

industrial Development Service Vs. Acit

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jan-01-2004

Judge : R Mehta, Vp, R Bahadur

Appellant : industrial Development Service

Respondent : Acit

Judgement :

1.The following grounds are raised in this appeal directed against the order passed by the CIT(A) : 1. " On the facts and circumstances of the case the Commissioner (Appeals) is wrong in disallowing the claim u/s 80-O of the Income Tax At in respect of receipts from International Executive Service Corps and Mr. M.J. Stevens.

2. The Commissioner (Appeals) is wrong in coming to the conclusion that the payment received from International Executive Service Corps and M.J. Stevens is not for technical and professional services.

3. The Commissioner (Appeals) is wrong in not allowing deduction u/s 80-O on 50% of the gross fee receipt less expenses incurred outside India in earning such income.

4. The Commissioner (Appeals) is wrong in holding that deduction u/s 80-O is allowable after taking into account expenses incurred in India.

5. The additions made on account of 80-O to the disclosed income are against the law and facts of the case." 2. At the outset, the Id. Counsel stated that he was not pressing for our consideration Ground Nos. 3 to 5 and these are accordingly being rejected.

3. Coming to the first two grounds, which raise an identical issue, the brief facts are as follows : - 4. The appellant in this case is a company "engaged in the business of demand/market survey, techno economic feasibility reports" etc. Under the head "Professional Fees" it had shown receipts to the tune of Rs. 57,87,798/-. The assessee initially claimed a deduction u/s 80-O to the tune of Rs. 73,242/- but it was later on revised by means of a letter to Rs. 12,38,374/-.

5. A perusal of the order of the AO shows that the aforesaid claim had been made in respect of the receipt from four parties but in the present appeal the dispute is with reference to the sum of Rs. 49,626/- received from Michael J. Stevens and an amount of Rs. 23,01,873/- received from International Executive Service Corps (hereinafter referred to as IESC). The AO asked the assessee to file the details pertaining to the work done for the aforesaid two parties as also to file evidence in support of the receipts having been received in convertible foreign exchange. The assessee was also asked to file the copies of the agreements entered into with the aforesaid parties. In response to the requirements of the AO, the assessee filed written submissions on three separate dates.

6. In considering the assessee's claim u/s 80-O, the AO at the outset summarized the relevant provisions and which according to him specified two categories, the first pertaining to the consideration received for the use outside India of any patent, invention, model, design, secret formula or process and the second pertaining to the consideration for technical or professional services rendered or agreed to be rendered outside India to a foreign Government or an enterprise.

7. Coming to the evidence, the AO at the outset referred to the agreement entered into by the assessee with IESC and a perusal thereof revealed that though the nomenclature used in the agreement for the assessee was that of "an independent contractor/advisor" but it was the later part of the agreement, which defined the relationship between the parties and as per the agreement itself, the responsibility

of the assessee was to : - 4. Follow up implementation of each project to ensure its satisfactory completion 5. Maintain close coordination with IESC through effective and timely communication." 8. The AO thereafter referred to the clause pertaining to the remuneration to be paid to the assessee and which stated : - "for each project developed, started and completed IDS will be entitled to receive remuneration of the equivalent of the rupees equivalent of US 2000 dollars per project in increments in accordance with the below listed schedule :Project acceptance by IESC, Stanford 25 percentVolunteer arrival at project location 50 percentCompletion of project 25 percentTotal 100 percent " 9. The last was a referred by the AO to the provisions for reimbursement of expenses by IESC.10. As regards the receipts from Michael J. Stevens, the evidence on which the assessee relied was the copy of a letter dated 18th September, 1992 from the said party to the assessee and which referred to cheque for US \$ 1000 being enclosed.

11. The AO on the basis of the aforesaid asked the assessee to justify its claim u/s 80-O in respect of IESC and M.J. Stevens and by means of a written communication, the assessee submitted as under : - "the assessee provides technical and commercial services to IESC. Based on its experience the company identifies the areas where (c) Changes in operational parameters which could lead to major productivity increases; and (d) technological improvements which could enhance the competitiveness." 12. According to the assessee as soon as the necessary identification has been made in respect of the companies, which require the aforesaid service, the necessary information was conveyed to the IESC, which in turn located various individuals/companies, with were suitable for providing the various services to the Indian companies. The plea in other words was that the amount received from IESC was in lieu of rendering technical advice.

