

**C.S. Mathur Vs. Central Board of Direct Taxes and ors.**

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**Court :** Delhi

**Decided On :** Mar-27-1998

**Reported in :** 1998IVAD(Delhi)550; 1998(45)DRJ450; [1999]235ITR769(Delhi)

**Judge :** R.C. Lahoti and; Dalveer Bhandari, JJ.

**Acts :** Income-tax Act, 1961 - Sections 80RRA

**Appeal No. :** CWP 3173 Of 1997

**Appellant :** C.S. Mathur

**Respondent :** Central Board of Direct Taxes and ors.

**Advocate for Def. :** Mr. R.D. Jolly, Sr. Standing Counsel and ; Ms. Prem Lata Bansal, Adv.

**Advocate for Pet/Ap. :** Mr. M.S. Syali and;Mr Satyen Sethi. Advs

**Judgement :**

ORDER

**R.C. Lahoti, J.**

1. The petitioner is a chartered accountant engaged in providing professional services to various Indian and foreign clients. Services to foreign clients are provided in terms of the agreement entered into from time to time. The petitioner

entered into agreements with Mannesman A.G., Germany on 15.2.1990 and with Fried Krupp GMBH, Germany on 8.4.1991. These agreements have been renewed from time to time. The relevant clause in the agreements entered into with the two companies is identical in terms. It is as under :-

Consultant (i.e. petitioner) shall provide to Mannesman/Krupp from time to time advice, information on finance, industrial, business and economic matters relating to India as would be useful to Mannesman/Krupp and its affiliated company in relation to its business investment in India.

2. Each of the two companies agreed to pay a fee of DM 16000 per year in consideration of the services provided by the petitioner.

3. The petitioner was granted approval under Section 80RRA for the financial years 1991-92 to 1994-95. The petitioner sought for a similar approval by way of extension/renewal being granted for the financial year 1995-96. The Ministry of Finance vide its letter dated 6.5.1996 (Annexure P-8), refused the approval on the ground that the petitioner was a full time professional chartered accountant in practice. His main field of specialisation was law and accountancy and not business management. A perusal of the terms and conditions of the consultancy agreement entered into with the two foreign companies revealed that the petitioner was required to render services in the field other than the field of accountancy which was his specialised technical area of experience. The nature of services rendered by the petitioner could not be said to be rendered outside India only. As per Section 7 of the Chartered Accountants Act, 1949, it was doubtful if the petitioner being a member of the Institute of Chartered Accountants, and a full time professional chartered accountant in practice could take up job of business management or industrial management. He could not enter into an agreement of technical service or be an employee of any concern.

4. Then ensued an exchange of correspondence between the petitioner and the Ministry of Finance. Vide communication dated 21.2.1997 (Ex.P11), the Ministry of Finance, Deptt of Revenue has refused to review its earlier decision dated 6.5.1996.

5. It appears that the petitioner's assessment for the assessment year 1996-97 was completed on 31.12.1996 affording the petitioner benefit of S. 80RRA. The concluded assessment is sought to be reopened and rectified and for that purpose a show cause notice dated 2.7.1997, (Annexure P-12), has been issued by the assessing authority.

6. According to the petitioner, refusal of approval under Section 80RRA is based on misapprehension of law by the respondents inasmuch as Section 80RRA applies to professionals such as chartered accountants and a full time employment in the sense of creating an employer-employee relationship is not one of the requirements of law and hence the respondents' refusal to grant approval under Sec. 80RRA deserves to be set aside.

7. The respondents have opposed the relief sought for by the petitioner. It is submitted that the case of the petitioner is clearly covered by Section 80O and not by Section 80RRA. In order to avail the benefit under Section 80RRA there has to be a relationship of employer and employee between the parties and as the petitioner was not an employee of the two companies under the agreements entered into by him, the case was not covered by Section-80RRA.

8. At the time of hearing, the learned counsel for the parties have agreed that the controversy calling for adjudication centres around the question whether an employment creating relationship of employer and employee or master and servant is a pre-requisite to the applicability of Section 80RRA. If the answer is in positive the petition must suffer a dismissal. Else it has to be allowed.

