

BOMBAY HIGH COURT

Indian Hume Pipe Co. Ltd

Vs.

Central Board of Direct Taxes

W.P. No. 1764 of 1981

(Sujata V. Manohar, J.)

14.10.1985

JUDGMENT

Sujata V. Manohar, J.

1. The petitioner is a public limited company registered under the Companies Act, 1956. It carries on business of manufacture and sale of hume pipes. In the course of its business over the years, the petitioner has acquired considerable technical knowledge, information and skill relating to manufacture of all types of concrete pipes - plain, reinforced, prestressed, etc. The petitioner also has a research and development department for development of its own designs for manufacture of prestressed concrete pipes.

2. An organization known as "The Water and Power Development Consultancy Services (India) Ltd." (hereinafter referred as "WAPCOS") is established by the Government of India with the object of providing consultancy services in connection with planning, development of irrigation, water supply, power, flood control and integrated agricultural development. In or about October, 1974, the Rangoon City Development Committee requested WAPCOS to provide consultancy services for the Rangoon City Municipal Water Supply Project. WAPCOS were required to supervise, inter alia, production of prestressed concrete pipes, laying of prestressed concrete transmission mains and specials from Pugyi reservoir to Rangoon and construction and supervision of prestressed concrete pipe plant.

3. WAPCOS in turn requested the petitioner to collaborate with WAPCOS. the petitioner agreed to make its technical expertise available for the said work. By its letter dated December 17, 1974, the petitioner agreed to supply its expertise for the various jobs set out in that letter. The petitioner also mentioned that its experts would be backed by the designs and development organization of the petitioner in discharging their duties efficiently; it would also provide facilities for training the engineering staff of the Rangoon City Municipal Committee, if so

required, at its works in India. The petitioner agreed to limit its role to that of consulting engineers. Thereafter, the work of providing consultancy services to the Rangoon City Municipal Committee at Rangoon, Burma, for the Rangoon Water Supply Project was awarded with the approval of the Asian Development Bank, to WAPCOS. The contract between the Rangoon City Development Committee and WAPCOS is dated February 5, 1976. Under the contract, the services of certain personnel which are specified by name in the contract are agreed to be provided as set out in that contract. All the personnel who are so required to provide their services are the personnel of the petitioner. The agreement sets out the payments to be made for the services of these personnel and the rates at which these payments are to be made. These are the only payments to be made under the contract dated February 5, 1976.

4. Prior to the finalization of the said contract, WAPCOS, by its letter dated December 3, 1975, addressed to the petitioner, conveyed to it the terms and conditions on which the contract was to be finalized by it with the Rangoon City Municipal Committee. Paragraph 2 of the said letter stated that 20% of the total payment to the experts under the contract would be retained by WAPCOS to cover promotional and other overheads and 80% would be made available to the petitioner. The letter said : "We will make the payment available to you in foreign exchange and local currency in the same proportion as received by us." In paragraph 3, it was set out as follows :

"We will be given an advance payment of US \$ 100,000 out of which equivalent to US \$ 19, 810 will be paid in local Kyats in Rangoon. We would make available to you the proportionate advance when received, after signing of the contract.

Thus, under the terms and conditions of the contract between the Rangoon City Development Committee and WAPCOS, the payments were in respect of services of the personnel of the petitioner. The agreement between the petitioner and WAPCOS shows that WAPCOS and the petitioner were to divide the total payment received under the contract dated February 5, 1976, in the proportion of 20% and 80%. WAPCOS were bound to hand over the entire share of 80% of the petitioner received under the said contract between the Rangoon City Development Committee and WAPCOS to the petitioner. In other words, though WAPCOS received the entire payment from the Rangoon City Development Committee in respect of the share of the petitioner, WAPCOS was merely the agent receiving payment on behalf of the petitioner. This is also clear from the letter dated March 31, 1980, which the petitioner has obtained from the Rangoon City Development Committee. The letter of Rangoon City Development Committee confirms that since inception, it was aware of the petitioner's association with WAPCOS in rendering consultancy services at Rangoon for its project, because these facts were clearly revealed in the global tender submitted by WAPCOS for this project. The petitioner's participation was recognized and approved before the contract was awarded to WAPCOS. What is important, the letter says : "... your share of fees for rendering consultancy services to us was remitted by us to you along with WAPCOS share of fees through the good offices of WAPCOS

as your agent in our foreign exchange." Subsequently, after WAPCOS obtained the permission of the Reserve Bank of India, the petitioner, as from December, 1978 onwards, is receiving payment directly in foreign currency, namely, US dollars, from WAPCOS in respect of the services rendered by it under the said contract.

