IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO.202 OF 1993

The Commissioner of Income Tax,
Bombay City III, Bombay ...Applicant
v/s
M/s Montedison of Italy,
Bombay ...Respondent

Mr Suresh Kumar for Applicant.
Mr P.J. Pardiwalla, Sr. Counsel with Mr Atul K. Jasani for Respondent.

CORAM : S.C. DHARMADHIKARI AND
B.P. COLABAWALLA JJ.

Reserved on : 23rd July, 2014.
Pronounced on : 8th August, 2014

JUDGMENT [Per B.P. Colabawalla J.] :-

1. By this Income Tax Reference, at the instance of the Revenue, the following question of law has been referred for the opinion of this Court and reads as under :-

> *"(A) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the payments received by the assessee – company from Fertilizer Corporation of India, Indian Petro Chemicals Corporation and J.K. Synthetics Ltd. under the various contracts are in the nature of technical service fees covered by the proviso to section 9(1)(vii) and are, therefore, exempt from tax ?"*

2. At the outset, we find that this Income Tax Reference is wholly misconceived. Whether payments received by the Assessee Company from Fertilizer Corporation of India (FCI), Indian Petro Chemicals Corporation (IPCC), and J.K. Synthetics Ltd under various agreements, were in the nature of "technical service fees" or "royalty", are questions of fact arrived at after interpreting various clauses of the said agreements. From the facts set out hereafter, it will be clear that the order of the ITAT did not give rise to any question of law. However, since the above question has been referred to us, we have answered the same later in this judgement.

3. The facts stated briefly are that the Assessee Company is a non-resident Company incorporated in India. One M/s Techniment was a subsidiary Company of the Assessee Company and was merged with it on 4th October 1978. M/s Techniment had entered into agreements with certain public sector undertakings and J.K. Synthetics Ltd. for the supply of technical know-how and for rendering technical services. By virtue of the merger all the rights and liabilities of M/s Techniment were taken over by the Assessee Company.

4. During the accounting year ending 31st March 1979, the Assessee Company, received in terms of the various agreements, a total amount of Rs.1,08,68,427/- from various public sector undertakings and from J.K.

Synthetics Ltd., the details of which have been set out in the order of the ITAT dated 10th February 1989. The Income Tax Officer considered the payments received from various collaborators of the Assessee Company in terms of the agreements entered into, and came to the conclusion that all the payments received by the Assessee Company were in respect of the assistance given by the Assessee through its technical personnel working in the plants located in India. The Income Tax Officer reached the conclusion that the services were rendered by the Assessee in India although the payments were received by the Assessee outside India. On the interpretation of the various terms and conditions of the agreements between the Assessee Company and the parties referred to hereinabove, the Income Tax Officer came to the conclusion that the payments received by the Assessee Company fell within the definition of the term *"Royalty"* given in explanation 2 of section 9(1)(vi) of the Income Tax Act, 1961.

5. Being dissatisfied, the Assessee Company took the matter in Appeal to the Commissioner of Income Tax (Appeals). The CIT (Appeals) came to a finding of fact that in the assessment years under Appeal, the Assessee had only received technical assistance fees as provided in the service agreements for the persons deputed to India, and accepted the claim of the Assessee Company that all payments related to contracts entered into prior to 1st April 1976 and therefore were not taxable under the proviso to section 9(1)(vii) of

the Act. The CIT (Appeals) came to the aforesaid conclusion after carefully considering and going through various clauses of the agreements entered into between the Assessee Company and FCI, IPCC and J.K. Synthetics Ltd. On a harmonious construction of all the clauses in the agreements, the CIT (Appeals) held that the payments received by the Assessee Company during the year were in the nature of technical service fees covered under section 9(1)(vii) of the Act and ought to be excluded from taxation in view of the proviso thereto, which took away the applicability of the said section in respect of the agreements entered into prior to 1st April 1976 and approved by the Government. It is not in dispute even before us that the agreements referred to herein were agreements that were approved by the Government.