13. As regard M.J. Stevens, the assessee by means of written submissions stated that "the company assisted the consultant for making technical of requirement of technology by various industrial units in India".

14. In considering the submissions with reference to IESC, the AO in examining the agreement between the parties at the outset opined that the purpose of payment to the assessee was to the furnishing of any technical or commercial

information but it was for the purpose of developing, starting and completing a project in India. The following observations of the AO are relevant : - "i) the assessee company is acting on behalf of IESC in India in term of para 3 page 1 of the agreement - "IDS will provide assistance as a representative ... in New Delhi and other cities in India." It is acting as a representative of the foreign party in India.

ii) The scope of responsibility of the assessee company is not merely supply of "technical & commercial services" to the foreign party but is much wider and encompasses the complete gambit of activities from business promotion for the foreign party, procurement of business for it and executing project for in India.

iii) Although the assessee has shown the receipts from IESC under the head "professional fee' received on supply of "technical know-how, and Upgradation of technology' (submission dated 1411.1995) the agreement clearly states the IESC is making payments nor for supply of the above services but for developing, starting and completing of projects in India.

iv) The condition for grant of deduction u/s 80-O remain unfulfilled in the present case on account of the assessee receiving receipts from foreign party not on account of technical and professional services rendered outside India but because of execution of projects on behalf of a foreign party in India." 15. The AO further noticed as a fact that for A.Y. 1992-93, the assessee had received for IESC a sum of Rs. 18,61,818/- but on which no claim for deduction has been made u/s 80-O. According to the AO, the intention behind section 80-O was to grant deduction on certain specified receipts, which fulfilled the conditions laid down in the section and not on each and every receipt from a foreign source.

Further, according to the AO the tax incentive contemplated by section 80-O was basically for encouraging India companies to export their know-how and skill abroad and mere supply of particulars or bio-data of Indians willing to work abroad or for that matter their selection or recruitment in India were situations, which fell short of the requisites necessary for attracting the benefit of the section.

Reliance was placed on the judgment of the Hon'ble Supreme Court in 175 ITR 523 as also 132 ITR 637 (Bombay). The AO further summarized the provisions of section 80-O with reference to the facts of the assessee's case as under : - "i) the receipt of foreign exchange is on account of developing and completing projects in India on behalf of IESC which does to qualify for deduction u/s 80-O and ii) the projects are being executed in India and therefore there is no activity outside India for which the assessee is receiving foreign exchange.

iii) it is not the assessee's supply of technical know-how which earns foreign exchange but its project execution activity in India which earns the foreign exchange. This has been clearly stated in the terms of the agreement." 16. As regard the receipts from M.J. Stevens the AO observed that the assessee had not been able to furnish any supporting evidence of documents, which would show how the receipts from this party qualify for deduction u/s 80-O. In the final analysis, the AO rejected the claim u/s 80-O with reference to the receipt from IESC and M.J.Stevens.

17. Before the CIT(A), the submissions on behalf of the assessee were to the effect that the AO had not fully comprehended s to what constituted a "project" and in so far as "professional services" were concerned these had not been defined in the I.T. Act and therefore the ordinary dictionary meaning was to be adopted. Reliance was placed on the judgment of the Hon'ble Supreme Court in 195 ITR 81 emphasizing that the expression "technical services" had been given a wider meaning so as to include "professional services" as well. According to the assessee, the AO had failed to take into account the amendment in law w.e.f. 01.04.92 whereby the technical and professional services had also been included to qualify for deduction u/s 80-O. According to the assessee necessary conditions for deduction u/s 80-O stood fulfilled.

18. As regards the receipts from M.J. Stevens, the submissions on behalf of the assessee was that this party was in International Business Consultant in the USA and he had specialized in other projects worldwide for transfer of technology from USA to India and the assessee company assisted it in India by making technical appraisal of the requirements of technology by various industrial units in India.

According to the assessee, the services to both the aforesaid parties were covered by Circular No. 700 dated 23rd March, 1995 issued by the CBDT and therefore the deduction be allowed.