9. It is not disputed that the petitioner shall be entitled to benefit of either Section 80O or 80RRA. According to the petitioner his case is covered by Section 80RRA and hence is entitled to deduction equal to 75% of the remuneration received for service rendered by him to the companies outside India and brought into India by him in accordance with the Foreign Exchange Regulation Act, 1973 and rules made thereunder. According to the respondent the petitioner is entitled to deduction equal to 50% only under section 80O.

10. We may examine the statutory provisions relevant to the petition. Section 80O applies also to an assessee who is resident in India receiving an income by way of fees etc from a foreign enterprise in consideration for the use outside India of an information concerning industrial, commercial scientific knowledge, experience or skill made available or provided or agreed to be made available or provided by such assessee or in consideration of technical or professional services rendered or agreed to be rendered outside India to such enterprises by the assessee, subject to fulfillment of other conditions provided by Section 80O, a re-statement whereof is not necessary for our purpose.

10.1. Section 80O as it originally stood, underwent a change by the Finance Act No.2 of 1991 (w.e.f. 1.4.1992). The provision which applied earlier to an Indian Company only was extended in its application to noncorporate tax payer residents in India. Concession became available in relation to professional services as well as for technical services rendered to foreign enterprises from India. Earlier it was a requirement of prior approval of the tax authorities in this regard which was done away with. These amendments became applicable in relation to the assessment year 1992-93 and subsequent years. The Parliament also clarified by way of Explanation that services rendered or agreed to be rendered outside India shall include services rendered from India but shall not include services rendered in India.

10.2 Section 80RRA (relevant part thereof) reads as under :-

Deduction in respect of remuneration received for services rendered outside India. 80-RRA(1) Where the gross total income of an individual who is a citizen of India includes any remuneration received by him in foreign currency from any employer (being a foreign employer or an Indian concern) for any service rendered by him outside India, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the individual, a deduction from such remuneration of an amount equal to-

(i) fifty per cent of the remuneration; or

(ii) seventy-five per cent of such remuneration as is brought into India by, or on behalf of, the assessed in accordance with the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder, whichever is higher.

2. xxx xxxx

Explanationn- For the purpose of this Section,-

xxx xxx xxx

(c) 'Technician' means a person having specialised knowledge and experience in

xxx xx xx

(iv) accountancy; or

xxx xx xxx

who is employed in a capacity in which such specialised knowledge and experience are actually utilised.

10.3. Section 80RRA was inserted in the Income-tax Act, 1961 by the Finance Act, 1975 (25 of 1975) w.e.f. 1.4.1975 and was then substituted by the Finance Act, 1977 w.e.f. 1.4.1978. There also, the deduction permissible was of an amount equal to 50% of the remuneration so received without its categorisation into two. The Finance Act, 1987 (11 of 1987) vide Section 37 thereof introduced the two categories in the present form providing for two rates of deduction. Now, while so much part of the remuneration as is brought into India by or on behalf of the assessed in accordance with the FERA and any rules made there under is entitled to the deduction 75%, the rest is entitled to deduction 50% merely.

10.4. We have referred to these amendments in law in brief inasmuch as they would be of some relevance for appreciating the submissions made by the learned counsel for the parties and the case law relied on by them in support of their respective submissions.

11. It is not disputed that if the contention of the assessed is upheld then he would be entitled to the benefit of 75% deduction from the remuneration brought into India by him or on his behalf.

12. The first question which arises for decision is whether the existence of an employer employee relationship in the sense of creating a master and servant relationship is an essential ingredient of Section 80RRA.

13. In *CBDT v. Aditya V. Birla*, : [1988]170ITR137(SC) , the approval under Section 80RRA was denied to the respondent by the tax authorities on the ground that according to the terms and conditions of the agreement, the status of the respondent was that of a 'consultant' and not of an 'employee'. It was submitted on behalf of the revenue that the provision should be confined to deduction to be given only in the case of the remuneration given to an employee and not to fees paid to a consultant or a technician. Their Lordships rejected the contention as not acceptable.

