

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1198 OF 2015

WITH

INCOME TAX APPEAL NO.260 OF 2016

WITH

INCOME TAX APPEAL NO.264 OF 2016

Co-operative Centrale Reiffeisen-

Boerenleenbank B. A.

..Appellant

Vs.

Deputy Director of Income Tax

International Taxation-1 (2),

Mumbai

..Respondent

Mr. Niraj Sheth a/w Mr. Atul K. Jasani, for the Appellant.

Mrs. S. V. Bharucha, for the Respondent.

CORAM:-S. C. DHARMADHIKARI &

B. P. COLABAWALLA, JJ.

DATE :- AUGUST 29, 2018.

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ORAL JUDGMENT:(Per S. C. DHARMADHIKARI,J.)

These Appeals involve common questions of law. They were heard together and can be conveniently disposed off by a common order.

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Admit.

3 By consent heard finally on the following substantial questions of law, which found at page 24 of the paper book in Income Tax Appeal No. 1198 of 2015. They read as under:-

“(i): Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in not concluding that the Appellant does not have a Permanent Establishment in India and instead setting aside the order of the CIT (A)?

(ii): Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in remanding the matter back to Assessing officer for fresh consideration when the Assessing officer has not discharged the burden of proving that the Appellant had a PE in India?”

4 By these Appeals, the Assessee-Appellant has challenged the order passed by the Income Tax Appellate Tribunal Bench at Mumbai in three Appeals. The orders have been passed on 1st April, 2015 for the Assessment Years 2002-2003, 2003-2004 and 2005-2006.

5 During the pendency of these Appeals, this Court noted that there were applications filed for rectification of the mistake in the order passed by the Tribunal. Noting that fact on 9th April, 2018, this Court passed the following order:-

“These Appeals under Section 260-A of the Income Tax Act, 1961 (the Act), challenge the order dated 1.4.2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 1.4.2015 relates to Assessment Years 2002-03, 2003-04 and 2005-06.

2 The basic issue urged by the Appellant before us is that whether the Tribunal was justified in restoring the matter to the Assessing Officer even when all material was available before the Tribunal to render finding on the dispute between the parties.

3 After the matter was heard for some time, Mr. Sheth the learned counsel appearing on behalf of the Appellant on instructions seeks time as the appellant proposes to file an application for rectification of the impugned order dated 1.4.2015 to the Tribunal.

3 In the above view, appeal is adjourned to 2.5.2018”.

6 Subsequently on 9th July, 2018, this Court noted that the rectification application was still not decided and as a final opportunity, the matter was stood over to 6th August, 2018.

7 The rectification application nos.324 and 369/Mum of 2017 in the two Appeals for the assessment years 2002-2003 and 2003-2004 were decided on 21st August, 2018. The applications were dismissed.

8 We have on record, the copy of the application seeking rectification of the order of the Tribunal initially passed by invoking Section 254 (2) of the Income Tax Act, 1961 and the order passed on the said applications. They shall be taken as forming part and parcel of the record of these Appeals.

9 Mr. Niraj Sheth, the learned counsel appearing on behalf of the Appellant would submit that the Tribunal should not have remanded the matter back to the lower authorities for the simple reason that the entire material was indeed before the authorities.

10 The facts are that the Appellant is a tax resident of Netherlands and is entitled to claim the benefit of the Double Tax Avoidance Agreement (for short “DTAA”) between India and Netherlands. In fact, the Rabo bank group is a group, of which the Appellant is part and parcel. An Indian company, the Rabo India Finance Private Limited is registered as a non-banking financial company with the Reserve Bank of India. It provides a wide range of financial services such as credit facilities, investment banking, strategic, financial and project advisory services. This company also belongs to the Rabo group. The Appellant is specialized in financing of food and agricultural business. It is claimed that both, the Appellant and the said Indian Company are independent entities but work together on select assignments as and when required. During the previous year relevant to the assessment year under consideration, the Appellant-Assessee

claims to have provided assistance on principle to principle basis to the Indian company on a few transactions and received fees and guarantee commission in the sum mentioned in the Appeal Memo before this Court, and particularly, in paragraphs 2.1 to 2.3.