19. In considering the aforesaid submissions with reference to the relevant provisions of law, the CIT(A) proceeded to uphold the action of the AO observing as under - "After carefully considering all relevant facts I find that the objections raised in the assessment order have not been met by the appellant. an elementary reading of the section reveals that deduction under section 80-O will apply to payments received in convertible foreign exchange in India for .

i) The use outside India of any patent, invention, model, design, secret formula or process on similar property right or ii) Information concerning industrial, commercial or scientific knowledge, experience or service made available or provided to foreign Government or enterprise.

iii) For technical or professional services rendered or agreed to be rendered outside India to such foreign government or enterprise.

Circular No. 700 dated 23.3.1995 states that as long as the technical or professional services are rendered from India and are received by a foreign Government or enterprise outside India, deduction under section 80-O would be available to the person rendering the services even if the foreign recipient of the services utilizes the benefit of such services rendered in India.

It is however, seen that the appellant is getting remuneration for services rendered for projects in India and it would not be entitled to any deduction u/s 80-O even on the basis of circular No. 700 discussed above. It is also be essential to mention here that the clause for remuneration in the Agreement with IESC reads as under :- for each project developed, started and completed IESC will be entitled to receive remuneration of the equivalent of the rupee equivalent of US \$ 2000 per project.

It is thus clear that the appellant company is to receive payment only in Indian Rupees and not in foreign currency taking payments received from IESSC totally

out of the ambit of deduction u/s 80-O. The fact in regard to M/s. M.J. Stevens are similar. Although copy of agreement specifying the payment of remuneration has not been filed it is clear that the payments are received for services rendered for projects in Indian.

On and objective consideration of the above facts it is clear that the appellant's case for deduction u/s 80-O is not justified in respect of these two payments and the deduction has rightly been denied by the A.O. the same is confirmed." 20. Before us the Id. counsel for the appellant reiterated the arguments advanced before the tax authorities contending that the various conditions stipulated by section 80-O stood fulfilled and in the same connection, the Id. counsel referred to the Board's circular dated 23rd March, 1995 supra, which according to him was reproduced in the commentary of Chaturvedi & Pithisari Vol. II and page 3778. The Id.

counsel also referred to the agreement between the assessee company and IESC appended at pages 1 and 2 of the paper book and also took us through the "short note" appended at pages 3 and 4 of the paper book and which according to him detailed the "technical services" provided to IESC, USA. The other documents to which the Id. counsel adverted were pages 5 to 99 of the paper book and which according to him contained the copies of the agreements between IESC and local parties.

On a specific query from the Bench, the Id. counsel very fairly stated that the assessee company was not instrumental in preparing these agreements. A specific reference was made to pages 9 and 10 of the paper book as also pages 5, 6, 12, 40 and lastly page 76 of the paper book.

21. In support of his arguments, the Id. counsel placed reliance on the decisions reported in 231 ITR 148 (SC) , 209 ITR 555 (Bombay), 227 ITR 380, 132 ITR 637, 175 ITR 523, 121 ITR 751 and 54 ITD 488.

22. The Id. DR on the other hand vehemently supported the orders passed by the tax authorities. The subsequent arguments advanced were a reiteration of the reasons recorded by the tax authorities in rejecting the assessee's claim. It was

emphasized that the assessee was not exporting any know-how or skill outside the country but it was only collecting and passing on information and receipt for such work were not eligible for deduction u/s 80-O. By reference to pages 37, 38, 40, 42 up to 44, it was sought to be impressed upon us that Shri V.K.Laroia, the Managing director of the assessee company had been designated as "Country director" of IESC in India. It was stressed that the said person was a representative of IESC and he was not engaged in any activities, which could be classified as rendering of technical services. According to the Id. DR, it clearly emerged from the agreement between the parties that some projects were being executed in India for which the assessee company rendered some assistance and some payment was made in lieu of such assistance and nothing else more so, the type of services which were to be rendered or the type of receipts, which were referred to the Section 80-O. The Id. DR also referred to the findings of the CIT(A) about the payments being received in India currency and not in convertible foreign exchange. In support of the Revenue's case, the Id, DR placed reliance on 132 ITR 637 and 175 ITR 23. In reply, the only submission made by the Id. counsel for the assessee was that the amount had been received in convertible foreign exchange and in support thereof, inward remittance certificates and been filed but we do note from the paper book submitted during the present proceedings that such certificates have not been placed on record. So we really do not wish to comment on this appeal of the matter.

