

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.06.2012

CORAM:

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN
and
THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Tax Case (Appeal) Nos.1159 to 1163 of 2005

The Commissioner of Income Tax
Chennai. .. Appellant in all these TCs.

versus

M/s.B.T.System and Service Limited
Chennai. .. Respondent in all these TCs

(Respondent's name amended as per the order of this Court dated 14.06.2012 in the Memo
filed in Tax Case (Appeal) Nos.1159 to 1163 of 2005 dated 06.06.2012)

PRAYER: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the
order of the Income Tax Appellate Tribunal "A" Bench, dated 04.01.2005 in ITA Nos.865 and
866/Mds/98, 448, 449 and 450/Mds/99 relating to assessment years 1993-94, 1994-95 and
1995-96.

For appellant in all these appeals : Mr.K.Suresh Kumar
Standing Counsel for Income Tax

For respondent in all these appeals : Mr.T.N.Seetharaman

JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

The Revenue is on appeal as against the order of the Tribunal, relating to the
assessment years 1993-94 to 1995-96. The Tribunal passed a common order in respect of the

appeals filed by the assessee for the assessment years 1993-94 and 1994-95 and the Revenue, for the assessment years 1993-94, 1994-95 and 1995-96 respectively.

2. It is seen from the records that the assessment for the assessment years 1993-94 and 1994-95 was completed by the Assessing Officer under Section 143(3), granting relief under Section 80-O. Thus, the Commissioner of Income Tax exercised his jurisdiction under Section 263 of the Income Tax Act, taking the view that the Assessing Officer had not considered the question as to the eligibility of the assessee to have the deduction granted under Section 80-O. Further, when there is a specific provision under Section 80E, introduced with effect from 1.4.1991 to deal with deduction on the income earned on development of software for providing technical services outside India in connection with the development or production of computer software, the relief granted without considering the applicability of Section 80-O was bad and hence, prejudicial to the interests of Revenue. Thus the Commissioner of Income Tax, on revision, directed the Assessing Authority to redo the assessment for both assessment years de novo after scrutinising the contracts, bills and the Articles of Association of the Company, to find out the real nature of the transaction to consider the granting of relief under the appropriate deduction provision. Subsequent to the order passed by the Commissioner of Income Tax on 31.03.1998, the Assessing Authority passed the assessment orders for 1993-94 and 1994-95, withdrawing the relief under Section 80-O and allowed deduction under Section 80E. The assessee took up the assessments on appeal before the Commissioner of Income Tax (Appeals).

3. It is stated that the assessee had also undertaken manpower deputation to foreign customers. The manpower is utilised for rendering services in computer software even in India. In the letter dated 02.12.1997, giving the note on the services rendered by the assessee to one of its foreign clients, it was specifically stated that the assessee was engaged in software development only. Sri.S.Ramachandran, President of the company, had given a statement regarding the activities of the company on 28.01.1998 and the same, extracted in the assessment order for the assessment year 1995-96, reads as follows:

"Q.4 Please explain what are the technical activities.

A.4 Overseeing the following activities:

- (1) System study at customer site
- (2) Translation of system findings to functional specifications
- (3) Design preparation
- (4) Programming
- (5) Testing
- (6) Site implementation
- (7) Customer Inter-face

Q.6 Please explain what is the software offered and from where it is offered.

A.6 The services offered as as follows:

Based on functional specifications received from overseas customers and using our extensive expertise in E.R.P., we customise or provide enhancements to the customers' products.

All such software services are provided from India.

Q.7 Please explain.

A.7 The overseas customers supply their products to their customers who will require modifications to suit their specific requirements. These requirements are sent to us and we effect modifications in the product to suit. Alternatively, the overseas customers also conceive changes to their products which again are carried out by us based on the specifications. "

4. The assessee placed before the authorities, purchase order issued by the foreign companies viz., (i) Martek Inc., (ii) Overseas Technologies (OST), and (iii) Constella Inc. (CI). On going through the documents, in the course of assessment proceedings for 1995-96, the Assessing Authority held that going by the nature of activities, the assessee was entitled to deduction under Section 80HHE and the deduction under 80-O was disallowed. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals).

