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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Apr-30-2003

Reported in : (2004)89ITD138(Kol.)

Judge : C Sethi, R Sharma

Appellant : Dcit, Spl. Range-6

Respondent : A. Tosh and Sons Ltd.

Judgement :

1. The above mentioned two appeals bearing ITA Nos. 1666 & 1667 (Cal)/97 have been filed by the assessee-company against the consolidated order dated 29-11-96 passed by the CIT(A) arising out of the order dated 19-3-91 passed by the A.O. under Section 163 or the Income-tax Act, 1961 (for short, the Act) pertaining to the asst. year 1988-89.

1.1 The other appeal bearing ITA No. 811(Cal)/97 has been filed by the revenue against the consolidated order dated 4-12-96 passed by the CIT(A) arising out of two separate asstt. orders, both dated 28-3-94 passed by the A.O. under Section 163/148/143(3) of the Act for the A.Y.1988-89.

1.2 These three appeals were consolidated and were heard together.

Hence, a consolidated order is being passed, for the sake of convenience.

2. We shall first take the appeals filed by the assessee arising out of the order passed under Section 163 of the Act. The material facts, in brief as has been unfolded by the orders of the authorities below, statement of facts filed by the assessee before the first appellate authority and the paper filed in the form of a paper book before us, are that - By way of an order dated 19-3-91 passed by the A.O., the assessee-company has been treated as an agent under Section 163 of the Act for, amongst others, two foreign buyers, viz. M/s. State Establishment for Food Stuffs Trading, Baghdad, Iraq and M/s. MISR Import & Export, Cairo, A.R.E., UAR in respect of refund of duty drawback and Central Excise Rebate received in India by the assessee-company for and on behalf of the said two foreign buyers in terms of the contract for purchase of tea on their behalf and export thereof to them. Besides the aforesaid two foreign buyers, the assessee was also treated as an agent under Section 183 of the Act, vide A.O.'s said consolidated order dated 19-3-91, for SOJUZPLODO-IMPORT, USSR in respect of export benefits by way of duty rebate, custom duty drawback etc. and as well interest income on fixed deposits made out of the fund received by way of export incentives. However, the matter relating to the A.O.'s order treating the assessee as an agent of the said foreign buyer, i.e.

SOJUZPLODO-IMPORT, USSR and consequential asst. order made under Sections 143(3)/163 in respect of the income received in India for and on behalf of the said foreign buyer is not before us. The order made under Section 163 in respect of aforesaid SOJUZPLODO-IMPORT, USSR, for the astt. year 1988-89 and 1989-90 has already been upheld by the Tribunal vide order dated 28-12-98 (vide ITA Nos. 446, 447, 448 & 449 (Cal), 95 - ITAT, 'C' Bench, Calcutta) and consequently an assessment order under Section 254/251/163/143(3) of the Act, dated 22-5-2000 for the asst. year 1988-89 has been completed treating the assessee as a agent under Section 163 and determining the total income at Rs. 31,36,069/- being interest on the amount of deposits made out of refund of duty drawback, central excise rebate etc. It has been stated by the L. Counsel for the assessee that no further appeal are pending against ITAT's order in respect of said foreign buyer, via., SOJUZPLODO-IMPORT-USSR.2.1 The assessee company is an exporter of tea. The assessee-company exported tea to foreign buyer in terms of the written contracts. The foreign buyers had been purchasing

finished tea from India through the assessee company who undertook to effect the purchase of tea required from the Auction Centres for supply to the foreign buyers as per method and procedure specified in the written agreements. The operation relating to buying, blending, repacking, packetising and shipping were required to be undertaken by the assessee-company. The assessee-company had to bear the full responsibility for the quality and quantity of tea purchased and supplied. The written agreement further provided that the export benefits received by the assessee-company, by way of Duty Rebate, cash compensation, customs duty drawback etc. would be passed on to the foreign buyers. It was held by the Hon'ble Calcutta High Court in the assessee-company's case reported in (1987) 166 ITR 867 that the amounts collected or received by the assessee-company on account of customs duty drawback and excise duty rebate are not the real income of the assessee-company but held by the assessee-company in a fiduciary capacity for and on behalf of the foreign buyers. Situated thus, the A.O. proceeded to assess the foreign buyers to income-tax on such income by way of customs duty drawback and excise duty rebate which were actually received in India by the foreign buyers through the assessee-company. The A.O., therefore, treated the assessee-company as an agent of non-resident foreign buyers in respect of refund of duty drawback and central excise rebate in accordance with the provisions of Sections 163(1)(b)(c)(d) of the Act read with provisions of Section 5(2)(a) of the Act. On an appeal, the CIT(A) upheld the action of the A.O. in treating the assessee-company as an agent under Section 163 of the Act for, amongst others, the aforesaid two foreign buyers, viz., M/s. State Establishment for Food Stuffs Trading, Baghdad, Iraq, and M/s MISR Import & Export, Cairo, A.R.E., UAR. Still aggrieved, the assessee is in further appeal before the Tribunal.

