

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1165 OF 2007
WITH
INCOME TAX APPEAL NO. 1163 OF 2007
WITH
INCOME TAX APPEAL NO. 1164 OF 2007
WITH
INCOME TAX APPEAL NO. 1166 OF 2007
WITH
INCOME TAX APPEAL NO.1257 OF 2007

SGS India Pvt. Ltd.
SGS House, 4B Adi Sankaracharya Marg,
Vikhroli (W), Mumbai – 400 023 .. Appellant

v/s.
The Joint Commissioner of Income-Tax
Special Range 20, Aayakar Bhavan, M.K. Road,
Mumbai – 400 020 ..Respondent

Mr. R. Murlidhar a/w Mr. Atul Jasani for the appellant
Mr. Suresh Kumar a/w Ms. Samiksha Kanani for the respondent

**CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.**

**JUDGEMENT RESERVED ON : 1st AUGUST, 2018
JUDGEMENT PRONOUNCED ON : 13th AUGUST, 2018**

Judgment : - (Per M.S. Sanklecha, J.)

1. These five appeals under Section 260A of the Income Tax Act, 1961 (the Act) challenge the order dated 27th February, 2007 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order relates to Assessment Years 1992-93, 1994-95,

1995-96, 1996-97 and 1997-98. Thus, these five appeals.

2. On 12th August, 2008, all the five appeals were admitted on the following identical substantial questions of law :-

(i) *Whether on the facts and in the circumstances of the case and in law, the Tribunal sought to have held in view of the consistent stand of the respondent for the assessment years 1985-86 to 1991-92 that the entirety of the net receipts of the Appellant were eligible for deduction under section 80-O of the Act, he had no jurisdiction to take the view that a portion of such receipts was attributable to alleged “routine services” in the present year in the absence of any change in the facts and circumstances?*

(ii) *Whether on the facts and in the circumstances of the case and in law, the Tribunal ought to have held that the respondent had no jurisdiction to categorize a portion of the receipts of the Appellant for professional services as attributable to alleged “routine services” in the light of the admitted position that the Appellant was rendering a consolidated report?*

(iii) *Whether on the facts and in the circumstances of the case and in law the Tribunal ought to have held that even the alleged “routine services” were an integral and an indivisible part of the professional work carried out by the Appellant and the consideration thereof was eligible for deduction under section 80-O?*

(iv) *Whether on the facts and in the circumstances of the case*

and in law, the Tribunal erred in taking the view that activities like supervising the weight loading and storage of goods were “routine services” when the facts on record clearly showed that such activities required a high degree of technical knowledge and expertise and could not be performed by lay persons?

3. It is an admitted position that the facts and the law applicable in all the five appeals are identical. Therefore, for the purposes of these appeals, we refer to the facts set out in the appeal filed for Assessment Year 1992-93. These facts are as follows :-

(a) The appellant is engaged in providing technical and professional services. These in the nature of quality control, inspection, testing and verification of goods.

(b) On 27th December, 1978, the appellant entered into an agreement with M/s. Societe Generale De Surveillance S.A., Geneva (for short “foreign company”) for rendering various technical and professional services with regard to import / export of goods by the foreign company from and to India. On expiry of the aforesaid agreement another agreement dated 8th March, 1984 was entered into with the foreign company and the same was renewed by separate agreements from time to time, the last such agreement was dated 31st March, 1994.

(c) The salient features of the agreement dated 8th March, 1984 are

as follows :-

“Whereas the Foreign Enterprise is one of the largest world organizations directly or indirectly connected with International Trade, import and export of various sophisticated items in huge quantities and other bulk movements between International boundaries;

And Whereas the Foreign Enterprise is often appointed by the Governments of Foreign States to act as inspection agents;

And Whereas in the course of its business activities, trade and rendering services, the Foreign Enterprise is required to obtain detailed, specialized and highly technical information, analysis and report concerning various items required to be imported or exported from one country to the other and every time it is not possible to obtain this highly scientific and technical information from so many countries of the world by deputing its own specialized employees and experts and it is therefore not only necessary but also the practice of the Foreign Enterprises to avail of services from time to time to time of local experts who possess such technical knowledge, experience and skill; And Whereas the Indian Company which is an expert having been found to possess such technical and scientific knowledge, experience and skill and fully equipped for this purpose to the satisfaction of the Foreign Enterprises. At the request of the satisfaction of the Foreign Enterprise, the Indian company has been rendering the technical services referred to herein below to or at the request or on behalf of the Foreign Enterprise, pursuant to an Agreement dated 27th December, 1978;

And Whereas the parties hereto are desirous of extending the previous Agreement between them.

