

Skoda Export Vs. Additional Commissioner of Income-tax, Andhra Pradesh

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Court : Andhra Pradesh

Decided On : Nov-29-1982

Reported in : (1983)37CTR(AP)77; [1983]143ITR452(AP)

Judge : B.P. Jeevan Reddy and ;K. Punnayya, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 9

Appeal No. : Case Referred No. 104 of 1977

Appellant : Skoda Export

Respondent : Additional Commissioner of Income-tax, Andhra Pradesh

Advocate for Def. : M.S.N. Murthy, Adv.

Advocate for Pet/Ap. : S. Parvatha Rao, Adv.

Judgement :

Jeevan Reddy, J.

1. The question referred for our opinion, under s. 256(1) of the I.T. Act, 1961, is :

'Whether, on the facts and in the circumstances of the case, any income accrued or arose to the non-resident in respect of the fee for consultancy activity as a result of operations carried out by it within the taxable territories and which constituted a business connection ?'

2. The facts relevant may briefly be stated : In pursuance of certain agreements entered into between the Govt. of India and the Govt. of Czechoslovakia, the Govt. of India formed a company, called 'Bharat Heavy Plate & Vessels Ltd.', a wholly Govt. of India-owned company for manufacturing heavy plates and high pressure vessels. On February 27, 1968, an agreement was entered into between the 'Bharat Heavy Plate & Vessels Ltd.' (hereinafter referred to as 'the company') and the 'Skoda Exports', Praha (Czechoslovakia), whereunder the Skoda agreed to render technical assistance and consultancy service to the company in erecting its plant and in putting it on stream. In this referred case, we are concerned with two assessment years, viz., 1969-70 and 1970-71. For the assessment year 1969-70, the Department held that an amount of Rs. 13,000 was paid to Skoda for the consultancy service rendered by it in the territories of India, and that 1/6th of the total turnover of the company should be treated as income arising on account of Skoda's activity, in India. So far as the assessment year 1970-71 is concerned, the amount paid on this account was held to be Rs. 1,08,130. On appeal, however, the AAC held that 80% of the consultancy fees should be deemed to have arisen on account of Skoda's activity in India, and accordingly taxable. On further appeal to the Income-tax Appellate Tribunal (there were appeals both by the assessee, as well as by the Department, and a number of questions were argued in appeal, but, we are concerned herein with the fees paid on account of consultancy services only), the Tribunal held, on a consideration of the relevant clauses of the agreement, that the consultancy fees paid to Skoda must be held to have arisen on account of its activity carried on in India; but, observed that, what part of it should be attributed to the consultancy service in India and what part to its activity, if any, carried on in Czechoslovakia, should have to be determined. Accordingly, the matter was remitted to the ITO with a direction to recompute the profit attributable to the consultancy service in India, in assessee from a qualified chartered accountant in Czechoslovakia. It is thereupon that the assessee applied for and obtained this reference under s. 256(1) of the Act.

3. Sri S. Parvatha Rao, learned counsel for the assessee, contended that, under the agreement dated February 27, 1968, the non-resident company, viz., Skoda, agreed to depute certain technical personnel to India to render technical assistance, guidance and advice, the agreement also provided for payment of the

salaries of such person by the Indian company. The consultancy fee provided for under the agreement is not at all for anything done or any activity carried on by the non-resident company in India, but is on account of training given to the deputed personnel in Czechoslovakia, and as a compensation for gathering and sparing those persons for deputation in India. His contention, therefore, is that the consultancy fee is paid not on account of any activity carried on by the non-resident company in India, but on account of something done by the non-resident company in Czechoslovakia itself and, therefore, the said amount cannot be said to be taxable in India.

4. On the other hand, Shri M. S. N. Murthy, learned standing counsel for the Department, supported the reasoning and the conclusion of the Tribunal.

5. The agreement dated February 27, 1968, says that it has been entered into with a view to train India personnel in Czechoslovakia to render consultancy activities or technical assistance in the construction of the plant, and also in bringing it into production; to prepare and supply the drawings and documentation for production of non-standard equipment to be installed in the plant,; and to render personnel, technical assistance and consultancy services for the starting and in the initial run of the production in the plant, as per the clauses of the said agreement.

6. Article 2 provides for the training of Indian personnel in Czechoslovakia, while art. 3 contains certain stipulations with respect to the training of such person. Articles 4 and 5 deal with technical assistance in the designing works. Article 4(1) says that, during the technical assistance of the plant, the Skoda will render consultancy service relating to the problems of constructions and that, for that purpose, it shall depute group of designing experts to India. Article 5(1) says that the consultancy activity consists of granting of the expert technical advice, opinions, and/or recommendations in technical basic matters, according to the circumstances, by the suppliers experts to the corresponding experts of the customer, to the extent possible by the number of experts deputed by the supplier, and limited to their field of specialisation. It is further provided that the consultancy activity shall be only advisory, and shall not extend to performing of any individual task. It is not necessary to refer to arts. 6 to 8. Articles 9 and 10 deal with

consultancy service in the matter of introduction of production at the plant. The clauses here are substantially similar to those in arts. 4 and 5. Article 19 provides for the payment of consultancy fees. Clause (1) of art. 19 provides for the purchase price for technical documentation, drawing documentation, and working drawings, separately. Clause (2) is relevant for our purposes, and must be set out :

'2. (a) The total fee for the consulting activity of the supplier for the designing works within the extent and stipulation according to articles 4 and 5 of this agreement and for the consulting activities of the supplier for introduction the production within the extent and stipulation of articles 9 and 10 of this agreement, amounts to Rs. 11,91,735.