5. In considering the claim of the assessee for deduction under Section 80-O, the first appellate authority pointed out that the agreement with regard to Martek Inc., did not involve export of computer software for provision of technical services outside India. Hence, the assessee was directly entitled to the deduction under Section 80-O and not under Section 80HHE. As regards the services rendered by two other concerns, it was found that the assessee had supplied the software and technical assistance outside India and hence, the appellant was entitled to claim deduction under Section 80-O as well as Section 80HHE. The Commissioner of Income Tax (Appeals) pointed out that the aim of both Sections are the same, namely, to encourage industries doing export of knowledge and technical services on computer software information. The introduction of the specific provision under Section 80HHE would not, in any manner, interfere with the relief to be granted under Section 80-O. The Commissioner of Income Tax (Appeals) pointed out that when the assessee had been enjoying the benefit from 1991 onwards and the purpose of the introduction of Section 80HHE was to give necessary relief to the assessee engaged in the business of computer software, considering that the type of activities also covered under Section 80-O, the Commissioner of Income Tax (Appeals) felt that if the deduction is to be allowed under Section 80HHE(5) only by withdrawing the larger relief already enjoyed under Section 80-O, then the language of the Section would have been different. Referring to Section 80HHE(5), the Commissioner of Income Tax (Appeals) pointed out that the relief under Section 80-O could not be denied. Thus, in respect of assessment year 1995-96, the appeal of the assessee stood allowed, directing the Officer to grant relief under Section 80-O of the Income Tax Act.

6. It is seen from the records placed before this Court that the Commissioner of Income Tax (Appeals) issued notice to the assessee under Section 263, to revise the order of assessment, taking the view that the assessment orders passed for the assessment years 1992-93 and 1994-95, granting relief under Section 80-O, were erroneous and hence, prejudicial to the interests of the Revenue.

7. After hearing the assessee, the Commissioner of Income Tax (Appeals) issued the order under Section 263 on 31.3.1998, taking the view that when there is a specific provision under Section 80HHE dealing with the export of computer software and provision of technical services outside India in connection with the development or production of computer software

and the assessee's business is one of developing computer software and export of the same, the question of the claim being considered under Section 80-O did not arise.

8. After going through the agreement and the portion indicating the professional services rendered by the assessee, the Commissioner of Income Tax pointed out that the Assessing Officer had not verified the materials to decide on the issue. Hence, the relief granted under Section 80-O was erroneous. In the circumstances, recording the submission of the assessee that some of the activities of the assessee would qualify for deduction under Section 80-O and they were not granted for the development of software, the Commissioner of Income Tax directed the Assessing Officer to look into the agreement and other materials to find out the real nature of the transaction and in case the transactions were in connection with the development of computer software for export and providing technical services in connection with the development of software outside India, the income would be considered for deduction under Section 80HHC. Consequent on that, by proceedings dated 29.6.1998 for the assessment year 1993-94 and for the assessment year 1994-95, the Assessing Authority considered the agreement and the bills raised by the assessee and found that the services rendered by the assessee related to systems analysis, systems design program specifications, program development documentation installation and implementation of software packages. The technical services rendered were in connection with the development of production of computer software. Thus on materials available, the Assessing Authority held that the deduction could be considered only under Section 80HHE.

