

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

INCOME TAX REFERENCE NO. 8 OF 1993

Zuari Agro Chemicals Limited,]
as agents of Toyo Engg. Corpn.]
of Japan, Bombay.] ... Applicant

Vs

The Commissioner of Income Tax,]
Central -I, Bombay.] ... Respondent

Mr. Percy Pardiwalla, senior counsel with Mr. Rajiv Singh i/b M/s.
Chitnis & Co. for the Applicant.

Mr. Suresh Kumar for the Respondent.

**CORAM : S.J. VAZIFDAR, &
M.S. SANKLECHA, JJ.**

FRIDAY, 14TH SEPTEMBER, 2012

JUDGMENT : [Per S.J. Vazifdar, J.]

1. This Income Tax Reference arises out of RA Nos.1052 and 1053/Bom/1991 which, in turn, arise out of ITA Nos.5033 and 5034/B/1986, which were disposed of by the order of the Income Tax Appellate Tribunal dated 9th January, 1991, and pertain to assessment

years 1981-82 and 1982-83.

2.(A) The Tribunal has referred the following questions for the opinion of this Court, at the instance of the assessee under section 256(1) of the Income Tax Act, 1961 :

“Assessment year : 1981-82

1) Whether on the facts and in the circumstances of the case, the Tribunal erred in holding that the sum of Japanese Yen 2,973,750 paid to Toyo Engineering Corporation was chargeable to tax in India ?

2) Whether on the facts and in the circumstances of the case, the Tribunal ought to have held that the sum payable was “Industrial or Commercial Profits” within the meaning of the Article III of the DTAA between India and Japan and was, therefore, not liable to be taxed in India, the assessee

having had no permanent establishment in
India ?

Similar questions have been raised with respect to the
Assessment Year 1982-83.

(B). The Tribunal also referred a question at the instance of the
Revenue. It is not clear whether the Revenue has had the Reference
numbered or not and whether or not the same is pending. We will,
therefore, restrict ourselves to the above questions which have been
referred to this Court at the instance of the assessee.

3. In the year 1978, the manufacturing operations of the assessee
had to be stopped as a result of a waste heat boiler tube bursting. The
assessee, therefore, sought technical assistance from Toyo Engineering
Corporation Limited (hereinafter referred to as “Toyo”). Pursuant to
the assessee's request, Toyo sent three technicians to India to repair the
machinery. The repairs were completed by December, 1978.

4.(A) Toyo raised an invoice dated 4th April, 1979, on the
assessee, which claimed separate amounts in respect of the air tickets

for its personnel and the “technical advisory services” rendered by them. The invoice specified the number of days on which the technical advisory services were rendered by each of Toyo's technicians, the rate per day and the over-time charges.

(B) The assessee addressed a letter dated 11th January, 1980 to Toyo which reads as under :

“We refer to your invoice No.I.C./ZACL WHB-02-01 dated 4-4-79 and are pleased to issue this work order for technical advisory service requested vide our tlx dated 13-11-78 as under :

1) Scope of work – To provide technical services JY35,03,850 of three experts for undertaking repairs to our waste heat boiler inclusive of one way air ticket from Japan to Goa.

Daily rate of supervisors JY 60,000 – per day per person.”

(C) By a letter dated 4th December, 1979 addressed to the Department of Chemicals & Fertilizers [copy whereof was not made available but the same is referred to in the order of the Commissioner of Income Tax (Appeals)], the assessee specified the work to be carried out by each of the technicians. The order of the Commissioner of Income Tax (Appeals), however, only refers to the qualification of each of the technicians. They were specialists in boiler designs, high

pressure boiler welding and high pressure boiler and pipe fabrication.

(D) The parties tendered a No Objection Certificate dated 28th February, 1980, issued by the Income Tax Officer (ITO), Central Circle-1, Bombay, which reads as under :

“NO OBJECTION CERTIFICATE.

