

\$~5

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 398/2004

COMMISSIONER OF INCOME TAX Appellant
Through: Mr.Ashok K. Manchanda, Senior
Standing Counsel for ITD.

versus

M.R.WARDLE Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

% **07.09.2016**

1. The question of law framed in this appeal filed under Section 260A of the Income Tax Act is as follows:

“Whether the ITAT was correct in law in holding that the assessee is entitled to the exemption under Section 10 (6) (viiia) of the Income Tax Act?”

2. The brief facts are that the respondent was deputed by his foreign employer GEC General Signals Limited only to carry a contract granted by Indian Railways to it. The assessee/respondent received salary, net of tax – his employer bore the tax liability. The assessee had filed in his income tax return for the year 1994 declaring a total income of `17,90,940/-; he claimed exemption in respect of the tax amount under Section 10 (6) (viiia) as an exempted perquisite. This claim was rejected by the AO on two grounds; (1) that the assessee was not a technician and (ii) his employer GEC General

Signals Limited was not carrying on any business in India. The CIT (A) set aside the findings with respect to the assessee being a technician and held that he was one. However, on the merits it was held that the assessee was not entitled to relief since exemption could be granted only if the employer of the assessee carried on business in India – a condition precedent for application of Section 10 (6) (viiia). The ITAT on further appeal followed the decision of the authority for advance ruling in ***Re: Arthur E Newell (223 ITR 776)*** and held that firstly the status of the employer was not relevant and that the assessee's employer could be said in the overall circumstances to have carried on business in India.

3. Mr. Manchanda, counsel for the revenue contends that ITAT's decision is flawed. He firstly urges that reliance placed on ***Arthur E. Newell's*** case (*supra*) was misplaced. It is stated that firstly in that case, Section 10 (5B) was in issue and that it was introduced with effect from 1994-1995. It was contended that the facts too were different in that case because the issue was whether the employee was a technician and that concededly the employer did carry on business in India. This court is of the opinion that the ITAT's decision is sound. It cannot be said that the foreign employer had no business relationship with India and or that it was not carrying on business in India. The terminology used in Section 10 (6) (viiia) is wide – “any business in India”. The revenue's contention that the business in India must be that of the employer imposing condition, appears to have been precisely considered by the AAR in ***Arthur E. Newell's*** case (*supra*) when it was observed as follows:

“15. The second aspect which came up for discussion at the time of hearing is a very interesting one. It is admitted that the applicant, though working in India and helping in the activities of the Indian company, continued to be an employee of the U. K. company. It is the U. K. company which paid him his salary and also paid the Indian income-tax on the applicant's salary to the Indian treasury. No doubt, the Indian company provided the applicant with certain amenities but the value of these perquisites has also been added, as contemplated in the statute, to the salary income of the applicant and tax has been paid on the salary income so determined by the U. K. company to the Indian exchequer. On these admitted facts, the question that arises is whether the applicant is entitled to the benefits of Section 10(5B). The clause talks of a foreign technician "in the employment of a Government in India, a local authority in India, any corporation set up in India under its laws, an institution or body established in India for carrying on scientific research ... or in any business carried on in India". One view could be that, having regard to the earlier collocation of words, it would be reasonable to infer that an exemption is intended only for an employee of an employer carrying on business in India and not an employee of a foreign employer as in the present case. It could be argued, for example, that if a foreign company were to depute its technician, as in the present case, to advise and help the Government, local authority, corporation or scientific research body, the exemption will not be available to such a technician as he cannot be said to be in the employment of--that is, he is not employed by--the Government, local authority, corporation or body and that the present case can be no better. This interpretation may also gather some support from Clause (vi) of Section 10(6) which provides an exemption for the remuneration received by "an employee of a foreign enterprise" for services rendered by him during his stay in India, subject to the fulfilment of certain conditions. It could be said that it is the special provision in Section 10 (6) (vi) that should be resorted to for

determining the exemption available to an employee of a foreign enterprise and that Section 10(5B) should be limited only to an employee of an Indian enterprise.

16. The Authority has come to the conclusion that no such limitations can be read into the language of Section 10(5B). It only talks of a technician employed in a business in India. The applicant, in the present case, is undoubtedly a technician "employed in a business in India". The Clause places no restriction regarding the status of the employer, that he should be an Indian and not a foreigner. The only conditions for exemption are about residential status and payment of the tax on the employee's remuneration by the employer and these are fulfilled in the present case. If a foreign technician with the prescribed residential qualification is employed and paid by an Indian company, then, admittedly, the exemption would be available, provided the Indian company pays tax on such remuneration. It seems anomalous to hold that the exemption would cease to apply, though the services are rendered in a business in India, when it is the foreign employer who pays the tax (a situation more beneficial to the country). Such a distinction would be meaningless."

4. This court is further of the opinion that though an unstated premise, the fact remains that assessee was deployed by his employer to carry on and discharge his function in respect of the business activities of the Indian Railways. Here, the revenue's contention is that the Indian Railways does not carry on business – a proposition not only difficult to subscribe to but requiring to be stated merely to reject. That the Indian Railways in its multifarious activities is subjected to all commercial laws and is in fact a limb of the government but carrying on a large measure of business activities cannot be denied. It is no doubt governed by the Indian Railways Act

which establishes the structures required for its functioning; it is equally covered by sovereign guarantee of the Union.

5. In the circumstances, we find no reason to depart from the reasoning of the ITAT. The question of law is accordingly answered against the revenue and in favour of the assessee. The appeal is dismissed.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

SEPTEMBER 07, 2016

rb