6. Being aggrieved by the order of the CIT (Appeals), the Revenue approached the ITAT. The ITAT, vide its order dated 10th February 1989, confirmed the order of the CIT (Appeals) and dismissed the appeal of the Revenue. On perusing the order dated 10th February 1989, we find that the ITAT also undertook a detailed exercise of analysing different clauses of the agreements entered into between the Assessee Company and FCI, IPCC and J.K. Synthetics Ltd. and thereafter agreed with the findings of the CIT (Appeals). Thereafter, at the instance of the Revenue, the ITAT has referred the question of law reproduced above for the consideration of this Court.

7. Before we answer the question posed for our consideration, it would be necessary to analyze Section 9(1)(vii) of the Act. It reads as under :-

> ***9. Income deemed to accrue or arise in India****.—(1) The following incomes shall be deemed to accrue or arise in India—*
>
> (i) ……
> (ii) ……
> *(iii)* ……
> *(iv)* ……
> *(v)* ……
> *(vi)* ……
> *(vii) income by way of fees for technical services payable by—*
>
> *(a) the Government; or*
>
> *(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or*
>
> *(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:*
>
> ***Provided*** *that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.*
>
> *Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.*
>
> *Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) 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".*
>
> (emphasis supplied)

8. Section 9(1) of the Act provides which incomes shall be deemed to

accrue or arise in India. Sub-clause (vii)(b) of section 9(1) of the Act, as applicable to the facts of the present case, inter alia provides that income by way of fees for technical services payable by a person who is a resident, would be income deemed to accrue or arise in India, except where (i) the fees are payable in respect of service utilised in a business or profession carried on by such person outside India; or (ii) for the purposes of making or earning any income from any source outside India. In the present case, FCI, IPCC and J.K. Synthetics Ltd are all residents of India. Hence payments made by them to the Assessee Company would fall within sub-clause (vii) (b) of section 9(1) of the Act. However, the proviso stipulates that nothing in sub-clause (vii) to section 9(1) shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

9. In the present case, the CIT (Appeals) as well as the ITAT have analysed and interpreted the various agreements entered into between the Assessee Company and FCI, IPCC and J.K. Synthetics Ltd in great detail and thereafter come to the conclusion that the payments made thereunder in the financial year in question were by way of fees for technical services. We ourselves, with the assistance of the learned counsel for both sides, have gone through the various clauses in the agreements. On going through the

same, we do not find that the conclusions reached by the CIT (Appeals) or the ITAT can be said to be perverse or vitiated by any error of law apparent on the face of the record. The conclusions reached by the said Authorities are, on a fair reading of the said agreements, certainly a possible one. We therefore are in full agreement with the findings of the CIT (Appeals) as well as the ITAT that the monies received in the financial year in question by the Assessee Company from FCI, IPCC and J.K. Synthetics Ltd. were by way of fees for technical services.

10. Now we turn our attention to the fact whether these payments by way of fees for technical services were exempt from tax. It is an undisputed position that all the agreements between the Assessee Company and FCI, IPCC and J.K. Synthetics Ltd. were entered into prior to 1st April 1976. This being the factual position, clearly the proviso to section 9(1)(vii) of the Act was attracted. The CIT (Appeals) as well as the ITAT, after holding that that the payments received by the Assessee Company from FCI, IPCC and J.K. Synthetics Ltd. under the various agreements were in the nature of technical service fees, were therefore fully justified in holding that the said payments were exempt from tax by virtue of the proviso to section 9(1)(vii) of the Act.

11. In view of our discussion in this judgement, we answer the question

raised in this reference in the affirmative, i.e. in favour of the Assessee Company and against the Revenue. The Income Tax Reference is disposed off in the aforesaid terms. No order as to costs.

(B.P. COLABAWALLA J.) **(S.C. DHARMADHIKARI J.)**