13.1. Their Lordships accepted the contention of the learned counsel appearing for the respondent assessed to the effect that the object of Section 80RRA was manifestly to encourage, firstly, earning of foreign exchange by India; secondly, bringing that currency by Indian nationals from abroad to India, and thirdly, to improve the status of the Indians abroad and increasing the market of Indian technicians. These were the laudable objects behind in the present socio-economic context.

13.2. As to the nature of employment contemplated by Section 80RRA, their Lordships have held :-

'We find that the amplitude of expressions `employee' and `employer' covers the cases of consultant or a technician. We find in the scheme of the Section nothing to warrant any exception as contended for by the Revenue. (pp 141-142)

'We find that there is no warrant in section to restrain the expression 'remuneration' received from a foreign employee only to the salary received by an employee. In our opinion, employment as a technician for the purpose indicated by

Shri Palkhivala could also be an object of the Act and in such a case the fee received by a consultant or a technician would also come within the purview of the section concerned.' (pp. 142-143 )

13.3. Their Lordships referred with approval to Aiyer, 'The Law Laxicon', (1940 Edn p.387) wherein it has been stated that an employer is one who employs, one who engages and keeps men in service, one who uses or enjoys the service of other persons for pay or salary. The words employer or employee are used not in any technical sense.

13.4. Their Lordships quoted their own observation in Chintaman Rao v. State of MP, : 1958 CriLJ803 and held :

'The concept of employment involves three ingredients:(1) employer (2) employee and (3) the contract of employment. The employer is one who employs, i.e., one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision.'

13.5.The contention of the counsel for the revenue that it was only to encourage salaried employees who were going abroad where the cost of living was very high, an exemption from tax on the salary earned abroad by working as a technician was introduced, did not appeal to their Lordships who observed that there was no warrant in the Section to restrain the expression 'remuneration received from the foreign employer' only to the salary received by an employee.

14. In Smt Kunti Verman v. CBDT : [1996]220ITR120(Delhi) the assessed was to advise and act as a consultant to the Company on terms relating to formulation of plant and programmes for the development, staffing and equipment of certain system in the company. The application for approval of the agreement under Section 80RRA was refused by the Govt of India. One of the reasons assigned was that relationship between the applicant and the foreign party was not that of employer and employee and the status of the former under the contract was that of an independent contractor. Delhi High Court following the law laid down by the

Supreme Court in the case of Aditya V. Birla ( supra) held the decision of the Government 'not sound'. The assessed a consultant and receiving retainership for the services rendered outside India from a foreign employer was held entitled to the benefit of Section 80RRA.

15. In the Continental Construction Ltd v. CIT, [1992] 195 ITR 71, their Lordships have observed (at page 117) that if a person consults a lawyer and seeks information from him on some issue, the advice provided by the lawyer would be a piece of technical service.

16. It was submitted by the learned counsel for the Revenue that it was the law laid down by the High Court in the case of Aditya v. Birla : [1986]157ITR470(Bom) maintained in LPA by the DB of the same High Court : [1988]170ITR136(Bom) (later on upheld by the Supreme Court also) which persuaded the Parliament into amending Section 80O by the Finance Act ( 2 of 1991) whereby cases like the present one have been specifically covered under Section 80O by enlarging its scope and inasmuch as Section 80O specifically covers such a case and that too by the amendment brought in the law, the same should be held to have been excluded from within the ken of Section 80-RRA. It is difficult to agree. We do not find any warrant for the proposition that the amendment in Section 80O was brought in so as to nullify the effect of the law laid down by the Bombay High Court in the case of Aditya V. Birla (supra). In our opinion, the interpretation placed by the Supreme Court on the term 'employment' as occurring in Section 80RRA, still holds the field and we find no reason to make a departure there from.

17. We are therefore of the opinion that the petitioner - a chartered accountant - having agreed to render his consultancy services to foreign companies in lieu of remuneration, and though not employed on full time basis in the sense of creating master-servant relationship, would still be deemed to have been 'employed' so as to attract the applicability of Section 80-RRA.

