

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

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**Court :** Delhi

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

**Reported in :** (1998)147CTR(Del)75

**Appeal No. :** Civil Writ Petn. No. 3173 of 1997

**Appellant :** C. S. Mathur

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

**Judgement :**

R. C. LAHOTI, J. :

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 Mannesmann A.G., Germany on 15th February, 1990, and with Fried Krupp GMBH, Germany on 8th April, 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 Mannesmann/Krupp from time to time advice, information on finance, industrial, business and economic matters relating to India as would be useful to Mannesmann/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 16,000 per year in consideration of the services provided by the petitioner.
3. The petitioner was granted approval under s. 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 dt. 6th May, 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 s. 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 dt. 21st February, 1997 (Ex. P11), the Ministry of Finance, Deptt. Of Revenue, has refused to review its earlier decision dt. 6th May, 1996.
5. It appears that the petitioners assessment for the asst. yr. 1996-97 was completed on 31st December, 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 dt. 2nd July, 1997, (Annexure P-12), has been issued by the assessing authority.
6. According to the petitioner, refusal of approval under s. 80RRA is based on misapprehension of law by the respondents inasmuch as s. 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 s. 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 s. 80-O and not by s. 80RRA. In order to avail the benefit under s. 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 s. 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 s. 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 s. 80-O or 80RRA. According to the petitioner, his case is covered by s. 80RRA and hence is entitled to deduction equal to 75 per cent of the remuneration received for service rendered by him to the companies outside India and brought into India by him in accordance with the FERA, 1973, and rules made thereunder. According to the respondent the petitioner is entitled to deduction equal to 50 per cent only under s. 80-O.

10. We may examine the statutory provisions relevant to the petition. Sec. 80-O applies also to an assessed 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 assessed 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 s. 80-O, a re-statement whereof is not necessary for our purpose.

10.1. Sec. 80-O as it originally stood, underwent a change by the Finance Act No. 2 of 1991 (w.e.f. 1st April, 1992). The provision which applied earlier to an Indian company only was extended in its application to non-corporate taxpayer 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 asst. yr. 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 Sec. 80RRA (relevant part thereof) reads as under :

'Deduction in respect of remuneration received for services rendered outside India.

80RRA(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 FERA, 1973 (46 of 1973), and any rules made thereunder, whichever is higher.

2. xxx xxx xxx

Explanation. - For the purpose of this section,

xxx xxx xxx

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

xxx xxx xxx

(iv) accountancy; or

xxx xxx xxx

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

10.3 Sec. 80RRA was inserted in the IT Act, 1961, by the Finance Act, 1975 (25 of 1975) w.e.f. 1st April, 1975, and was then substituted by the Finance Act, 1977, w.e.f. 1st April, 1978. There also, the deduction permissible was of an amount equal to 50 per cent of the remuneration so received without its categorisation into two. The Finance Act, 1987 (11 of 1987) vide s. 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 per cent, the rest is entitled to deduction @ 50 per cent 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 per cent 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 s. 80RRA.

13. In *CBDT vs. Aditya V. Birla* : [1988]170ITR137(SC) the approval under s. 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-assessee to the effect that the object of s. 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 s. 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.'

'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.'

13.3 Their Lordships referred with approval to Aiyer, *The Law Lexicon*, (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 vs. State of MP* AIR 1958 SC 388 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 vs. 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 s. 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 s. 80RRA.

15. In the Continental Construction Ltd. vs. CIT : [1992]195ITR81(SC) 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 vs. CBDT : [1986]157ITR470(Bom) maintained in LPA by the DB of the same High Court in CBDT vs. Aditya V. Birla : [1988]170ITR136(Bom) (later on upheld by the Supreme Court also) which persuaded the Parliament into amending s. 80-O by

the Finance Act (2 of 1991) whereby cases like the present one have been specifically covered under s. 80-O by enlarging its scope and inasmuch as s. 80-O 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 s. 80RRA. It is difficult to agree. We do not find any warrant for the proposition that the amendment in s. 80-O 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 s. 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 s. 80RRA.

18. Though we are clear in our mind that the petitioners case is covered by s. 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 ss. 80-O 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 vs. Indian Petro Chemical 1997 (JT) SC 318. In our opinion, Mr. Syali is right in his submission.

19. In CIT vs. Indian Engg. & Commercial Corpn. Pvt. Ltd. : [1993]201ITR723(SC) the situation was that s. 40(c) applied to directors among others though the provision was applicable to companies only. Sec. 40A(5) was applicable to the employees whether of companies or others. The directors being employees of the company were covered by s. 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 *Collector of Central Excise vs. Indian Petro Chemicals (supra)*, there were two exemption notifications. Their Lordships approved the view of the High Court giving the assessee 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 per cent under s. 80-O but @ 75 per cent under s. 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 s. 80-O amounts to implied partial repeal of s. 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 s. 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., 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 s. 80-O by the Finance Act of 1991 is so inconsistent with the provisions of s. 80RRA as to rebut the presumption against implied repeal. It cannot be said that s. 80-O has either impliedly repealed s. 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 dt. 11th January, 1996, 6th May, 1996 and 21st February, 1997, refusing the grant of approval under s. 80RRA of the IT Act, 1961, to the petitioner are hereby quashed and set aside. It is directed that the petitioners application for issuance of the requisite approval under s. 80RRA(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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