M/s. Continental Construction Ltd.

Vs

Commissioner of Income-tax, Central-I

(S. Ranganathan, N.D. Ojha, V. Ramaswami-II JJ)

Civil Appeal No.3458 of 1990

15.01.1992

JUDGMENT

RANGANATHAN, J.:-

1. This is an appeal preferred by M/ s. Continental Construction Ltd. (hereinafter called 'the assessee') from the judgment of the Delhi High Court in ITR 110 to 11 2 of 1987: (reported in 1990-185 ITR 178) : (1990 Tax LR 729) answering, against the assessee, the following questions of law referred to under S. 256 of the Incometax Act, 1961 ('the Act'):

> 1. "Whether on the facts and in the circumstances of the case the Tribunal is right in holding that the income arising from the activities pursuant to the seven agreement with foreign Governments/enterprises, etc. are governed by the provisions of S. 80-HHB of the Income-tax Act, 1961 and not of Section 80-O of that Act?"
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> 2. "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that notwithstanding the approvals granted by the Board to the seven agreements for the purpose of S. 80-O, for the purpose of assessment for assessment year 1983-84, the income arising from these contracts have to be brought under S. 80-HHB of the Incc)me-tax Act, 1961?"
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> 3. "Whether on the facts of the case, the Tribunal is right in holding that the income from the entire activities under the seven agreements cannot be bifurcated and is 'Wholly covered under Section 80-HHB of the Income-tax Act, 1961?"
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> 4. "Whether on the facts and in the circumstances of the case, the. Tribunal is right in holding that the assessee company is not an 'industrial company' as defined in the Finance Act, 1982?"

2.The first two Income-tax References were made to the High Court at the instance of the assessee which was dissatisfied with the decision of the Income-tax Appellate Tribunai on these questions; there were two references because the above questions arose out of two cross-appeals before the Tribunal _ one by the assessee and the other by the Department. This appeal by the assessee, CA. 3458 of 1990 is disposed by the present judgment.

3. The third reference (ITR 112/87) was made by the Tribunal at the instance of the Department on

a totally different question which related to the interpretation of Ss. 40(c) and 40A(5) of the Act. The High Court answered all the three references in favour of the assessee and the aggrieved Commissioner of Income-tax (C.I.T.) has preferred an appeal to this Court from that part of the judgment being C.A. 3458-A of 1990. But that question has no connection with the other four question set out earlier. We have, therefore, delinked the appeal by the C.I.T. for -separate hearing. Also, of the four questions posed above in the assessee's appeal, counsel for appellant has stated that he is not pressing question No. 4 before us. We, therefore, do not express any opinion on it and merely dismiss the appeal in so far as this question is concerned. In the result, we confine this judgment to the assessee's appeal and to the first three of the four questions set gut above.

4. The questions arise out of the assessee's assessment to income-tax for the assessment year 1983-84 (the calendar year 1982 being the relevant previous year). S. 80-O of the Act, under which the assessee claimed deductions, provides for a deduction, in computing the total income, in respect of royalties etc. from certain foreign enterprises. This topic was originally dealt with by S. 850. S. 80-O was substituted in its place w.e.f. April 1, 1968. The section has since undergone amendments from time to time. As on 1-4-83, the provision, in so far as is relevant for our purposes, was in the following terms:

> S.80-O: Deduction in respect of royalties, etc. from certain foreign enterprises -
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> "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 enterprise 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 outside 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 such income so received in, or brought into India, in computing the total income of the,assessee.
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> 4. During the currency of this provision, the Finance Act, 1982 introduced a new Sections 80-HHB w.e.f. 1-4-1983. This provision reads thus:
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> S. 80-HHB -- Deduction in respect of profits and gains from projects outside India-
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> (1) Where the gross total income of an assessee being an Indian company or a person (other than a company) who is resident in India includes any profits and gains derived from the business of-
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> (a) the execution of a foreign project undertaken by the assessee in pursuance of a contract entered into by him, or

(b) the execution of any work undertaken by him and forming part of a foreign project undertaken by any other person in pursuance of a contract entered into by such other person, with the Government of a foreign State or any statutory or other public authority or agency in a foreign State, or a foreign enterprise, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and ,ains of an amount equal to twenty five per cent thereof: Provided that the consideration for the execution of such project, or, as the case may be, of such work is payable in convertible foreign exchange.

(2) For the purposes of this section,-

(a)"convertible, foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder:

(b) "foreign project" means a project for-

(i) the construction of any building, road, dam, bridge or other structure outside India;

(ii) the assembly or installation of any machinery or plant outside India;

(iii) the execution of such other work (of whatever nature) as may be prescribed.

(3) The deduction under this section shall be allowed only if the following conditions are fulfilled, namely:-

(i) the assessee maintains separate accounts in respect of the profits and gains derived from the business of the execution of the foreign project, or, as the case may be, of the work forming part of the foreign project undertaken by him and, where the assessee is a person other than an Indian company or a co-operative society, such amounts have been audited by an accountant as defined in the Explanation below sub-sec. (2) of S. 288 and the assessee furnishes, along with his return or income, the report of such audit in the prescribed form duly signed and verified by such accountant;

(ii) an amount equal to twenty five per cent of the profits and gains, referred to in sub-sec. (1) is debited to the profit and loss account of the previous year in respect of which the deduction under this section is to be allowed and credited to a reserve account (to be called the "Foreign Projects Reserve Account") to be utilised by the assessee during a period of five years next following for the purposes of his business other than for distribution by way of dividends or profits;

(iii) an amount equal to twenty five per cent of the profits and gains referred to in sub-sec. (1) is brought by the assessee in convertible foreign exchange into India, in accordance with the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and'any rules made thereunder, within a period of six months from the end of the previous year referred to in Cl. (ii) or, where the Chief Commissioner or

Commissioner is satisfied (for reasons to be recorded in writing) that the assessee is, for reasons beyond his control, unable to do so within the said period of six months, within such further period as the Chief Commissioner or Commissioner may allow in this behalf:

Provided that where the amount credited by the assessee to the Foreign Project Reserve Account in pursuance of Cl. (ii) or the amount brought into India by the assessee in pursuance of Cl. (iii) or each of the said amounts is less than twenty five per cent of the profits and gains referred to in sub-sec. (1), the deduction under that sub-section shall be limited to the amount so credited in pursuance of Cl. (ii) or the amount so brought into India in pursuance of Cl. (iii), whichever is less.

(4) If at any time before the expiry of five years from the end of the previous year in which the deduction under sub-sec. (1) is allowed, the assessee utilises the amount credited in the foreign Projects Reserve Account for distribution by way of dividends or profits or for any other purpose which is not a purpose of the business of the assessee, the deduction originally allowed under sub-sec. (1) shall be deemed to have been wrongly allowed, and the sub-section (1) shall be deemed to have been wrongly allowed, and the Income-tax Officer may, notwithstanding, anything contained in this Act, recompute the total income of the assessee for the relevant previous year and make the necessary amendment; and the provisions of S. 154 shall, so far as may be, apply thereto, the period of four years specified in sub-sec.(7) of that section being reckoned from the end of the previous year in which the money was so utilised'.

(5) Notwithstanding anything contained in any other provision of this Chapter under the heading "C.-Deductions in respect of certain incomes, "no part of the consideration or of the income comprised in the consideration payable to the assessee for the execution of a foreign project referred to in Cl. (a) of sub-sec. (1) or of any work referred to in Cl. (b) of that sub-section shall qualify for deduct on for any assessment year under any such other provision. The three questions which are now for consideration before us raise the issue whether the assessee is entitled to a deduction under S. 80-O or S. 80-HHB or partly under one and partly under the other or, indeed, under neither of the provisions. We shall now pwceed to set out the factual background in which the issues arise.

5. The assessee is a civil construction company which describes itself as Engineers and Contractors. It has executed a large number of projects overseas and in India. In India, its projects include dams, irrigation and hydel projects, water supply and sewerage plants, marine and harbour works, airports etc. The assessee entered into eight contracts for the construction, inter alia, of a dam and irrigation project in Libya, a fibreboard factory at Abu Sukhair in Iraq. and the huge Karkh Water Supply Project in Baghdad which was of the total value of 534 million dollars. For these contracts the assessee obtained the approval of the Central Board of Direct Taxes ('Board' or 'C.B.D.T.') in terms of S. 80-O. A broad outline of these projects can be gathered from the following table:

S.No. Name of Project Date of agreement Name of the other contracting party Date of approval by Board Period of approval as per Board's letter

1. Abu Sukhair Project 6-9-75 State Organisation of Industrial Design & Construction, Ministry of Industry & Minerals, Baghdad (Iraq) 11-8-76 For assesment years 1976-77 to

1978-79

2. Wadi Ghan Dam 8-8-77 Socialist People's Libyan Arab Jamahiriya, Secretariat of Dams and Water Resources, Tripoli (Libya) 31-8-78 For the assessment years 1978-79 and onwards

3. Amara Project 15-3-78 State Contracting Co. for Water and Sewerage Projects, Ministry of Municipalities, Republic of Iraq 22-2-79 "Assessment years 1979-80 to 1982-83"

4. Nassiriyah Project 14-12-78 Ministry of Housing & Construction, Govt. of Iraq 7-2-80 "Assessment years 1980-81 and onwards"

5. Sulaimaniyah Project 10-10-79 Ministry of Housing & Construction, Govt. of Iraq 31-5-80 "Assessment years 1980-81 and onwards"

6. West Bank Project 12-4-80 Baghdad Sewerage Board, Govt. of Iraq 23-7-80 "Assessment years 1981-82 and onwards"

7. Karkh Project 17-12-80 Amanat Al-Asima, Baghdad Water Supply Administration, Govt. of Iraq Baghdad 28-10-83 "For the assessment year 1982-83. For the subsequent period your attention is invited to the provision of S.80HHB which are operative w.e.f. 1-4-83"

8. Diwaniyah Project 10-1-81 Water & Sewerage Project, Baghdad 28-10-83 -do-

In the light of these approvals, the assessee claimed and obtained deduction under Seciton 80-O in respect of the receipts from the first six of the contracts in some of the assessment years between 1976-77 to 1980-81.

6. For the assessment year 1983-84, the assessee returned a gross total income of Rs.72,67,45,938 but, as against this, it claimed a deduction of Rs. 89,16,19,198 in respect of seven of the above contracts, the eighth having been completed much earlier. Of this, the deduction claimed in respect of the Karkh and Diwaniyah Projects came to Rs. 77,84,29,446 and Rs. 6,36,85,436 respectively. As pointed out above, the letter of approval of the Board under S,80-O in respect of these two contracts dated 28-10-83 was limited to the assessment year 1982-83. The Inspecting Assistant Commissioner (I.A.C.), Sri Hari Narain, who completed the assessment on 26-3-1984 declined to grant the assessee any deduction under S. 80-O not only in respect of these two contracts but also in respect of the other five. He was of opinion that it was S. 80-HHB that applied to these agreements and not S. 80-O. However, he declined to grant any relief to the assessee even under S. 80-HHB as the conditions for exemption specified in that sub-section were not fulfilled. In the result, he determined the assessee's total income at Rs. 89,41,35,103 as against the NIL income re-turned by the assessee, thus raising a tax demand of Rupees 66,07,72,982.