This is to certify that there is no objection to the remittance by M/s. Zuari Agro Chemicals Ltd. of a sum of J.Yen 3503750 to M/s. Toyo Engg. Corpn., Japan, for technical services of experts provided by them for undertaking repairs to the assessee's waste heat boiler at Goa provided tax at appropriate rate is deducted at source and paid to the Government.”

5. The assessee filed a return in respect of assessment year 1981-82 as agents to M/s. Toyo Engineering Corporation on 15th September, 1981, of Rs.1,48,160/- which was followed by a revised return on 12th September, 1983, declaring a 'Nil' income. The revised return was based on the Agreement For Avoidance Of Double Taxation Between India And Japan (hereinafter referred to as the “DTAA”). Similarly, the assessee filed a return of income and a revised return in respect of assessment year 1982-83.

6. Mr. Pardiwalla conceded that the receipt of the amounts by Toyo would fall within section 9(1)(vii) of the Act. He, however, contended that the assessee / Toyo were entitled to the benefit of the DTAA.

7. The relevant provisions of the DTAA read as under :

“Article II.- (1) In the present agreement unless the context otherwise requires :

.....

(2) In the application of the provisions of the present Agreement by either Contracting State, any term not otherwise defined in the present Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to tax.

Article III.- (1) The Industrial or commercial profits (excluding the profits derived from the operation of ships or aircraft) of an enterprise of one of the Contracting States shall not be subjected to tax in the other Contracting State unless the enterprise has a permanent establishment situated in that other Contracting State. If it has such permanent establishment, the profits attributable thereto may be subjected to tax in that other Contracting State.

.....

(5) The term “industrial or commercial profits” as used in this article shall not include income in the form of dividends, interest, rents, royalties and similar payments as referred to in paragraph (e) of Article X, capital gains, remuneration for personal services or fees for technical services as referred to in paragraph (k) of Article X.

.....

Article X.- Subject to the provisions of paragraph (4A) of Article III, for the purposes of the present Agreement :

.....

(k) Fees for technical services payable to an enterprise shall be treated as income from sources within the Contracting State in which are rendered the services for which such fees paid.”

8. The ITO held that the receipt of the said amounts in the hands of Toyo constituted fees for technical services within the meaning of section 9(1)(vii) of the Income Tax Act, 1961 and that the same could not be considered as income from business operations. He held that the receipts in the hands of Toyo were in the nature of fees for technical services and that the same were not exempt under the DTAA. He, therefore, proceeded to assess Toyo's income in the hands of the assessee as agents.

The CIT(A) and the Tribunal upheld the Revenue's contention that the said receipts were not exempt under the DTAA.

9. Mr. Pardiwalla submitted that as the DTAA does not define the term “technical services”, it should be ascribed the meaning it has under the laws of India relating to tax in view of Article II (2). We

agree.

10. Mr. Pardiwalla submitted that the term “technical services” under the DTAA does not include fees paid for the deputation or provision of technical personnel. In other words, according to him, deputing or providing technical personnel does not amount to rendering technical services. He relied upon section 9(1)(vii) and in particular Explanation “2” thereto, which reads as under :

“Income deemed to accrue or arise in India.

9(1) The following incomes shall be deemed to accrue or arise in India :-

.....

(vii) income by way of fees for technical services payable by -

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India;

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.- For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2.- For the purposes of this clause, “fees for technical services” means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head “Salaries”.

Mr. Pardiwalla relied upon the fact that Explanation-2 defines “fees for technical services” to include the provision of services of technical or other personnel. He submitted that the fact that the Legislature included within the definition of “fees for technical services”, the provision of services of technical or other personnel, indicated that the same did not normally fall within the expression “fees for technical services”. According to him, the normal meaning of “technical services” does not include the deployment of personnel which is why the Legislature considered it necessary to include within the meaning of that expression the provision of services of technical

personnel in section 9(1)(vii). He further submitted that whenever the Legislature intended including the provision of services of technical personnel within the expression “technical services”, it provided the same expressly such as in sections 44-D, 115-A and 194-J of the Income Tax Act. These three provisions adopt the definition of “technical services” in section 9(1)(vii).