3. The main contention putforward by the Ld. counsel for the assessee company assailing the order passed under Section 163 of the Act would that unless and until it is found and held that non-resident is liable to pay tax in respect of the refunded duty drawback and excise duty rebate, the question of appointing an agent under Section 163 and making him liable to pay tax under Section 9(1) cannot arise. It is the contention of Mr. N.K. Poddar, Ld. senior counsel of the assessee-company that the only activity of the said two non-resident overseas buyers vis-a-vis the assessee company for the year under appeal was the

purchase of tea in India and export thereof by the assessee company to the said non-resident overseas buyers, and since the refunded duty drawback and central excise rebate was the property of the overseas buyers in terms of the contract, such refunded amount operated to reduce the cost of the purchase of tea by the overseas buyers and no income whatsoever arose to the overseas-buyers in respect of the said operation. Reliance in this connection was placed by the Ld. Counsel for the assessee, on the provisions of Explanation (b) to Section 9(1) of the said Act as well as the Departmental Circular No.20, dated 7th July, 1964, which also reiterated that a non-resident will not be liable to tax in India on any income attributable to operations confined to purchase of goods in India for export, even though the non-resident has an office or agency in India for the purpose, or the goods are subjected by him to any manufacturing process before being exported from India. It was further submitted by Mr. N.K.Poddar, Ld. senior counsel for the assessee that this view was again reiterated by the Board in its Circular No. 163 dated 29-5-75 reported in (1975) 99 ITR (St.) 187. It was, therefore, strongly submitted for the assessee-company that there being no income chargeable to taxed in the hands of the non-resident overseas buyers of tea, the assessee-company could not be lawfully treated as the agent under Section 163 of the Act for the asst. Year under consideration to assess the said refunded duty drawback and central excise rebate. In these premises, it was, therefore, contended that passing of any order under Section 163 of the Act against the assessee-company was without jurisdiction, illegal, invalid and void ab initio.

3.1 Mr. N.K. Poddar, the Ld. Sr. Counsel for the assessee company further elaborated his contention that Section 163 of the Act corresponding to Section 43 of the 1922 act merely sets up a machinery to give effect to the substantive provisions of Section 9(!) of the Act corresponding to Section 42 of the 1922 Act and unless it is found and held that non-resident is liable to pay tax in respect of the refunded duty drawback and excise duty rebate, the question of appointing an agent under Section 163 and making him liable to pay tax under Section 9(1) cannot arise. Mr. N.K. Poddar has very strongly relied upon the decision of the Hon'ble Bombay High Court in Abdullabhai Abdul Kadar v.CIT (1952) 22 ITR 241 (Bom) as well as other cases forming part of the compilation of 25 pages filed on

behalf of the assessee before the Tribunal.

4. The Ld. D.R., on the other hand, supported the orders of the authorities below and reiterated the views and reasons as given by the A.O. as well as CIT(A). It was submitted that the contention of the assessee has to be appreciated and considered only in terms of the provisions of Section 9(1) of the Act, which refers to "Income deemed to accrue or arise in India" and all the sub-clauses of Section 9 are the further clarification and elucidation of the meaning of "income deemed to accrue or arise in India. Beyond this deeming provision of accrual or arising of certain income in India, the provision of Section 9 has no further application. On the contrary, where certain receipts, it is submitted by the Ld. D.R., in the nature of income assessable to tax is actually received in India, there is no question of applying the deeming provision of Section 9 of the Act including the Explanation (b) to Section 9(1) of the Act. It was further submitted that the case in hand is related to the income received in India and as such assessable to tax within the meaning of Section 5(2)(a) of the Act. The provisions of Section 9(1) of the Act can only be referred to as a further clarification and meaning of the "income deemed to accrue or arise in India" as referred to Section 5(2)(b) of the Act. The Ld. D.R., therefore, concluded his submission by saying that the Explanation (b) to Section 9(1) cannot be invoked in the case in hand as in much as it is not a case or "income deemed to accrue or arise in India" but is a case of "income received in India".