7. On appeal, the Commissioner of Income-tax (Appeals) gave the assessee partial relief. He agreed with the IAC that the assessee was not entitled to relief u/S. 80-O because; (1) the approval of the CBDT for three of the contracts did not extend to assessment year 1983-84; (2) all the contracts undertaken by the assessee were in the nature of 'foreign projects' within the meaning of S. 80-HHB; and (3) even where the contracts had the approval of the CBDT the non obstante provisions of S. 80-HHB (5) ruled out the grant of relief under S. 80-O for any of the projects. He, however, felt that

as the assessee had been under a bona fide belief all through that it was entitled to relief under S. 80-O, it had not had a proper opportunity of putting forth its claim for relief under Section 80-HHB. He, therefore, set aside the assessment to enable both sides to marshall their evidence and to enable the IAC to reappraise the assessee's claim for exemption under that section. The order of the CIT was dated 26-3-85.

8. The Income-tax Appellate Tribunal (ITAT) agreed with the CIT. Its conclusion, set out succinctly in para 48 of its order was thus :

> "To conclude this point, we would hold that the income and consideration received by the assessee in the execution of all the seven contracts in general and the Karkh work in particular fell under the provisions of Section 80-HHB as the contracts were for execution of foreign projects. We further hold that in view of the provisions of S. 80-HHB (5) the claim of the assessee under S. 80-O cannot be considered in spite of the approval orders of the Board. This ground in the assessee's appeal has, therefore, to be rejected and the conclusion arrived at by the learned Commissioner of Income-tax (Appeals) is upheld."

9. It may be mentioned here that, before the appeal was heard by the ITAT, the CBDT on a representation made by the assessee and after some enquiry and correspondence, issued on 31-7-85 a letter modifying the original letter of approval of 28-10-83 in respect of the Karkh and Diwaniyah contracts. By this letter, the CBDT directed the substitution of the following words in place of the words quoted in the last column of the table set out earlier:

> "Assessment years 1982-83 and onwards".

In other words, the CBDT lifted its earlier limitation of approval only to assessment year 1982-83 and made it operative even for subsequent assessment years. There has been some criticism, on behalf of the assessee, of the manner in which the Department has sought to get over the effect of the modification letter attributing it to some misunderstanding or confusion. One of the assessee's principal grievances is that the ITAT has erred in accepting this explanation, treating the approval of 28-10-1983 as a qualified one and ignoring the letter of 31-7-85. We shall discuss this aspect later.

10. The ITAT, at the request of the assessee, referred the four questions of law which we-have set out earlier for the decision of the High Court. The High Court came to the conclusion that the receipts of the assessee from the contracts did not fall within the category of receipts for which deduction is provided in S. 80-O. It was of the view that the Board's approval was a qualified one which fully authorised and empowered the officer to determine whether all the conditions of the section are fulfilled as well as the amount, if any, which could be deducted under S. 80-O. The Court also came to the conclusion that the execution of the work by the assessee, in the presents case, fall under S. 80-HHB and not S. 80-O. In the result, questions 1 to 3 were answered against the assessee and in favour of the Revenue. The assessee has, therefore, preferred these appeals.

11. As pointed out earlier, the assessees claim for deduction relates to seven contracts and depends on the terms and conditions of; each one of them. However, the Karkh Water Supply Scheme contract has been taken as the model or specimen for purposes of discussion both because the terms and conditions of all the contracts are more or less similar and also because the deduction claimed in respect Of this contract constitutes an overwhelmingly high percentage of the assessee's total claim. We shall also, therefore, proceed to discuss the issues raised in the light of the terms and conditions

of this contract and the approval given therefore. Before doing so, we would like to point out that for the assessment year 1983-84 with which we are concerned, a discussion of the relative spheres of Section 80-HHB and S. 80-O would be called for and the assessee may get full or partial relief under either or neither of the sections for the said assessment year; but if, in the process, we come to the conclusion that the provisions of S. 80-O can have no application to the contracts in question, such conclusion is bound to have repercussion also on the deductions claimed by, and allowed to, the assessee under that section in the earlier years in respect of some of the contracts.

12. The Baghdad Water Supply Administration (BWSA) invited tenders from "experienced engineering Consortia" to submit tenders "for the design, manufacture, delivery, supply, construction and installation, complete under a single contract of the works required" for the first stage of the Karkh Water Supply Scheme. The works comprised "a river intake and pumping station on the west bank of the River Tigris about 30 kms. north of Baghdad; raw water pumping through twin 1800 mm diameter pumping mains to a nearby treatment works; treatment comprising essentially pre-settlement, clarification and chemical coagulation, rapid gravity sand filtration and disinfection with chlorine; treated water storage; treated water pumping through twin 2200 mm diameter transmission,pipelines to the city area, and distribution and storage within the west bank part of the city area and within the municipalities of Abu Ghraib and Taji". Five volumes of documents containing instructions, conditions, general specifications and requirements, specifications for plant and civil works, schedules, and supplementary information and a sixth volume containing 99 drawings were issued along with the tender documents. Since tenders had been called for from Consortia, the assessee joined hands with the State Contracting Company for Water and Sewerage Projects, Baghdad (SCC) to form a Consortium and was able to bag the contract and an agreement was entered into on 17-12-80 between the Iraqi Government and the Consortium. The terms of the Consortium between the assessee and SCC were set down in an agreement dated 18-12-80 which divided the areas of responsibility (the packages) under the contract between the two. Broadly speaking, the SCC was made responsible for the Reservoir works while the assessee was made responsible for the civil works. The total value of the contract was 325,750,000 Iraqi Dinars (ID) of which 65% was payable in U.S. dollars, pound sterling or swiss francs. The value of the package of the assessee was ID 152,956,253 (75% of which was payable in the said foreign exchange).

13. On 3rd March, 1981, the assessee applied to the CBDT for according approval to the contract "for the supply of civil construction know-how to the Government of Iraq" u/ S. 80-O of the Act. A pro forma prescribed by the Revenue was filled up and enclosed to the application. Paras 5 to 11 of this proforma run as follows:

> 5. Please state whether the income is received in consideration for -
>
> a) the use outside India of
>
> i) any patent, invention model, design, secret, formula or process or similar property right: No
>
> ii) information concerning industrial, commercial or scientific knowledge, experience, or skill made available: Yes
>
> b) technical services rendered or agreed to be rendered outside India (Please also state the arrangements available with the applicant for rendering such technical

services and the mode of tendering such services). Technical services will be rendered by us to Baghdad Water Supply Administration, Government of Iraq in accordance with the said agreement dated 17-12-80. The technical know-how and services will be rendered by us through our qualified experienced and skilled Engineers, Scientists and Technicians, for the purpose, a strength of about 1,800 Indian Engineers, Technicians and semi-skilled labours will be inducted.

6. Does the agreement provide for supply of technical know-how or rendering of any services other than those covred by S.80-O (e.g. use of trade marks or supply of goods) if so, please specify them and also the amount of consideration receivable/received in respect of them. The agreement also provides for the supply use of goods as per details given below:

Machinery, Plant, Equipment, Vehicles, Cement, Steel-bars, Sand Aggregate, Bitumen, Fencing-fabric, Shuttering material, Steel pipes, Patent items, Projection, Cladding, ceiling, Joining, Steel Pipes with lining and ductile iron pipes etc. The cost of supply of these items will be determined at the close of each year as the work progresses. The total value of the contract is - ID 152,956,253/-. After taking out the net cost of machinery and equipment and other embedded items, as mentioned above (in which no profit element is involved), from the total value of the Contract, the remaining amount will be the value of technical know-how and services to be rendered by us under this contract. It is this amount for which we are seeking exemption u/S. 80-O.

7. If technical know-how falls under S.5(a)(i) above, please indicate. Not applicable.

(a) How the applicant acquired it or what arrangements he has made for acquiring it Not applicable.

(b) What are the applicant's own rights in respect thereof Not applicable.

(c) Whether its provision to the other party to the agreement involves:-

(i) transfer of all or any rights of the applicant in respect of it, if so, please specify the nature and extent of the right transferred and the manner of its transfer; Not applicable.

(ii) the imparting of any information concerning its working or use; if so, please specify the information imparted and the manner of its imparting; Not applicable.

(iii) its use by the other person to the agreement, if so, please specify the nature and manner of the use. Not applicable.

8. If the technical know-how falls under S.5(a)(i) above, please specify

(a) the arrangements available with the applicant for obtaining and imparting it. We have on our rolls qualified Engineers and Technicians who have already acquired the requisite scientific knowledge, experience and skill for giving such technical know-

how and it is they, who will be imparting the same to the client by executing the works at the site in Iraq.

(b) the manner of imparting it. The Engineers and Technicians will be working for about 5 years at the site of construction to impart the technical know-how and services on behalf of our Company.

9. Has the applicant made any agreement or arrangement with any other person in India or abroad, for obtaining the technical know-how etc., to be provided under this agreement or for rendering technical services? If so, please give the following information: Not applicable.

(i) the name and address of such other person; Not applicable.

(ii) details of the agreement or arrangement together with a certified copy of the written agreement, if any; Not applicable.

(iii) the nature, and extent of applicant's relationship and association with such other person. Not applicable.

10. Please state the nature of the income in respect of which deduction is claimed, viz., Income out of imparting civil construction know-how and services for the construction of work of Karkh Water Supply Scheme, Baghdad. Royalty Commission Fees Any similar payment

11. Please indicate the portion/amount (along with its computation) which is eligible for deduction under S.80-O of the Act. Please see our reply under S.No.6 of this form.

14. On 9-7-81, the C.B.D.T. called upon the assessee to clarify four aspects of its application : (i) the details of the materials and equipment to be supplied by the assessee under the contract and the quantum of profit thereon; (ii) whether any engineers, scientists and technicians were recruited in India and there was any fee attributable to such services; (iii) whether any tests on materials and workmanship were carried out in India and there was any fee attributable to such tests; and (iv) the break-up of the fee relating to the supply of information/know-how and rendering of the technical services. The assessee answered in the following terms on 4-8-1981 :

"As desired, the information/ clarification is furnished below:-

(i) Our contract is for civil construction and know-how. The use of materials and equipment is part of these services. There is no separate supply of materials and equipment. As such the question of any separate quantum of profit on the same does not arise. As the material is purchased locally in Iraq, there is no possibility of making any profit on its consumption in execution of the works.

(ii) The qualified experienced skilled engineers, scientists and technicians are our employees and they are sent to Iraq for executing the work under contract. We do not avail of the services of any agency for the purpose. As such there are no recruitment

expenses involved. Consequently no fee can be attributed on the transfer of our workers toforeign country.

(iii) No tests will ever be taken in India because all works will be executed in Iraq.The question of attributing any fees to such tests in India, therefore, does not arise. These tests are part of the process undertaken to render technical know-how.

(iv) The profits which will accrue to our Company will be the gross contracts receipts less expenses incurred in supplying technical know-how and execution of the works. It is estimated that this will be about 25% of the contract value. The exact amount may vary and will be known only after the works have been completed."

There was further correspondence, discussion of Section 80-O of the Income-tax Act, 1961, and hearing including a detailed letter of the assessee dated 24-12-1981 and clarificatory letters dated 15-2-1982, 17-3-1982, 9-10-1982, some of the contents of which may have to be referred to later. Eventually, the C. B. D. T. accorded its approval to the agreements, as already mentioned, on 28-10-1983. The letter of approval has to be extracted here. It runs:

"I am directed to refer to your application 3-3-1981 received with your letter No. 601 / IT/80-O dated 3-3-1981 and to convey the approval of the Central Board of Direct Taxes to the agreement entered into between you and M/s. Amanat Al-Asima, Baghdad Water Supply Administration, Government of Iraq, Baghdad, on 17-12-1980 for the purpose of Section 80-O of the Income-tax Act, 1961, for the assessment years 1982-83. For the subsequent period your attention is invited to the provision of Sec. 80-HHB which are operative w.e.f. 1-4-1983.