11 It is then claimed that a return of income was filed for the assessment year 2002-2003 declaring Nil income. The amounts received under the aforesaid category were not offered to tax in India on the ground that the Assessee-Appellant does not have a permanent establishment in India within the meaning of Article (5) of the DTAA.

12 As far as the Assessing Officer is concerned, an order came to be passed by him on 28th March, 2005 holding that the Indian Company Rabo India Finance Private Limited is a permanent establishment of the Appellant-Assessee within the meaning of the above Article and particularly Article 5 (5) of the DTAA. Hence, certain percentage of the sums under the category referred above were taken as profits attributable to the permanent establishment. A further percentage from that was taken as a profits chargeable to tax in India. This resulted in the return

depicting total income to Rs. 31,25,060/-

13 Aggrieved by this assessment order, the matter was carried in Appeal to the Commissioner of Income Tax (Appeals). He passed a detailed order on 15th May, 2006 and he came to the conclusion that the Assessee neither had a fixed place of business nor agency or any other form of permanent establishment in India and consequently the income of the Appellant-Assessee is not taxable in India. Annexure-D to this Petition, is a copy of this order passed by the First Appellate Authority dated 15th May, 2006.

14 The Tribunal in the Appeals of the Revenue came to the conclusion that the Assessing Officer was not provided with any opportunity to find out whether the Appellant indeed had a permanent establishment in India. The Tribunal concluded as under:-

“Now, we would take the other issues raised by the A. O. In our opinion, for ascertaining whether particular articles of the agreement of the Avoidance of Double Taxation between India and Netherlands were applicable or not, the exact working of RI, the correspondence between RI and the assessee and the mode of their functioning and operations would have to be examined in toto. The

quantum of work done, the services rendered, the contracts undertaken for outsiders would have to be examined to determine whether RI was an agent having independent status or was merely working on behalf of the assessee, as alleged by the AO. In absence of such basic material facts, it is not possible to come to a conclusion as to whether the assessee had PE in India or not. There is no material available on record to prove as to whether RI had significant independent activities on its own or not. The FAA, while allowing the appeal has dealt with the DTAA and held that provisions of Article 5 (1), 5 (2) of the DTAA of Indo-Netherland were not applicable. But, he has not discussed the actual work and the nature of the job done by the assessee for RI nor has he given the reasons as to how he arrived at the said conclusion. In our opinion, the assertion- that advisory services were rendered or that guarantee commission was received for the job outside India or that he was rendering services independently in itself-is not sufficient to prove or disprove the claim made by the assessee. Such a claim has to be proved by facts. The agreements entered into by RI with outsiders and the agreements entered into by RI with the assessee have to be examined to understand the real nature of the transaction. It also appears that some material was made available to the FAA, but it is found that he did not call for a remand report from the AO in that regard. The role of expatriate Director deputed to India has not been inquired into. What were his duties and what function actually he had performed, is not known. Similarly, the circumstances in which guarantee commission was paid by RI to the assessee are not discussed by the FAA. The circumstances, under which RI approached the assessee which entitled it to get roughly one third of the commission, are not known. In short, the appeal has been

decided by discussing the principles governing DTAA and not mentioning as to how those principles were applicable to the facts of the case. In our opinion, the matter needs further investigation. Therefore, in the interest of justice, the matter is restored back to the file of the AO to determine the issue afresh after affording a reasonable opportunity of hearing to the assessee. Third ground of appeal filed by the AO is allowed in his favour, in part.

ITA/3633 & 5056/Mum/2007 & 2010, AY.s. 2003-04 & 2005-06

The facts and circumstances of the cases are identical to the facts of the year 2001-02. As we have already restored back the issue to the file of the AO for fresh adjudication for that year, so following the same, we decide effective ground of appeals in favour of the AO, in part for both the AY.s. As a result, appeals filed by the AO for all the three AY.s stand partly allowed.”

