

Graphite India Ltd. Vs. Deputy Commissioner of Income Tax

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Oct-16-2002

Reported in : (2003)86ITD384(Kol.)

Judge : M Bakshi, Vice, P Kumar

Appellant : Graphite India Ltd.

Respondent : Deputy Commissioner of Income Tax

Judgement :

1. This appeal is directed against order dt. 6th July, 1998, passed by learned CIT(A)-XI, Kolkata, in the matter of ascertainment of withholding tax liability from remittance made by the assessee to Mr.

Frank Rusinko, an American scientist, on account of consultancy charges.

2. The assessee's grievance is that the authorities below ought to have held that the remittance in question did not fasten any withholding tax liability on the assessee inasmuch as, on the peculiar facts of this case, the same is covered by the scope of expression 'independent personal services' under Article 15 of Indo-US Double Taxation Avoidance Agreement (DTAA). As a corollary to this proposition, the assessee has also assailed the action of the authorities below in holding that the remittance in question is covered by the scope of expression 'fees for included services' appearing in Article 12 of Indo-US DTAA. Although the assessee has taken seven grounds of appeal, these grounds are, in substance,

only arguments in support of these propositions. As a matter of convenience, therefore, we will take all these grounds of appeal together.

3. Briefly, the facts. The assessee, is an Indian company engaged, Inter alia, in the business of manufacturing and/or marketing of graphite electrodes, anodes and other miscellaneous carbon and graphite products. The assessee had appointed one Mr. Frank Rusinko Jr., a resident of the United States of America as is its consultant on retainer basis. As to the scope of Mr. Rusinko's primary work, para. 2 of the appointment letter dt. 28th March, 1996 (duly acknowledged copy placed before us at pp. 7 and 8 of the paper book) states as follows : "During the continuance of your appointment hereunder, you shall advise the company's accredited representative(s) in the USA or, if required, send to the company by post, documentation on matters concerning technology upgradation and development of new products in the field of carbon and graphite, and, without limitation on the generality of the foregoing, shall render to the company consultancy services for improvement of electrodes and nipples quality, particularly in large diameter UHP grade, development of fine grain Isotrophic Graphite, EDM Graphite and other Carbon/Graphite Speciality Products." Paras. 6 and 7 of the appointment letter had further imposed the following obligations on Mr. Rusinko : "6. You shall forthwith communicate to the company and transfer to it the exclusive benefits of and absolute right to all inventions, improved process of manufacture, designs, secret materials, formulas of mixing, improvements in addition to or further inventions relating to the patents or processes of manufacture or products manufactured or being developed by the company or otherwise relating to the business and affairs of the company which you may produce, make, invent or discover or which may come to your knowledge or be communicated to you during the continuance of your appointment hereunder relating to any of the company's business or products and will give to the company full information as to exact mode of working and using the same and also all such explanations and instructions to the officers and workmen of the company as may be necessary to enable them effectually to work the same and shall from time to time at the expense of the company furnish it with fill necessary plans, drawings, models and information for enabling the company to register in its own name any such improvement, invention or additions as the company shall think fit.

7. You shall agree that any and all improvements, intentions and discoveries, whether or not capable of being patented, which you may make either alone or in conjunction with others during your appointment hereunder relating to or in anyway pertaining to or connection with any of the products of the company or manufacturing process thereof shall become the sole and exclusive property of the company and that whenever required to do so by the company whether during or after the termination or earlier determination of your appointment hereunder, you shall, at the cost of the company, execute and sign any and all applications, assignments and other instruments which the company may deem necessary or advisable in order to apply for and obtain letters patent design registration or other forms of protection for the said improvements, inventions and discoveries in such countries as the company may direct and to vest in the company alone or in any such person or persons as the company may direct, the whole right, title and interest thereto." 4. On 25th Aug., 1997, the assessee moved an application to the AO seeking permission to make the remittance of two quarterly instalments of the consultancy fees payable to the aforesaid Mr. Rusinko. The assessee submitted that consultancy services for which the remittance in question was being made was covered by the scope of expression 'independent personal services' in Article 15 of Indo-US DTAA. It was also submitted that since neither Mr. Rusinko had a 'fixed based regularly available to him in India for the purpose of performing his activities' nor did he 'stay in India for a period or periods amounting to or exceeding in aggregate 90 days in the relevant taxable year', Mr.