5. We have carefully considered the rival contentions of both the parties. We have gone through the orders of the authorities below as well the papers filed before us. We have deliberated upon the relevant provisions of law as well the judicial precedents cited and relied upon by the parties.

6. The question that falls to be considered is, whether, on the facts and circumstances of the case, the assessee-company can be treated as an agent under Section 163 of the Act for two non-resident foreign buyers in respect of refund of excise duty drawback and central excise rebate received in India by the assessee company for and on behalf of the two non-resident foreign buyers in terms of the contract for purchase of tax on their behalf and export thereof to them.

It is an admitted fact that the assessee-company had actually received in India certain amounts by way of refund of duty drawback and central excise rebate for and on behalf of the non-resident buyers in terms of the contract/agreement for purchase of tea on behalf of foreign buyers and export thereof to them. The controversy as to whether, on the facts and circumstances of the case, the excise duty rebate and customs drawback were received by the assessee-company on its own account or on the account of the foreign buyers has been settled by a decision of the Hon'ble Calcutta High Court in the assessee's own case, reported in (1987) 166 ITR 867, wherein it has been held that the amounts received on account of customs duty drawback and the excise duty rebate were not the real income of the assessee but the assessee company was holding the same for and on behalf of foreign buyers. It is, therefore, settled that the amounts received in India by the assessee-company on account of customs duty drawback and the excise duty rebate are belonged to the foreign buyers. On a consideration of the provisions of the relevant agreements between the assessee and its foreign buyers, we find the foreign buyers had been purchasing tea from India through the assessee company since long, and the assessee-company had undertaken to effect the purchase of tea as per requirement of foreign buyer and as well undertaken the responsibility of buying, blending, re-packing, packetising, shipping, maintaining the quality and quantity etc. The assessee company was also under an obligation to remit the amounts received on account of excise duty rebate and customs duty drawback to the foreign buyers after obtaining the permission from The Reserve Bank of India.

7. Now, the main question to be considered is whether the amounts received by way of excise duty rebated and custom duty drawback is chargeable to tax in the hands of the non-resident foreign buyers within the ambit of Income-tax Act, 1961. On reading the provisions of Section 5 of the Act, we find that Section 5, both for residents in Sub-section (1) and for non-residents in Sub-section (2), brings within the fold of chargeable total income all income which is received or is deemed to be received in India or which accrues or arises or in deemed to accrue or arise in India to the assessee in a particular previous year, Sub-section (2) of Section 5, which limits the scope of total income of a non-resident to income which is received or deemed to be received in India during the relevant previous year by or

on behalf of such person or accrues or arises or is deemed to accrue or arise to him in India during such year, is reproduced below:- "(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which - (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1. - Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2. - For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India." Thus, it is apparent that the income described in Clause (a) or (b) of Sub-section 2 of Section 5 are to be included in the chargeable total income of a non-resident in accordance with and subject to the provisions of the Act. It is further clear that actual or deemed receipt of income in India by or on behalf of a non-resident attracts tax. Further, receipt is not the sole test of chargeability to tax. If an income is not taxable on receipt basis, it may be taxable on accrual basis. Not only income received or deemed to be received in India, or accruing or arising in India but also all income which may be deemed to accrue or arise in India are brought to charge according to Section 5(2) in case of a non-resident. The provisions of Section 9 have been enacted to indicate as to what types of income although actually accruing or receiving elsewhere, shall be deemed to accrue or arise in India for the purposes of income-tax levy. The provisions of Section 9 of the Act have the effect of rendering persons liable to tax on income which do not accrue or arise or are not received in India but which are deemed to accrue or arise in India. The ambit of the expression "is deemed to accrue or arise to him in India" used in Section 5 has been explained and defined in Section 9. The concept of actual receipt of income in India is quite distinct and apart from the notion of deemed accrual or arising of the income in India. Similarly, the concept of actual accrual or arising of income in India, although not dependent upon the receipt of Income in India, is

quite distinct and separate from the notion of deemed accrual or arising of the income in India.