15 Thus, the Revenue's Appeals were partly allowed and the matter was remanded to the Assessing Officer.

16 In the Miscellaneous Applications seeking rectification of the order initially passed by the Tribunal, the Appellant-Assessee specifically urged that the above reproduced conclusion of the Tribunal is vitiated by several mistakes. Firstly and foremost, if the Commissioner of Income Tax (Appeals), as a First Appellate Authority, allowed the Appeal of the Assessee by

concluding that they do not have a permanent establishment in India and the Rabo Finance India Private Limited is not a permanent establishment of the Assessee in India, that would denote that the record was before the Commissioner of Income Tax. Thus, the relevant documentary evidence was available on the record. The parties made submissions on that basis and it is erroneous to assume that the findings have been rendered by the Commissioner without adverting to either the DTAA or relevant Articles thereof or some germane piece of evidence. Thus, the Tribunal should have decided the matter itself for the record was complete.

17 Surprisingly, in the rectification application when all this was brought to the notice of the Tribunal, the Tribunal concluded that the issue was rightly remitted to the Assessing Officer by inter alia observing that the quantum of work done, services rendered, the contract undertaken for outsiders would have to be examined to determine whether the Rabo Finance India Private Limited was an agent having independent status or was merely working on behalf of the Assessee as held by the Assessing Officer. Thus, these basic material facts were not there, and

therefore, it is not possible to come to a conclusion either-way. Then, the Tribunal reiterated its earlier conclusion that the agreement entered into by Rabo Finance India Private Limited with outsiders and the agreement entered into by M/s. Rabo with the Assessee have to be examined to understand the real nature of the transaction. Thus, the First Appellate Authority did not call for remand report from the Assessing Officer.

18 It is clear that when the Tribunal passed the order on these Miscellaneous Applications, there were indeed on record, the documents and Mr. Sheth tenders a compilation before us and says that with the Miscellaneous Applications, the documents have indeed been tendered in triplicate. There is an acknowledgement to that effect.

19 Thus, according to Mr. Sheth, on the date when the Miscellaneous Applications for rectification of the mistakes were taken up, there was indeed a record of the transactions and if at all the Tribunal was inclined to examine them, they could have done so. However, they committed a further mistake by not deciding the matter fully. At least, in this round they could have

corrected their mistake.

20 It is in these circumstances he would submit that above projected questions are substantial questions of law.

21 Mrs. Bharucha appearing on behalf of the Revenue though not disputing that a rectification application was indeed filed and some documents were tendered during the course of its pendency, would urge that these are pure findings of fact and no prejudice will cause by mere a remand back to the Assessing Officer. She would submit that the questions projected are not substantial questions of law. Hence, the Appeals be dismissed.

22 With the assistance of both counsel, we have perused the paper book including the copies of the orders passed by the First Appellate Authority and the Tribunal. The First Appellate Authority while deciding the Appeals of the Assessee has passed a fairly detailed order. The facts and the submissions have been noted in paragraph 2 of his order at running page 45 of the paper book. In fact, sub-paragraphs 2.1 to 2.9 articulate these submissions and conclusions of the First Appellate Authority and

from paragraph 2.10 onwards under separate heads, the details have been noted and considered.

23 The Appellate Authority concludes that all the agreements placed on record would indicate that the Rabo India Finance Private Limited had procured the contract of provision of services to the two parties. However, with a view to meeting its obligations, the Rabo India Finance Private Limited further entered into an agreement with the Assessee before us requiring the Assessee to provide advisory services in Italy for a consideration paid by the Rabo India Finance Private. Based on these two contracts, the First Appellate Authority concluded that it cannot be said that Rabo India Finance Private Limited is acting as an agent of the Assessee. On the contrary, the agreements point towards the said Indian company obtaining independent contracts and subcontracting the part of the work thereunder to the Assessee. On each of the counts, namely, guarantee commission and other services, the First Appellate Authority has held that the Assessing Officer committed a mistake. The clear conclusion in this order is that the business profits of the Assessee are not taxable in India in absence of any permanent

establishment in India within the meaning of Article 5 of the DTAA.

