The Commissioner of Income-tax, West Bengal

Vs

Wesman Engg. Co. (P.) Ltd.

Civil Appeal No.1535 of 1978

(K. Ramaswamy, N. M. Kasliwal JJ)

24.01.1991

JUDGEMENT

KASLIWAL, J:-

1.This appeal by grant of certificate under S. 261 of the Income-tax Act, 1961 by High Court of Calcutta raises the following question for consideration:

> "Whether on the facts and circumstances of the case in an appeal filed under S. 248 of the Income-tax Act, 1961, the A.A.C. had jurisdiction to deal with the quantum of the sum chargeable under the provision of the said Act from which the assessee was liable to deduct tax under S. 195 thereof ?"

2. Brief facts of the case are that the respondent-assessee is a private limited company incorporated in India. The assessee company carried on some business in collaboration with M/s. Wilhelm Ruppmann, Industrieofenbau, Stuttgart W, Gutenburgstr. By an agreement entered on 1st January, 1963 it was agreed that the foreign collaborators would grant to Indian company during the term

> (a) the exclusive right to manufacture the licensed equipment in India.
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> (b) the exclusive right to sell the licensed equipment in India under the "Wesman Ruppnan" such sale to be effected by the agency agreed upon,
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> (c) permit licensees to export the licensed equipment freely outside India, except to countries where the licensors have similar licence-arrangements. Clause 5 of the agreement provided for payment to the licensees of the following sums:
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> (a) "A payment of 5 per cent towards the cost of detailed working drawings in terms of clause 3(b). The payment for these drawings shall be admissible in those cases where new drawings are supplied by the Licensor abroad i.e. from their or their associates works design offices at Stuttgart or elsewhere in Europe.

This payment shall not be admissible for minor modification of drawings and designs which have already been purchased from the Licensors and paid for by the Licensees nor on repeat orders executed by the Licensees.

This fee shall be calculated on the ex-factory selling price of the licensed products after deducting the value of imported components used in the manufacture thereof, if any, payment for cost of drawings shall be arranged by the Licensees against supply of individual furnace designs, such

payment being effected forthwith against delivery of drawings."

> (b) "A royalty at 5 per cent (five) which will be subject to Indian taxes on the annual net ex-factory sale value of each licensed equipment manufactured by the Licensees shall be payable to the Licensors. The value of imported components, if any, that may be used in the manufacture of' the Licensed equipment shall be deducted in computing the ex-factory price of the licensed equipment for purpose of payment of royalty. The payment has to be effected together with the report referred to under clause 6".

3. The assessment year involved in the case is 1964-65. In the matter of remittance to the non-resident company, the assessee vide applications dated June 4, 1964 and 18-8-64 requested the Income-tax Officer to grant necessary certificate in order to enable them to approach the Reserve Bank of India for remittance to their collaborators. The said applications related to the invoice in regard to supply of drawings for manufacture of furnaces in India in accordance with their collaboration agreement. The Income-tax Officer placing reliance on the terms of the agreement came to the conclusion that the payments made by the applicant company to the non-resident collaborators in Germany could be grouped under the heads Royalties and Remuneration for labour or personal services. According to the Income-tax Officer neither the remittance fell within the exempted category nor did the agreement for avoidance of double taxation between India and the Federal German Republic apply to the facts of the instant case. According to him, the payment of the remittances in respect of which the applications had been made represented payment for supply of technical know-how and for use of trade name and manufacturing right of the licensor company. He did not agree with the submissions of the assessee company and disposed of the said applications vide order dated 5th September, 1964 under S. 195(2) of the Income-tax Act, 1961 directing the assessee company to deduct tax @ 65% on the entire sum proposed to be remitted.