2. The income allowable as a eduction for the assessment year 1981-82 and onwards would be the income computed after accounting for expenses incurred in earning such income i.e. net income.

3. The actual deduction to be allowed will, however, be such portion of the income which has been 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 in accordance with the law for the time being in force for regulating payment and dealings in foreign exchange.

4. The grant of deduction from the total income will be subject to your fulfilling the other conditions laid down in the Act in this behalf. The amount eligible for deduction will be determined by Income-tax Officer at the time of assessment.

5. This approval is subject to any amendment in the provisions of the Income-tax Act, 1961, from time to time.

6. I am further to add that the approval accorded.by this letter is only for the purpose and should not be construed to convey the approval of the Central Government or Central Board of Direct Taxes or any other statutory authority under the Government for any other purposes."

15. It may be mentioned that even while the assessee's applications for approval to the Kharkh &

Diwaniya contracts were pending, the Finance Act, 1982 had amended the Act to insert S. 80-HHB with effect from 1-4-1983.

This amendment compelled the assessee to send a letter to the C.B.D.T. on 9-10-82 explaining that this new provision would not stand in the way of approval being accorded to its contracts under S. 80-O. But, despite the pleas in this letter the C.B.D.T., in para 1 of its ietter of approval of 28-10-1983 restricted the approval to assessment year 1982-83. The assessee, therefore, wrote again in detail on 2-12-1983, urging the Board that the reference to S. 80-HHB in the letter of approval was uncalled for and that the approval granted should be made valid for the entire duration of the contract. The material on record shows that this letter was the subject of careful consideration by the C.B.D.T. which finally issued a clarification in the following terms on 31-7-1985, more than a year and a half later:

> "With reference to your representation dated 2-12-83 on the above subject, I am directed to say that for the words and figures "assessment years 1982-83. For the subsequent period your attention is invited to the provision of Section 80-HHB which are operative w. e. f. 1-4-83, " appearing at the end of para 1 of the Board's letter F. No. 473/46/81-FTD dated 28-10-83, the following words and figures may please be substituted :
>
> assessment years 1982-83 and onwards"

16. It appears that though the above intimation to the assessee was cryptic, the CBDT had decided to extend the period of operativeness of its approval under S. 80-O only after consulting the Attorney General of India (A.G.). The CBDT had circulated the opinion of the A. G. in this case along with the statement of case put up to him for opinion to all the officers of the Departments. On 14-81985, the CIT (Central-1), New Delhi wrote a letter to the concerned member of the CBDT which makes interesting reading. We do not wish to extract, or comment on, the contents of this letter here. Suffice it to say that the writer of the letter was of opinion that the CBDT should not have reviewed the decision taken by it on 28-10-83. He stated that, on the strength of the CBDT's letter dated 31-7-85, the assessee was claiming 100% exemption and requested that "clear instructions" should be issued early "on the complications" pointed out in the letter. Thereupon, a letter dated 24-9-1985 was addressed by the Deputy Secretary (FTD), Government of India, (who at the time, happened to be Sri Hari Narain, the IAC who had completed the assessment on the assessee) to the C.I.T. (Central), New Delhi to the following effect:

> "Please refer to your D. O. No. 777, dated 14th August, 1985 addressed to Member I.T. (J) on the above subject.
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> 2. Letter F. No.473/644/83-FTD dated 31 st July, 1985 was only in recognition of the position that the approval u/s. 80-O is for the agreement as such and the mention of any time limit therein is redundant, except for the starting year.
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> 3. As would be noticed from all the approval letters themselves, Board's approval to the agreements is subject to the other conditions of the Act being satisfied. These have to be examined carefully by the assessing officers while making the assessments. If the income does not satisfy the requirements of section 80-O, it cannot be said that the mere approval would automatically entitle the assessee to relief u/s 80-O. The quantum 'any of the income which would be entitled to relief

under section 80-O has necessarily to be determined by them on the facts of each case.

4. It would also be noticed from all the approval letters that they are subject to amendments enacted in the Income-tax Act, 1961, from time to time. Therefore, notwithstanding the approval under Section 80-O or the words "Assessment year 82-83 and onwards", if the project or work falls within the definition given in Section 80-HHB(1), the same would be hit by the provision of Section 80-HHB(5).

5. Your apprehension that the approval has been modified or that it ignores the provisions, of Section 80-HHB is, therefore, without any basis.

The position in respect of letter F. No. 473 / 643 / 83-FTD dated 31-7-1985 for the agreement dated 10-1-81 in respect of the same assessee is also identical."

Normally, correspondence of this type would be hardly relevant for deciding questions regarding the construction of a section in the statute. But, apparently, the Department, before the Tribunal, relied upon the letter of 14-9-85 as superseding the effect of the approval granted on 31-7-85. The Tribunal, in its appellate order, referred to these letters. It observed:

"It is true that in respect of Karkh and Diwaniyah Projects confusion which has arisen in this case could have been avoided. In the first approval letter the Board confined the approval to the assessment year 1982-83 and referred to Section 80-HHB for the subsequent years. On representation by the. assessee the matter was considered for almost two years and meanwhile the assessment was also made and the first appellate authority also decided the matter. It was only in July, 1985 that the Board rectified their earlier order removing the reference to S. 80-HHB for the assessment years 1983-84 onwards. The second order was likely to give an. impression that the rectification has been made in view of the representation made by the assessee about the scope and application of section 80-HHB. This impression was not reated in the minds of the assessee but only created in the minds of the assessee but also led to some misunderstanding in the mind of the Commissioner. When he sought a clarification the Board stated that in spite of approval under Section 80-O if the income does not satisfy the requirements of that section, the assessee would not be entitled to such deduction. In this letter it was also stated that the mention of the assessment years in the approval orders was redundant. We have referred to this clarification given by the Board only because the learned counsel for the revenue has adopted the arguments given in this letter as his own. There is no doubt that the first qualified approval followed by the modification of that approval coupled with this thinking on the part of the Board as given to the Commissioner does indicate that the position was not clear in the mind of the authorities who approved or modified the approval of the contracts. Be that as it may, we have to consider the matter from the angle of law as it stands and we cannot decide on the basis of some misunderstanding or confusion which might have been created at some stage."

Learned counsel for the assessee vehemently criticised the issue of the letter of "clarification" by the officer who had completed the assessment in the case. He urged that the Tribunal should not have taken into account the contents of this letter at all and, in any event, could not have drawn an inference, because of this letter, that the position was not clear in the mind of the CBDT. He also

pointed out that he had sought for a reference of a "question of law" to the High Court on this aspect which the Tribunal (in his submission, unjustifiably) declined on the ground that the letter had been considered only because it was adopted as an argument by counsel for the Revenue. One aspect which may need consideration by us is the question how far the issue of the letter of 14-9-85 affects the assessee's claim for exemption under S. 80-O in the present case.

17. There does not seem to be much doubt that the provisions of S. 80-HHB apply to the contracts in the present case and that., at the worst, the assessee's claim for exemption under S. 80-HHB deserves to be considered afresh after giving the assessee an opportunity of being heard, as directed by the CIT (Appeals) and confirmed by the C. I. T . and the High Court (see (1990) 185 ITR 230). It is possible that, with Sections 80HHB and 80-O, as they stand today, it might not make very much difference to the assessee whether the relief is granted under the one section or the other, as they both permit a deduction from the gross total income of fifty per cent, of the profits in the one case and of the qualifying receipts in the other. However, till 1-4-1987, the relief under S. 80-HHB was 25% of the profits whereas the deduction under S. 80-O was 100% of the qualifying receipts up to assessment year 1984-85. Thereafter the latter was reduced to 50% but the former was raised to 50% only w.e.f. 1-6-1987. This has made it very material to decide whether the assessee is entitled to the deduction under S. 80-O and the question that really arises for our consideration is whether the relief under that section is available to the assessee. We shall first discuss this question only the language of S. 80-O without taking into account the insertion of S. 80 HHB or the complication introduced into the case by the approvals of the CBDT referred to earlier.

18. The Department's case, urged with great emphasis and vehemence by Sri B. B. Ahuja, is that a careful reading of S.80-O will show that the deduction provided by that section is very limited in nature and not available to the assessee. He submits, on the other hand, that this case is clearly one falling under the terms of S. 80-H H B being a case of execution of a "foreign project" as defined in that section. We shall, however, consider the two aspects of the argument separately for the fact that the income in question may qualify for deduction under S. 80-HHB does not necessarily exclude the applicability of the provisions of S. 80-O. It is sufficient to point out that the language of sub-section (5) of S. 80-HHB which gives precedence to a claim under S. 80-HHB over one under any other provision, itself necessarily postulates the possibility of the whole or part of the consideration payable to an assessee for the execution of a foreign project qualifying for deduction under S. 80-HHB falling for consideration also under any other provision as well.

19. Sri Ahuja points out that Part C of Ch. VI-A of the Act permits deductions, from, the gross total income of an assessee, of various "species" of income, which are carefully defined, in Ss. 80H onwards. Ss. 80H to 80-JJA, 8OQQ, 80-RR and 80S permit a deduction in respect of the "profits and gains" or "profits" derived from various types of businesses, undertakings or professions, Ss. 80K to 8ONN and 8OQQ deal with income by way of "dividends" and "interest" falling under certain categories; S. 80P, which grants a deduction to co-operative societies, classifies the deductible income into "profits and gains" from activities in the nature of business on the one hand and income falling under other heads such as interest, dividends, income from house property etc. on the other; 8OQQA refers to income derived from a profession but only in the form of consideration for assignment or grant of copyright interests or royalties or copyright fees; Ss. 8OR and 8ORRA allow a deduction in respect of "remuneration"; and S. 80T relates to 44 capital gains". In other words, the scheme of this Part of Ch. VI-A is to correlate the deductions to specific heads of income. S. 80-HHB talks of the profits and gains derived from a business - and the assessee here is seeking such a deduction - but S. 80-O provides for a deduction only in respect of an assessee's receipts from a foreign Government or enterprise by way of "royalty, commission, fees or any

similar payment". Not only this; the section also requires that the assessee must have derived the receipts falling under the above categories in one of two ways-

> (i) in consideration for the use outside India of any patent, invention, model, design, secret formula of 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
>
> (ii) in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee.
>
> According to learned counsel, the receipts of the present assessee do not fulfil these requirements.