The determination as regards actual accrual or arising of income in India follows the general principles of law while in the case of deemed accrual or arising of the income in India, the accrual has to be tested against the deeming provisions of Section 9. This distinction has to be kept in view and the one cannot be mixed with the other Section 9(1), by fiction, deems to certain income in the circumstances mentioned therein, as income accruing or arising in India. The fiction embodied in the provisions of Section 9(1) does not apply to the income which actually accrues or arises to the assessee in India or which actually received or deemed to be received in India. By the provisions of Section 9 of the Act, only income accruing or arising outside India is sought to be brought within the net of the Income-tax Law. Where the income is actually received or accrues or arises in India, it is no longer necessary to have recourse to fiction created by the provisions of Section 9 of the Act, which takes within this ambit only the expression "is deemed to accrue or arise to him in India". The relevant portion with which we are concerned here, of Section 9 is reproduced below:- "9. (1) The following incomes shall be deemed to accrue or arise in India:- (1) all income accruing or arising, whether directly or indirectly, though or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export; The close reading of the above provisions of Section 9(1)(i) and the Explanation thereto makes it undoubtedly and amply that the provisions of Explanations there apply only to a case where the income is deemed, under Section 9(1)(i), to accrue or arise in India and does not apply to a case where the income actually does accrue or arise or is received in India. The Explanations below the Clause (1) of Sub-section (1) of Section 9 stipulates in an unequivocal terms that the Explanations are meant for the purpose of Clause (i) of Sub-section (1) of Section 9 of the Act. We, therefore, are of the view that Explanation (b) to Section 9(1)(i) applies only to a case where income is deemed,

under Section 9(1)(i), to accrue or arise in India and does not apply to a case where the income actually does accrue or arise or is received in India.

Therefore, in the case of non-resident, income received or accrues or arises in India through or from operation which are confined to the purchase of goods in India for the purpose of export are chargeable to tax in India inasmuch as the Explanation (b) to Section 9(1)(i) excludes only those income which are deemed to accrue or arise in India to non-resident through or from operations which are confined to the purchase of goods in India for the purpose of export. The provisions of Explanation (b) to Section 9(1)(i) cannot be extended to apply to a case where the income actually does accrue or arise or is received in India.

8. At this juncture, we may observe that there might be a case where the A.O. may bring to tax in the hands of a non-resident, a portion of the profits from the overseas sale of goods purchased in India through agent, as profits deemed to accrue or arise in India on the reasoning that the operations confined to the purchase of goods in India has contributed to the earning of income by the non-resident in its trading activity. In other words, a part of the income, profit and gains might be apportioned to the purchasing activity as income deemed to have accrued or arisen to the non-resident through the business connection in India so as to be liable to be taxed under Section 9(1)(i) of the Act. Only in such cases where no income is actually received in India or actually accrues or arises in India but treated as deemed to have accrued or arisen to the non-resident through business connection in India on account of purchasing activity, and a part of income or profit or gains earned on sales made outside India is apportioned to the purchasing activity and is treated as deemed to have accrued or arisen to the non-resident so as to be liable to be taxed under Section 9(1)(i) of the Act, the Legislature has thought it fit to exempt non-resident from the effects and hardships of Section 9(1)(i) by providing, in Explanation (b), that no income shall be deemed to accrue or arise in India to a non-resident through or from operation which are confined to the purchase of goods in India for the purpose of export.

The circular No. 20, dated July 7, 1964, issued by CBDT explains the effect of the removal of the proviso to Explanation (b) to Section 9(1)(i). The Board circular

applies to a case where income is deemed to accrue or arise in India under Section 9(1)(i) of the Act and does not apply to a case where the income actually does accrue or arise or is received in India. The subsequent Board's Circular No. 163 dated 29-5-1975 reported in (1975) 99 ITR (St.) 187 also speaks of such an eventuality where a non-resident is made liable to be taxed on a portion of profits attributable to the purchase of raw materials required for the purpose of manufacture and sale abroad, if the purchases are made in India through a regular agency established in India for that purpose, and then in such a situation it was clarified that by virtue of Clause (b) of Explanation to Section 9(1)(i) of the Act, in the case of non-resident, no income shall be deemed to accrue or arise in India through or from operations which are confined to purchase of goods in India for the purpose of export. This Board's Circular is, therefore, confined to the assessability of income which is deemed to accrue or arise in India within the meaning of Section 9(1)(i) of the Act and is extended not beyond that. Thus, placing the reliance on the provisions of Explanation (b) to Section 9(1) of the Act and Board's Circulars mentioned above by the Ld. Counsel for the assessee to contend that refunded duty drawback and central excise rebate actually received in India by the assessee-company for and on behalf of non-resident overseas buyers cannot be brought to tax, is totally misplaced and untenable.

