SUREME COURT OF INDIA

Petron Engineering Construction Pvt.Ltd.

Vs.

Center Board of Direct Taxes

(M.M. Dutt, S. Natrajan J.)

13.12.1988

JUDGMENT

DUTT, J.

This appeal by special leave is directed against the judgment of the Division Bench of the Bombay High Court dismissing the appeal preferred by the appellants against the judgment of a Single Judge of the High Court dismissing the writ petition of the petitioners whereby they challenged the order dated January 5 1982 of the respondent No. 1 the Central Board of Direct Taxes rejecting the application of the appellant-company under section 80-O of the Income Tax Act, 1961, hereinafter referred to as the Act'.

By two agreements one dated April 5 1980 and the other dated August 14,1980 entered into between the appellant- company and Toyo Engineering India Ltd. (for short 'Toyo India'). the appellant-company agreed to render technical services in respect of Iraqi Storage Terminal Project Installations in consideration of payment to it by way of fees payable under the said agreements. In the said agreement dated April 5,1980 it is stated inter alia that Toyo India has been engaged by Toyo Engineering Corporation (for short 'TEC'), a Company organised and existing under the laws of Japan having its registered office at Tokyo, Japan for the Project of Storage Terminal of State Organisation for Oil Project. a public Organisation organised and existing under the law of Iraq. Toyo India has in its turn engage the appellant-company to perform certain construction an6 related services by the appellant-company of the project work as set out in the said agreement. The appellant-Company by its letter dated October 23, 1980 requested the respondent No. 1, the Central Board of Direct Taxes, for the approval of the said agreements under section 80-O of the Act. The respondent No. 1 after giving the appellants a hearing, by its order dated January 5, 1982, refused to approve the said agreements for purposes of section 80-O of the Act inasmuch as in the view of the respondent No. 1, the essential conditions laid down in section 80-O were not satisfied. The respondent No. 1 in its said order pointed out inter alia that according to the said agreements, the contract price was received by the appellant-company from Toyo India, an Indian Company. In other words, income by way of royalty, commission, fees, etc. had not been received by the appellant-company from the Government of a foreign State or a foreign enterprise, and that the agreements had been entered into by the appellant- company with Toyo India, and Indian company, and not with a foreign State or a foreign enterprise. Further, it was stated by the respondent No. 1 that as there was no private of contract between the appellant-company and the foreign enterprise, it could not be said that the income had been received by the appellant-Company in consideration of

the use outside india of patents inventions etc. made available or provided or agreed to be made available or provided to a Government of a foreign State or to a foreign enterprise or in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the appellant-company.

Being aggrieved by the said order dated January 5 1982 of the respondent No. 1 refusing to approve the said two agreements the appellants filed a writ petition before the Bombay High Court challenging the said order. A learned Single Judge of the Bombay High Court by his judgment dated June 23, 1986 dismissed the writ petition on the ground inter alia that the payment was not received by the appellant-company from the Government of a foreign State or a foreign enterprise and, as such, it was not entitled to any relief under section 80-O of the Act.

On appeal by the appellants against the judgment of the learned Single Judge the Division Bench of the High Court held that in order to attract the provision of section 80-O the payment must be received by an Indian company from the Government of a foreign State or a foreign enterprise. and that the words ' foreign enterprise" must have the colour from the words Government of a foreign State" and must be read to mean an enterprise of a foreign national or a foreign ownership. Further the words "foreign enterprise" could not he held to apply to an establishment or undertaking or branch or unit of an Indian company in a foreign country. Such establishment, undertaking, branch or unit might well be an enterprise, but not a foreign enterprise within the meaning of the said words. In that of the matter, the Division Bench of the High Court as stated already, upheld the judgment of the learned Single Judge and dismissed the appeal preferred by the appellants. Hence this appeal by special leave.