Now it is hereby agreed by and between the parties hereto as under:

1. The Indian Company agrees to render to the Foreign Enterprise or at its request or on its behalf mainly the following technical services or any one of them amongst others:

- (a) Physical and Chemical test;*
- (b) Sampling analysis;*
- (c) Qualitative and quantitative analytical tests, scientific and technical inspection and verification;*
- (d) Quality evaluation of packing material;*
- (e) Preparation and submission of technical report including project report as and when necessary;*
- (f) Expert advice and certificates pertaining to goods, materials, articles, things, etc. mainly exported outside India.*
- (g) And professional and technical services of any other nature as are specified herein.*

2. In consideration of the above technical services or any one of them rendered by the Indian Company to the Foreign Enterprise at its request or for and on its behalf, the Foreign Enterprise shall pay to the Indian Company in convertible foreign exchange in India in accordance with the law for the time being in force in regulating bills and payments in foreign exchange at rates as per schedule of fees annexed hereto. The Foreign Enterprise shall settle accounts as far as possible every month, but not later than three months.

5. *The Indian Company, in addition to the above technical services, will also provide its special expertise and experience which it has built up and formulated with experience of last 30 years on various Indian items under the diverse and wide-ranging Indian conditions and circumstances. The Indian Company whenever called upon by the Foreign Enterprise will also provide and render technical services such as pre qualification survey, inspection and report, metallurgical consultancy, conducting evaluation, evaluation of corrosion and erosion and leak detection test.”*

(d) In respect of the fees received from the foreign company for technical services rendered under the agreement of 27th December, 1978 and 8th March, 1984, the appellant made claim for deduction under Section 80-O of the Act. During the period 1980 to 1984 i.e. A. Y. 1980-81 to 1984-85, the appellant approached the Central Board of Direct Taxes (CBDT) for approval of the above agreements and technical services. The CBDT called upon the appellant to supply the break up of fees received under the following categories :-

- (i) Laboratory / testing charges
- (ii) Professional charges
- (iii) Inspection fees
- (iv) Export fees; and
- (v) Other expenses

(e) On submission of the above break up, the approval was granted from the Assessment Years 1980-81 upto 1984-85 being 100%

deduction on account of Laboratory / testing charges and 33 1/3 % on account of professional charges under Section 80-O of the Act. The fees attributable in respect of other services rendered to foreign company was not granted any deduction under Section 80-O of the Act.

(f) The appellant protested at this arbitrary bifurcation of the fees received for technical services from the foreign company. This, on the ground that the services rendered are part of the continuous operation which culminates into technical services to the foreign party. It is for the final report i.e. Technical services, that it is paid for in foreign exchange by the foreign company. As a consequence of the above, the CBDT while approving the agreement dated 8th March, 1984 for Assessment Year 1985-86 for the purposes of Section 80-O of the Act varied its earlier approval. Instead of fixing the percentage allowable, the CBDT directed that the consideration attributable to the technical services which would qualify for deduction under Section 80-O of the Act was to be determined by the Assessing Officer.

(g) In consequence of the above direction, the Assessing Officer for the Assessment Years 1985-86 to 1991-92 allowed the claim for deduction of 50% of the net foreign exchange earnings under Section 80-O of the Act. This on the total fees received from the foreign company after deducting expenses therefrom to earn the foreign

exchange.

(h) However, during the Assessment Year 1992-93, the Assessing Officer called upon the appellant to bifurcate its receipts into five heads referred to hereinabove (as done by the CBDT) for considering deduction under Section 80-O of the Act. Finally, the Assessing Officer by assessment order dated 30th March, 1995 adopted the same methodology as was done by the CBDT in its approval to the agreement for Assessment Years 1980-81 to 1984-85 i.e. 100% deduction on account of laboratory / testing charges and 33 1/3% on account of professional charges. The other claims on account of services rendered to the foreign company was disallowed in toto.

(i) Being aggrieved by the order dated 13th March 1995, the appellant filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 14th September, 1995, the CIT(A) held that there is no basis / reasons whatsoever for the Assessing Officer to deviate from the consistent practice of the Assessing Officer allowing deduction at 50% of the net foreign exchange earnings received from a foreign company in consideration of the technical services rendered for the Assessment Years 1985-86 to 1991-92. This in view of its activities remaining the same even for A.Y. 1992-93. Further, the CIT(A) draws attention that this very issue of deduction under Section 80-O of the Act

for Assessment Year 1985-86 was the subject matter of revision under Section 263 of the Act by the Commissioner of Income Tax (CIT). However, it also records the fresh assessment order passed under Section 143(3) of the Act, the Assessing Officer did not disturb the deduction which was granted under Section 80-O of the Act in the earlier assessment order which was subject to revision under Section 263 of the Act. On merits also while allowing the appeal, it held that the so called routine services are a part of technical services and cannot be excluded from the services rendered.