Rusinko's income from such independent personal services was not exigible to tax in India. Accordingly, the assessee's case was that, the assessee did not have any obligation to withhold taxes from this remittance. These submissions, however, did not find any favour with the AO. He was of the view that the services rendered by the foreign consultant are covered by the scope of fees for technical services, which are termed as 'fees for included services' in the Article 12(4) of Indo-US DTAA, and accordingly, the assessee should have deducted tax from the remittance. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Still aggrieved, the assessee is in second appeal before us.

5. We have heard Shri D.B. Desai, learned counsel for the assessee, and Shri Sunil Kumar, learned Departmental Representative. We have also carefully perused the orders of the authorities below, as indeed the paper book filed before us, and deliberated upon the applicable legal position.

6. We deem it necessary to reproduce the contents of Articles 12(4), 12(5) and Article 15 of the Indo-US DTAA, for ready reference : (4) For the purposes of this article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services : (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in para. (3) is received; or (b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

(5) Notwithstanding para. (4), "fees for included services" does not include amounts paid ; (a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in para. (3)(a); (b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic; (d) for services for the personal use of the individual or individuals making the payment; or (e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).

(1) Income derived by a person who is an individual or firm of individuals (other than a company) who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first-mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State : (a) if such person has fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that

case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or (b) if the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant taxable year; (c) the term "professional services" includes independent scientific, literary, artistic educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants." 7. The primary thrust of rival contentions before us has been in support of the assessee's contention that the impugned payment for consultancy fees is covered by the scope of expression 'independent personal services' within meaning of Article 15 of the Indo-US DTAA, and, of course, in support of Revenue's contention, that the impugned payment is covered by the scope of fees for technical services termed as 'fees for included services' within meanings of Article 12(4) of the same. On a careful analysis of the provisions of the Article 12, however, even this proposition seems to be somewhat fallacious inasmuch as in case the impugned payment falls within the scope of expression 'independent personal services' within meaning of Article 15, the same shall automatically be out of ambit of Article 12(4) since, in view of the specific provisions of Article 12(5), notwithstanding the provisions of Article 12(4). "fees for included services" does not, Inter alia, include amounts paid to any individual for independent personal services as defined in Article 15. In other words, when an amount paid to an individual, or for that purpose a firm of individuals, resident in the United States of America, is found to be covered by the scope of expression 'independent personal services' within meaning assigned in Article 15 of the Indo-US DTAA, it is immaterial whether or not the same is covered by the scope of 'fees for included services', which in common parlance is known as 'fees for technical services', under Article 12(4) of the Indo-US DTAA. In that eventuality, in view of the provisions of Article 12(5), if at all that amount is exigible to tax in India, it can only be taxable under Article 15 of the Indo-US DTAA. To that extent, provisions of Article 12(4) and Article 15 are non-competing and mutually exclusive.

8. The question which then needs to be addressed is as to what is the precise scope of expression 'independent personal services' under Article 15 of Indo-US DTAA.9. We find that, barring substitution of '90 days' for '183 days' appearing in Article 15(1)(b), the Article 15(1)(a), 15(1)(b) and 15(2) of Indo-US DTAA are

verbatim the same as Article 14(1)(a), 14(1)(b) and 14(2) of UN Model Convention 1980. As observed in the official commentary of the UN Model Convention, this model article, in turn, "contains all essential provisions of Article 14 of OECD Model Convention" and, therefore, OECD "Commentary on that article is important" and very relevant. That commentary inter alia states as follows : "The article is concerned with what are commonly known as professional services and other activities of independent character.