At this stage we may refer to section 80-O of the Act as it stood during the assessment year 1980-81 which is the relevant period for this appeal. Section 80-O provides as follows:

"80-O, Deduction in respect of royalties, etc. from certain foreign enterprises.-Where the gross total income of an assessee, being an Indian company, includes any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprises in consideration for the use outside India 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 made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee or in consideration of technical services rendered or agreed to be rendered out-side India to such Government or enterprise by the assessee under an agreement approved by the Board in this behalf and such income is received in convertible foreign exchange in India or having been received in convertible foreign exchange outside India or having been converted into convertible foreign exchange outside India is brought into India by or on behalf of the assessee in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange there shall be allowed in accordance with and subject to the provisions of this section a deduction of the whole of the income so received in or brought into India in computing the total income of the assessee: Provided that the application for the approval of the agreement referred to in this sub-section is made to the Board before the 1st day of October of the assessment year in relation to which the approval is first sought: Provided further that approval of the Board shall not be necessary in the case of any such agreement which has been approved for the purposes of the deduction under this section by the Central Government before the Ist day of April 1972 and every application for such approval of any such agreement pending with the Central Government immediately before that day

shall stand transferred to the Board for disposal."

The following principal conditions must he fulfilled so as to attract the provision of section 80-O:

1. The assessee must be an Indian company.

2. The income by way of royalty commission fees etc. must be received by the assessee from the Government of a foreign State or a foreign enterprise.

3. The consideration shall be for the use outside India of any patent invention model design etc. made available or provided to such Government or enterprise by the assessee or technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee.

4. The agreement must be approved by the Board.

5. The income received by the assessee shall be in convertible foreign exchange.

6. The deduction shall be in respect of the whole of such income received in or brought into India. One of the principal points that is involved in this appeal relates to the interpretation of the expression "foreign enterprise". The respondent No. 1 refused to approve the agreements entered into by the appellants with Toyo India principally on the ground that Toyo India is not a foreign enterprise. According to the respondent No. 1 Toyo India is an Indian Company and cannot be regarded a foreign enterprise within the meaning of section 80-O. The learned Single Judge and the Division Bench of the High Court have also taken the same view and upheld the order of the respondent No. 1 refusing to approve the agreements. It is not disputed that Toyo India has been engaged by TEC. The latter Company is admittedly a foreign Company organised and established by the laws of Japan for the Project of Storage Terminal of State Organisation for Oil Project. By the said agreements Toyo India engaged the appellant-company to perform certain construction and related services for the project work as set out in the agreements.

It is urged by Mr. Rajagopalan learned Counsel appearing on behalf of the appellants that the High Court is wrong in its view that Toyo India is not a foreign enterprise. Counsel submits that the test of the expression "foreign enterprise" is the location of the enterprise which will clinch the issue. It is submitted that as the establishment of Toyo India with which we are concerned is a branch unit or on undertaking in Iraq it should be regarded a foreign enterprise within the meaning of section 80-O of the Act. According to the learned Counsel the concept of ownership for the purpose of deciding whether an enterprise is a foreign enterprise or not should not be introduced in section 80-O and if any enterprise satisfied the test of location or in other words if an enterprise is situate in a foreign country it should be held to be a foreign enterprise within the meaning of section 80-O.

On the other hand Dr. Gauri Shankar learned Counsel appearing on behalf of the respondents submits that the plain meaning of the words "foreign enterprise" is an enterprise having a foreign nationality. According to the learned Counsel a "foreign enterprise" means an enterprise created or established in a foreign country under the law of that country. If an Indian company opens an enterprise in a foreign country but does not get the enterprise registered under the law of that country it will in the view of the learned Counsel remain an Indian enterprise and not a foreign enterprise.

Before considering the contentions of the learned Counsel for both parties relating to the interpretation of the expression foreign enterprise" occurring in section 80-O we may refer to the legislative background. Under section 85-C of the act which was introduced by the Finance Act 1966 and which came into force w1th effect from April 1, 1961. Indian companies could obtain concession of the extent of 25 per cent of its income if the foreign exchange was received from a company which was neither an Indian company nor a domestic company. Section 80-O was inserted in the Act by the Finance Act 2 of 1967 and it came into force with effect from April 1, 1968. Section 80-O as it stood on that day provided that the payer should be a foreign company and the relief was enlarged to 60 per cent. Finance Act 2 of 1971 made an amendment in section 80-O changing the prayer from "foreign company" to "Government of a foreign State or a foreign enterprise" and enlarging the relief to 100 per cent. Even up to this day no change has been made in respect of the payer.