24. We have examined the rival contentions and have also perused the orders passed by the tax authorities. the decisions cited at the bar have also been taken into account along with the factual aspects of the matter highlighted before us by the parties vis-a-vis the material placed on the paper book filed on behalf of the assessee.

25. At the outset, we would refer to some of the decision relied upon and in this direction, we take up those relied upon by the assessee's counsel. He has cited 231 ITR 148 (SC). which deals with an agreement between an Indian company and a Nepalese company, the latter owning and operating a hotel in Khatmandu. for ensuring better operational results and promotion of business, the foreign enterprise desired that its operations be taken over by the India company w.e.f. 1st

December, 1969 on the terms and conditions set out in the agreement. The other fact we do not proceed to discuss, coming straight away to the fact that the assessee's requires for approval to the CBDT made under section 80-O came to be rejected on the ground that the agreement merely provided for rendering managerial services and these did not amount to technical services. The Indian company filed a writ petition before the Hon'ble Delhi High court, which came to be allowed and on further appeal to the Supreme Court by the CBDT, the decision of the Hon'ble Delhi High Court came to be affirmed. The main question before the Supreme Court was that technical services included professional services and the following observations at page 150 of the report are quite relevant : - "The main purpose of section 80-O is the spread by an Indian assessee of any patent, invention, model, design, secret formula or process or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill of the assessee for use outside India and in that process to receive income to augment the foreign exchange resources of the country. The assessee can also make available to the foreign enterprise, technical and professional service, expertise of which it possesses for earning foreign exchange for the country." 26. Their Lordships of the Hon'ble Supreme Court have stressed on the twin objects behind the introduction of section 80-O and these being the use/spread of Indian expertise and skill outside India and secondly to receive income which would augment the foreign exchange reserves of the country.

27. Another decision relied upon in that of the Hon'ble Bombay High Court in 209 ITR 555 but a perusal thereof shows that this pertains to the weighted deduction u/s 35-B read with section 80MM. The Tribunal had taken the view that the information, which the assessee in question imparted to its foreign clients fell under clause (IV) of section 82MM(2) and therefore it directed the ITO to examine the claim of the assessee and allow weighted deduction on the eligible expenditure. This decision in our opinion does not help the assessee's case where the section under consideration is 80-O and whose twin objects have already been highlighted by us.

28. There was also a reference to 227 ITR 380 (AAR) and this was the case of a non-resident, who had received fees from abroad. he in fact had entered into a

consultancy agreement with a Swiss company which included the study of the petroleum section, analyzing Government policies and identifying opportunities for supply of petroleum products to various customers by the Swiss company. the on-resident was not an employee of the foreign company and the advice was delivered abroad. On the aforesaid fact. the AAR took the view that the services rendered amounted to technical services to a foreign enterprise and therefore entitled for deduction u/s 80-O. In the present case before us, it has been highlighted by the tax authorities as also the Id. DR before us that the entire concentration of the foreign organization i.e. IESC is in India and the Id. DR in fact highlighted before us that the Managing Director of the assessee company has been mentioned in quite a few of the documents placed on the paper book by the assessee itself as a "Country Director". We in fact also enquired from the Id. counsel during the course of the hearing as to whether the assessee company had been instrumental in the preparation to the three agreement, copies thereof being placed at pages 5-99 of the paper book and its reply was in the negative.

29. Another decision relied upon was that of the Hon'ble Delhi High Court in 121 ITR 751 and that once again pertained to an approval to be accorded by the CBDT to an agreement u/s 80-O. The assessee company had entered into an agreement with BBC by means of which the former was to undertake an audience research study in Hindi speaking areas in India state to assessee the radical hastening habits of the people and to use their technical knowledge to advice on a questionnaire in the proposed audience research programmes to be broadcast in India by the BBC. On the aforesaid facts. their Lordships took the view that the agreement was required to be approved u/s 80-O for purposes of deduction under the said section. This case has been delivered on its own facts but once again it highlights the use of the knowledge/information abroad.