11. The submission is not well founded, in any event, as an absolute proposition of law.

12. Firstly, even if the submission is well founded in law, in the facts of this case, it would be of no assistance to the assessee. This Reference does not deal with a case where technical personnel have been deputed by a recruiting agency and the remuneration received by them is confined only to their role as recruiting agents. It is necessary first to analyze the nature of the services rendered by Toyo to the assessee.

13. We have referred to the invoice and the No Objection

Certificate dated 28th February, 1980 issued by the ITO, Central Circle-1. This certificate was obviously issued pursuant to the assessee's application. It is reasonable to presume that what is stated therein reflects the assessee's / Toyo's application. The certificate refers to the payment of the amounts by the assessee to Toyo “*for technical services of experts provided by them for undertaking repairs to the assessee's waste heat boiler*”. The words “*for undertaking repairs to the assessee's waste heat boiler*” may well, in a given case, be descriptive only of the work to be done by the technical experts. In this case, however, it is clear that they refer to the repairs carried out by Toyo through the technical experts. In other words, the technical work is carried out by Toyo and Toyo has not merely provided technicians to carry out the work. The fees were, therefore, paid not merely for deputing technical experts, but for the technical services rendered by Toyo. That the services were rendered through technical experts engaged by Toyo does not detract from the fact that Toyo rendered the technical services. Technical services obviously had to be rendered, inter-alia, through technical experts.

14. “Technical services” is a composite phrase involving several activities, including rendering advice and suggestions as well as undertaking the actual physical tasks. Rendering technical services may involve one or more or all such activities. Each case must be considered on its facts to ascertain whether the real purpose was the rendition of technical services. However, technical services in most cases at least would be rendered only by the input of technical personnel. Without them, there would be no start to rendering technical services.

Toyo did not merely provide the services of its personnel. It provided technical services required for undertaking the repairs to the assessee's damaged machinery. The repairs were undertaken by Toyo's technical experts / technical experts provided by Toyo. The record indicates that Toyo rendered a package of facilities required for repairing the assessee's machinery. The repairs had to be undertaken with the involvement of technicians.

15. It is not the assessee's case that the technical experts were paid

separately by the assessee. Thus, even if there was any substance in Mr. Pardiwalla's submission, in the facts of this case, it would make no difference for the services were not confined merely to providing technical personnel but of carrying out by Toyo, albeit through them, the required repairs.

16. Thus, in the facts of this case, it would make no difference even if Mr. Pardiwalla's submission is well founded.

17. Whether Explanation-2 to section 9(1)(vii) includes an enterprise merely providing technical personnel or not is another matter with which we are not concerned in the present case. Assuming it does not, and it merely deals with cases such as the one before us, we have no hesitation in holding that the definition is merely clarificatory for cases such as these, where a composite agreement is entered into for undertaking technical works, fall within the normal meaning of the expression “technical services”. The inclusive definition, in that event, would be clarificatory.

If the inclusive words refer to the mere provision of technical personnel, it would certainly not affect this view for, in that event, it could, at the highest, be argued that the mere provision of technical personnel does not fall within the ambit of the phrase technical services as normally understood necessitating the Legislature introducing the inclusive definition.

18.(A) We find support for our view that composite agreements providing for the carrying out of technical works through the technical personnel of the contracting party fall within the ambit of the term “technical services” as normally understood, in the judgment of the Supreme Court in *M/s. Continental Construction Ltd. v. CIT* 1999 Supp.(2) SCC 567. The Supreme Court considered section 80-O as it then stood. Section 80-O of the Act, prior to its amendment, referred to gross total income of an assessee, including any income in consideration of technical services rendered or agreed to be rendered outside India in certain cases.

Section 80-O read as under :

“80-O. Deduction in respect of royalties, etc., from certain foreign enterprises.— Where the gross total

income of an assessee, being an Indian company, includes any income by way of royalty, commission, fees or any similar payment received by the assessee from the government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such government or enterprise by the assessee, or in consideration of technical services rendered or agreed to be rendered outside India to such government or enterprise by the assessee, under an agreement approved by the Board in this behalf, and such income is received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India, or having been converted into convertible foreign exchange outside India, is brought into India, by or on behalf of the assessee in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction of the whole of the income so received in, or brought into, India, in computing the total income of the assessee.”