It thus. appears from the legislative background or the legislative changes that from 'foreign company" it has been changed into "Government of a foreign State or a foreign enterprise". It is apparent that the expression foreign enterprise" has been substituted for "foreign company" while the words "Government of a foreign State"have been inserted. There can be no doubt that the expression "foreign enterprise' is a wider term than "foreign company" "Foreign enterprise" will include within it also a foreign company Now a foreign company is a company incorporated under the called a foreign company. Thus in the case of a foreign enterprise which is a foreign company such company must be incorporated in accordance with the law of the foreign country in question. Keeping this in view the question that arises is whether a branch unit or establishment of an Indian company doing business in a foreign country can be said to be a foreign enterprise. In our view it is difficult to regard such branch unit or establishment a 'foreign enterprise" within the meaning of section 80-O of the Act. The interpretation of a term should be such as to be consistent with the things or objects that are included within it. In other words the meaning of the expression cannot be different for different objects included in the expression. If an Indian company having a branch unit or establishment in a foreign country cannot be regarded a foreign company then for the same reason a branch unit or establishment of an Indian company situate in a foreign country or doing business in such foreign country cannot be included within the meaning of the expression "foreign enterprise".

The test of location as contended by the learned Counsel appearing on behalf of the appellants is no doubt one of the tests for deciding whether an enterprise is a foreign enterprise or not within the meaning of section 80-O of the Act but that is not the only test. In order that an enterprise can be called a foreign enterprise for the purpose of section 80-O there can be no doubt that it has to be located in a foreign country. The High Court has decided the issue on the ground of foreign ownership. Undoubtedly. ownership is also a criterion for deciding whether an enterprise is a foreign enterprise or not. But again that is not the sole criterion or test and as has been observed before location of an enterprise is also a test for deciding whether an enterprise is a foreign enterprise or not. Now we may consider the contention of Dr.Gauri Shankar that a "foreign enterprise" means an enterprise created and registered under the foreign law. The question of creation of an enterprise under the foreign law necessarily comes in as the expression foreign enterprise"includes within it a foreign company. Thus considering the above aspects and to give the expression "foreign enterprise" as used in section 80-O a consistent and reasonable meaning we are of the view that a "foreign enterprises an enterprise situate in a foreign country having been created or registered in accordance with the law of such country. It will now be profitable for us to refer to a decision of this Court in R. L. Arora v . State of Uttar Pradesh, [1964]6 SCR 784, where it has been

held that a literal interpretation is not always the only interpretation of a provision in a statute and the Court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which control the literal meaning of the words used. The expression "foreign enterprise" in section 80-O has been placed after the words "the Government of a foreign State". The view which we take as to the interpretation of the expression "foreign enterprise" finds support from the setting in which the expression has been placed and the circumstances in which the law came to be passed.

It is however urged by Mr. Rajagopalan learned Counsel for the appellants that it may be that a foreign enterprise can be defined in the manner we have done at the same time the definition of the expression on the basis of the test of location cannot altogether be ruled out. In any event it is possible to define the expression "foreign C enterprise" as an enterprise located outside India. Counsel submits that when two interpretations are possible to be made the interpretation which is favourable to the assessee should be adopted. In support of that contention learned Counsel has placed reliance upon a few decisions of this Court in Commissioner of Income Tax;. Lucknow v. D Madho Pd. Jalia, [1976] 105 ITR 179; Commissioner of income Tax v. Vegetable Products Ltd., [1973] 88 ITR 192 and Commissioner of Income Tax, Punjab v. Kulu Valley Transport Co. P. Ltd., [1970] 77 ITR 518. The above principle of law is well established and there is no doubt that. But the question is whether two views are possible to he taken on the interpretation of the expression 'foreign enterprise. In our opinion the expression "foreign enterprise" admits of only one interpretation. The interpretation which the learned Counsel for the appellants wants to put on the expression will not be full and complete and will render the meaning of the expression inconsistent with the objects included within it having regard to the change effected by the Legislature from 'foreign company' to the present expression "foreign enterprise" as has been already noticed. We are therefore-unable to accept the interpretation of the expression as submitted on behalf of the appellants.