9. In considering the claim of the assessee that the relief could be considered under any of these two Sections, the Tribunal pointed out that some of the services rendered by the assessee might overlap on areas of export of software development and some covered under the head "provision of technical services". Reading Section 80HHE(5) and Section 80HHB(5), the Tribunal pointed out that under Section 80HHB, the assessee was prohibited from claiming deduction under any other provisions of Chapter VIA, whereas, under Section 80HHE(5), it is provided that if the deduction had been claimed under this Section, no further deduction could be allowed in relation to such profits under any other provision of the Act. Referring to the decision of the Apex Court reported in [1992] 195 ITR 81 (SC) (Continental Construction Ltd. Vs Commissioner of Income-tax), the Tribunal held that the relief could be sustained under Section 80-O. Thus the Tribunal allowed the assessee's appeal, thereby set aside the order of the Commissioner of Income Tax (Appeals) made under Section 263 and dismissed the Revenue's appeals. Aggrieved by this, the Revenue is on appeal before this Court.

10. Learned Standing Counsel appearing for the Revenue pointed out that after the introduction of the specific Section 80HHE with effect from 1.4.1991, dealing with development of software providing technical services outside India in connection with the development of production of computer software, the assessee could no longer have the benefit of a general provision like Section 80-O. Consequently, when specific deduction provisions are there in the statute, the question of claiming relief as falling under either one or the other provision did not arise. Going by the specific language under Section 80HHE, the Tribunal should have considered the nature of services rendered by the assessee that it fits in with what is defined as

"computer software" in Explanation B to sub section (5) of Section 80HHE and on the nature of activities of the assessee, the Tribunal should have considered the Revenue's case positively and rejected the assessee claim on deduction under Section 80HHB.

11. Countering the claim of the Revenue, learned counsel appearing for the assessee, while placing heavy reliance on the decision of the Apex Court reported in [1992] 195 ITR 81 (SC) (Continental Construction Ltd. Vs Commissioner of Income-tax), referred to the decision reported in [1999] 235 ITR 769 (Delhi) (C.S.Mathur Vs. Central Board of Direct Taxes), wherein, the Delhi High Court, on a consideration of Section 80RRA and Section 80-O, held that Section 80-O had not impliedly repealed Section 80RRA or had any overriding effect on Section 80RRA. Thus the assessee was held to be entitled to a larger benefit under Section 80RRA. Contrasting Section 80HHE(5) with Section 80HHB(5), where there is an emphatic exclusion to other provisions, learned counsel submitted that reading Section 80HHE(5), one could note that the introduction of Section 80HHE, has not, in any manner, whittled down the choice of the assessee from claiming the relief under Section 80-O. Consequently, he submitted that the relief granted by the Tribunal could not, in any manner, be interfered with.

12. Heard learned counsel appearing on either side and perused the materials placed on record.

13. Before going into the contentions of the learned counsel appearing for the assessee, the provisions as are available under Section 80-O and Section 80HHE need to be seen. Section 80-O, as it stood during the relevant point of time, speaks about the deduction given to an assessee on the income received by the assessee and it reads as under:

" 80-O. Deduction in respect of royalties, etc., from certain foreign enterprises.--(1) Where the gross total income of an assessee, being an Indian company or a person (other than a company) who is resident in India, 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 or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, and such income is received in convertible foreign exchange in India, or having been received in 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 an amount equal to fifty per cent. of the income so received in, or brought into, India in computing the total income of the assessee:

Provided that such income is received in India within a period of six months from the end of the previous year, or where the Chief Commissioner or Commissioner is satisfied (for reasons to be recorded in writing) that the assessee is, for reasons beyond his control, unable to do so within

the said period of six months, within such further period as the Chief Commissioner or Commissioner may allow in this behalf.

Explanation.--For the purposes of this section,--

(i) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the law for the time being in force for regulating payments and dealings in foreign exchange ;

(ii) "foreign enterprise" means a person who is a non-resident;

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

(2) Omitted by FA 1974 wef 1-4-75.

Section 80HHE, introduced in the statute book with effect from 1.4.1991 under Finance Act No.2 of 1991, is a specific provision for deduction in respect of profits from export of computer software, etc. The company which is engaged in the business of export out of India of computer software or its transmission from India to a place outside India by any means or a company engaged in providing technical services outside India in connection with the development or production of computer software, is granted deduction in respect of profits derived by the assessee from such business under Section 80HHE.