20. In support of the contention that the claim for the assessee, on the facts, is only for a deduction from the profits and gains of a business carried on by it and that such a claim is not referable to S. 80-O at all, Sri Ahuja first draws our attention to the treatment accorded to the receipts by the assessee in its books of account as well as the claim made in the applications filed before the CBDT. The balance sheet of the company for the calendar ypar 1982 accounts for "contract receipts" of Rs. 2,332,490.079 and "other receipts" of Rs. 47,000,122. Deducting a total expenditure of Rs. 1,717,751,494 classified under three headings -Direct Contract Expenses, management expenses and other expenditure, a "net profit" of Rs. 661,738,707 is arrived at. While the details of the "direct contract expenses" set out in Schedule 1 include an item of "royalties" paid and the details of "other expenditure" set out in Schedule K include an item of payment of "technical consultation fees", there is no similar item under contract receipts or other receipts. The assessee's balance sheet is thus one of a company carrying on business as Engineers and Contractors and reflects only the profits,derived from such business. It is then pointed out that the assessee has not been able to identify the basis of the deduction claimed by it in the application made to the C.B.D.T. In para 6 read with para 11 of the application, the assessee explains that it is claiming exemption under S. 80-O of the contract on the total value of the contract less the net cost of machinery, equipment and other items (on which no profit element is involved and, obviously, though not specifically mentioned, all other expenses incurred on the contract). In other words, the exemption claimed is on the contract receipts less the contract expenses; that is to say, on the entire profits from the contract. Paras (i) and (iv) of the letter of the assessee to the CBDT dated 4-8-81 also leave no doubt regarding this. Para 10 of the pro forma requires the assessee to give details of the receipts under the four headings mentioned in Section 80-O but the assessee side-steps the query with a vague answer. It is, therefore, clear, says Sri Ahuja, that this is a case in which deduction is claitned of the "profits and gains" of a "foreign project", a claim squarely falling under S. 80-HHB and totally outside the terms of S. 80-O.

21. Sri Ahuja, in this context, relied on the observations of this Court in Cloth Traders P. Ltd. v. C. I.T., (1 979) 118 ITR 243: (AIR 1979 SC 1691). There the question which this Court had to consider was whether the deduction provided for in S. 80-M of the Act was of the gross amount of the intercorporate dividend received by an assessee or the net amount thereof arrive at after deducting the expenses incurred for the earning of such income. The Court held that the deduction was available for the gross amount of the dividend. This question does not concern us but in the course of the discussion, the Court made the following observations on which Sri Ahuja seeks to rely (at pp. 1698-99 of AIR):

> "Section 80M, sub-section (1), opens with the words "where the gross total income of an assessee.... includes any income by way of dividends from a domestic company" and proceeds to say that in such a case there shall be allowed in computing the total income of the assessee a deduction "from such income by way of dividends" of an amount equal to the whole of such income or 60 per cent of such inc ome, as the case may be depending on the nature of the domestic company from which the income by way of dividends is received. Now, the words "such income by way of dividends" must be referable to the income by way of dividends from a domestic company which is included in the gross total income. The whole of such income, that is, income by way of dividends from a domestic company or 60 per cent of such income, as the case may be, would be deductible from the gross total income for arriving at the total income of the assessee. The words "where the gross total income of an assessee... includes any income by way of dividends from a domestic company" are intended only 1 to provide that a particular category of income, namely, income by way of dividends from a domestic company, shoujd form a component part of the gross total income. These words merely prescribe a condition for the applicability of the section, namely, that the gross total income must include the category of income described by the words "income by way of dividends from a domestic company". If the gross total income includes this particular category of income, whatever be the quantum of such income included, the condition would be satisfied and the assessee would be eligible for deduction of the whole or 60 per cent of "such income". Now, if the words ',where the gross total income of an assessee.... includes any income by way of dividends from a domestic company" in the opening part of the section refer only to the inclusion of the category of the income (re -noted by the words "income by way of dividends from a domestic company" and not to the quantum of the income so included, the words "such income" cannot have reference to the quantum of the income included, but they must be held referable only to the category gf the income included, that is, income by way of dividends from a domestic company. The words "such income" as a matter of plain grammar must be substituted by the words "income by way of dividends from a domestic company" in order to arrive at a proper construction of the section and if that is done, it would be obvious that the deduction is to be in respect of the whole or 60 per cent of the "income by way of dividends from a domestic company" which can only mean the full amount of dividends received from a domestic company."

Sri Ahuja is, of course, fully conscious that the decision in Cloth Traders (AIR 1979 SC 1691) (supra) has since been overruled by a larger Bench of the Court in Distributors (Baroda) P. Ltd. v Union of India, (1985) 155 ITR 120: (AIR 1985 SC 1585) but he points out - and we agree he is right in this - that the latter decision does not affect the weight of the above observations. We entirely agree with Sri Ahuja is that the deduction under S. 80-O is in respect of the categories of income specifically referred to therein and this is an aspect to which we shall advert later. But we are unable to agree with him that there is an antithesis between the categories of income so specified and' the expression "profits and gains" It is no doubt true that, wherever the statute refers to the "profits and gains" of a business, it has in mind the income chargeable under the Act under that head - head "D" specified in S. 14 of the Act but the other categories of income referred to in the various sections are not correlated to the head-wise classification of S. 14. It is well known that items of interest, dividends and other items of remuneration are not always referable to any particular head. They may be assessable as "business" income or income from other sources. In particular, the

receipts by way o. royalty, fees, commissions and similar payments may be derived in the course of a business or profession and constitute part of the profits and gains of such business or profession. For instance, a consulting scientist, architect or engineer might provide technical services to others and receive that what is styled as "fees" from them; the receipts will nevertheless be assessable as part of the profits and gains from his profession. The mere 'act, therefore, that the assessee is carrying on business as engineers and contractors and the receipts in question flow to it in the course of its business as such will not necessarily preclude relief under S. 80-O if they can be brought within the categories of receipts mentioned in the section. The material question, therefore, is not whether the receipts form part of the business profits of the assessee but whether the entire receipts, or any part of them, can be brought within the qualifying words in S. 80-O. To thi& basic question we shall now turn.

22. Sri Ahuja spoint on this aspect is two fold. He first points out that the contract does not stipulate for any payment labelled under one of these categories. The expressions royalty, commission and fees have wellknown connotations and the word "any similar payment", he says, has to be construed ejusdem generis and the receipts under the contract answer none of these descriptions. We do not think that the mere fact that the contract does not specifically assign the nomenclature mentioned in the section to the payments made to the assessee can be conclusive of the assessee's claim to exemption. That apart, of the four expressions referred to in the section three are referred to elsewhere in the Act. While 'royalty' is generally as consideration paid to the owner of a right or asset - such as copyright, patent right, mining, right etc. - for the privilege of using it for one's own purposes, the other expressions are more comprehensive. The expressions 'royalty'and 'technical fees have been defined in S. 9. Though the definitions are only for the purposes of classes (vi)'and (vii) of S. 9(1) respectively, they may be set out here. The definitions read thus :

> "S. 9(1)(vi) - Income by way of royalty payable by-
>
> xxx xxx xxx
>
> Explanation 2: For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "capital gains") for-
>
> (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
>
> (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;
>
> (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;
>
> (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
>
> (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio

broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (v).

Section 9(1)(vii) - income by way of fees for technical services payable by-

xxx xxx xxx

Explanation 2: For the purposes of this clause, 'fees for technical services'means any consideration (including any lump sum consideraeion) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries'."

The word 'commission' has a somewhat different connotation and is used differently in different contexts. It has been explained by this Court in Gestetner Duplicators Pvt. Ltd. V. C.I.T. (1979) 117 ITR 1 : (AIR 1979 SC 607) in the context of the definition of 'salary'. Black's Law Dictionary assigns very wine meaning to these expressions: See, for example, pp. 614, 1369 and 1463 of the Sixth Edition (1991). But we do not think that it is necessary to attempt any precise definition of each of these expressions or to attempt to discern any common thread running through them so as to restrict the meaning of the words any similar payment'. In our opinion, the true clue to the interpretation of this expression lies not in the preceding three words but reallv in the second part of the section. The essence of the exemption lies, not in consigning the receipt to one of these pigeonholes but in examining whether the receipt is a payment in consideration of one of the two situations envisaged in the section. To illustrate: where the assessee is the owner of a patent or invention, he may generally permit another to make use of the patent or the invention in consideration of a 'royalty' payment. Or, again, where the assessee is in possession of technical know-how, he ' may be prepared to allow another to make use thereof in consideration of a 'fee' to the assessee. He may also stipulate a consideration in the form of a commission based on the sales of the products the other party is able to manufacture with the aid of such invention or know-how. Again, an assessee may have achieved some speciality and he may agree to lend his services to some other person and stipulate a consideration therefor which may be variously described. The nature of the asset, right, information or services which can be brought under this provision may be varied and the consideration stipulated for allowing another to avail of the assessee's asset, knowledge or services can likewise assume multifarious forms. The word 'similar' connotes that the payment made to the assessee need not be in the nature of royalty, commission or fees only; it could be any payment of like nature i.e. made in consideration of the use or supply of such an asset, knowledge or services in the same manner or royalty, fees or consideration could be. We are, therefore, of the view that any type, of payment received by an assessee will qualify for deduction under the section so long only as it is a payment made in consideration of one of the two types of transactions referred to in the section.

23. Sri Ahuja then draws attention to the finding of the Tribunal in para 41 of its order:

"Admittedly in the present case, there is no claim under the first part of the section and the claim was that the assessee company was receiving payments in

consideration of technical services rendered outside India."

He submits that this is a finding of fact based on an admission which has not been specifically challenged by the assessee in its application for reference to the High Court and that it is not open to the assessee to go behind this position at this stage. It seems to us that there has been some misconception on the part of the Tribunal. There are actually two limbs to the first part of the relevant clause of the section which are clearly brought out in column 5 of the application for approval made to the Board. Col. 5(a) refers to consideration received for the use outside India (i) of any patent invention, model, design, secret formula or process or similar property right and (ii) of information concerning industrial, commercial or scientific knowledge, experience or skill made available by the assessee. The second part of the clause is dealt within Col. 5(b) which refers to consideration for technical services rendered outside India to the foreign Government or enterprise. If, in this context, we peruse the applications for approval made by the assessee to the Board, it will be seen that the assessee had no doubt clearly stated that the payments received by it did come under category (a)(i) above referred to. It was, however, claimed that they did fall under (a)(ii) as well as category (b).- In the application, this was further elaborated. The second limb of the first clause of the section [(a)(ii)] was, it was claimed, attracted in the manner set our in Cl. 8 and the second part of the section was explained to be attracted set out against sub-para (v) of Col. 5. The Tribunal, in the paragraph referred to by Sri Ahuja refers only to the first limb of the first part of the section - which we have referred to as "(a)(i) and has overlooked the presence of the second limb referred to by us as "(a)(ii)5. Sri Ahuja may not, therefore, be quite correct in asserting that the assessee had restricted its claim before the Tribunal only to the ground of "technical services" rendered by the assessee outside India to its client. The asessee's claim rested both on the second limb of the first part as well as on the second part of the relevant clause. The finding of the Tribunal in this regard is not one of fact based an an admission as suggested by Sri Ahuja. The finding proceeds on an incorrect appreciation of the contents of the assessee's application for approval. There is no basis to put forward a contention that, though in the application to the Board, the assessee had claimed relief on two grounds, it had given up a part of the claim before the Tribunal. The the passage relied on by Sri Ahuja does not appear to refer to any admission over and above that contained in regard to column 5(a)(i) of the application for approval. The question is whether the claim has been substantiated under either of these headings.

24. Sri Ahuja vehemently argues it has not been. He submits that the assessee has neiher made any information available to the foreign client nor has it rendered any technical services to the said client. He contends that the contract in favour of the two members of the consortium was in the nature of a turnkey project. This meant that the client was not interested in the details of the information possessed or the services rendered by the contractor; all it wanted was that the Water Supply Project, as per the detailed specifications, designs and drawings furnished by the BWSA should be executed by the consortium, complete in all respects, and handed over to it. Sri Ahuja points out by analysing the provisions of the consortium agreement that the assessee was not concerned with any part of the contract other than the "civil works'. He says that all the 'Reservior works" which involved the putting up of the reservior structures, the trunk pipelines and the mechanical and electrical plant for the project was the responsibility of the SCC and that the assessee had nothing to do but put up a few buildings and ancillary pipelines. The assessee was nothing more than an engineering contractor and, in constructing pump-houses or laying sanitary fittings, he imparted no information and rendered no technical services. Such information as it possessed in these respects was utilised by itself and such technical services, as were rendered by its engineers and other employees were rendered to it and not to either its partner in the consortium or to the foreign Government.