18. Though we are clear in our mind that the petitioner's case is covered by Section 80RRA, still an alternative argument advanced by the learned counsel for the petitioner-assessee has to be taken note of. It was submitted by Mr M.S. Syali, learned counsel for the petitioner, that if the case of the petitioner is covered by

Section 80O and 80RRA - both, then too he would be legitimately entitled to the benefit of that provision of the tax law which enables a larger benefit being earned by him. He placed reliance on a recent decision of the Supreme Court in Collector of Central Excise, Parody v. Indian Petre Chemical, 1997(11) SC 318. In our opinion, Mr Syali is right in his submission.

19. In CIT v. Indian Engineering & Commercial Corporation Pvt Ltd, : [1993]201ITR723(SC) the situation was that Section 40(c) applied to directors among others though the provision was applicable to companies only. Section 40A(5) was applicable to the employees whether of companies or others. The directors being employees of the company were covered by Section 40A(5) also which confer a higher benefit. As both the provisions were attracted their Lordships held that in the case of directors who were also 'employees' higher of the two ceilings had to be applied.

20. In the Collector of Central Excise Vs. Indian Petro Chemicals, 1997 (11) S 318, there were two exemption notifications. Their Lordships approved the view of the High Court giving the assesses the benefit of that notification which was more beneficial to it.

21. The above said two decisions of the Supreme Court support the submission of Mr Syali. We are of the opinion that if an assessed in the same set of facts and circumstances, is entitled to deduction from the remuneration received 50% under Section 80O but at the rate of 75% under Section 80RRA then the assessed would be entitled to the benefit of computation of deduction under the latter provision which is higher of the two.

22. We have already stated-and we reiterate that the submission of the learned standing counsel for the revenue that the enactment of the amendment in the year 1992 in the provision of Section 80O amounts to implied partial repeal of Section 80RRA [as interpreted in the case of Aditya V. Birla (supra)], has not appealed to us. The theory of implied repeal has to be accepted with caution. The inference of implied repeal cannot be drawn as it is necessarily spelled out. And certainly there is no express repeal of Section 80RRA, even partially.

22.1. There is a presumption against a repeal by implication; and the reason of this rule is based on the theory that the Legislature while enacting a law has a complete knowledge of the existing laws on the same subject-matter, and therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation.

[Principles of Statutory Interpretation, Justice G.P.Singh, Sixth Edn 1996,p.401 ]

22.2. The continuance of existing legislation, in the absence of an express provision of repeal being presumed, the burden to show that there has been a repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act 'that the two cannot stand together'. But, if the two may be read together and some application may be made of the words in the earlier Act, a repeal will not be inferred. (supra, pp 401-402)

22.3. The Parliament was well aware of the two provisions in the statute book. It was also aware of the law laid down by the High Court and the Supreme Court in the case of Aditya V. Birla (supra). Nothing prevented the Parliament from making a specific provision of repeal so as to get rid of the situation created in the field of law by the decision of the Supreme Court in Aditya V. Birla (supra). It cannot be said that the amendment introduced in Section 80O by the Finance Act of 1991 is so inconsistent with the provisions of Section 80RRA as to rebut the presumption against implied repeal. It cannot be said that Section 80O has either impliedly repealed Section 80RRA or the former has an overriding effect on the later provision to the extent to which it confers a similar benefit on the assessed like the petitioner. In our opinion, the theory of extending and conferring on the assessed the higher of the two benefits spelled out by two provisions would apply.

23. For the foregoing reasons the petition is allowed. Impugned orders dated 11.1.96, 6.5.96 and 21.2.1997 refusing the grant of approval under section 80RRA of the Income-tax Act, 1961 to the petitioner are hereby quashed and set aside. It is directed that the petitioner's application for issuance of the requisite approval u/s 80-RRA(2)(ii) of the Act shall be taken up for consideration and orders consistently

with the view of the law taken hereinabove within a period of two months from the date of communication of this order. No order as to costs.

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