(j) Thereafter, our attention was drawn to the order dated 4th January, 2007 of the Tribunal, emanating from reopening proceedings under Section 148 of the Act for Assessment Years 1985-86 and 1991-92. The Assessing Officer sought to reopen the assessment for Assessment Years 1985-86 and 1991-92 seeking to excude from the claim of deduction under Section 80-O of the Act, to the extent of certain services. The Tribunal set aside the reopening notices as it found that regular assessment for Assessment Years 1985-86 and 1991-92 were made under Section 143(3) of the Act and deduction under Section 80-O of the Act was granted after due application of mind. Thus, seeking to reopen those assessments were mere a change of opinion as there was no change in facts and / or in law which would

warrant issuing notices for reassessment for Assessment Years 1985-86 and 1991-92.

(k) In the meantime, the respondent-Revenue had filed an appeal to the Tribunal from the order dated 14th September, 1995 of the CIT(A) for the Assessment Year 1992-93. The impugned order dated 27th February, 2007 of the Tribunal holds that the provisions of Section 80-O of the Act have to be applied independently for each assessment year and on consideration of the services rendered by the appellant to the foreign company, it was found that the routine services which are rendered in India would not form a part of preparation and forwarding technical information to be used outside India for deduction under Section 80-O of the Act. This on the ground that the services rendered by the appellant were held routine services rendered in India and not rendered outside India from India. Thus, 20% of the consideration received was excluded from the benefit of deduction under Section 80-O of the Act. The balance consideration received was allowed in determining deduction under Section 80-O of the Act.

4. On the aforesaid facts, we shall now take up the substantial questions of law admitted for our consideration.

5. Regarding question no.(i) :-

(a) The learned Counsel for the Appellant submits that for the earlier Assessment Years i.e. from A. Y. 1985-86 up to 1991-92, deduction under Section 80-O of the Act was allowed at 50% of the net foreign exchange earnings on the total fees received from the foreign company. This after deducting expenditure incurred to earn the foreign exchange. The Principle of consistency and the law of precedent would require that even for the subject Assessment Years i.e. Assessment Years 1992-93 to 1997-98, the Revenue ought to have followed its earlier decisions, particularly, as there is no change in fact and /or in law. In support, reliance is placed upon the decisions of this Court in PCIT v/s. M/s. Quest Investment Advisors Pvt. Ltd., (Income Tax Appeal No. 280 of 2016) rendered on 28th June, 2018.

(b) It is further submitted on behalf of the Appellant that the Tribunal by its order 4th January, 2008 set aside the re-opening proceedings taken for Assessment Years 1985-86 and 1991-92, on identical issue as being without jurisdiction. Thus, the Tribunal ought to have allowed deduction under Section 80-O of the Act, as has been allowed for the Assessment Years 1985-86 to 1991-92 by the Assessing Officer.

(c) In the present case, we find that there has been admittedly

change in law w.e.f. A.Y. 1992-93. This by inclusion of sub-clause (iii) of Explanation to Section 80-O of the Act. The aforesaid Explanation of Section 80-O of the Act added w.e.f. 1st April, 1992 reads as under :-

“Section : 80-O

(iii) services rendered or agreed to be rendered outside India shall include services rendered from India but shall not include services rendered in India.”

The above Explanation for the first time specifically excludes services rendered in India while allowing deduction to services rendered from India.

(d) The services rendered by the Appellant to the foreign company, *inter alia*, involves the activity of inspection, supervision of loading and storage etc. These are activities which are in the nature of routine services and admittedly carried out in India. In the above facts, the impugned order of the Tribunal disallowed the deduction under Section 80-O of the Act to the extent of 20% of the consideration received as attributable to the activity being rendered in India and not being services rendered from India.

(e) Thus, the principle of consistency and/or doctrine of precedents would not apply in the present facts, as undisputedly there is a change in law. The impugned order of the Tribunal on facts found that the routine services were rendered in India and not from India. Thus,

would not qualify for deduction under Section 80-O of the Act. Moreover, the decision of the Tribunal in the case of re-opening of an Assessment for A. Y. 1985-86 and 1991-92 being held to be bad by the Tribunal by order dated 4th January, 2007 will not help the Appellant as the tests to be applied to determine whether or not, re-opening of an Assessment is permissible under the law, would be entirely different from assessment done in regular proceedings. The jurisdiction to reopen an assessment is a very limited jurisdiction hemmed in by various limitations, amongst them being no notice for reopening can be issued only on a change of opinion. In any event, there is admittedly, a change in law for the subject assessment years from the A. Y. 1985-96 and 1991-92 for which reopening notice was issued. Thus, the same would not have any impact on the present proceedings.

