and perveRs.?. Mr.Bajoria, learned senior advocate, appearing in support of the appeal, drew our attention to the agreement between PILCo.and the nonresident whereunder the non-resident agreed to to compose and produce promptly and faithfully high-tech animated Pictorial presentation of international standard with the help of Laser and other sophisticated Electronic Technology for the Opening Ceremony of the WILLS WORLD CUP EVENT to be held on 11th February, 1996 at Eden Gardens, Calcutta, India not only in accordance with and in terms of the annexures hereto

but also by developing and composing the themes as may be required by PILCo.without any deviation or failure. on the terms and conditions contained in the agreement dated 5th August, 1995, a copy whereof is at page 15 of the paper book.

By the expression non-resident, we mean M/S.Half Moon SRL which it is indicated in the written agreement is known as one of the top most producer and exhibitors of International Events by using sophisticated Electronic Technology, including Laser and animations but also successfully organised the Opening Ceremony of World Cup Football Soccer Tournament held in Italy in the year 1990.

Its Chairman and Director Mr.Gianfrance Lunetta is one of most experienced and acclaimed person in this field in International events. Mr.Bajoria, learned Senior Advocate drew our attention to paragraph-37 of the judgment delivered by the CIT (Appeal) which was under examination before the learned Tribunal.

In the aforesaid paragraph, Mr.Bajoria contended, several factual findings were made which are as follows: The transaction between HALF MOON Sr.and PILCo.was on principal to principal basis.

HALF MOON SRLs personnel came on behalf of their employer M/S.HALF MOON Sr.to produce the show.

HALF MOON Sr.did not deliver any managerial or technical services to the personnel of PILCOM.

HALF MOON Sr.did not train or educate the personnel of PILCo.about the production of a LASER show.

HALF MOON Sr.did not impact any managerial information to PILCo.about the management techniques, if any, in regard to production of a LASER show.

HALF MOON Sr.did not part with any software/ hardware utilized in production of a LASER show to PILCOM.

LCIs and Gerrits personnel simply used their equipment to generate LASER beams and created visual patterns for the entertainment of the spectators HALF

MOON Sr.did not render any service to any one but only charged for the skill, efforts and time used in production of the LASER show.

On the basis of the aforesaid factual findings, the CIT (Appeal) held that simply because technical equipment is used by a person, the services rendered by him do not acquire character of technical services.

The aforesaid finding of the CIT (Appeal) has not been demonstrated by the learned Tribunal to be erroneous.

The learned Tribunal proceeded to hold that the performance amounted to a technical service taking into consideration the fact that the right, title and interest in respect of recordings of the said high tech show are exclusively belonged to PILCo.throughout the world and the Half Moon shall not at any time claim ownership or sale or deal with the recordings of the said high-tech show to any Third Party or otherwise without prior consent in writing of PILCOM.

Further, all skills and presentations produced by Half Moon were not amounted to infringe copyright or any other right of any Third Party.

Thus, on a reading of the Agreement between Half Moon and PILCo.as a whole, it shows that the activities, services and the works undertaken by Half Moon as per requirements of PILCo.amount to rendering of managerial, technical or consultancy services as defined in Explanation-2 to Clause (vii) of Section 9)1) of the Act; (This definition is only relevant for our purpose as discussed above.

Mr.Bajoria, learned Senior Advocate, submitted that the fact that interest in the recordings of the Show was agreed to belong to PILCo.cannot by itself show that the performance by the non resident amounted to a technical service.

He, therefore, contended that the order passed by the learned Tribunal should be set aside and the order passed by the CIT (Appeal) should be restored.

Mr.Nizamuddin, learned Advocate appearing for the Revenue advanced two submissions : a) Sophisticated technology was involved in the service utilised by PILCOM; and b) Human involvement was there; He submitted that these two

factors go to establish that the performance rendered by the non-resident amounted to a technical service.

We have not been impressed by this submission.

When a movie is produced, sophisticated technology is involved in the production thereof.

Human involvement is also there.

But it is difficult to accept a proposition that the price paid by the spectator is on account of any technical service rendered to him.

Similar shall be the case when a drama is staged.

A drama cannot be staged in the modern times without the assistance of sophisticated technology nor can a drama be staged without the assistance of human beings.

It would similarly be difficult to accept that the spectator of a drama pays for technical service rendered to him.

Another instance in point is that of a magician.

A magician presents his performance with the help of sophisticated technology.