This excludes industrial and commercial activities and also professional services rendered in employment..... The meaning of term 'professional services' is illustrated by some examples of typical liberal professions. The enumeration has an explanatory character only and it is not exhaustive....." Elaborating upon the underlying philosophy of this model article, the Commentary further explains that : "The provisions of the article are similar to those for business profits and rest on the same principles as those of Article 7 (dealing with business profits). The provisions of Article 7 and Commentary thereon could, therefore, be used as guidance for interpreting Article 14." 10. The concept of 'permanent establishment'; which is fundamental to article dealing with business profits, is, however, missing in the article dealing with independent personal services. Explaining the rationale behind this omission and the alternate paradigm, the Commentary makes following concluding observations : "Even if Articles 7 and 14 are based on the same principles, it was thought that the concept of permanent establishment should be reserved for commercial and industrial activities. The term 'fixed base' has, therefore, been used. It has not been thought appropriate to try to define it but it would cover, for instance, a physician's consulting room or the office of an architect or lawyer. A person performing independent personal services would probably not, as a rule, have premises of this kind in any other State than of his residence. But, if there is, in another State, a center of activity of a fixed or permanent character, then that State should be entitled to tax the person's activities." 11. In the light of the above discussions, in our considered view, the following conditions are required to be satisfied for a service rendered by 'the US resident being brought within the ambit of 'independent personal services' exigible to tax in India under Article 15 of the Indo-US DTAA : (i) The service should be in the nature of a 'professional service' or other activity of an independent character,

which includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

In addition, this service should be rendered by an individual or firm of individuals (other than a company).

(ii) The service should not be in the nature of a commercial or industrial activity, or a professional service rendered in the course of employment.

(iii) In addition to satisfying both the above conditions, at least one of the following conditions should also be satisfied : (a) The person rendering such service has a fixed base regularly available to him in India for the purpose of performing his activities. The connotations of 'fixed base', for this purpose, are somewhat akin to a professional's chamber which, in broad terms, implies a place from where the person can conduct his independent professional activities.

(b) The person rendering such service stays in India, in the relevant previous year, for period of 90 days or more.

12. The definition of 'professional services', which are termed as 'independent personal services' in the phraseology employed in tax treaties, is, however, not defined in tax treaties or even official commentaries on UN and OECD Model Conventions. The meaning of this term is illustrated by some examples of typical liberal professions, and this enumeration of professions has only an explanatory character. 'The Law Lexicon' edited by Justice Y.V. Chandrachud (1997 Edition) defines 'profession', inter alia, as involving 'the idea of an occupation requiring either purely intellectual skill or if any manual skill, as in painting and sculpture or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities'. This definition, barring the words "as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities" is incidentally the same as assigned by Scrutton, LJ in IRC v. Maxse (1919) 1 KB 647 referred to in L.B. Curzon's Law Dictionary. Referring to Hon'ble Bombay High Court's judgment in

the case of *Sakharam Naryan Kherdekar v. City of Nagpur Corporation* AIR 1964 Bom 200, at p. 210, the Law Lexicon further states that 'an activity to be profession must be one carried on by an individual by his personal skill, intelligence and dependent on individual characteristics'. Black's Law Dictionary (5th Edition) defines profession as 'a vocation or occupation requiring special, usually advanced, education and skill e.g. in law and medicine' and observes that 'the labour and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual'. The school of thought thus emerging from these deliberations is that, broadly speaking, a profession will imply any vocation carried on by an individual, or group of individuals, requiring predominantly intellectual skills, dependent on individual characteristics of the person(s) pursuing that vocation, requiring specialized and advanced education or expertise.

14. Mr. Frank Rusinko Jr. is admittedly a scientist by profession, resident of the United States of America, and as evident from paper book p. 29, he is in regular employment as Director of Carbon Research Centre in Pennsylvania State University. A perusal of Mr. Rusinko's obligations under the consultancy contract, extracts from which have been reproduced earlier in para. 3 above, also shows that services, which he was required to deliver under the contract, were, to use the phraseology employed by Lord Justice Scrutton, involved "either purely intellectual skill or if any manual skill, as in painting and sculpture or surgery, skill controlled by the intellectual skill of the operator". We find that the trust of consultancy arrangement is that Mr. Rusinko is to keep the assessee abreast of matters concerning technology upgradation and development of new products in the field of carbon and graphite, besides sharing with the assessee fruits of his labour in the area of his related research and development. This work essentially involves predominantly intellectual skills, dependent on individual characteristics of Mr. Rusinko, and presupposes Mr.