We are also unable to accept the contention of the appellants that as the provision of section 80-O is an exemption provision, it should be construed liberally and upon such liberal construction. it should be held that Toyo India is a foreign enterprise. It is true that an exemption provision should be liberally construed but this does not mean that such liberal construction should be made doing violence to the plain meaning of such exemption provision. Liberal construction will be made whenever it is possible to be made without impairing the legislative requirement and the spirit of the provision. In our opinion to construe "foreign enterprise" in section 80-O as including within it an Indian company or a branch or unit of such company simply because it is located in a foreign country would be against the plain meaning of the term and the legislative intent. We may now Consider another argument of the appellants based on the objective of the provision of section 80-O. It is submitted by the learned Counsel for the appellants that the objectives of section 80-O are to encourage Indian companies to export their technical know-how and thereby augment the foreign exchange resources of the country. Counsel submits that the main objective of the section is to augment the foreign exchange resources of the country and that the appellant-Company having earned foreign exchange it should be held that the requirement of the section is satisfied and accordingly the appellant- Company is entitled to deduction of Income Tax. On the other hand Dr. Gauri Shankar points out that the main objective of section 80-O is not the earning of foreign exchange. According to him the principal purpose for which the deduction is allowed to an assessee is that contained in the speech of the Finance Minister on the floor of Parliament at the time of introduction of section 85-C into the Act. A copy of the speech has been handed over to us and has also been supplied to the learned Counsel for the appellants. In his speech. the Hon'ble Finance

Minister stated inter alia that 'some fiscal encouragement needs to be given to our industries to encourage them to provide technical know-now" and technical services to newly developing countries. In view of the speech it is urged by Dr. Gauri Shankar that the principal objective of section 80-O is to supply technical know-how and render technical services by Indian companies to newly developing countries. Counsel submits that it will he wrong to say that the principal objective of section 80-O is to augment the foreign exchange resources of the country. Although there is no indication in section 80-O regarding the supply of technical know-how or rendering technical services to newly developing countries yet it may be reasonable to infer from the said speech of the Finance Minister that at the time section 85-C was introduced in the Act one of the objectives was to supply technical know-how and render technical services to newly developing countries. Foreign exchanges can be earned by various other modes but that will not in all cases entitle the assessee to a deduction of Income Tax. Section 80-O. as it stood during the relevant period with which we are concerned grants cent percent deduction of tax. In the context of such deduction of tax it will not be unreasonable to presume that the principal objective of section 80-O is to supply technical know-how or render technical services to developing countries. In the circumstances the contention of the appellants that as the appellant-Company has fulfilled the principal object of section 80-O by earning foreign exchange the respondent No. I should have approved the agreements for the purpose of section 80-O cannot he accepted.

It is however submitted on behalf of the appellants that apart from the question as to what is the principal objective of section the appellant-Company has fulfilled both the objectives namely it has supplied technical know- how to a foreign enterprise through an Indian company and that it has also earned foreign exchange. it is urged on behalf of the appellants that although the appellant-Company may not have directly supplied technical know-how to or directly received fees commission etc. from the foreign enterprise in convertible foreign exchange in effect the appellant-Company having satisfied the objectives of section 80-O indirectly it is entitled to a deduction of Income Tax. In support of this contention much reliance has been placed two Single Bench decisions of the Bombay High Court which will be referred to presently. In Gannon Dunkerley and Co. Ltd. v. Central Board of Direct Taxes, [1986] 159 ITR 162, the facts are more or less similar to those in the present case and it has been held that the main conditions imposed by section 80-O has been complied with by the petitioner- Company and the Central Board of Direct Taxes should have approved the agreement. The same view has been taken in the other Single Bench decision of the Bombay High Court in Indian Hume Pipe Co. Ltd. v . Central Board of Direct Taxes, [1987] 165 ITR 537. Both the above decisions have been considered by the Division Bench in the impugned judgment and the Division Bench could not agree with the view expressed in those decisions.