14. "Computer Software" is defined under Explanation (b) to Section 80HHE as follows:
"(b) "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme which is transmitted from India to a place outside India by any means."

15. Section 80HHE(5) reads as follows:

"(5) Where a deduction under this section is claimed and allowed in respect of profits of the business referred to in sub-section (1) for any assessment year, no deduction shall be allowed in relation to such profits under any other provision of this Act for the same or any other assessment year. "

Sub section (5) to Section 80HHE states that when a deduction is claimed under this Section and allowed in respect of the profits of the business referred to under Sub Section (1) for any assessment year, no deduction shall be allowed in relation to such profits under any other provisions of the Act for the same or any other assessment year. Learned counsel appearing for the assessee submits that given the fact that Section 80-O is for granting deduction in respect of income earned on technical or professional services rendered outside India, the claim of the appellant cannot be thrown out on the strength of sub section (5) of Section 80HHE. He submitted that if relief is available to the assessee under both Section 80HHE and Section 80-O, the assessee can claim under either of these provisions and the benefit which would be beneficial to the assessee has to be necessarily considered. In support of this submission, learned counsel relied upon the decision of the Delhi High Court reported in [2000] 243 ITR 56 (CIT Vs. Mahendra Mills Ltd.).

16. We do not find any good ground to subscribe to this line of reasoning. As already seen, Section 80-O is a provision relating to the grant of a deduction on income earned by way

of royalty, commission, fees or any similar payment received in foreign exchange by the assessee from certain foreign enterprises or the Government of a foreign State, in consideration for the use of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge outside India or in consideration of technical or professional services rendered or agreed to be rendered outside India by the assessee. The only commonality is that such income received in convertible foreign exchange is brought into India by or on behalf of the assessee in accordance with law. Section 80HHE is regarding the deduction of income derived by the Indian company from export out of India, computer software or its transmission from India to a place outside India by any means, and providing technical services outside India in connection with the development or production of computer software. The deduction under sub section (1) would be allowed only if the consideration is received in or brought into India by the assessee in convertible foreign exchange within a period of six months from the end of the previous year or within such further period as the competent authority may allow in this behalf. The Section also gives the definition of "computer software". A reading of Section 80 and Section 80HHE show that both operate on different fields.

17. It is no doubt true that prior to the introduction of Section 80HHE under the Finance Act No.2 of 1991 with effect from 01.04.1991, there was no specific head under which technical or professional services would qualify for deduction other than under Section 80-O of the Income Tax Act. It may be noted that even for Section 80-O, Section 85-C was the fore-runner, in substitution of which alone, Section 80C was inserted under Finance (No.2) Act, 1967 with effect from 01.04.1968 and Section 80-O was later on amended. In other words, the phrase "technical or professional services" is given a generic meaning for any type of technical or professional services. However, with the introduction of Section 80HHE with effect from 01.04.1991, one finds a specific provision for granting deduction of any income earned on providing technical services outside India in connection with the development or production of computer software. This is a specific provision providing fiscal incentive for promoting export of computers. Thus, any technical service thus rendered in connection with the development of computer software also is taken within the fold of Section 80HHE along with the income earned in the export of computer software or its transmission from India to a place outside India by any means.

18. Given the well settled principle of law that a specific provision excludes a general provision, once the nature of services rendered by the assessee is in connection with the development or production of computer software, it cannot go for deduction under a provision which deals in general with the deduction on the income earned in technical or professional services rendered outside India. It is no doubt true that under Sub Section (5), the grant of deduction under Section 80HHE has to be claimed by an assessee and allowed by the Officer and once it is considered, it will not be allowed under any other provision, either in the same or in any other assessment year. This, however, does not mean, an assessee has a choice to claim the relief either under Section 80HHE or under Section 80-O.