Rusinko's specialized and advanced education or expertise in related fields. The services rendered by Mr. Rusinko, in our considered opinion, were, therefore, clearly in the nature of professional services referred to in Article 15 of the Indo-US DTAA. As a natural corollary to this finding, and in view of the specific provisions of Article 12(5) of the Indo-US DTAA, the amount paid in consideration of these

services is outside the scope of Article 12(4) of the Indo-US DTAA. We, therefore, vacate the findings of the authorities below that the impugned amount was exigible to tax in India under Article 12(4) of the Indo-US DTAA.¹⁵ The question then is whether the impugned amount can be subjected to Income-tax in India under Article 15 of the DTAA : 16. In the present case, the two basic conditions discussed in para. 11 above, i.e., II(i) and II(ii), are admittedly fulfilled but, in order to attract taxability in India under Article 15, at least one of the further conditions laid down in 11(iii) is required to be fulfilled. As far as the first of these conditions, i.e., regarding availability of 'fixed base' in India, is concerned, the following observations of the AO, after taking into account the fact that Mr Rusinko had, though under a separate contract, visited manufacturing facilities of the assessee-company, as relevant : ".....A fixed base has to be decided in totality and in the instant case, the entire factory premises and its auxiliary space is available to Mr. Frank Rusinko to carry out his work. To say that Mr. Frank Rusinko does not have a fixed base is, therefore, totally unrealistic. In Article 15, the word used is 'fixed base' and not 'fixed place'. This will denote that the expression has been consciously used to signify a wide base to operate from. In this case, the whole factory of assessee-company is available to operate from and hence he does have a fixed base available to him in India.

Considering the above, it is found that the payment made to Mr.

Frank Rusinko does not enjoy any immunity granted in Article 15 of the DTAA....." In our considered view, the above observations regarding the scope of expression 'a fixed base' are devoid of any sustainable basis and are in fact repugnant to the context. We are unable to appreciate the material distinction between 'fixed base' and 'fixed place' and, in any event, we are of the considered view that availability of this 'fixed base' has to be 'regularly available' for the purpose of carrying out 'independent personal services' or, what is normally termed as, 'professional services'. The 'entire factory premises and auxiliary space' being available to Mr. Rusinko can only be for the purpose of carrying out the specific assignment in connection with which he may have visited the factory, but it is nobody's case that this place was 'regularly available' to Mr. Rusinko for being used as a place from which he carried out, or could have carried out, his independent professional

activities, in the manner in which a professional will pursue his profession from his office, or, for that purpose, a doctor will practice from his consulting chamber. As we have observed earlier in para. 11, the connotations of 'fixed base', for the purpose of Article 15, are somewhat akin to a professional's chamber which, in broad terms, implies a place from where the person can conduct his independent professional activities.