25. We do not desire to encumber this judgment with a detailed discussion of the large number of clauses of the contract (tender) document and the consortium agreement. But it seems to us that while Sri. Ahuja seems to be right in saying that the assessee was concerned only with the civil works section of the project, he has over simplyfied the part played by the assessee in the execution of the contract. It is not necessary to quarrel with Sri Ahuja's description of the contract as a "turn-key project" which, indeed, was the description given to it by the assessee itself - in para 19 of the application to the Board and in para 2 of the letter dated 17-3-82 - or his consequent suggestion that the foreign government was not interested in the minute details or working of the contract but only in the final outcome. Still the fact is that the contract executed by the assessee is no ordinary contract. It may be that a good part of the contract was executed by the SCC. But this cannot render the assessee's part insignificant. If the State enterprise itself was a fully expert body capable of completing the entire project on its own, there would have been no need to call for tenders from experienced consortia. The part of the contract entrusted to the assessee was therefore no less significant. The value of the assessee's package in the contract was about ID 153 millions as against the total value of the contract estimated at ID 326 millions more than 40 per cent. The job of the assessee involved survey, soil investigation design, detailed drawings and construction of all civil works and pipelines (other than trunk vive lines). Even these activities involve technical knowledge and expertise. It cannot therefore, be doubted that the assessee, under the contract, had to make use, outside India, of its industrial, commercial and scientific knowledge, experience and skill. Sri Ahuja makes the point that, even if this be so, the assessee made available no information regarding such expertise to the foreign Government. There is equally no doubt that. in executing the contract, the assessee has rendered technical services. Any engineering contract involves technical services; more so, a contract of the nature and magnitude involved in the present case. Here again, Sri Ahuja says, no technical services were rendered by the assessee to the foreign Government. the assessee only made use of the technical knowledge, experience and skill of its own employees to perform a task undertaken by it.

26. We think the approach of Sri Ahuja on this issue is narrow and unrealistic. It would be far from accurate to say that no information of a technical nature was imparted or made available to the foreign Government. It cannot be forgotten that the contract was executed jointly with an enterprise that was nothing but an instrumentality of the foreign state. The contract had to be executed in close co-ordination with the SCC. Every single step in the contract was done under the supervision of a Consortium Board and a Project Management Board on which both the partners of the consortium were represented. It would be unpragmatic to suggest that this close association was not aimed at enabling the foreign State to collect and acquire such technical knowledge and knowhow from the assessee as could be reasonably acquired in the process of execution of the project. In our view, there is force in the as.sessee's contention that it would not be possible to execute the contract without imparting to the foreign State and enterprise information of the category specified in the section. The findings of the Tribunal in this regard, which have not been challenged by the Department, and are contained in para 42 of the order, are as follows:

> "42. We have already extracted some parts of the contract and the terms of the agreement and from these extracts it appears that the contract was for execution of Karkh Water Supply Scheme'contract Stage 1. As already stated above "works" has been given a defined meaning for interpreting the contract as it means all the works to be executed in accordance with the provision of the contract including the design, manufacture, delivery, supply installation, construction, setting to work, commissioning, site testing, operations and maintenance as the case may be. Form of agreement also makes it clear that the consideration of the payment to be made by .

> he employer to the contractor was for executing, completing and maintaining works in conformity in all respects with the provisions of the contract. The general specification of the work to be done gives the details about head-works, making of the transmission pipelines, reservior works, trunk-pipelines etc. The tender document itself had given some geological hydrological and other information for assisting the contractor at the time of tendering but this information was not guaranteed by the employer and the contractor had to make use of and interpret the same on his own responsibilities. The contract comprised all surveys and site investigation and also detailed design, manufacture, supply etc. of all the works including mechanical plant and services, pipelines and civil and building works from the point of abstraction at the river Tigris intake to the connections of the proposed primary feeder systems to the existing distribution networks in the various supply areas. The surveys, planning, designing and actual construction as well as installations were part of the whole contract and the assessee company had to perform all these functions and after completion of the work, had to commission it and had to operate the works for a period of three months after the issue of Certificate of completion. The various surveys and design reports are contemplated as a part of the contract. The Contract also contemplated training the employers personnel for the- operation and maintenance of the whole of the work and had also to conduct studies on water treatment process to optimise operations.

Similar objective observations regarding technical competence, expertise and experience are also found in para 44 of the order which is extracted a little later. In the context of these factors and findings, it is difficult to say that no information of the type contemplated in Col. 5(a)(ii) of the application form had been made available by the assessee to the foreign Government for use outsid, India. What exactly would be the proportion of the total consideration that could reasonably be attributed to such imparting of information would, however, be a separate question and may have to be reasonably estimated.

27. But, even assuming that there could be some difference of opinion on the above issue, there can be no doubt at all that, under the contract, technical services were rendered by the assessee to the foreign Government. In our opinion, the attempt of Sri Ahuja to differentiate technical services rendered to the assessee by its employees and technicians from technical services rendered by the assessee to a foreign constituent and urge that the latter alone can qualify for relief under S. 80-O on the ground that the project in question was a turnkey project which has succeeded before the High Court, proceeds on an unduly narrow interpretation of the section. In our view, the assessee was undoubtedly rendering services to the foreign Government by executing the water supply project. These services were no doubt technical services as they required specialised knowledge, experience and skill for their proper execution. The argument seems to be that the services in the present case will not be covered by the section because there was no privity of contract between the employees of the assessee who contributed their technical skill and the foreign Government. We think this argument cannot be accepted. The assessee is a company and any technical services rendered by it can only be through the medium of its employees, skilled and unskilled, and, even if the contract had not related to a turnkey project, the assesee's employees would have been answerable only to the assessee and none else though, perhaps, in such an event, the other party to the contract may have retained a larger degree of control and supervision in the execution of the contract. Even where the contractor is an individual or firm and not a company, a contract of this magnitude can be executed onlythroughthe medium of employees or other personnel engaged by the assessee. The facts that physically speaking, it is only such employees that render services and that, so far as they are

concerned, they render services only to their employer and not to the other contracting party are in no way inconsistent with, or repugnant to, the notion that, so far as the foreign Government is concerned, it looks only to the assessee for the rendering of the technical services under the contract. The High Court has pointed out that a person who manufactures a television set ordered by another cannot be said to render technical services to the latter. In our view, that analogy is not apposite in the context of a contract of the nature, magnitude and specialisation with which we are concerned. Where a person employs an architect or an engineer to construct a house or some other complicated type of structure such as theatre, scientific laboratory or the like for him, it will not be incorrect to say that the engineer is, in putting up the structure, rendering him technical services even though the actual construction and even the design thereof may be done by staff and labour employed by the engineer or architect. Where a person consults a lawyer and seeks an opinion from him on some issue, the advice provided by the lawyer will be a piece of technical service provided by him even though he may have got the opinion drafted by a junior of his or procured from another expert in the particular branch of the law. Sri Ahuja tried to negative this line of thinking by urging that "professional services" have been brought within the scope of Section 80-O only by an amendment by the Finance (No. 2) Act, 1991 and that, too, w.e.f. 1-4-1992 which is proposing to substitute the word "technical or professional services" in place of the word "technical services" now used in the section. It seems to us that this amendment may be only of a clarificatory nature. The expression "technical services" has a very broad connotation and it has been elsewhere in the statute also so widely as to comprehend professional services: vide S. 9(1)(vii), referred to earlier. But we need not digress on this aspect for two reasons. Firstly, whatever may be the position regarding other 44 professional services", there can hardly be any doubt that services involving specialised knowledge, experience and skill in the field of constructional operations are "technical services". The Board's guidelines, to which reference is made later, specifically sav so. Secondly, the question whether "professional services" would be "technical services" or not has no impact on the point we are trying to make viz. that in order to say that a person is rendering such services to another, it is not necessary that the services should be rendered by the former personally and not through the medium of others. For the reasons discussed above, we have come to the conclusion that, under the contracts in question, the assessee had made available technical information to the foreign Government for use outside India and had also rendered technical services to the foreign Government outside India.

28. All the same,contends Sri Ahuja, the receipts of the assessee under the contract are just the profits of its business and cannot be described as received in consideration of such information or services as discussed above. If what Sri Ahuja means is that no part of the payments made to the consortium is specially described by the contract, or even the consortium agreement, made in consideration of such information or services he is no doubt correct and the consequence of such non-specification has to be considered. But Sri Ahuja, like the Tribunal, seems to go even further. He says that the contract has been found to be an integral, indivisible contract and that it is not permissible for the assessee to dissect the consideration as attributable to its several ingredients and apportion a partof the consideration as being payment for information made available to or technical services rendered to the foreign Government. The Tribunal observed:

> "43. Schedue 11 to the contract refers to the consideration of the work. Though the lump sum price is indicated for different works but the. overall consideation is for the work as a whole and it is made clear even before the tenders were given that the contract could not be bifurcated and it could not be given in parts. Separate payments are not contemplated for the surveys done, designs made and the other studies carried on they are made an integral part of the work. The assessee company had to give proposals for execution of the works and had to submit a preliminary work

programme showing the starting and completion dates for each complex and major installation including construction of the Dreliminary works, submission of functional plants and general designs and periods for manufacture, delivery, erection etc. of all works required, including plant and civil works pipelines and services. The price schedules were deemed to cover all expenses, costs risks and all material necessary for the contractor to execute, operate and maintain the works.

44. The perusal of the contract and its various parts very clearly show that it was a contract for commissioning of a turn-key project for the Karkh Water Supply Scheme. It is true that for executing this work, it was absolutely essential for the contractor to have necessary technical competence and they had to use highly experienced technical personnel for this purpose. From the very nature of the work, it is clear that the execution of the project involved a high degree of technical competence as well as expertise and experience.However, reading the contract as a whole, the intention of.the parties was only to get the whole project being made available on a turn-key basis according to the general specifications laid down by the Baghdad authorities. It is not possible in this contract either to separate one part from the other or to bifurcate a part of consideration for any particular service. We have already considered the various case laws including certain decisions of the-Hon'ble Supreme Court in the case of Gannon Dunkerley & Co. and Ram Singh Engineering Works (supra) which throw light on interpretation on such contracts. Various High Courts have also considered similar questions throwing light on the nature of contracts. Applying these principles, it appears that this is an indivisible and integrated contract for the whole work and has to be treated as such.