The aforesaid amount has been worked out on the basis of 639 man-months calculated in direct proportionate to the number and duration of stay in India of the supplier's specialists and it shall be subject to adjustment of Rs. 1,865 per man per month on the basis of actual number of men and months that the specialists of the suppliers spend in India.

(b) The monthly and other rates stipulated in enclosure No. 5 of this agreement shall be paid monthly by the customer to the supplier for the experts deputed for the technical co-operation in the design works in the plant in compliance with articles 4 and 5 of this agreement and for the consulting activities of the supplier's experts in the introduction and progressive production in the plant according to articles 9 and 10 of this agreement.'

7. Enclosure 2 contains the number and nature of experts to be deputed, while enclosure 5 contain the terms and conditions upon which such experts shall serve in India.

8. A reading of the above provisions makes it clear that Skoda, the non-resident company, is charging the Indian company for the technical assistance and consultancy service rendered by it, in two ways, viz., (i) payment of salaries of the personnel deputed by it to India; and (ii) consultancy fee for rendering technical assistance, which the Skoda was to render to the Indian company, was to be

rendered only through experts, or the personnel deputed by it; and such personnel had to be paid their salaries during their stay in India or during the period they were working for the Indian company by the Indian company. In addition to this, the Indian company was also made liable to pay a separate consultation fee, as provided for in art. 19(2), as the which we have set out hereinabove, makes it clear that the consultancy fee under the agreement has been arrived at on the basis of 'man-months' calculated in direct proportion to the number and duration of stay in India of the Skoda's specialists and the said amount is subject to adjustment at the rate of Rs. 1,865 per man per month, on the basis of actual number of men and months that the specialists of Skoda spend in India. it may be that a part of this service is attributable to the activity of Skoda in Czechoslovakia (that is a matter which is yet to be decided, and it is precisely for that purpose that the Tribunal has remitted the matter to the ITO) but there can be little doubt that a major part of this service is rendered in India. The Tribunal has directed the assessee to produce a certificate from a qualified chartered accountant in Czechoslovakia stating what exactly is the profit that could be attributed to the consultancy service for the said two assessments years rendered in India, after deducting the expenditure, etc., involved in it; and that is yet to be done. We are, therefore, in agreement with the Tribunal that the consultancy fee earned by Skoda must be deemed mainly to arise from its activity carried on in India and is, accordingly, taxable in the hands of its agent, i.e., Bharat Heavy Plate & Vessels Ltd., Visakhapatnam.

9. Mr. S. Parvatha Rao relied upon certain decision in support of his contention that none of the consultancy services can be said to have been rendered in India to which a brief reference is necessary. However, before referring to those cases, we must say that, whether any part of the activity is carried on in India or not, is essentially a question of fact, and the decided cases, would be relevant only for the principles underlying the decision. The first decision cited is in *Carborundum Co. v. CIT* : [1977]108ITR335(SC) . That was a case where the service were rendered by the non-resident company for starting a factory in India, in the shape of preparing the design and layout, which was done abroad and sent to India by post. The pamphlets and bulletins incorporating the research made by the non-resident company were also furnished to the Indian company by post. Therefore, it was held that the service was rendered outside India. Similarly, the service of

foreign technical personnel were made available to the Indian company outside India, and the Indian company employed them and they worked as the employees of the Indian company. Even training to the Indian personnel was imparted outside India. It is in view of these findings of the Tribunal that Supreme Court held that no part of the activity of the non-resident company can be said to have been carried on in India and, therefore, the income earned by it on the account cannot be held to be taxable. The facts of this case, therefore, are entirely distinct from the one before us.

10. Similarly, in CIT v. Toshoku Ltd. [1980] 124 ITR 535 it was held that the Japanese company through which the Indian exporters sold tobacco to Japan, cannot be said to have carried on any business activity in India, in spite of the fact that the price payable to the Indian Exporters was remitted in its entirety to India, and the 3% commission payable to the Japanese company was credited to the Japanese company in the account books of the India exporters, and latter remitted to the Japanese company. This again is a case where the Japanese company did not carry on any activity whatsoever in India. All its activity was outside the Indian territories.

11. Lastly, Mr. Parvatha Rao sought to rely upon the decision in CIT v. Hindustan Shipyard Ltd. : [1977]109ITR158(AP) , the decision of a Bench of this court (to which one of us, Punnayya J., was a party). But, we find that that case deals entirely with the question whether any business connection existed between the Hindustan Shipyard Ltd. and the Polish Co. with which it had entered into an agreement. The said decision does not with which it had entered into an agreement. The said decision does not deal with the question with which we are concerned herein.

12. For the above reason, our answer to the question referred shall be in the affirmative, i.e., in favour of the Department and against the assessee. The referred case is ordered accordingly. In the circumstances, however, there shall be no order as to costs.