24 These very materials could have been examined by the Tribunal and it would have arrived at the satisfaction whether the Assessing Officer was correct or whether the First Appellate Authority was right in reversing the order of the Assessing Officer and holding as above in favour of the Appellant-Assessee. We do not see why, when the Tribunal refers to all the factual matters in paragraph 2 of its order and has in earlier paragraphs crystallized the issues, then, what was the occasion for a remand. In paragraph 3 of the order under Appeal, the Tribunal notes that the Assessee preferred an Appeal before the First Appellate Authority and argued that the concept of fixed place, permanent establishment requires the enterprises to have their business or a place of management/branch in India or office in India and the Assessee had neither.

25 The activities of the Indian company did not result in constitution of any agency or permanent establishment of the Assessee and that the Indian company did not have any authority

to conclude the contract on behalf of the Assessee, that it did not maintain any stock of any goods or merchandise of the Assessee nor did it secure any orders from the Assessee that it was economically and legally independent, that it was acting in ordinary course of its business not dependent on the Assessee. During the year under Appeal, the Indian company had income from various sources amounting to Rs. 1386.70 Millions. The Assessee received professional income and guarantee commission. There was also certain reimbursement of expenses by the Indian company.

26 In the backdrop of all this, and further facts noted, a cryptic order has been passed by the Tribunal. In fact, in paragraph 5 of the order under challenge in reference to the Income Tax Appeal No. 4632/MUM/2006 for Assessment Year 2002-2003, the Tribunal says that the Indian company had made payment to the Assessee for providing the advisory services to it and under the Head “Guarantee Commission” and that the Indian company was paying the Assessee more than 30% of its income. That the basic issues are, as to whether the Assessee had permanent establishment in India or not and as to whether the

services rendered by the Indian company could be treated as the activities carried out by the Assessee. Yet, it says that there is nothing on record to prove that the provisions of Article 5(1) of the Agreement are applicable. That stipulates that the permanent establishment for the purpose of convention meant a fixed business through which the business of the enterprise was wholly or partly carried on. The conclusion is that the Assessee was not having fixed place of business in India. Hence, the First Appellate Authority rightly held that the provisions of Article 5 (1) were inapplicable. It is in these circumstances we are surprised that the Tribunal still deems it fit and proper to remand the case. If there was indeed no material on record, then, the above conclusion was impossible to be reached.

27 Be that as it may, we do not wish to express any opinion on the rival contentions for it may prejudice both sides. In fact, resorting to such shortcuts, results in wastage of precious judicial time of the Tribunal as also Higher courts and delaying the collection and recovery of Revenue, if any. It only enables the parties to postpone the inevitable. It also results in uncertainty and chaos. Judicial decisions have to be consistent and all the

more there should be no confusion. There ought to be some predictability and when given facts and circumstances give rise to certain legal principles which parties assert are applicable, then, as a last fact finding authority, the Tribunal could have summoned all records and thereafter should have arrived at a categorical conclusion whether the First Appellate Authority was right or the Assessing Officer. This having admittedly not been done, we are of the firm opinion that the Tribunal failed to act as a last fact finding authority. It failed to discharge its duty and function expected of it by the law. We have no hesitation, therefore, in answering question nos.1 and 2 as reproduced above in favour of the Assessee and against the Revenue.

28 Having thus answered these substantial questions of law, we set aside the order of the Tribunal. We cause no prejudice to the parties but balance their rights and equities. We restore the Revenue's Appeal to the file of the Tribunal for a decision afresh on merits and in accordance with law.

29 Needless to clarify therefore, that the initial order dated 1st April, 2015 and the order on the Miscellaneous

Applications for rectification are quashed and set aside There shall be no order as to costs.

30 All the three Appeals are disposed of accordingly.

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