29. In our view, neither of the propositions contended for by Sri Ahuja can be accepted as correct. So far as the first proposition is concerned, it is sufficient for us to point out that it is a well-settled principle that exigibility of an item to tax or tax deduction can hardly be made to depend on the label given to it by the parties. An assessee cannot claim deduction under S. 80-O in respect of certain receipts merely on the basis that they are described as royalty, fee or commission in the contract between the parties. By the kame token the absence of a specific label cannot be destructive of the right of an assessee to claim a deduction, if, in fact, the consideration for the receipts can be attributed to the sources indicated in the section. The second proposition is equally untenable. Contracts of the type envisaged by S. 80-O are usually very complex ones and cover a multitude of obligations and responsibilities. It is not always possible or worthwhile for the parties to dissect the consideration and apportion it to the various ingredients or elements comprised in the contract. The cases referred to by the Tribunal and Sri Ahuja as to the indivisibility of a contract arose in an entirely different context. For purposes of income-tax, a principle of apportionment has always been applied in different contexts. Consolidated receipts and expenses have always been considered apportionable in the contexts - (a) of the capital and revenue constituents comprised in them; (b) portions of expenditure attributable to business and non-business purposes; (c) of places of accrual or arisal; and (d) of agricultural and non-agricultural elements in such receipts or payments. This is a point that does not need much elaboration and it is sufficient to refer to decided cases cited under the passages on this topic at pp. 47, 137, 264, 621 and 677 of Kanga and Palkhivala on the Law and Practice of Income-tax (Vol. I, Eighth Edition). We are, therefore, of opinion that if, as we have held, the contracts in the present case oblige the assessee to make available information and render services to the foreign Government of the nature outlined in S. 80-OO, it is the duty of the Revenue and the right of the assessee to see that the consideration paid under the contract.legitimately attributable to such information and services is apportioned and the assessee given the benefit of the

deduction available under the section to the extent of such consideration.

30. So far, we have looked at the language of S. 80-O in isolation. The question to be considered next is whether the introduction of S. 80-HHB has made a difference. On behalf of the Revenue, it is urged that the facts of the present case squarely fall under the scope of this new Section. The assessee, it is said, has derived profits and gains from its business of execution of a foreign project, as defined in clauses (b)(i) and (ii) of sub-section (2) of the section. Whether the contract is viewed as one directly entered into by the assessee with the foreign Government or as involving the execution of work undertaken by it as part of a foreign project undertaken in pursuance of a contract entered into by the consortium with the foreign Government, the profits and gains qualify for deduction under S. 80-HHB, subject to the conditions and to the extent, outlined in the Section. Even assuming that the whole, or at least a part, of the consideration payable to the assessee for the execution of a foreign project or work in connection therewith can be said also to fall under the terms of S. 80-O, the terms of sub-section (5) of S. 80-HHB make it clear that the assessee would be eligible for deduction under S. 80HHB only and cannot claim deduction under S. 80-O in respect of any part -of the consideration.

31. Sri Nariman, on behalf of the assessee, seeks to repel this contention in several ways. He submitted, firstly, that since the insertion of S. 80-HHB has not resulted in the deletion of S. 80-O the two sections should be read harmoniously and given effect to together. This, he says, can be done by restricting the opertion of S. 80-HHB to contracts entered into on or after 1-4-1983 on which date that section came into force and so as not to affect contracts entered into before that date and approved by the Board. In this context, it is pointed out that S. 80-O envisages grant of approval to a contract and once such approval is granted (on whatever date it be) the approval should enure for the entire period of contract and cannot be restricted to any particular assessment year or years. In support of this contention, the decision in CIT v. Indian Institute of Public Opinion, (1982) 134 ITR 23: (1982 Tax LR 93) (Delhi) is relied upon. It is urged that, once the approval is granted to a contract. Section 80-O becomes operative in respect of all sums received under the contract of the nature specified therein. If the applicability of S. 80-HHB is thus restricted, it is submitted, the terms of that section, including sub-section (5) thereof, cannot stand in the way of the relief available to the assessee under Section 80-O. Secondly, he contends that the definition of "foreign project" in Section 80HHB(2)(b) is a restrictive one; it covers only the construction of the nature specified in sub-clause (i) or the assembly and installation of the nature specified in sub-clause (ii), there being no other prescribed work in terms of sub-clause (iii) and it is only the consideration received for the carrying out of these two activities that is excluded from the purview of relief under other sections under Heading 'C' of Ch. VI-A. In other words, it is said, S. 80HHB applies only to construction/installation activity simpliciter and not a "composite" activity. It is argued that where, as in the present case, the contract envisages, in addition to construction of buildings or other structures and installation of machinery or plant outside India, some further acts to be done by the assessee - such as making available information of rendering of services to the foreign Government enterprise - the consideration attributable to such act will not forfeit the deduction otherwise available under S. 80-O. Some significance is sought to be attached to the use in sub-section (5) of the words "Notwithstanding anything contained in any other provision under this Chapter" and not "Notwithstanding anything done or any approval granted under any other provision" as also the use of the word "shall not qualify" at the end of the sub-section. It is argued that once approval is granted under S. 80-O. the receipts have already qualified for deduction under that section and Section 80-HHB(S) does not operate after that stage. A reference is also made to the different langauge used in S. 8OHHA(6) which specifically excludes relief under Section 80-I and J and to the language used in S. 80-MM which specifically excludes S. 80-O. Thirdly, it is submitted that, if

the Board, after considering the arguments as to applicability of S.80HHB put forward by the assessee, accepted this as a plausible view of the relative area of operation of the two provisions, and extended the approval to assessment year 1983-84 onwards as well, it could not be said to have exceeded its jurisdiction and it is not open to the Revenue to ignore the order of approval merely for the reason that S. 80-HHB has been introduced into the statute book.

32. The contention of Sri Nariman that, even after the insertion of S. 80-HHB, there is room for applicability of S. 80-O in relation to a contract this type which is not a construction/ installation contract simpliciter appears attractive but we do not think S. 80-HHB should be interpreted in such a narrow or pedantic fashion. The section provides for an exemption in respect of profits from a "foreign project" undertaken outside India in the course of business. The expressions ,business of execution of a foreign project" or work forming part of it or the' profits derived' he business, take in all aspects of a business involving the activities referred to in sub-section (2)(b) of S. 80-HHB together with all activities, commitments and obligations ancillary and incidental thereto and the profits flowing therefrom. The definition cannot be restricted to the mere physical activity or putting up the superstructure, machinery or plant but should be understood to take within its fold all utilisation of technical knowledge or rendering of technical services necessary to. bring about the construction, assembly and installation. However, we need not theoretically eliminate all possibility of a contract involving independent elements calling for consideration both under S. 80-HHB and S. 80-O. It is perhaps possible to envisage cases where, while undertaking a foreign project, separate contracts are entered into for two different sets of activities involved viz. (i) construction of works and assembly or installation of plant and machinery and (ii) the transfer of rights and know-how, the impartation of technical knowledge or information and the rendering of technical services and providing separate consideration under each heading. It is perhaps possible to say in such cases that there are two contracts in respect of a foreign project, one of which will fall under S. 8OHHB and another under S. 80-O. Or it may be that even though there is a single contract, it separately identifies the two sets of activities and provides separate consideration for each. In such a case also, it is perhaps, possible to say that the consideration for the foreign project does not comprise in part or 'in whole of consideration that would fall under S. 80-O. But where the contract is for a single indivisible consideration for the execution of a foreign project and does not spell out the imparting of information or the technical services and any consideration therefor, it is difficult to segregate two parts of such a contract, artificially apportion the consideration under two headings referred to above and then apportion the relief under S. 80-HHB and S. 80-O. This is particularly so in.the context of the fact that in the particular case, as has been pointed out earlier the impartation of information was only (sic) indi consisting of what the foreign enterprise or Government could gather from the manner of execution of the contract by the assessee and ,the technical services rendered to the non-resident principal consisted only of the execution of the project for it by the assessee. In other words, this is a case where the execution of the foreign project, in itself, comprises the elements referred to in S. 80-O. There is one single, integral, indivisible contract for executing a foreign project and the entire consideration is attributable to such execution.

33. Sri Nariman drew our attention to columns 27 and 28 in form 10F which read thus

> "27. Whether any part of the payment is derived from,-
>
> (a) the execution of a foreign project undertaken by the applicant in pursuance of the agreement under consideration, or
>
> (b) the execution of any work undertaken 'by the applicant and forming part of a

foreign project undertaken by any other person in pursuance of a contract entered into by such other person with a foreign Government or any statutory or other public authority or agency in a foreign State or a foreign enterprise.

28. With reference to 27(b) above, -

(a) furnish the date of the contract entered into by the other person with the foreign Government or enterprise for the execution of the foreign project.

(b) whether all the services were rendered by the applicant-

(i) before the signing of such contract; or

(ii)after signing of contract."

He sought to contend on the strength of these columns that a part only of the payment derived from a contract submitted for approval under S. 80-O may be referrable to S. 80-HHB leaving a balance, at least, eligible for relief under S. 80-O. This is not the purport of this para. On the other hand it seems to be clearly intended to ensure while granting approval under S. 80-O in pursuance of the application that S. 80-HHB(S) is given effect to and no part of the payment derived from the execution of such a project is allowed to qualify under S. 80-O.

34. Sri Ahuja sought to make a further point that even if the assessee's case falls under S. 80-O, assessee will be entitled to relief not on the entire profits derived by the assessee but only to that (sic) poll of the receipts as can be ascribed the character enumerated in S. 80-O. He suggested that it may actually be more beneficial to the assessee to claim relief for 25% of the whole under S. 80-HHB rather than claim 100% of say 10% attributable to S. 80-O. There is, of course, a fallacy in this argument. For the assessee's case is that.the contract falls either wholly under S. 80-O or partly under S. 80H HB and partly S. 80-O. Thus, if only 10% of the receipts are attributable to S. 80-O, the assessee would be entitled to relief of 25% of the 90% under S. 80-HHB and the whole of the 10% under S. 80-O - in other words a relief of 32 1/2% (which is more than 25%) of the whole. But, for reasons, we have already set down this is a case in which the impartation of information and provision of technical services arise directly from the execution of the project and nothing else. This being so there is a complete identity of the matters governed by S. 80-HHB and S. 80-O and so the assessee will be entitled to only one and not both the reliefs.

35. The assessee has, naturally placed considerable reliance on the approval granted by Board under S. 80-O and, in particular, on the clarification issued by the Board on 31-7-85 after the assessees representation, by deleting the reference to S. 80 (sic). The Department has sought to retaliate by taking up the stand that the contracts in the present case do not at all fall under S. 80-O and that the Board erred altogether in granting such approval. The Tribunal accepted a suggestion put forward on behalf of the Department that the clarification was the result of some confusion and purported to obtain a further clarification from the Board in a manner that has attracted vehement complaint and criticism from the assessee. We do not think it is necessary for us to enter into this realm of debate for, apart from the doubtful sustainability of a collateral attack by the Department on an approval granted by the highest administrative authority under the Act, we have endeavoured to point out that the Board was fully justified in considering the receipts of the assessee as falling under S. 80-O and in granting approval to the contract. We shall also proceed on the footing that the assessee is also right in saying.that the Board had, after considering its representations, accepted the position that

