CALCUTTA HIGH COURT

Indian Aluminium Co Ltd

Vs

Commissioner of Income Tax

(Sabyasachi Mukharji, J.)

15.07.1981

JUDGEMENT

Sabyasachi Mukharji, J.

(1.) IN this reference under Section 256(1) of the I.T. Act, 1961, at the instance of both the Revenue as well as of the assessee several questions have been referred to us. At the instance of the Revenue, the following questions have been referred to us: "1. Whether, on the facts found by the Tribunal or on record and in the circumstances of the case, the Tribunal was justified in holding that the assessee was entitled to relief Under Section 84/80J of the INcome-tax Act, 1961, in respect of the new production units added to the existing production units of the assessee at Alupuram, Belur, Hirakud and Muri for the assessment years 1966-67 to 1969-70. 2. Whether, on the facts and in the circumstances of the case, and on a proper interpretation of the agreement between the non-resident company and the INdian Aluminium Company Ltd., the Tribunal was correct in holding that there was no receipt of fees by the non-resident company in INdia for the assessment years 1967-68 to 1969-70. 3. Whether, on the facts and in the circumstances of the case and on a proper interpretation of the agreement between the non-resident company and INdian Aluminium Company Ltd., the Tribunal was correct in holding that no part of the services was rendered by the non-resident company in INdia and in that view holding that no income accrued or arose to the non-resident company in INdia for the assessment years 1967-68 to 1969-70. 4. Whether, on the facts and in the circumstances of the case and on a correct interpretation of the agreement between the non-resident company and INdian Aluminium Company Ltd., the Tribunal was correct in holding that there was no business connection in INdia between the said two companies within the meaning of Section 9(1) of the INcome-tax Act, 1961, and in that view holding that no income could be deemed to accrue or arise to the non-resident company in INdia for the assessment years 1967-68 to 1969-70. 5. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessee was entitled to depreciation on roads, fences and culverts within the factory compound at the rate applicable to first class factory building for the assessment years 1966-67 to 1969-70."

(2.) WHILE, at the instance of the assessee, four other following questions have been referred to us : "6. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that in respect of the powder and paste plant at Kalwa, the applicant-company was not entitled to deduction under Section 80E/80-I of the Income-tax Act, 1961, for the assessment years 1966-67 to 1969-70. 7. Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in holding that development rebate at 35% is not allowable on the machinery installed at the applicant's company's powder and paste plant at Kalwa for the assessment years 1966-67 to 1969-70. 8. Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in not holding that the company is entitled to depreciation on the storage tanks at 10% being the rate applicable to aluminium industries plant instead of at 7% for the assessment years 1966-67 to 1969-70. 9. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that Rs. 55,546 is assessable as income for the assessment year 1968-69." So far as question No. 1 is concerned, the Tribunal in the statement of the case has observed, inter alia, as follows: "3. One of the points at issue which arose for the consideration of the Tribunal in the departmental appeal relates to the relief given by the Appellate Assistant Commissioner under Section 84/80J of the I.T. Act, 1961, in respect of the additions made to the assessee's production units at Hirakud, Alupuram, Belur and Muri. The facts of the case, as both the parties pointed out, have already been set out in the orders of the lower authorities and are substantially similar to the case (CIT v. Indian Aluminium Co. Ltd.) which went to the Calcutta High Court. The departmental representative relied on the findings of the ITO, whereas the assessee pointed out that the facts of the case were stronger than those for the year in which the matter was taken up to the Calcutta High Court. In this connection, the assessee pointed out to certain facts relating to this claim which we shall set out below as contained in a separate statement filed by the assessee

: JUDGEMENT_114_ITR140_1983Html1.htm Hirakud Smelter (Hirakud II) : Completed in 1961--Previous plant capacity 10,000 tons per annum--new capacity additional 10,000 tons per annum. Unit housed in separate buildings ; cost for this new project was approximately Rs. 22 million. This new project for the first time had facilitated to produce wirebars with special grade metal for supplying to cable manufacturers under separate commitments to Government of India. New Industrial Licence No. L/IB(1)/N-4/59 dated 10th November, 1959, received from the Government of India. Also confirmed that the new unit was formed not by splitting up or by reconstruction of the existing unit. Also submitted that the buildings or machinery used for the new unit were absolutely new and not used previously. Also confirmed that the new project was financed by additional capital. Alupuram Extrusion (Alupuram) : Completed in 1961--Previous plant capacity 1,500 tons per annum. New plant capacity 3,700 tons per annum. Further land acquired and a new building constructed to house the new Extrusion Press. The project cost came to about Rs. 7.3 million and is capable of producing large and heavy extruded sections, which the old unit could not do. New Industrial Licence No. L/IB(2)/N-44/59 dated November 10, 1959, was obtained from the Government of India for producing another 2,500 tonnes per annum of Extrusions. Confirmed that the new unit was not formed by splitting up or by reconstruction of