Human element is also there.

Can it, therefore, be said that the spectators of a magic show are paying for technical services rendered to them.

Possibly the same is the case with a signer.

Many more examples can be cited, but they are not necessary according to us because our object is merely to demonstrate that the reasoning advanced by Mr.Nizamuddin is not acceptable.

Mr.Nizamuddin drew our attention to a judgment of the Delhi High Court in the case of CIT versus Bharti Cellular LTD.reported in 2009 (319) ITR139 The judgment of the Delhi High Court was obviously cited by Mr.Nizamuddin in support of his submission, which we already have recorded.

Although Delhi High Court did not in the facts of that case hold that the services were or did amount to technical services, the views expressed in that regard are as follows: From the above discussion, it is apparent that both the words managerial and consultancy involve a human element.

And, both, managerial service and consultancy service, are provided by humans.

Consequently, applying the Rule of noscitur a sociis, the word, technical as appearing in Expln.

2 to s.9(1)(vii) would also have to be construed as involving a human element.

But, the facility provided by MTNL/other companies for interconnection/port access is one which is provided automatically by machines.

It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/other companies which provide such facilities are rendering any technical services as contemplated in Expln.

2 to s.9(1)(vii) of the said Act.

This is so because the expression technical services takes colour from the expressions managerial services and consultancy services which necessarily involve a human element or, what is now a days fashionably called, human interface.

In the facts of the present appeals, the services rendered qua interconnection/port access do not involve any human interface and, therefore, the same cannot be regarded as technical services as contemplated under s.149J of the said Act.

Since we have applied the rule of noscitur a sociis, it would be necessary to indicate that this rule or principle has been applied and accepted by the Supreme

Court whenever the meaning of a word, which falls within a group of words, is unclear and the intention of the legislature is doubtful. Mr.Nizamuddin hastened to add that the view of the Delhi High Court has been reversed by the Supreme Court and the matter has been remanded.

He referred to the judgment of the Supreme Court in the case of CIT versus Bharati Cellular LTD.reported in 2011 (330) ITR239 The Apex Court was of the opinion that further enquiry into the facts and circumstances of the case including opinion of the experts was required.

Therefore, the matter was remanded to the assessing officer.

It is, therefore, clear that the submissions made by Mr.Nizamuddin on the basis of the judgment in the case of Delhi High Court in a sense were not accepted by the Supreme Court.

We already have indicated our reasons as to why we are unable to accept them.

The Delhi High Court applied the rule of noscitur a sociis which in English means it is known by its associates. Explanation 2 of Section 9(1)(vii) of the Income Tax Act provides as follows: Explanation [2]..- For the purpose of this clause, fees for technical services means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head Salaries.].Going by the aforesaid explanation consideration paid to the nonresident could be treated to be on account of fees for technical services if PILCo.had intended to stage the show by itself and in case it had agreed to take technical assistance for that purpose from the non-resident.

In that case it could have been said that the services taken are in consonance with the word managerial or consultancy.

The word technical is placed in between the words managerial and consultancy.

If the show was to be staged by PILCo.itself with the technical assistance of the non-resident then certainly it would have fallen within the category contemplated by the explanation.

But that is not the case here.

We have indicated and, as a matter of fact, quoted from the agreement between the parties which goes to show that the fees were payable to the non-resident in consideration of the latter agreeing to compose and produce promptly and faithfully hi-tech, animated, pictorial presentation of international standard.

It is quite possible that for the purpose of composition and production of the agreed type of pictorial presentation user of technology is there, but that, by no means, can amount to saying that the agreed price was payable in consideration of any technical service.

The learned Tribunal has laid emphasis on the fact that the interest in the recording of the show was left with the assessee without any infringement of any copy right.

The intellectual property of the non resident, we are inclined to think, is located in the composition of the show and not in the recordings thereof.

For the aforesaid reasons, we are unable to agree with the views expressed by the Tribunal.

For the reasons indicated above, question No.(a) is answered in the negative.

In that view of the matter, answer to question No.(b) has to be in the negative, as a natural corollary.

In so far as the question Nos.(c) and (d) are concerned, they have now become academic in view of the answer given by us to questions (a) and (b).Therefore, the order of the learned tribunal is set aside and the order of the CIT (A) is restored to the extent indicated above.

(GIRISH CHANDRA GUPTA, J.) (SUDIP AHLUWALIA, J.) Sm./Km/A/s.