19. As per the decision reported in [2009] 317 ITR 218 (Liberty India Vs. Commissioner of Income Tax), each Section under Chapter VIA is a stand-alone provision dealing with a particular nature of industrial activity, the income from which is given a deduction under the particular provision on deduction, subject to the satisfaction of the other qualifying conditions. The contention that unlike in Section 80HHB(5), there is no prohibition under Section 80HHE(5), cannot be read as reserving a right on the assessee to claim the relief, treating Section 80-O as an alternative provision to Section 80HHE. Whatever be the nature of prohibition contained in Sub Section (5), the same has to be considered in the context of wording of the Section.

20. Learned counsel appearing for the assessee pointed out that the claim of the assessee has to be considered under a provision whichever is beneficial. We do not find any good ground to accept this plea. As already pointed out, given the fact that unlike Section 80-O, Section 80HHE is a specific provision to deal with export of computer software and providing of technical services in connection with the development and production of computer software, the wording in Section 80HHE(1)(ii) read as "providing technical services outside India" alone and there is no further qualification as is found in the said Section reading as "in connection with the development or production of computer software". Perhaps what the assessee contends herein, as narrated above, may be correct. However, given the fact that Sub Section (ii) to Section (1) of Section 80HHE restricts technical services rendered outside India as one in connection with the development or production of computer software, we do not find that the assessee could fall back on Section 80-O for the purpose of claiming a better deduction. In this connection, the reliance placed on the decision of the Delhi High Court reported in [1999] 235 ITR 769 (C.S.Mathur Vs. Central Board of Direct Taxes) needs to be seen. The said case related to the case of a Chartered Accountant who was engaged in providing professional services to various Indian and foreign clients. He was engaged in rendering professional services to foreign companies by providing advice, information on finance, industrial business and economic matters relating to India as would be useful to foreign companies in relation to their business investments in India. On the ground that the profession of the assessee, namely, chartered accountancy could not contemplate inclusion of a job of business management, advice on business management or industrial management, the approval sought for under Section 80RRA was rejected. Thus the relief granted to the assessee for the assessment year 1996-97 granting benefit under Section 80RRA was withdrawn, by reopening the assessment. On a writ petition, the Revenue contended that the petitioner was entitled to deduction only under Section 80-O to an extent of 50%. On the question as to whether such consultancy services to the foreign companies created employer-employee relationship, the Delhi High Court held that even though the assessee was not employed on full-time basis, the services would nevertheless be deemed to be considered as "employed" so as to attract the applicability of Section 80RRA.

21. Dealing with the alternative contention of the assessee that the assessee would be entitled to the benefit either under Section 80-O or under Section 80 RRA, the Delhi High Court pointed out that if the assessee, under the same set of facts and circumstances, is entitled to deduction from the remuneration received at 50% under Section 80-O but at 75%

under Section 80RRA, then the assessee would be entitled to the benefit of computation of deduction under the latter provision which was higher of the two.

22. The Delhi High Court, however, rejected the contention of the Revenue that the introduction of the provision under Section 80-O amounted to implied partial repeal of Section 80RRA and held that the inference of implied repeal has to be necessarily spelt out and certainly there was no express repeal of section 80RRA, even partially.

23. Pointing out that the Parliament was well aware of the two provisions under the statute book and the decision of the Apex Court reported in [1988] 170 ITR 136 (Aditya Vs. Birla), it held that if the Parliament felt that Section 80-O, introduced under Finance Act No.2 of 1991, was so inconsistent with the provision of Section 80RRA, certainly it would have resorted to such measures to deal with Section 80RRA. Consequently, it could not be held that Section 80-O either employed a repeal of Section 80RRA or had an overriding effect on Section 80RRA, to restrict the benefit on an assessee like the petitioner therein.