Mr. Rajagopalan has pressed us to hold on the basis on the said Single Bench decisions of the Bombay High Court that the objectives of the section having been fulfilled, the agreements should have been approved by the Central Board of Direct Taxes. Attractive though the argument is, we regret, we are unable to accept the same. It is true that viewed in the light of the submissions made on behalf of the appellants, the objectives of the section are to some extent fulfilled, but we cannot, at the same time, ignore the plain language of the section. Section 80-O unequivocally provides that the income by way of royalty, commission, fees etc. shall be received by the assessee from the Government of a foreign State or a foreign enterprise and indeed that is one of the principal conditions for the application of the section. The assessee has to fulfil that condition before he can claim any deduction of Income Tax or approval of an agreement. The fulfilment of the objectives of a provision of a statute without fulfiling the condition laid down in plain and clear language will not enable one to have the benefit of the section. In our opinion not only the objectives of a provision of

a statute have to be fulfilled but also the conditions for the applicability of the provision have also to be fulfilled. The fulfilment of conditions of a provision of an Act in most cases will also be fulfilment of the objectives of the provision. But the converse may not be true. In other words the fulfilment of the objectives may not satisfy the conditions required to be fulfilled by the provision. In the instant case the appellant-Company received its income by way of royalty commission fees or any similar payment not from the Government of a foreign State or a foreign enterprise but from an Indian company. The appellant-Company has therefore failed to fulfil the principal condition of section 80-O of the Act. In the circumstances it is difficult to accept the contention of the appellants that as they have indirectly fulfilled the objectives of the section the Central Board of Direct Taxes was not justified in not approving the agreements.

In the impugned judgment the High Court has held that section 80-O does not require that the agreement should be made with the Government of a foreign State or a foreign enterprise. We are unable to accept this view of the High Court. Section 80-O refers to three parties namely. Government of a foreign State. foreign enterprise and the assessee. It is clear from section 80-O that the agreement must be between the assessee on the one hand and the Government of a foreign State or a foreign enterprise on the other. When section 80-O speaks of the supply of know-how by the assessee to a Government of a foreign State or a foreign enterprise and the receipt of income by way of royalty commission etc. from the Government of a foreign State or a foreign enterprise it is unreasonable to think that the agreement under which the technical know-how shall be supplied and the income shall be received by the assessee in convertible foreign exchange may not be with the Government of a foreign State or a foreign enterprise but with some other party. It is manifestly clear from the provision of section 80-O that the agreement shall be entered into by and between the assessee and the Government of a foreign State or a foreign enterprise.

In the instant case no such agreement has been entered into by the appellant-Company with the Government of a foreign State or a foreign enterprise. In that respect also the appellant-Company does not fulfil another condition of section 80-O which is also very material. The agreements which have not been approved by the Central Board of Direct Taxes have been as already noticed entered into between the appellant-Company and Toyo India which is not a foreign enterprise but an Indian Company. In view of the facts stated above the Central Board of Direct Taxes was justified in not approving the agreements in question. Lastly it is argued on behalf of the appellants that section 80-O should be construed as permitting canalisation and if so construed the appellant-Company will be entitled to the benefit of the section. On the other hand it is the contention of Dr. Gauri Shankar that in view of the specific mandate of section 80-O that the income of the assessee shall be directly received from the foreign enterprise the question of canalisation does not arise. In other words it is submitted that canalisation is not contemplate.1 by section 80-O. In reply to the contention of Dr. Gauri Shankar Mr. Rajagopalan submits that it is a lacuna on the part of the Legislature in not providing for canalisation in fulfilment of the objectives referred to above. In support of his contention. much reliance has been placed by him on the observation of Lord Denning in the decision in Seaford Court Estates Ltd. v . Asher [1949] 2 K.B. 481. In that case Lord Denning observed as follows:

"A judge believing himself to he fettered by the supposed rule that he must look to the language and nothing else laments that the draftsmen have not provided for this or that or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task

of finding the intention of Parliament and he must do this not only from language of the statute but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy. and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

The above observation of Lord Denning does not in our opinion help the appellants. The entire observation is based on a defect appearing in the provision of a statute. In our view there is no defect in the provision of section 80-O. It may be that the Legislature has not provided for canalisation but that cannot be said to he a lacuna or a defect in the provision. Whether canalisation should be permitted or not is absolutely a matter for the Legislature. It is not incumbent on the Legislature to provide for canalisation although it has been frankly conceded by Dr. Gauri Shankar that canalisation is desirable and a reasonable one. In the circumstances in view of the plain language of the section we do not think that we can construe the section as providing canalisation that is to say income by way of royalty commission etc. need not be received directly from the Government of a foreign State or a foreign enterprise but through another Indian company. This is not the intention of the Legislature.

For the reasons aforesaid the appeal is dismissed. There will however be no order as to costs.

R.S.S. Appeal dismissed.

</html