9. Coming now to the question as to whether the amounts received in India for and on behalf of non-resident on account of duty drawback and central excise rebate is an income chargeable to tax within the meaning of the Income-tax Act, we may observe that excise rebate and Custom duty drawback belonging to the foreign buyers has actually been received in India as incidental to the business activities of the foreign buyers, who have thereby got substantial relief of revenue in nature. The purchase price, inclusive of duties payable thereupon, of the tea has already been realised from the non-resident by the assessee-company at the time of purchase of goods and the assessee-company has also received thereafter the refunded excise rebate and custom duty in India for and on behalf of the foreign buyers. It is an admitted position that normally the purchases take place at one point of time in India and the excise rebate and duty drawback are actually received much later from the date of actual export of goods to the foreign buyers. There is no way to correlate of such rebate and duty drawback received much

later from the date of purchase with the cost price to the foreign buyers. The receipt by way of such rebate and duty drawback is one kind of business benefit received or realised by the foreign buyers in India through the assessee-company. In view of retrospective insertion (with effect from 1-4-72) of Section 28(iiic) read with Section 2(24)(vc) (w.e.f.

1-4-72), any duty of customs or excise repaid or repayable as drawback to any person against exports under the Customs and Central Excise Duty Drawback Rules, 1971, is taxable under the head "Profit and Gains of business or profession" with retrospective effect for and from assessment year 1972-73. The assessee has also not supplied any materials or evidences on the basis of which it could be concluded that the refunded excise rebate and custom duty drawback is not an income of the foreign buyers in India. The assessee has also not supplied any materials or evidences to show that the said rebate and duty drawback has been adjusted or appropriated against the cost of goods purchased during the year under appeal. Since the said rebate and duty drawback is received in India and/or held by the assessee for and on behalf of foreign buyers and has not been appropriated against the cost of purchases made in India during the year under consideration, the same is clearly includible in the total income of a non-resident foreign buyers as per provisions of Section 5(2)(a) of the Act and hence is chargeable to tax under the Act.

10. As observed above, where a non-resident purchases goods within India by having a business connection here and earns profits by sale outside India, his case could be governed by Section 9 of the Act as by virtue of the statutory fiction created under Section 9 of the Act, the profits earned by sale outside India could be deemed to have accrued and liable to be apportioned in the manner specified in the Section 9 of the Act, and only such cases of treating the part of profits earned outside India as deemed to have accrued or arise in India are only excluded by virtue of Clause (b) of the Explanation to Section 9(1)(i) of the Act. The Assessee's case does not fall within this category. The assessee's Case is of income actually received in India by and for and on behalf of the non-resident foreign buyers in the nature of refunded such rebate and duty drawback, which are taxable by virtue of Section 28(iiic) read with Section 2(24)(vc) of the Act.

11. It can, therefore, now, be safely held that there being income in the nature of refunded custom duty drawback and excise duty chargeable to tax in the hands of the non-resident foreign buyers, the assessee-company could be lawfully treated as the agent under Section 163 of the Act for the asst. year under consideration to assess the said refunded central excise rebate and duty drawback, which were received in India and were accordingly held by the assessee-company for and on behalf of non-resident foreign buyers. On the facts and circumstances of the case, and in view of the fact that there being a continuous business activity of the non-resident in India of purchasing tea through the assessee-company, the non-resident being in receipt of income from or through the assessee-company and there being a case where the refunded central excise rebate and custom duty drawback are held by the assessee-company for and on behalf of the non-resident foreign buyers, the assessee company has been rightly treated as the agent of the said two non-resident foreign buyers within the meaning of Section 163(1)(b) or (c) or (d) in respect of said refunded duty drawback and central excise rebate for the year under consideration.