the approval under S. 80-O would enure also for the assessment year 1983-84 onwards. In fact, we think that, irrespective of the Board's clarification of 1985, the correct position is that, once a contract stands approved under S. 80-O in relation to the first assessment year in relation to which the approval is sought, the approval enures for the entire duration of the contract.'This is the principle enunciated in C.I.T. v. Institute of Public Opinion (1982) 134 I.T.R. 23:(1982 Tax LR 93) (Delhi) the correctness of which cannot be doubted and is, indeed, accepted by both counsel before us. S. 80-O does not envisage an application for approval of the contract every assessment year or the limitation of the approval granted by the Board to any particular assessment year. The Board is approving of a contract having regard to the nature of the receipts flowing therefrom and once this approval is granted, the assessee is entitled to seek a deduction under S. 80-O in respect of all the receipts under the contract the consideration for which is traceable to the three ingredients discussed earlier irrespective of the assessment year in which the receipts fall for assessment. The Board's approval of the contract - in 1983 as well as in 1985 -has no doubt this effect. But this is not the same thing as saying that relief under S. 80-O would be available despite S. 80-HHB. It seems to us that the Board's clarification of 31-7-1985 (which merely withdraws the reference to S. 80-HIIB and extends the approval beyond 1982-83) cannot be read as involving a further decision that the assessee should be granted relief under S. 80-O contrary to the terms of S. 80-HHB. S. 80-O only empowers the Board to approve of a contract on being satisfied that it gives rise to receipts qualifying for deduction under S. 80-O and nothing more. In fact the various terms and conditions of the Board's letter of approval (in relation to which arguments have been addressed before us) are totally redundant and unnecessary. All that the Board has to do is to approve of an agreement for the purposes of S. 80-O. It has nothing more to do. Its approval cannot be tentative or provisional or qualified. It cannot be hedged in with conditions and restrictions of the nature set out in the Board's letter. It cannot limit the relief to certain assessment years only; it cannot restrict or enlarge the scope of the relief that can be granted under the section. The assessment years for which relief is available, the extent of the receipts that qualify for deduction and all other incidents flow from the language of the section. The position therefore is that the Board's approval of the agreements in the present case, originally accorded legitimately and properly, as pointed out by us, in respect of assessment years earlier to 1983-84 will enable the assessee to claim like relief under S. 80-O for all subsequent years too. But, after the insertion of S. 80-HHB, in the matter of receipts governed both by S. 80-HHB and S. 80-O, the former and not the latter will prevail. We have therefore come to the conclusion that the 31-7-85 amendment of the Board's approval cannot help the assessee to overcome the mandate of S. 80-HHB(S). The Board, by its 31-7-1985 letter, could not have intended to say this and, if it did, it acted outside the jurisdiction conferred on it by the statute. While the Board has every right to declare that S. 80-O applies in respect of the receipts under a contract approved by it, it has no statutory or other right to supersede or limit the clear terms of S. 80-HHB. We find ourselves unable to accede to the proposition of Sri Nariman that the scope of S. 80-HHB should be excluded from application to contracts approved prior to 1-4-1983. Indeed, a difficulty of this type could arise even in respect of a contract entered into after 1-4-1983. Since S. 80-O continues to be in the statute book even after 1-4-1983, an application may be made and a contract approved under that section. In doing,this the Board may not have, and certainly need not have, considered the provisions of S. 80-H HB. But, despite such approval, the receipts under the contract cannot qualify for relief under S.80-O if the assessing officer comes to the conclusion that the case falls under Section 80-HHB. The legislature has clearly envisaged the possibility of the same receipts qualifying for deduction under S. 80-HHB as well as under any other provision of the Act and has specifically provided that, in such a case, the terms of S. 80- HHB will prevail over the provisions of such other provision. Sri Ahuja invited our attention to the fact that sub-section (5) was not part of S. 80-HHB at the stage of the Finance Bill but was inserted during the passage of the

Bill in Parliament. The Finance Minister explained the purpose in his budget speech. He said:

> "Indian companies and resident non-corporate tax payers are entitled under the Bill to an exemption of 25 per cent of the profits desired by them from the execution of foreign contracts undertaken by them. Some doubts have been raised that income derived from such foreign projects may also be eligible for exemption under S. 80-O of the Income-tax Act. I propose to make a provision to clarify that no part of the consideration received by a person for the execution oi the foreign project or the income comprised in such consideration shall qualify for deduction under any other provision in the Income-tax Act."

The statutory interdict thus inserted cannot be frustrated by the terms of an approval of the Board under S. 80-O. Such approval, at its best, cannot overreach the limitations imposed on the relief available under that section as a consequence of S. 80-HHB(5).

36. There was a good deal of discussion before us as to the scope and effect of the approval granted by the Board to the terms of a contract under S. 80-O. Sri Ahuja would have us told that the approval of the Board has significance only in that, without such approval, the assessee's claim for relief under S. 80-O could not all be entertained. It only opens the gate to enable the assessee to enter and seek a deduction under the section. It is not conclusive on any other aspect of S. 80-O, certainly not on the merits of the assessee's claim. Despite the approval, the Income-tax Officer cannot be absolved of his functions and responsibility of deciding whether any part of the assessee's receipts fulfils the characteristics prescribed for deduction under the section and, if so, to what extent the assessee is entitled to get the deduction in accordance with and subject to the provisions of the section. According to counsel, the Board is not competent to decide these issues in the process of granting approval to the agreement. He points out that, in the instant case, the assessee has not identified the receipts or any parts thereof as having the characteristics enumerated in the section. Nevertheless the assessee purported to claim that the entirety of such unidentified receipts would be the value of the.technical information and services to be imparted-or rendered under the contract (vide col. 6 of the application); eligible for relief under S. 80-O. In order, however, not to give an impression that exemption was sought for the entire profits, the assessee purported to exclude from the claim of exemption the net cost of certain machinery, equipment and other items allegedly supplied to the foreign Government under the contract on a no-profit basis. Sri Ahuja says, the calculations of the assessee are incorrect in several respects. These errors apart, the consideration for services plus profits under the entire contract was estimated at 69.893 million ID at the time of filing the application for approval as per a break-up chart placed on record. Of this the figure of profits was estimated at 25.49 million IDS or Rs. 68 crores only. As against this, the assessment order shows that the relief claimed under S. 80-O for the assessment year 1983-84 alone was to the tune of Rs. 77.84 crores in respect of the Kirkh contract. lie also points out that the aggregate net profits shown by the assessee from this contract for the assessment years 1982-83 to 1989-90 were Rs. 165 crores, almost 50% of the total receipts from the contract. Sri Ahuja says, therefore, the application for approval was based on wild estimates made before the contract began to be worked in right earnest and the Board could certainly have had no possible material for accepting the basis of claim for exemption set out in col. 6 as correct. It would, therefore, Sri Ahuja urges, be totally untenable to interpret the Board's approval as a decision on the merits of the assessee's claim putting the seal of finality as to the basis or quantum of the relief to be granted to the assessee. That is the exclusive domain of the assessing officer which the Board has no business to encroach upon.

37. On the other hand, Sri Nariman contended that it would be preposterous to attribute such an

insignificant role to the Board. The Board is the appex administrative authority under the Act and the responsibility of approving the contract was entrusted to such a high authority for weighty reasons with the clear intention that, once the contract is approved by the Board, the assessee should be entitled to exemption subject only to the arithmetical computations being left to be done by the assessing officer. He points out that the Board had prescribed an elaborate and detailed pro forma on which the application for approval had to be made, some portions of which have been extracted earlier in this judgment. It requires the assessee to give full details of the contract (cols. 2 to 4, 3 to 19) explain how the receipts under contract fulfil each of the requirements of the section (cols. 5 to 9), specify the nature and quantum of the exemption claimed (cols. 10 and 11) and indicate the terms and mode of payment (col. 12). Elaborate guidelines were drawn up and published by Board's circular No. 187 dated 23-12-75, (see 1976-102 ITR st 83). These guidelines, read with the pro forma, clearly envisage a vital role to the Board to analyse the terms of the contract and nature of the assessee's receipts carefully and ensure that they qualify for relief under the section. No doubt, the approval is granted on the basis of the terms of the contract and the actual quantification of the relief available under the ontract for any particular assessment year nas to be worked out by the assessing officer under the contract. It is also possible that the Board's approval is obtained by fraud or misrepresentation and the guidelines provide for revocation of the approval in case some such situation is found to exist. But, so long as the approval lasts, the assessing officer is bound and cannot challenge the correctness of the approval or take up the position that the contract itself falls outside the purview of the section. Apart from this general position. Sri Nariman points out that the approval of the Board had been accorded in this case after full and detailed discussions, correspondence and hearings stretching from 3-3-1981 - the date on which the application was made - to 28-10-1983 when approval was given. These show that each and every aspect of the contract was examined. The assessee was questioned as to how it was claiming that no profit was involved in the sale of materials. Details regarding technical personnel engaged by the assessee and the extent of fees attributable to their recruitment in India were called for. A query was raised as to how the contract can be said to involve the rendering of services to a foreign enterprise within the meaning of S. 80-O. The objection that the services under the contract were rendered to self and not to a third party was also raised. These objections were duly answered and it was only after applying its mind and deliberating over the matter that Board approved the contract. If there had been any misrepresentation of facts on the basis of which the approval had been secured, it was open to the Board to have revoked the approval but this has not been done till today. In the circumstances, Sri Nariman contends that the Department should not be allowed to take up the stand that the approval of the Board had no value at all and could be completely ignored by the assessing officer because, in his opinion, it did not fulfil the requirements of S. 80-O.

38. We have considered the contentions urged on behalf of both parties. Since we have already expressed our conclusion that the contract in the present case does come within the fold of S.80-O and that the Board acted rightly in granting approval to the contract, it may not be quite necessary for us to express any opinion on this issue. However, since the matter has been fully debated before us, and is of some general importance we may indicate our views on this issue.

39. At the outset, it may be pointed out that, earlier S. 80-O (and certain other sections in the statute) had provided for the approval of the Central Government as a condition precedent for the grant of relief or concessions thereunder, where the relief or concession was in relation to a contract with a foreign party. At that stage, it was possible to take a view that the provision was intended only as a safeguard to monitor contracts with foreigners as such contracts may involve several aspects of policy, finance, foreign exchange and other elements vital to the country's interests. But this power of approval has since been shifted to the Board, which is the highest administrative

authority under the Act. This is a very significant change. No doubt, even after the change, the approval acts as a safety valve and enables the Government to decline Its approval for various reasons the effect of which, inter alia, would be that no relief can be sought for under the relevant provisions. But there is a change in the content and purpose of the approval. The Board has to grant the approvai "in this behalf" that is for the purposes of this section. It is true that, even earlier, the approval of the Central Government was to be granted "in this behalf" but when the power is vested in the apex authority under the Income-tax Act, it is clear that the scope of the Board's powers is more extensive and should bear upon the terms of the agreement vis-a-vis the claim for relief under the section in relation to which relief is sought. It is also interesting to see that this power of approval has since been decentralised and vested in the Director-General and Chief Commissioner which are authorities at a lower rung than the Board but at a higher rung than the assessing officer. While, at one time, the Income-tax Officer was described as the king-pin of the tax administration and wa; the sole repository of all functions pertaining to assessment, the recent tendency has been to vest powers of assessment even in officers above that rank of the Income-tax Officer either because of the amount involved or for other reason. Here again, there is good reason, over and above the general need to have a surveillance over foreign contracts, why the power to grant approval is vested in a higher authority in the Income-tax hierarchy itself. The first is that the Borad is considered better equipped, both on considerations of time as well as the technical knowledge needed to examine the ramifications of technical international contracts and decide how far the contract in question and the receipts thereunder are of the nature intended to be covered by the exemption clause. The second is that, with such a provision, the applicant is sure to take steps to obtain necessary approval at a stage earlier to the implementation of the contract and it will be possible to require the party, if modification or changes are called for, to modify the contract even at the outset so as to bring it within the rdnge of contracts for which relief is intended. The third and perhaps the most important reason is that such contracts are generally likely to be longterm contracts and it is of the essence for an applicant to know well beforehand where he stands in the matter of tax exemption and whether he can proceed to execute the contract on the basis that he would be eligible for the relief he feels he is eligible-for. It would result in chaos if an assessee's contracts were left to be scrutinised at the time of assessments several years after they have been implemented and the availability of an exemption provision which the assessee was banking upon and on the basis of which he had entered into the contract, denied to him for one reason or another whereas, duly forewarned by a disapproval, he could have backed out of the contract, if necessary, and saved his skin. In this situation, we find it difficult to accept the plea of Sri Ahuja that the approval is nothing but a measure for screening the cases which an assessing officer may have to consider.

