IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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ITA-93-2007 (O&M)
Date of decision:- 25.04.2024

The Commissioner of Income Tax-I, Chandigarh ....Appellant

vs.

Bhakra Beas Management Board ...Respondent

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MRS. JUSTICE SUDEEPTI SHARMA

Present: Mr. Vaibhav Gupta, Jr. Standing counsel for the appellant.

Mr. Rajesh Garg, Sr. Advocate assisted by Ms. Namarta Shergil, Advocate, for the respondent.

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SANJEEV PRAKASH SHARMA, J. (Oral)

1. The appeal is preferred by the revenue assailing the order dated 31.08.2006 passed by the Income Tax Appellate Tribunal, Chandigarh Bench ‘A’, (for brevity ‘ITAT’) whereby it over-turned the order passed by the Assessing Officer as well as by the CIT (Appeals) and partly allowed the appeal preferred by the assessee holding that the assessee was not required to deduct tax at the rate of 20% for the payments of Rs.8,58,75,000/- to the Technopromexport (hereinafter to be referred as ‘TPE’) and further directed the AO to grant refund to the assessee (State Trading Corporation) of the tax recovered from the assessee @ 20% from the payments made to the TPE.

2. Learned counsel for the revenue submits that ITAT has fallen in error in holding that the consideration paid for the preparation of the technical documentations, working designs, testing models of equipment and other technical purposes, would not fall within the definition of Royalty.

3. Learned counsel has taken to the definition of the word ‘Royalty’ as defined under the provisions of Section 9 (Explanation 2, 3, 4 and 5) of the Income Tax Act, 1961 to submit the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill; and the payment made in consideration thereof would fall within the clause 9. He further submits that the use or right to use of any Industrial, Commercial or scientific equipment or any right, property or information whether or not in possession or control with the payer, would also be included in the term ‘Royalty’.

4. Learned counsel, therefore, submits that the amount of Rs.8,58,75,000/- had been rightly assessed by the Assessing Officer as well as by CIT (A) as a payment of ‘Royalty’ and the deduction on the part of the assessee is erroneous and the order passed by the CIT (A) deserves to be restored.

5. *Per contra*, learned senior counsel appearing for the respondent-BBMB submits that when the payments which were made with respect to TPE’s expenditure in relation to preparation of DPR including technical assignments and other documents, was for a sum of Rs.2,71,95,100/- and the payments relating to the TPE’s expenditure in Russia for the preparation of technical documentation, working drawings, testing models of the equipments and other technical purposes, was made for a sum Rs.8,58,75,000/-. So far as expenditure relating to preparation of DPR including technical assignments and other documents which were handed over by the TPE to the assessee, has not been treated as ‘Royalty’ by the appellant.

6. However, the expenditure incurred in Russia for preparation of technical documentation, working drawings testing models of equipments and other technical purposes, has been wrongfully assesssed by the assessing officer as well as

CIT (A) to be as a Royalty and 20 per cent tax deductable on the same has been wrongly imposed.

7. It is his submission that since the said expenditure incurred was not for the purpose of providing any information to the answering respondent, and was to be put to use at the territory of Russia alone and not to be handed over to the STC i.e petitioner, the said expenditure could not be treated as 'Royalty' in terms of the provision as laid down in Section 9 Explanation 2, 4, 5 and 6 in fact it could be treated as capital assets purchased by the answering respondent.

8. It is his further submission that the entire expenditure incurred, was treated as a capital assets by the Customs department and the duty for the same was also paid by the respondent. In these circumstances, there was no occasion for the respondent to pay the said amount. He further, therefore, supports the contentions as finally arrived at by the ITAT.

9. We have considered the submissions made at bar.

10. It would be apposite to quote the provisions of Section 9 Explanation 2, 4, 5 and 6, which are as under:-

> *"Explanation 2. - For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-*
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> *(i)the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;*

(ii)the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade-mark or similar property;

(iii)the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv)the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

[(iv-a) the use or right to use, any industrial, commercial or scientific equipment but not including the amounts referred to in section 44-BB;

(v)the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi)the rendering of any services in connection with the activities referred to in [sub-clauses (i) to (iv), (iva) and (v)]

Explanation 4-For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

Explanation 5-For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not-

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India;"

The CIT (A) examined the detailed project report and found that the concerned TPE was to prepare the detailed project report and handed over to STC, whereafter, the detailed design and documentation including the modelling testing calculations, working designs etc were to be prepared by the TPE for their own use in Russia for manufacturing of the equipments with the required parameters and quality indicated in the DPR and not to be handed over to the STC. However, he further proceeds after touching the definition of 'Royalty' as defined under Article 12 of the DTA agreement and quotes that as the entire purpose is to provide entire payments made for obtaining DPR was two fold, one for the purpose as detailed above relating to the technical assignments under the documents to be handed over to STC which would be treated to be as Capital Assets. The other expenditure incurred was to be treated as Royalty.

11. We are unable to accept the interpretation taken by the CIT (A) and find that ITAT has succinctly examined the said aspect.

12. The contention of learned counsel for the appellant that as the Royalty means consideration to be paid for imparting of any information concerning technical industrial commercial or scientific knowledge, experience or skill, we have to understand that the said imparting of any information has to be conveyed to the assessee. Since, the information which was gathered by the TPE at Russia was to be handed over to Russia alone and was not to be handed over to the assessee, we do not find the said consideration to come within the ambit of 'Royalty'. Even as per

explanation 5, it is clarified that royalty includes the possession and control of such rights, property or information with the payer**.** We find that factually the same is not available in the present facts because the documentation conducted by the said TPE was to be handed over to Russia and would, therefore, not remain in its possessoin and control. In fact there is no knowledge available to the assessee with regard to the second part of the preparation of technical documentation in Russia. In these circumstances, we are unable to accede to the submission of learned counsel for the appellant that the consideration would fall within the ambit of Royalty. It is the final product which the assessee received, therefore, the said product would only come within the four corners of the capital assets.

13. In view thereof, the order passed by ITAT does not suffer from any illegality or misinterpretation of law.

14. The appeal is accordingly dismissed.

(SANJEEV PRAKASH SHARMA)
JUDGE

April 25, 2024 **(SUDEEPTI SHARMA)**
G Arora **JUDGE**

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No