12. The decisions forming part of the compilation of 25 pages filed by the assessee-company holding that unless and until it is found and held that non-resident is liable to pay tax, the question of appointing an agent under Section 163 and making him liable to pay tax cannot arise, are of no help to the assessee-company and are out of the context as in much as we have already held above that the non-resident foreign buyers are liable to pay tax in respect of income in the nature of refunded custom duty drawback and excise duty rebate received in India on their behalf and thus found includible in the total income of the non-resident foreign buyers within the meaning of Section 5(2)(a) of the Act. The decision of Hon'ble Bombay High Court in the case of Abdullabhai Abdul Kader v. CIT (1952) 22 ITR 241 was decided in context of Section 42 of 1922 Act corresponding to Section 9 of the 1961 Act.

It was held therein that the non-resident had a business connection in India within the meaning of Section 42(1) of 1922 Act (corresponding to Section 9 of 1961 Act) and the assessee was rightly treated as an agent of the non-resident. In the case of CIT, Bombay South v. Ramanarayan Rajmal (1953) 24 ITR 442 the Bombay

High Court held that in view of provisions of Section 42(1) of 1922 Act (corresponding to Section 9 of 1961 Act) the agent was liable to be charged only on income accruing to non-resident through dealings with him. In the case in hand, the assessee-company is made liable to be charged only on the amounts received by it for and on behalf of the non-resident foreign buyers and not on any other income of the non-resident foreign buyers. The other decisions of Calcutta High Court reported in (1978) 115 ITR 323, of the Hon'ble Supreme Court reported in (1969) 71 ITR 457 and of Bombay High Court reported in (1969) 73 ITR 283 being rendered in the context of Section 42 of 1922 Act (corresponding to Section 9 of 1961 Act) are of no assistance to the assessee as distinguishable on facts and circumstances of the case in hand. We may further observe that we have borne in mind the principles laid down in all these decisions while deciding the issue in hand. We would also like to clarify here that the assessee's case does not fall within the ambit of Section 160(1)(i) of the Act as the assessee-company has not been treated as an agent under Section 163 in respect of the deemed accrual or arising of income of a non-resident specified in Sub-section (1) of Section 9 of the Act but has been treated as an agent under Section 163 in respect of the income received in India by or on behalf of the non-resident foreign buyers as specified under the provisions of Section 5(2)(a) of the Act. We further observe that no other point has been argued on behalf of the assessee-company in these appeals.

13. It is pertinent to mentioned here that the Hon'ble Supreme Court in the case of CIT v. R.D. Agarwal & Co. (1965) 56 ITR 20 (24) (SC) has held that the fiction embodied in Section 9 of the Act, corresponding to Section 42 of 1922 Act does not apply to the income which actually accrues or arises to the assessee in India. We further find it appropriate to make reference to the following decisions in support of the view that the provisions of Section 9 and Explanations to Section 9(1)(i) apply only to a case where the income is deemed, under Section 9(1)(i), to accrue or arise in India and do not apply to a case where the income actually does accrue or arise or is received in India.

4) CIT v. Annamallain Timber Trust Ltd. (1950) 18 ITR 333, 349 (Mad.) 14. It is well settled that tax is attracted at the point when the income is earned, taxability of income is not dependent upon its destination or the manner of its utilisation. It

has to be seen whether at the point of accrual the amount is of revenue nature; if so, the amount will have to be taxed; this has been observed by the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT (1997) 227 ITR 172 (SC). In the instant case, the receipt of amounts in India by way of central excise rebate and custom duty drawback for and on behalf of non-resident foreign buyers is of revenue nature and it is immaterial as to how the same would be utilised and appropriated by the foreign buyers after receiving the same at outside India.

15. For the reasons aforesaid and considering our view expressed we hold that the passing of the impugned order under Section 163 of the Act against the assessee-company and consequently treating the assessee-company as an agent under Section 163 of the Act for the two aforesaid foreign buyers in respect of refunded duty drawback and central excise rebate received in India by the assessee-company for and on behalf of said two non-resident foreign buyers is fully within jurisdiction, legal, valid, proper and justified. The impugned appellate order passed by the CIT(A) is, therefore, upheld.16. The result, therefore, is that the appeals filed by the assessee-company in the matter of an order passed under Section 163 of the Act for the year under appeal are dismissed.