30. In the decision of the Delhi Bench of the Tribunal reported in 54 ITD 488 it had been held on the facts of that case that services rendered by the assessee to foreign ship owners were in the nature of technical and professional services and therefore the brokerage earned in convertible foreign exchange through banks in Indian rupees satisfied the requirement of section 80-O making the assessee entitled to the requisite deduction. The assessee in that case was liaising

between the foreign ship owners and Indian companies intending to send their cargo ahead. He was signing agreements on behalf of the foreign ship owners and had lower supplying specifies information to both the parties gathered from available sources as also by his owner skill.

31. Coming now to the decisions relied upon by the Revenue the first is 132 ITR 637 (Bombay). This was the case of an assessee, which was acting as an employment/precutting bureau. It was selecting prospective candidates, collecting their bio-data and sending their names to foreign employers. The entire service were rendered in India and on the aforesaid facts their Lordship of the Hon'ble Bombay High Court took the view that the information provided did not partake the nature of "industrial, commercial or scientific knowledge or experience or skill" made available for "use outside India". The deduction u/s 80-O was not allowed. This case can be treated as somewhat akin to the facts of the present case where in our opinion the agreement between the parties is "India based" and information which is stated to be passed to IESC abroad is only incidental thereto.

32. The order decision relied upon by the Revenue was that of the Hon'ble Supreme Court in 175 ITR 523 and this pertained to the Branch Office of an Indian company doing business in a foreign country and which was not treated to be a "foreign enterprise" and therefore the condition that the agreement should be with a foreign company or with a foreign enterprise was not satisfied. This decision in our opinion does not advance anybody's case much less than of the Revenue.

33. By referring to the aforesaid judgments as also taking into account the CBDT's Circular No. 700 dated 23rd March, 1995, we on the facts of the present case held that the assessee was not entitled to the deduction u/s 80-O vis-a-vis the agreement with IESC. It emerges quite clearly from the agreement between the parties that the assessee was rendering services to the foreign enterprise only in India and which required the coordination of certain promotional activities identification of a potential clarinet, finalizing of a project agreement although as already observed earlier, the Id. counsel in response to a query from the Bench categorically stated that the assessee company played no role in the preparation of any such agreement. The only other thing which has been highlighted in the

agreement between the parties, is the maintenance of a close coordination. There is also a provision for reimbursement of expenses although this aspect of the matter does not appear to be in dispute before the Tribunal and nothing is highlighted before us by either party.

34. It is also quite apparent from the material placed on record that most of the work is being done by the assessee company and IESC comes into the picture probably at the finalisation stage of an agreement with an Indian client and it is not a fact which could be overlooked that the Managing Director of the assessee company is described as the representative of IESC in the agreement. At page 10 of the paper look Shri V.K. Laroia, the Managing Director of the assessee company is described as "Director of Operations for India". This is also the position at page 45 and page 46. We had earlier referred to the judgment of the AAR where it has been specifically noted by the Authority that the non-resident was not an employee of the foreign enterprise. In the agreement between the assessee company and IESC, the description is not that of an employee but the description of Shri V.K.Laroia and the Director of Operations for India of IESC takes the agreement somewhat into the realm of an employer employee relationship although this observation of ourselves is for the limited purpose of deciding whether the agreement between the parties is of a nature, which would fall for consideration u/s 80-O. Another fact to which we would like to refer is the non-deduction claimed u/s 80-O in A.Y.1992-93 vis-a-vis a substantial amount of Rs. 18.61 lakhs received from IESC pursuant to the same very agreement. Much was made by the Id. DR of the fact that the amount in the year under appeal had not been received in convertible foreign exchange but this plea is not supported by reference to any evidence since the AO clearly notes in the assessment order that "in the assessee's case while the activity of the assessee is leading to earning of foreign exchange." 35. In the final analysis, we on the facts of the present case uphold the action of the tax authorities in rejecting the claim u/s 80-O in respect of the receipts from IESC. We also uphold the action of the tax authorities in respect of the receipts from M.J. Stevens observing that the factual aspect has remained the same before the Tribunal as it was before the tax authorities and nothing much has been argued before us on behalf of the assessee and which would bring about a view from outside quite contrary to the one expressed by the tax authorities.