It is pertinent to note that the phrase “technical services” was not defined in Section 80-O.

(B) Section 80-O fell for the consideration of the Supreme Court in *M/s. Continental Construction Ltd. v. CIT* 1999 Supp.(2), SCC 567.

The appellant therein had applied to the CBDT for approval to

the contract for the supply of civil construction know-how to the Government of Iraq under section 80-O. The form submitted by the appellant, insofar as it is relevant, reads as under :

“5. Please state whether income is received in consideration for -

..... <i>(b) technical services rendered or agreed to be rendered outside India. (Please also state the arrangements available with the applicant for rendering such technical services and the mode of tendering such services)</i>	<i>Technical services will be rendered by us to Baghdad Water Supply Administration, Government of Iraq in accordance with the said agreement dated December 17, 1980. The technical know-how and services will be rendered by us through our qualified experienced and skilled Engineers, Scientists and Technicians, for the purpose, a strength of about 1800 Indian Engineers, Technicians and semi-skilled labours will be inducted.</i>
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The Supreme Court observed that section 80-O required, *inter-alia*, that the assessee must have derived the receipts in one of two ways, including in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee. The Supreme Court held as follows :

“26.There is equally no doubt that, in

executing the contract, the assessee has rendered technical services. Any engineering contract involves technical services; more so, a contract of the nature and magnitude involved in the present case. Here again, Sri Ahuja says, no technical services were rendered by the assessee to the foreign government; the assessee only made use of the technical knowledge, experience and skill of its own employees to perform a task undertaken by it.

.....

28. But, even assuming that there could be some difference of opinion on the above issue, there can be no doubt at all that, under the contract, technical services were rendered by the assessee to the foreign government. In our opinion, the attempt of Sri Ahuja to differentiate technical services rendered to the assessee by its employees and technicians from technical services rendered by the assessee to a foreign constituent and urge contention that the latter alone can qualify for relief under Section 80-O on the ground that the project in question was a turnkey project which has succeeded before the High Court, proceeds on an unduly narrow interpretation of the section. In our view, the assessee was undoubtedly rendering services to the foreign government by executing the water supply project. These services were no doubt technical services, as they required specialised knowledge experience and skill for their proper execution. The argument seems to be that the services in the present case will not be covered by the section because there was no privity of contract between the employees of the assessee who contributed their technical skill and the foreign government. We think this argument cannot be accepted. The assessee is a company and any technical services rendered by it can only be through the medium of its employees, skilled and unskilled, and, even if the contract had not related to a turnkey project, the assessee's employees would have been answerable only to the assessee and none else though, perhaps, in such an event, the other party to

the contract may have retained a larger degree of control and supervision in the execution of the contract. Even where the contractor is an individual or firm and not a company, a contract of this magnitude can be executed only through the medium of employees or other personnel engaged by the assessee. The facts that, physically speaking, it is only such employees that render services and that, so far as they are concerned, they render services only to their employer and not to the other contracting party are in no way inconsistent with, or repugnant to, the notion that, so far as the foreign government is concerned, it looks only to the assessee for the rendering of the technical services under the contract. The High Court has pointed out that a person who manufactures a television set ordered by another cannot be said to render technical services to the latter. In our view, that analogy is not apposite in the context of a contract of the nature, magnitude and specialisation with which we are concerned. Where a person employs an architect or an engineer to construct a house or some other complicated type of structure such as a theatre, scientific laboratory or the like for him, it will not be incorrect to say that the engineer is, in putting up the structure, rendering him technical services even though the actual construction and even the design thereof may be done by staff and labour employed by the engineer or architect. Where a person consults a lawyer and seeks an opinion from him on some issue, the advice provided by the lawyer will be a piece of technical service provided by him even though he may have got the opinion drafted by a junior of his or procured from another expert in the particular branch of the law. Sri Ahuja tried to negative this line of thinking by urging that “professional services” have been brought within the scope of Section 80-O only by an amendment by the Finance (No. 2) Act, 1991 and that, too, w.e.f. April 1, 1992 which is proposing to substitute the word “technical or professional services” in place of the word “technical services” now used in the section. It