the existing unit. Also submitted that the building or machinery used for the new unit were absolutely new and not used previously. Also confirmed that the new project was financed by additional capital. Muri Alumina Plant (Muri No. II) : Completed in 1961--capacity of previous plant 18,000 tons per annum ; capacity of "new plant 36,000 tons per annum. Consequent upon the newly added smelter units at Hirakud a new section at the Alupuram Plant had to be added to meet the increased alumina requirements of the new smelter. Under this new project, new digestors, autoclaves, turbo alternators and boilers, etc., were further installed. This new section was to operate on double digestion process as against the single digestion process under the existing facilities. The entire project cost was about Rs. 28 million. Confirmation that the new unit was not formed by splitting up or by reconstruction of the existing unit was filed. The buildings or machinery for the unit were all new. The new unit was financed by additional capital. BEWR-II Industrial Licence No. L/IB(C)/H-44/50, dated 10th November, 1950, was received from the Gov't. of India for the production of another 1,500 tonnes per annum of fabricated products at Belur. For giving effect to this increased production a new 4 feet high mill was installed at a separate building. The cost of these facilities amounted to approximately Rs. 38 million. Initial capacity was for 9,000 tonnes per annum. Also confirmed that the new unit was not formed by splitting up or by reconstruction of the existing unit. Also submitted that the buildings or machinery used for the new unit were absolutely new and not used previously. Also confirmed financed by additional capital. 4. From the above facts and in view of the Calcutta High Court decision in this very case (CIT v. Indian Aluminium Co. Ltd. the Tribunal upheld the Appellate Assistant Commissioner's action in granting relief under Section 84/80J." In the aforesaid view of the matter and in view of the ratio of the decision of the Supreme Court in the case of CIT v. Indian Aluminium Co. Ltd. the question must be answered in the affirmative and in favour of the assessee.

(3.) SO far as questions Nos, 2, 3 and 4 are concerned, it would be instructive to refer to the facts as found by the Tribunal. The Tribunal observed, inter alia, as follows : "9. Since we have to consider the chargeability to tax, we have by necessity to see sections. Section 5 brings to charge any income which is received or deemed to be received or which is accrued or arises or is deemed to accrue or arise in India or outside India. Taking up the question of receipt first on a consideration of the evidence before us it is not possible to hold that any income is received in India. The agreement with the non-resident company had provided for the payment of the fees at Canada. Clause 4(e) provides for such payments in Canada. Clause 4(d) also makes it clear that the payment would be made at Montreal. We have also enquired about the modus operandi of the payment. It appears that on the permission for transfer of the amounts being sanctioned by the Reserve Bank of India, the assessee purchases a demand draft from the bank and sends it by post to Montreal. In the absence of anything in the agreement to show that the Canadian company has asked for the payment to be sent by post, the post office cannot be treated as the agent of the non-resident company. We, therefore, come to the conclusion that there is no receipt of the fees in India. 10. The next point to be considered is whether anything has arisen or accrued to the non-resident in India. Now, the agreement makes it clear that the technical information and know-

how would be provided to the Indian company on payment of the fees. The technical know-how and the information required are with the non-resident in Canada. The learned counsel for the assessee, in the course of the hearing, had given us a few examples of the type of services done by the non-resident. From the examples given, it would appear that whenever the assessee-company has some problems, the problems are stated in a concise manner and sent to Canada. The Canadian company finds out the solution to these problems. It would, therefore, appear that the service has actually been done by the non-resident company in Canada itself. They have not sent their expert to India. Neither is their know-how applied under their guidance when such service, are done. It has been held that the income arises only at the place where the service is done. The Bombay High Court in the case of *Kathiawar Coal Distributing Co. v. CIT*[1], had considered the service done by a commission agent under similar circumstances and had held that since every item of the services were rendered in non-taxable territories (Saurashtra), the income accrued outside the taxable territories. 11. We also find that the agreement providing for the services were not entered into between the two companies at Montreal in Canada. Therefore, the ratio of the cases like *CIT v. Anamallais Timber Trust*[2] *and CIT v. A. S. T. F. Rodriguez and Co*[3]. would not apply and no income accrues on the basis of the situs of the contract. There is also one other point to be considered before we finally decide about the accrual of income. The facts as given by the assessees show that the problems are sent to the Canadian company and the Canadian company pursuant to the agreement gives its solution. Now, unless the solution or the know-how is received by the Indian company in India, there is really no service at all rendered. Merely the solution of the problems in Canada does not help the assessee unless it is also duly conveyed to India and is received by the Indian company. If it is the outlook of the Indian company to receive the information from Canada then there is no difficulty. The services are really rendered outside India. But if it is the duty of the Canadian company to see that the information are received by the Indian company in India then perhaps further consideration would arise. Prima facie on a reading of Clause (1) of the agreement it would appear that it is the duty of the Canadian company in procuring and forwarding such information and advice as required by the Indian company. It may be that if the Canadian company has the duty of forwarding information to India it could be reasonably inferred that their part of the contract would be fulfilled only when the Indian company received the information in India. In such case again it may be possible that the post office would be acting as an agent of the Canadian company conveying the information to the Indian company. In a well-known case, *CIT v. Ogale Glass Works Ltd*[4]. the Supreme Court considered the post office as an agent when moneys were being remitted by post. If sufficient materials are available it may be possible to stress the ratio to cover the cases of information being sent by post. However, we do not have any material on this point excepting Clause (1) of the agreement- It appears to us that this is hardly sufficient to give a finding on this point. We will, therefore, hold that there is no material that the services were rendered in India through the post office as an agent." In view of the facts found by the Tribunal and the nature of the agreement, the place of receipt under the agreement, the nature of the transaction and the place of the transaction, we are of the opinion, that the Tribunal in the background of well-settled principles of law has arrived at the correct conclusion on these three

questions, viz., questions Nos. 2, 3 and 4 and, therefore, we are of the opinion, that all these three questions must be answered in the affirmative and in favour of the assessee. ;

Cases Referred.

1[1958] 34 ITR 182
2[1950] 18 ITR 333 (Mad)
3[1951] 20 ITR 247 (Mad)
4[1954] 25 ITR 529