17. The aforesaid interpretation is clearly in harmony with the OECD and UN Model Conventions' official commentaries, as elaborated in paras. 9 and 10 above. As the provisions of Article 15 of Indo-US DTAA, and corresponding provisions in these model conventions, are identical in material respects i.e., are in pan materia, the UN and OECD Model Conventions, and Commentaries thereon, have key role in determining connotations of the expressions employed in Article 15. Hon'ble Andhra Pradesh High Court has, in the case CIT v. Visakhapatnam Port Trust (1983) 144 ITR 146 (AP), referred to OECD commentaries on the technical expressions and the clauses in the model conventions, and referred to, with approval, Lord Radcliffe's observations in *Ostime v. Australian Mutual Provident Society* (1960) AC 459, 480 : (1960) 39 ITR 210, 219 (HL), which have described the language employed in these documents as the "international tax language". In view of the observations of Hon'ble Andhra Pradesh High Court, in Visakhapatnam Port Trust's case (supra), these model conventions and commentaries thereon constitute international tax language and the meanings assigned by such literature to various technical terms should be given due weightage. In our considered view, the views expressed by these bodies, which have made immense contribution towards development of standardization of tax treaties between various countries, constitute 'contemporanea expositio' inasmuch as the meanings indicated by various expressions in tax treaties can be inferred as the meanings normally understood in, to use the words employed by Lord Radcliffe, 'international tax language' developed by bodies like OECD and UN.¹⁸ We are thus unable to approve Revenue's stand that, merely because Mr. Rusinko visited the manufacturing facilities of the assessee-company, though in connection with some other contractual arrangements, it could be said that a 'fixed base' was 'regularly available' to him for carrying out 'independent personal services' in consideration of which the impugned payment was made. There is also no other material before

us to indicate that any 'fixed base' was 'regularly available' for carrying out the professional work in question. A perusal of Mr. Rusinko's obligations under the consultancy contract, detailed in para. 3 above, clearly shows that no part of this work was, in any event, required to be performed from any fixed base in India. It is thus clear that condition laid down in para. 11(iii)(a) is not fulfilled in the instant case. As far as the alternate condition, i.e., in para. 11(iii)(b) regarding stay for more than 90 days, is concerned, it is not even Revenue's case that Mr. Rusinko stayed in India for more than 90 days in the relevant previous year. Learned counsel for the assessee has made a statement at the Bar that Mr.

Rusinko's stay in India, in the relevant previous year, was less than 90 days. In view of this undisputed position, the condition regarding stay for, or for more than 90 days is also not fulfilled. In this view of the matter, none of the conditions elaborated in para. 11(iii) above are fulfilled, and, accordingly, the remittance in question is not exigible to income-tax in India by the virtue of Article 15 of the Indo-US DTAA.¹⁹ In view of the above discussions, we are of the considered view that the impugned payment to Mr. Rusinko is neither covered by Article 12(4) nor by Article 15 of the Indo-US DTAA. It is also not in dispute that if the impugned payment cannot be brought within the scope of Article 12(4) or of Article 15, it cannot be subjected to income-tax in India. We are, therefore, of the considered view that the impugned payment to Mr. Rusinko is not exigible to Indian income-tax. We may now refer to the observations of a co-ordinate Bench in the case of *Dy. CIT v. ITC Ltd.* (2002) 76 TTJ (Cal) 323 : (2002) 82 ITD 239 (Cal) wherein, inter alia, the following observations were made : "20. Under Section 195(1) of the Act, any person making payment in the form of income to a non-resident is required to deduct tax at source, from the said income, at the 'rate in force' which, in turn, has been explained under Section 2(37A)(iii) as Mows : 'for the purposes of deduction of tax under Section 195, the rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year or the rate or rates of income-tax specified in an agreement entered into by the Central Government under Section 90, whichever is applicable by virtue of the provisions of Section 90.' As we have earlier observed, provisions of the DTAA clearly override the provisions of the Act to the extent the provisions in such agreements are more favourable to the assessee. Therefore, in case a DTAA provides for lower rate, which includes 'Nil'

rate, of taxes, such a rate will prevail over the rate given in the Act. As a natural corollary to this proposition, when, in terms of the provisions of a DTAA, an income is not exigible to income-tax in India, no tax is required to be deducted under Section 195 from the payment of such income to a non-resident....." As we have already given a finding that the impugned payment to Mr.

Rusinko was not exigible to tax in India, in our considered view, the assessee did not have any withholding tax liability in the instant case.

20. For the detailed reasons set out above, we deem it fit and proper to vacate the orders of the authorities below and direct the AO to refund the taxes already deposited by the assessee tax deductor. As we have arrived at this Conclusion on merits of the case, we see no necessity to deal with other peripheral legal issues raised by the assessee.

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