(f) In the above view, this question is answered in the negative i.e. in favour of the Respondent-Revenue and against the appellant-assessee.

6. Regarding question Nos. (ii) and (iii) :-

(a) It is contended by the appellant-assessee that the fees received by the Appellant is for a consolidated report which also includes routine services. Although these routine services are rendered in India it is an integrated and indivisible part of the technical services rendered to a

foreign company as evidenced by the report. Therefore, it is not permissible to exclude some part of the technical services on the ground that it is rendered in India.

(b) Moreover, it is submitted that the use in India of the technical services will not deprive the appellant the benefit of deduction under Section 80-O of the Act. In support, Appellant places reliance upon the decision of the Delhi High Court in the case of *CIT v/s. Eicher Consultancy Services Ltd.*, 167 Taxman 64. In the aforesaid case, the assessee therein provided professional services of management consultancy services to a foreign party abroad. The foreign party paid assessee therein in foreign exchange and the assessee claim the benefit of Section 80-O of the Act. The services so rendered to the foreign company were used by the foreign company in India. It was in the above context, that the Appellant states that rendering of the services in India, would not deprive the Appellant the benefit of Section 80-O of the Act.

(c) We find that the aforesaid case would have no application to the present facts, as the services which are being rendered in respect of inspection, loading/ unloading are services which are all rendered in India to the foreign company and not a case like in Eicher Consultancy Services Ltd. (supra) where services are rendered to the foreign party

from India and the foreign party then uses these services/ technical know how/ technical knowledge in India.

(d) In fact, Mr. Suresh Kumar, learned Counsel for the Revenue invites our attention to the decision of the Delhi High Court in **Anand & Anand v/s.CIT 152 Taxman** 113 and the Karnataka High Court in the case of **H. Raghavendra Rao v/s. DCIT 49 Taxmann.com 425**. In both the aforesaid cases, the Courts held that where an Advocate renders services in India, when he argue the matter for the foreign company in India, then the Advocate will not be entitled to the benefit of Section 80-O of the Act. However, when the Advocate gives an opinion to a foreign party, then it would stands covered by Section 80-O of the Act as it satisfies Explanation (iii) thereto, namely – rendering of services from India to a foreign party abroad.

(e) It was also contended that the fees are received for the entire report from the foreign company. Thus, the so called routine services are an indivisible part of the report and cannot be excluded.

(f) We note that Section 80-O of the act very clearly restricts the benefit of deduction thereunder, only to the extent technical services are rendered from India. The routine services are undisputedly services such as supervising, loading/ unloading/ storage rendered in India and not out side and / or from India. Therefore, would not qualify for

deduction under Section 80-O of the Act. This, even if, it forms a part of consolidated report furnished to the foreign party.

(g) In the above view, Question Nos. (ii) and (iii) are to be answered in the negative i.e. in favour of the Respondent-Revenue and against the appellant-assessee.

7. **Regarding question no.(iv) :-**

(a) Appellant submits that the work of supervising, loading and unloading, storage of goods in the ship were highly specialized services requiring technical knowledge. Thus, the consideration received thereon could not be denied on the ground that they are routine services.

(b) We find that loading and storage of goods for services which may require special expertise would not necessarily be in the nature of technical services. In fact, clause (5) of the Agreement (extracted above) entered into by the Appellant with the foreign company, specifically provides that whatever special expertise or experience is required, keeping in mind the Indian conditions, the said services would be over and above technical services rendered under the Agreement. It would, therefore, be in the nature of special expertise which would not necessarily amount to technical services.

(c) In any event, this routine services such as supervising, loading and storage of good, even if it requires high degree of technical know how and experience, it would still be a services rendered in India and not a service rendered from India. Consequently, it would be hit by Explanation (iii) of the Act to Section 80-O of the Act.

(d) In the above view, this question is answered in the negative i.e. in favour of the Respondent-Revenue and against the appellant-assessee.

8. In the above view, all the substantial questions of law are answered in favour of the respondent Revenue and against the appellant-assessee for all the subject assessment years i.e. Assessment Years 1992-93 to 1997-98.

9. Accordingly, all these five Appeals relating to Assessment Years 1992-93, 1994-95, 1995-96, 1996-97 and 1997-98 are dismissed. No order as to costs.

(SANDEEP K. SHINDE J.)

(M.S. SANKLECHA, J.)