17. Coming now to the appeal being ITA No. 811(Cal)/1997 filed by the department, we find that the CIT(A) has held that no income would arise on the amounts received by way of central excise rebate or duty drawback relating to purchase made by the concerned foreign buyers as Section 9(1)(b) provides that "no income shall be deemed to have accrued or arisen in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export" and it would go to reduce the cost of purchase to the foreign parties.

However in view of our discussion and decision given in foregoing paragraphs while deciding the matter arising out of an order passed under Section 163 of the Act, we hold that the CIT(A) has erred in relying upon the provisions of Section 9(1)(b) of the Act as the income on account of central excise rebate or custom duty drawback actually received in India by the assessee-company for and on

behalf of non-resident foreign buyers is includible in the total income of the non-resident under the provisions of Section 5(2)(a) of the Act and not as income deemed to have accrued or arisen in India within the meaning of Section 9(1)(i) of the Act. The Explanation (b) to Section 9(1)(i) is not at all applicable to the case in hand. We have also already held above that the amounts by way of central excise rebate and custom duty drawback received and held in India by the assessee-company for and on behalf of the non-resident foreign buyer would thus, in the facts circumstances of the case, not go to reduce the cost of purchase made by the foreign buyers in such a manner so that it would not attract any liability of tax in India. The view of the CIT(A) that no income would arise on the amounts received in India by way of central excise rebate and duty drawback is, therefore, not justified and correct. The contention of the assessee company that in view of the CBDT Circular No. 20 dated 7-7-64 read with Explanation (b) to Section 9(1)(i) of the Act, the refund of central excise rebate and duty drawback clearly goes to reduce the cost of the two overseas buyers and the same, therefore, are not chargeable as income under Income-tax Act, 1961 has no merit and is fit to be rejected. In this view of the matter and considering the reasons given above, the order of the CIT(A) is set aside and that of the A.O. is restored.

18. In the result, we hold that the A.O. was justified in computing the total income at Rs. 5,19,595/- on account of central excise rebate and custom duty drawback received and held in India by the assessee company for and on behalf of non-resident viz., State Establishment Food Stuff Trading, Bagdad, Iraq, by treating the assessee as an agent under Section 163 of the Act of the said foreign buyer viz., State Establishment Food Stuff Trading, Bagdad, Iraq.

19. Before parting with this appeal, we may observe that the impugned CIT(A)'s consolidated order dated 4-12-96 had arisen out of two separate orders, both dated 28-3-94, passed by the Ld. A.O. under Section 163/148/143(3) of the Act in respect of assessment year 1988-89 being related to two non-residents foreign buyers, viz., State Establishment for Food Stuffs Trading, Bagdad, Iraq and M/s. MISR Import and Export, Cairo, A.R.E., UAR, but there is only one departmental appeal before us stated to be in connection with both non-residents, viz., State Establishment Food Stuff Trading, Baghdad, Iraq and M/s. MISR Import & Export,

Cairo, A.R.E., UAR. It was, however, clarified at the time of hearing that this appeal has been filed in respect of non-resident viz., State Establishment Food Stuff Trading, Baghdad, Iraq. We may further observe that the department had initially enclosed a copy of assessment order pertaining to another foreign buyer of USSR along with the Memorandum of Appeal filed before the Tribunal resulting in to a mistake in Tribunal's order dated 19-10-2001 passed in this appeal, which was later set aside and recalled by the Tribunal on a petition filed by the assessee-company under Section 254(2) of the Act by directing the department to file a copy of correct assessment order and to fix the appeal for fresh and a de novo hearing. Now, the department has filed a copy of assessment order in respect of foreign buyer, viz. State Establishment for Food Stuffs Trading, Baghdad, Iraq, in respect of which, inter alia, the CIT(A) has passed the impugned order and which is the subject matter of this appeal. Both the parties have also submitted their contentions in the light of assessment order pertaining to said foreign buyer i.e.

State Establishment Food Stuff Trading, Baghdad, Iraq. Hence, this appeal is treated in respect of only one of two non-residents, viz.

State Establishment Food Stuff Trading, Baghdad, Iraq and is disposed of accordingly.

20. In the result, the appeals being ITA Nos. 166 and 1667(Cal)/97, filed by the assessee are dismissed, and the appeal being ITA No.811(Cal)/97, filed by the revenue is allowed.

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