seems to us that this amendment may be only of a clarificatory nature. The expression “technical services” has a very broad connotation and it has been used elsewhere in the statute also so widely as to comprehend professional services: vide Section 9(1) (vii), referred to earlier. But we need not digress on this aspect for two reasons. Firstly, whatever may be the position regarding other “professional services”, there can hardly be any doubt that services involving specialised knowledge experience and skill in the field of constructional operations are “technical services”. The Board's guidelines, to which reference is made later, specifically say so. Secondly, the question whether “professional services” would be “technical services” or not has no impact on the point we are trying to make viz. that in order to say that a person is rendering such services to another, it is not necessary that the services should be rendered by the former personally and not through the medium of others. For the reasons discussed above, we have come to the conclusion that, under the contracts in question, the assessee had made available technical information to the foreign government for use outside India and had also rendered technical services to the foreign government outside India.”

19. In the case before us also, technical services were rendered by Toyo through the medium of the said technicians. It is not the assessee's case that the technicians were not answerable to Toyo. Nor is it the assessee's case that there was a separate agreement between the technicians and itself and that the only role played by Toyo was the provision of technicians and not the rendering of technical services through them. Where technical services are rendered by an enterprise

to another, the same falls within the ambit of the expression “technical services” and constitute the rendering of technical services even though the same required technicians to be deputed for carrying out the work.

20. As is evident from the No Objection Certificate dated 28th February, 1980, Toyo did not merely depute its technical personnel, to wit they did not merely place technicians at the assessee's disposal. They themselves rendered the technical services of undertaking the repairs through the medium of the said technicians. They charged the assessee not merely for supplying personnel, but for rendering technical services to the assessee itself through its personnel. The assessee did not enter into a separate agreement with the personnel in respect of the services rendered by them. This is also established by the invoices which establish that the consideration was for the entire scope of the repairs and not merely for making available technical personnel.

21. A view to the contrary would render the working of the DTAA

difficult. It is not difficult to imagine that both the countries were obviously aware that several contracts between enterprises of two countries would involve the rendering of technical services in a composite manner as in this case. If Mr. Pardiwalla's submission is accepted, it would in most such cases be virtually impossible to bifurcate satisfactorily in any event, the lump sum payment stipulated in the contract for the same. It would lead to disputes which would affect, not merely the parties to the transaction, but the contracting States. An interpretation that avoids such a situation is preferable.

22. Mr. Pardiwalla relied upon the fact that Article 12(4) of the new Indo-Japan DTAA of 1990 defined the term “fees for technical services” to include the provision of services of technical or other personnel. Article 12(4) reads as under :

“ARTICLE 12

.....

(4) *The term “fees for technical services” as used in this article means payment of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in article 14 in consideration for the services of a managerial, technical or consultancy nature including the provisions of services of technical or other personnel.”*

23. What we have said in relation to section 9(1)(vii) of the Act would apply equally to Article 12(4). Assuming that it applies to contracts such as these, in our opinion, the definition insofar as it includes the provision of services of technical or other personnel is merely clarificatory.

24. In view of the conclusion we have arrived at, it is not necessary to consider the question whether while interpreting the provision of the DTAA the Court ought to rely upon the definitions in the domestic law as they existed when the DTAA was entered into or whether the Court ought to take into consideration the subsequent amendments thereto.

25. The Reference is, therefore, answered in the negative, in favour of the Revenue and against the assessee in respect of all the questions. There shall be no order as to costs.

26. The Reference is, accordingly, disposed of. There shall be no

order as to costs.

M.S. SANKLECHA, J.

S.J. VAZIFDAR, J.