24. Thus the Delhi High Court quashed the order refusing to grant approval under Section 80RRA and directed the Revenue to grant the approval and pass orders thereon. A perusal of Section 80-O and Section 80RRA, as are available under the statute book, show that while Section 80-O is with reference to the technical or professional services rendered outside India, Section 80RRA is with reference to deduction on the remuneration received by the individual from the employer for the services rendered by him outside India. There is no definition as to the nature of service contemplated for the purpose of Section 80RRA. Given the fact that Section 80-O deals with rendering of technical or professional services outside India, Section 80RRA is equally on services rendered by the assessee outside India, the only requirement under Section 80RRA is that there should be an employer-employee relationship. Given the commonality of the subject matter, namely, rendering of technical or professional services under Section 80-O and Section 80RRA on services rendered outside India, the Delhi High Court came to the conclusion that better deduction should be given to the benefit of the assessee. The decision of the Delhi High Court is distinguishable and has no relevance as far as the present case is concerned. We are concerned herein as regards the income earned on providing technical services outside India in connection with the development or production of computer software and it is not the assessee's case that the services rendered were general technical service. Consequently, we have no hesitation in accepting the plea of the Revenue that in the face of the specific deduction provision available and the technical services outside India considered for deduction under Section 80HHE in connection with the development or production of computer software, one cannot make Section 80-O as an alternate to an allowability of the deduction under Section 80HHE for the purpose of better tax deduction. In the circumstances, the Tribunal is not correct in holding that the assessee had a choice of choosing either Section 80HHE or Section 80-O, depending on the nature of the profession.

25. It is stated in the Tribunal's order that some of the services rendered by the assessee may be overlapping in the area of export of software development and some covered under the head of provision of technical services. If that be so, it is a matter of enquiry on facts, which the assessee is bound to prove. As already noted in the preceding paragraphs, in the

course of assessment proceedings for the assessment year 1995-96, the President of the assessee company narrated the activities of the company as system study at customer site, translation of system findings to functional specifications, design preparation, programming, testing, site implementation and customer inter-face. In the context of the plea made by the assessee, as had been done before the Tribunal in the course of the proceedings under Section 263, the Commissioner of Income Tax (Appeals) rightly directed the Assessing Officer to redo the assessment for both assessment years de novo, after scrutinising the contracts, bills and the Articles of Association of the Company, to find out the real nature of the transaction. Thus, after going through the documents, the Officer recorded a factual finding that the services rendered by the assessee are systems analysis, systems design program specifications, program development, documentation, installation and implementation of software packages and the technical services rendered by the assessee are in connection with the development of production of computer software. The said facts had not, in any manner, been controverted by the assessee in the appeal preferred before the Commissioner of Income Tax (Appeals) for the assessment years 1993-94 and 1994-95. So too before the Tribunal, the said finding had not, in any manner, been controverted. Apparently, persuaded by what had been contended by the assessee in the Section 263 proceedings, without even giving a finding of fact, the Tribunal observed that the services of the assessee were overlapping on areas of export of software development and some covered under the head "provision of technical services".

26. When the specific provision under Section 80HHE is concerned about technical services rendered in connection with software development, we do not approve of the line of reasoning of the Tribunal. One cannot read any such choice available to the assessee for claiming deduction either under Section 80-O or under Section 80HHE of the Income Tax Act. In the face of the finding of the Officer as to the nature of technical services rendered as in connection with the development of production of computer software as spoken to by the company's Director, we do not find any good ground to accept the assessee's plea. In view of the above, the order of the Tribunal stands set aside and these appeals, filed by the Revenue, stand allowed. There will be no order as to costs.

Index: Yes / No
Internet: Yes / No

(C.V.,J.) (K.R.C.B.,J.)
14.06.2012

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To

1. The Income Tax Appellate Tribunal "A" Bench, Chennai.
2. The Commissioner of Income Tax (Appeals), Chennai-34.
3. The Commissioner of Income Tax
Central Circle III (2), Madras.

CHITRA VENKATARAMAN,J.
and
K.RAVICHANDRABAABU,U.

ksv

Tax Case (Appeal) Nos.1159 to
1163 of 2005

Dated: 14.06.2012