5. The petitioner, by its letter dated September 26, 1977, made an application to the Central Board of Direct Taxes for approval of the agreement dated February 5, 1976, under section 80-O of the Income-tax Act, 1961. By its reply dated April 19, 1978, the application of the petitioner has been rejected by the Central Board of Direct Taxes on the ground that the agreement dated February 5, 1976, is not directly between the petitioner and the foreign party, namely, the Rangoon City Development Committee, Burma. The letter sets out that since the agreement is through Water and Power Development Consultancy Services (I) Ltd., Delhi, which is another Indian concern, the agreement does not qualify for registration under section 80-O of the Income-tax Act, 1961.

6. Section 80-O of the Income-tax Act, 1961, at the material time, was as follows :

"80-O. 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 the income so received in, or brought into, India in computing the total income of the assessee."

Under section 80-O, therefore, as it was in force at the relevant time, a deduction of the whole of the income brought into India was available while computing the total income of the assessee, if the income qualified under section 80-O. The relevant requirements of section 80-O for the present case are - (i) income should be by way of fees or any similar payment, (ii) it should be received by the assessee from a foreign enterprise, (iii) it should be in consideration of technical services rendered or agreed to be rendered outside India to such foreign enterprise by the

assessee, (iv) such technical services should be rendered by the assessee under an agreement approved by the Board in this behalf, any (v) 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 the present case, the income received by the petitioner is by way of fees. These fees are in consideration of technical services rendered outside India by the petitioner to a foreign enterprise, namely, the Rangoon City Development Committee. The fees have been paid by the Rangoon City Development Committee in US dollars, which have been brought into India. The fees are for services rendered under the agreement dated February 5, 1976. The question is whether the agreement dated February 5, 1976, between WAPCOS and the Rangoon City Development Committee is an agreement of the kind contemplated under section 80-O which qualifies for approval by the Board. The second objection which is now raised by the Department is that the payments are not received in India by or on behalf of the assessee. According to the Department, the assessee has received payments from WAPCOS, which is an Indian company, and hence such payments do not qualify for deduction under section 80-O.

7. The application of the petitioner for approval of the agreement dated February 5, 1976, has been rejected on the ground that there is no privity of contract between the petitioner and the Rangoon City Development Committee. Now, section 80-O does not state that the agreement should be between the assessee and the foreign party. Section 80-O requires that the fees should have been received in consideration of technical services rendered under an agreement approved by the Board. In the present case, the technical services have been rendered by the petitioner to the Rangoon party under the agreement dated February 5, 1976. Although the agreement is not between the petitioner and the Rangoon party, it in terms refers to the personnel of the petitioner by name who are required to render technical services to the Rangoon party outside India. There can be no doubt that the services rendered by the petitioner are pursuant to the agreement dated February 5, 1976. Although the name of the petitioner is not mentioned in that agreement, the detailed biodata concerning the personnel who are required to render technical services to the Rangoon party would clearly show that the technical experts are the employees of the petitioner. In fact, the Rangoon City Development Committee has clarified by its letter date March 31, 1980 that it was throughout aware of the association of the petitioner in the contractual work, and in fact there was an express approval given to the petitioner's participation in the said work. Thus the petitioner has rendered technical services under the agreement February 5, 1976, to the Rangoon City Development Committee. The petitioner has, therefore, fulfilled all the requirements of section 80-O. There is nothing in section 80-O which requires that the agreement referred to therein must be between the assessee and the foreign party.