4. The assessee company preferred an appeal to the Appellate Assistant Commissioner. It did not dispute the assessability of the royalty @ 5% mentioned in clause 5(b) of the agreement aforesaid. It, however, challenged that the whole of the sum of 5% specified in clause 5(a) was not chargeable to income tax in India. In regard to the same the assessee submitted that there was no liability to deduct tax in terms of the order of the Income-tax Officer as, in its opinion, (a) the services, if any, enumerated under clause 5(a) of the agreement were performed outside India and the payments were also being made outside India so that the amount paid was not chargeable to tax under the Indian Statute, (b) there was a bar to assessment under the Income-tax Act, 1961 in terms of an agreement for avoidance of Double Taxation between India and the Federal German Republic referred to above and (c) in the alternative, since the cost of the work drawings to the foreign collaborators exceeds the remuneration, the same was not taxable.

5. The Appellate Assistant Commissioner did not accept the first two of the aforesaid Contentions of the assessee. With regard to the third contention, however, the Appellate Assistant Commissioner came to the conclusion that it would be reasonable to determine the said cost by estimate which he did at 75 per cent of the amount paid to the non-resident. In his opinion the net profit chargeable to tax was accordingly 25% of the amount paid.

6. The department filed an appeal against the aforesaid order of the Appellate Assistant Commissioner and the assessee filed a cross-objection, before the Income-tax Appellate Tribunal. Both the departmental appeal and the assessee's cross-objections were heard together and decided by a consolidated order of the Tribunal. The departmental representative made two submissions. The

first was that the A.A.C. was wrong in holding that the quantum of income could be determined in an appeal under section 248. The second was that the A. A. C. was wrong in allowing expenses at 75% of the remittance. The first point of the assessee's cross-objection was covered by the first ground of the departmental appeal mentioned above. The second point raised in the assessee's cross-objection was to the effect whether the payment for the cost of drawings were exempt from the tax under the provisions of Double Taxation Avoidance Agreement or not. The Tribunal, taking the points raised in the departmental appeal first came to the conclusion that it was difficult to accept the argument that a total denial enables an appeal to be filed but not a part denial with reference to part of the payment subjected to deduction of tax. In the opinion of the Tribunal the interpretation of section 248 of the Income-tax Act as given by the A.A.C. was correct. According to the Tribunal the A.A.C. could pass an order regarding the quantum. The Tribunal held that the same could not be said to be unreasonable. In the result the departmental appeal was dismissed. In regard to the assessee's cross-objection, the Tribunal held that first part of the cross-objection had already been dealt with in the appeal preferred by the department and to that extent the assessee's cross-objection on the said issue automatically succeeded. In regard to the second issue, the Tribunal came to the conclusion that the amount brought to charge by the Income-tax , Officer was notexempt under the Double Taxation Avoidance Agreement between India and the Federal Republic of Germany vide Articles 3(1) and 16 of the Agreement. The assessee's cross-objection was thus partly allowed.

7. At the instance of the Commissioner of Income-tax, West Bengal-1 the Tribunal referred the above mentioned question for the opinion of the High Court. The High Court followed its earlier Judgment dated 12th August, 1970 in Income-tax Reference No. 31 of 1970 (Commissioner of Income-tax West Bengal-1 Calcutta v. M/s. Beni Ltd., Calcutta) and answered the said question in the affirmative and in favour of the assessee by order dated 10th February, 1976. The department filed an application for leave to appeal to the Supreme Court and the High Court by order dated 8-9-1977 certified it to be a fit case for appeal to the Supreme Court under S. 261 of the Income-tax Act, 1961 and issued a certificate accordingly.

8. We have heard Mr. S. C. Manchanda, Sr. Advocate f6r the appellant but nobody appeared for the respondent. The High Court in answering the reference placed reliance on its earlier Judgment dated August 12, 1970 but the copy of the said Judgment has not been supplied in the paper book as such we were deprived to go through the reasoning given by the High Court in answering the reference in the affirmative and in favour of the assessee.

