

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

INCOME TAX APPEAL NO.382 OF 2017

Pr. Commissioner of Income Tax-27 ... Appellant

V/s.

Smt. Supriya Suhas Joshi ... Respondent

Mr.A.R.Malhotra with Mr.N.A.Kazi for the Appellant.
Mr.Ruturaj Gurjar for the Respondent.

**CORAM : AKIL KURESHI AND
SARANG V. KOTWAL, JJ.
DATE : APRIL 12, 2019.**

P.C.:-

1. This appeal is filed by the revenue challenging the judgment of Income Tax Appellate Tribunal. Following questions are presented for our consideration :-

- “i. Whether on the facts and in the circumstances of the case and in Law, the ITAT erred in giving a finding that the impugned income is income from salary instead of income from contract of services as held in the assessment order?
- ii. Without prejudice to the Ground No.i, whether the services rendered after the execution of contract for services would be covered and

taxable as Fees for Technical Services u/s 9(1)(vii) read with explanation below sub-section (2) of section 9 of the I.T. Act, 1961?

iii. Whether on the facts and in the circumstances of the case and in Law, the ITAT was justified in deleting the disallowance u/s 40(a)(ia) of the I T Act, 1961?"

2. These issues arise in the following background. Respondent is sole proprietor of one M/s Radiant Services. Said Radiant Services had entered into an agreement with one M/s Arabi Enertech of Kuwait based company on 2007-08 for providing manpower to the said company as per its requirements. Individual contract was executed for supplying the person. The Commissioner has reproduced relevant portion of the terms and conditions in this contract. As per which, the Kuwait based company paid a fixed sum out of which the assessee would remunerate the employee. The Assessing Officer was of the opinion that while making the payment to the employee the assessee failed to deduct the tax at source under Section 195 of Income Tax Act, 1961 ("the Act" for short) though required. He did not accept the assessee's stand that the persons so employed worked in the employment of the assessee and were only loaned to the Kuwait

based Company for carrying out the work as per the requirement of the said company. It is undisputed that in case of payment to a non-resident towards salary would not come within the scope of section 195 of the Act and hence, this controversy.

3. The assessee carried the matter in appeal. Commissioner (Appeals) took note of the documents from record including the contract between the assessee and the Kuwait based company and the license granted by the Union Government to enable the assessee to provide such service. Commissioner was of the opinion that assessee had employed the persons who had discharged the duties for Kuwait based company. The assessee was therefore, in the process making payment of salary and therefore, there was no requirement of deducting tax at source under Section 195 of the Act.

4. The revenue carried the matter in appeal before the Tribunal. Tribunal confirmed the view of the CIT (Appeals) upon which the present appeal has been filed.

5. Having heard learned counsel for the parties and having perused documents on record, we do not find any error in the view of the CIT (Appeals) and the Tribunal. The contract between the assessee and the Kuwait based company was sufficiently clear giving all indications that the concerned person was the employee of the assessee. The preamble to this contract itself provided that as per the contract the assessee would supply Commissioning Engineer to the said company on deputation basis for its on going project. Such deputation would be on the terms and conditions mutually discussed between the assessee and the said company. The contract envisaged payment of deputation charges which were quantified at US \$ 5500 per month. Such amount would be paid to the assessee. Out of such amount the assessee would remunerate the employee. The mode of payment was also specified. The same would be released upon the assessee submitting invoices. The record suggests that the assessee after receiving the said sum from Kuwait based company would regularly pay to the employee 4000 US \$ per month, retain the rest.

6. In clear terms, thus the concerned employee was in the employment of the assessee and not of the US based company contrary to what the department contends. Learned counsel Shri Malhotra for the department however painstakingly took us through the terms of the contract to argue that looking to the supervision and control of the Kuwait based company over the employee, it must be held that he was under the employment of the said company and not that of the assessee. In this regard, he placed heavy reliance on the decision of the Supreme Court in case of **Ram Prashad v. Commissioner of Income-tax**¹.

7. The test of the extent of control and supervision of a person by the engaging agency are undoubtedly relevant factors while judging the question whether the person was an agent or an employee. However, in a situation where the person employed by one employer is either deputed to another or is sent on loan service, the question of dual control would always arise. In such circumstances, the mere test of on-spot control or supervision in order to decide the correct employer may not succeed. It is

1 (1972) 86 ITR 122 (SC)

inevitable that in a case as the present one, the Kuwait based company would enjoy considerable supervising powers and control over the employee as long as the employee is working for it. Nevertheless, the assessee-company continued to enjoy the employer-employee relationship with the said person. For example, if the work of such person was found to be wanting or if there was any complaint against him, as per the agreement, it would only be the assessee who could terminate the service.

7. Under the circumstances, no question of law arises. Income Tax Appeal is dismissed.

(SARANG V.KOTWAL,J.)

(AKIL KURESHI,J.)

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