8. In this connection, my attention was also drawn to the provisions of section 80MM of the Income-tax Act, 1961, which has since been repealed with effect from April 1, 1984. Under section 80MM "the gross total total income of an assessee, being an Indian company, includes any income by way of royalty, commission, fees or any other payment... received by the assessee

from any person carrying on a business in India in consideration..... under an agreement entered into by the assessee with such person on or after the 1st day of April, 1969, and approved by the Board in this behalf, there shall... be allowed a deduction from such income of an amount equal to forty per cent. thereof,.....". The language of section 80 MM shows that where an agreement is required to be between an assessee and a third party, the section in terms prescribes this requirement. Any such express requirement that the agreement should be between the assessee and the foreign party is absent from section 80-O. Therefore, under section 80-O, it is not necessary that the agreement referred to therein should be between the assessee and the foreign party. All that is required is that the assessee should have rendered, inter alia, technical services under an agreement and this agreement should be approved by the Board. The rejection of the petitioner's application for approval of the agreement on the ground that there is no privity of contract between the assessee and the foreign party, therefore, is not warranted by the provisions of section 80-O. The section merely requires that fees should have been received in consideration of technical services rendered under an agreement approved by the Board. The petitioner qualifies under this provision for getting the agreement date February 5, 1976, approved. The Board, therefore, cannot refuse its approval only on the ground that the petitioner is not a party to the agreement.

9. It is further submitted on behalf of the Department that in the present case, the assessee has not received any income in convertible foreign exchange form outside India. It is the submission of the Department that the income received by the assessee is the payment received by the assessee from WAPCOS pursuant to an agreement between WAPCOS and the petitioner. In the first place, this was not a ground for rejecting the petitioner's application. Any way, this submission is not supported by the terms of the agreement dated February 5, 1976, or the nature of the arrangement between the petitioner and WAPCOS. As set out earlier, the petitioner is entitled to receive payment in its own right in respect of services rendered by the employees of the petitioner outside India. Under the agreement between WAPCOS and the petitioner, WAPCOS is entitled to retain 20% of this income for its promotional expenses and overheads. The balance of 80% of the income is to be received by the petitioner. WAPCOS is merely the agent of the petitioner for the purpose of receiving this 80% of the payment which in turn is handed over by WAPCOS to the petitioner in India. In the absence of the Reserve Bank of India's permission, the payment which was received in foreign exchange by WAPCOS was converted into Indian rupees and handed over to the petitioner. This cannot make any difference to the fact that the payment was received in foreign exchange on behalf of the petitioner by WAPCOS and it is brought into India on behalf of the petitioner. In fact, under the same agreement, after obtaining the permission of the Reserve Bank of India, the petitioner is now receiving payment in foreign exchange as from December, 1978 onwards. The income, therefore, which is derived by the petitioner under the contract dated February 5, 1976, is an income received in convertible foreign exchange outside India and brought into India on behalf of the assessee in accordance with the law in force.

10. In this connection, my attention was drawn to a decision of my brother Pratap J., dated *June 10, 1985, in Gannon Dunkerley & Co. Ltd. v. Central Board of Direct Taxes, New Delhi, in* ¹In

that case, Gannon Dunkerley & Co. Ltd. had acted as sub-contractors of Engineering Projects (India) Ltd. in respect of a contract entered into by Engineering Projects (India) Ltd. with the Government of Kuwait. There was an agreement between Gannon Dunkerley & Co. Ltd. and Engineering Projects (India) Ltd., under which Gannon Dunkerley & Co. Ltd. had worked in Kuwait. The application of Gannon Dunkerley & Co. Ltd. for approval of this agreement with Engineering Projects (India) Ltd. under section 80-O of the Income-tax Act was rejected by the Board on the ground that the agreement was with an Indian company and hence it did not qualify for approval under section 80-O. This contention of the Board was negated by the High Court which held that the main conditions and ingredients of section 80-O were complied with. The court said that the object of section 80-O is to encourage the export of Indian technical know-how and augmentation of foreign exchange resources of the country. Bearing in mind the object, the agreement in question fulfilled objectives for which section 80-O was enacted and hence it should be held as covered by section 80-O. The learned judge in that case on facts came to the conclusion that the agreement in question there complied with the conditions of section 80-O.

11. In the present case, there is nothing in section 80-O which requires that the agreement should necessarily be between the assessee and the foreign party. If the conditions set out in section 80-O are fulfilled, the agreement would qualify for approval by the Board. The agreement dated February 5, 1976, for the reasons set out above, qualifies for such

¹ Writ Petition No. 1044 of 1981 [1986] 159 ITR 162 (Bom)

approval.

12. In the premises, the petition is allowed and the rule is made absolute in terms of prayers (a) and (b).

13. The respondents to pay to the petitioner the costs of the petition.
Petition allowed.