9. It was contended by Mr. Manchanda that the order passed by the Income-tax Officer under S. 195(2) of the Income-tax Act, 1961 (hereinafter referred to as the Act) was not appealable to A.A.C. under S. 248 of the Act. His further contention was that the order passed by A.A.C. was totally without jurisdiction and the only remedy available to the assessee was to file a writ petition to High Court under Art. 226 of the Constitution of India. In our opinion this question does not arise before us nor such question was raised in the reference before the High Court. The Commissioner of Income-tax only sought to refer the following question for the opinion of the High Court:

> "Whether, on the facts and circumstances of the case in appeal filed under S. 248 Income-tax Act, 1961, the Appellate Assistant Commissioner had jurisdiction to deal with the quantum of the sum chargeable under the provision of the said Act from which the assessee was liable to deduct tax under Section 195 thereof ?"

The above question does not contain the objection that no appeal was maintainable under S. 248 of the Act against the order of the Income-tax Officer passed under S. 195(2) of the Act. The High

Court was not called upon to decide any question of jurisdiction as sought to be raised by Mr. Manchanda before us nor the High Court has granted any certificate in this regard. So far as the question referred to the High Court is concerned, its language shows that there was no controversy about the appeal filed under S. 248 of the Act and the only question raised was whether the A.A.C. had jurisdiction to deal with the quantum of the sum chargeable under the provisions of the said Act from which the assaessee was liable to deduct tax under S. 195 thereof. The argument thus raised by Mr. Manchanda before us that order under S. 195(2) was not appealable under S. 248 of the Act is not available. Even otherwise the language of S. 248 of the Act is wide enough to cover any order passed under S. 195 of the Act. The case Meteor Satellite Ltd. v. Income-tax Officer, Companies Circle Ahmedabad (1980) 121 ITR 311 : (1980 Tax LR 427) (Guj) cited in support of the above contention by Mr. Manchanda is of no relevance.

10. It was next contended by Mr. Manchanda that the A. A.C. was wrong in holding that the quantum of income could be determined in an appeal under S. 248. It was also argued that the A.A.C. was also wrong in allowing the expenses at 75% of the remittance. It would be proper to reproduce S. 248 of the Act which reads as under:

> Section 248: Appeal by Person Denying Liability to deduct Tax:
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> "Any person having in accordance with the provisions of Sections 195 and 200 deductedand paid tax in respect of any sum chargeable under this Act, other than interest, who denies his liability to make such deduction, may appeal to the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to be declared not liable to make such deduction."

11. It was argued by Mr. Manchanda that under S.248 a person could deny his liability to make such deduction but there was no power to determine the quantum and to say as to what extent the said remittance will be taxed. We find no force in the above contention. Section 248 makes a mention of Sections 195 and 200 and it does not speak of the sub-clauses of S. 195 either (1) or (2). When once an appeal has been preferred to the A.A.C. on the matter of liability of the company to deduct taxes, the A.A.C. is well within his competence to pass an order on the quantum also. In our opinion the A.A.C. was also competent to pass an order with regard to quantum when once he is seized of the matter. Under Section 248 a person having deducted and paid tax under Section 195 may appeal to the A. A. C. denying his liability to make such deduction and for a declaration that he is not liable to make such deduction. It is thus difficult for us to accept the argument that total denial may enable an appeal to be filed but not a part denial with reference to part of the payment subjected to deduction of tax. The right of appeal given under S. 248 is clear and we cannot accept the view sought to be propounded by Mr. Manchanda that such a right is restricted and the A.A.C. was not competent to fix the quantum or to revise the,, proportion of the amount chargeable under the provisions of the Act as determined by the Income-tax Officer. S. 251 of the Act provides with the powers of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals). Clause (c) of subsec. (1) of S. 251 reads as under:

> Section 251(1) (c):
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> "In any other case, he may pass such orders in the appeal as he thinks fit."

The above provision gives full power to the Appellate authority to pass such orders in the appeal as he thinks fit. There is no controversy before us that appeal could lie before A. A.C. under S. 248 of

the Act. We are thus in agreement with the view taken by the High Court and the Income-tax Appellate Tribunal. The appeal thus falls and is dismissed with no order as to costs as nobody has appeared on behalf of the respondent.

Appeal dismissed.

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