40. We are also reinforced in this conclusion by the manner in which the provision has been understood and implemented by the Board since its introduction. The Board had issued circulars earlier when the relief had been introduced originally by the insertion of S. 85-C and, again, later in 1972. But, after the power of approval was vested in the Board, elaborate guidelines were drawn up as pointed out by Sri Nariman. These guidelines clearly envisage a detailed examination, by the Board of the terms of the contract submitted to it for scrutiny from all angles relevant for a decision as to eligibility for exemption under S. 80-O. The pro forma calls for details of the analysis of the receipts under the contract. An examination whether the receipts can be said to be by way of royalty, commission, fee or similar payment is undertaken. The receipts are analysed under the three headings, as earlier referred to us, set out in paras 5(a)(i), 5(a)(ii) and 5(b) of the pro forma. Even the situation where the contract is a composite one has been dealt with by the guidelines and this may be referred to here in a little greater detail. In the circular of 23-12-75 (supra), the Board

decided that it would decline approval in cases where the consolidated consideration could not be legitimately attributed to know-how, services etc. envisaged in the section but that in cases where such apportionment was considered permissible, it would grant approval to the agreement and have the quantification of the exemption to be decided by the assessing officer. It said:

> "(ix) In the case of a composite agreement specifying a consolidated amount as consideration for purposes which include matters outside the scope of section 80-O (e.g. use of trade marks, supply of equipment etc.) the amount of the consideration relating to the provision of technical know-how or technical services, etc. qualifying for purposes of Section 80-O will have to be determined by the Income-tax Officer separately at the time of assessment after due appreciation of the relevant facts. Where, however, in the opinion of the Board, it will not be possible to properly ascertain and determine the amount of the consideration relatable to the provisions of the know-how or the technical services, etc., qualifying for section 80-O, the Board may not approve such an agreement for the purposes of S. 80-O of the Act."

It had also taken the view that a consideration for the use of the assessee's trade-mark would be outside the purview of S. 80-O. Subsequently, however, the Board changed its line of approach on these two issues. In its circular No. 253 dated 30-4-1979, the Board clarified:

> "Attention is invited to the Board's Circular No.' 187 (F.No. 473/15/73-FTD) dated 23rd December, 1975 on the above subject laying down the guidelines for the grant of approval under S. 80-O. The Board has had occasion to re-examine the aforesaid guidelines and it has been decided to modify the guidelines to the extent indicated below:-
>
> xxx xxx xxx
>
> (ii) In para (ix) of the said circular, it was mentioned that consideration for use of trade mark would be outside the scope of section 80-O. It has now been decided that payments made for the use of trade-marks are of the nature of royalty, and therefore, fall within the scope of S. 80-O.
>
> (iii) It was also stated in para 3(ix) of the -circular dated 23-12-1975 that in the case of a composite agreement which specified a consolidated amount as consideration for purposes which included matters outside the scope of section 80-O, the Board may not approve such an agreement for the purposes of section 80-O of the Act if it was not possible to properly ascertain and determine the amount of the consideration relatable to the provision of the know-how or technical services etc., qualifying for section 80-O. Thus, the benefits of section 80-O could be denied to the entire amount of royalty, commission, fees etc., receivable under such an agreement. It has since been decided that in such cases approval would be granted by the Board subject to a suitable disallowance for the non-qualifying services after taking into consideration the totality of the agreement so that balance of the royalty-fees etc. which is for the services covered by section 80-O can be exempted."

41. It is thus clear that the Board has chalked out for itself, we think quite leitimately and properly, a very detailed and dominant rule as to the availability of exemptions under S. 80-O. The guidelines are of general nature, fully sanctioned by the provisions of S. 119(1) of the Act and, being

instructions enuring to the benefit of the assessee, cannot be gone back upon by Departmental Officers subordinate to the Board, particularly in a case where no steps have been taken - or even suggested as necessary to be taken - to cancel or revoke the approval already accorded. This is, indeed, a proposition well-settled by the series of judicial decisions starting from Navnitlal Javeri's case (1965) 56 ITR 198 : (AIR 1965 SC 1375). In fact also, the Board has followed only its own guidelines. Elaborate reference to the correspondence, discussions and hearing is unnecessary. The Board has reached its decision to approve the contract and the basis of claim for exemption after full consideration and analysis. We may, in this context, also point out that while the Board, in the present case, simply approved of some of the contracts on the basis of the application filed, it has, in the case of some other contracts modified that basis also. For instance, in regard to the Wadi Khan and Abu Sukhair projects, the letter of a proval states that approval is granted subject to the condition or clarification that only the profits relating to rendering of technical services will qualify for the benefit of S. 80-O of the I.T. Act and not the profits relating to the supply of material/ equipment. These guidelines have also since attained statutory recognition as the pro forma earlier prescribed by the Board has virtually been incorporated in Rule 11E and Form prescribed thereunder. In fact Sri Nariman wants to utilise certain columns in the statutory form to support his contentions that an approval under section 80-O is effective even after section 80-HHB was introduced but to this argument, we shall advert a little later. We have, in view of the above discussion, no doubt at all that, while granting the approval under Section 80-O, the Board has not only the jurisdiction but also the responsibility of examining the agreement submitted for approval from all angles relevant to the deduction provided for under S. 80-O and that it is not competent to the Department to question the maintainability of the claim for deduction under Section 80-O in respect of the aspects gone into and decided upon by the Board.

42. We should, however, make it clear that our conclusion does not mean the deprivation of all functions of the assessing officer while making the assessment on the the applicant. The Officer has to satisfy himself (i) that the amounts in respect of which the relief is claimed are amounts arrived at in accordance with the formula, principle or basis explained in the assessee's application and approved by the Board; (ii) that the deduction claimed in the relevant assessment year relates to the items and is referable to the basis on which application for exemption was asked for and granted by the Board; (iii) that the receipts (before the 1975 amendment) were duly certified by an accountant or that, thereafter, the amounts have been received in or brought into India in convertible foreign exchange within the specified period. The second of these functions is, particularly, important as the approval for exemption granted in principle has to be translated into concrete figures for the purposes of each assessment. Neither the introduction of the words "in accordance with and subject to the provisions of this sections" nor the various "conditions" outlined in the letter of approval add anything to or detract anything from the scope of the approval.

43. As already mentioned, Sri Nariman also contended that, even after the insertion of 80-HHB, the assessee would be entitled to claim the deduction under section 80-O in view of the Board's amendment to the letter of approval that the approval will be operative for assessment year 1982-83 onwards, rescinding the qualification in the earlier letter that the provisions of S. 80-HHB will apply for assessment year 1983-84 onwards. It is true that the earlier restriction was lifted by the Board after considering the contentions raised by the assessee in its letter of 2-12-1983:

> (a) that the two sections operate in different fields for exemption;
>
> (b) that the approval once granted under Section 80-O, the exemption to which the assessee became eligible should ensure for the directions for the entire contract; and

(c) that S. 80-HHB should be restricted to agreements entered into before 1-4-1983.

44. But we are unable to give effect to the Board's decision of 31-7-1985 in the same way as we have given effect to the Board's earlier approval letter of 28-10-1983 for a number of reasons. The first is that the jurisdiction of a Board is to grant approval to a contract only for the purposes of S. 80-O; it has no jurisdiction to pronounce on the availability or otherwise of an exemption under Section 80-HHB and the Board's opinion as to this, even if expressly stated by the Board, cannot bind the officer. The relief under S.80-HHB is not dependent on the approval of the Board and is for a totally different type of transaction. The letter of 31-7-85 is also a decision in an individual case and cannot be treated as a general circular incorporating a policy decision by the Board that in all cases of a particular type governed by both sections relief may be given under S. 80-O in which event perhaps it could have been implemented by applying the principle of the Jhavari case (AIR 1965 SC 1375) (supra). The second is that the Board, in the 1985 letter, has only stated that the approval under S.80-O will enure for 1982-83 onwards. This is quite a correct statement for, as we have explained earlier, the approval by the Board is to the contract and so long as the contract subsists the relief should be granted on the terms of S. 80-O. Thus the assessee is entitled to deduction under S.80-O on the terms of that section even for 1983-84 and subsequent years. It becomes disentitled to the relief not because it does not fulfil the requirements of S. 80-O but only because S. 80-HHB(5) stands in the way and mandates that in cases to which both provisions will apply relief under S. 80-HHB will alone be available. The argument that the applicability of S. 80-HHB should be excluded from contracts entered into, or those approved of under S. 80-O, before 1-4-1983, is patently untenable. Section 80-HHB comes into force on 1-4-1983 and should be applicable for assessment year 1983-84 onwards in all cases. It does not contain even a reference to S. 80-O and so its applicability cannot depend on the formation of the contract subsequent to that date or to the date of its approval under the latter section being after that date. Thirdly, the approval which otherwise qualifies the assessee for relief is no doubt still effective but its power to "qualify" for relief is taken away by the new statutory provision. The argument that the assessee could not have anticipated the insertion of S. 80-HHB and is put to a hardship if that section is applied is no doubt correct. But one cannot decline to give effect to the applicability of the statutory provision on the ground of hardship or on the ground that it restricts the relief which, but for the insertion of the section, would have been available to the assessee, particularly when the section itself envisages the possibility of the assessee being also eligibile for relief under another section and makes special provision for that eventuality.

45. Sri Nariman submitted that we should not favour the above interpretation as it would lead to an anomalous result. He says that the whole idea of S. 80-HHB was to enlarge the benefits to contractors working abroad and earning foreign exchange but that, by reason of our decision, the assessee will now get relief only to the extent of 25% in respect of a contract for which it got 100% benefit in earlier years. On the other hand, the department would no doubt say that our conclusion that the assessee was entitled, in earlier assessment years, to 100% relief on this type of contract is anomalous in the light of the fact that subsequently the legislature specifically provided that only 25% of the earnings on foreign projects should be exempted. In our view, there is no force in these contentions. The anomaly, if it is one, arises because of the specific language of the statute and the nature of the contract we have to consider. S.80-HHB does not confer an additional benefit; sub-section (5) in no uncertain terms states that the benefit thereunder will take away the benefit, if any, under any other provision. This has to be given effect to. Equally, the assessee was able to get 100% relief in earlier years only because the contract here is of such nature that it consists only of the rendering of technical services so that the fields of the two exemptions completely overlap. On the other hand, as discussed earlier, it is possible to conceive of foreign projects wherein the

construction and installation aspect and information or technical services aspect are kept separate. Equally there can be cases falling under S. 80-O which do not all relate to a "foreign project" as defined in S. 80-HHB. In such cases, the two provisions will continue to operate independently. There is, therefore, no anomaly or absurdity in the conclusion we have reached.

46. For the reasons discussed above, we hold that the assessee was entitled to the relief under S. 80-O for assessment years earlier to 1983-84 and that the approval granted by the Board under that section was right and proper. However, for the assessment year 1983-84, the assessee does not qualify for deduction on the terms of that section as the contract receipts are fully covered by the provisions of S. 80-HHB and the deduction under that section will prevail over the relief that might have been otherwise available in view of the terms of S. 80-HHB(5). We, therefore, affirm the conclusion reached by the High Court and dismiss this appeal. We however, make no order as to costs. Appeal dismissed.

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