IN THE HIGH COURT OF DELHI.

I.T.A.No.15 of 2001 with I.T.A.Nos.238 of 2002,
222, 230 and 411 of 2003; and 239 of 2004

Date of Decision:- November 01, 2004

Commissioner of Income Tax.....Petitioner

Through: Mr.R.D.Jolly, Ms.Premlata Bansal, Mr.Sanjeev Sabharwal, Mr.S.C. Sharma Mr.J.R.Goel & Ms.Rashmi Chopra, Advocates.

Versus

M/s.Mittal Corporation.....Respondent

Through:Mr.M.S.Syali, Sr. Advocate, with Mr.Manu K.Giri and Mr.Satish Khosla, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR.JUSTICE BADAR DURREZ AHMED

i) Whether Reports of the local papers may be allowed to see the judgment?
ii) To be referred to the Reporter or not?
iii) Whether the judgment should be reported in Digest?

B.C.PATEL, C.J. (ORAL)

1. These appeals, under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as " the Act"), are placed before the Court, which are for the assessment years

1992-93 to 1997-98 and the lead case is for the assessment year 1992-93 being ITA No.15 of 2001.

2. The following question of law, as framed on18.7.2001, is required to be answered by the Court:-

> "Whether the assessee has fulfilled the conditions aspprescribed under Section 80-O of the Income Tax Act, 1961 to be eligible for deduction?"

3. The assessee received commission income of Rs.92,59,066/- as buying agents of foreign enterprises, namely, M/s.G.J.Coles (P) Ltd., Australia and M/s.K.Mart of U.S.A. The assessee claimed deduction under Section 80-O of the Act on this commission income.The assessee explained that it was entitled to deduction under Section 80-O of the Act as: (i) it is a registered partnership firm and resident in India; (ii) commission has been received in convertible foreign exchange and (iii) it earns income by way of commission in consideration, for the use outside India, of information concerning commercial knowledge, experience or skill made available to foreign enterprises. It is essential to refer, at this stage, page 49 of the paper book which is a copy of the letter dated 12.2.1993 issued by the Deputy Commissioner of Income Tax to the assessee. Reading the

letter, it appears that the Assessing Officer was much concerned with the "technical services" as would be clear from the following extract therefrom:-

> "The sentence of this section is to be read in continuity as this deduction is admissible on rendering above mentioned services in connection with technical or professional services. On going through the agreements executed between you and the foreign enterprises, you are merely working on their behalf at their direction to ensure supply of samples, getting them approved, ensure issue of Inspection Certificate before despatch, timely shipment, negotiate and arrange payments of any claims with the manufacturers."

4. It is in view of what is indicated hereinabove, that the assessee was called upon to show cause, why deduction under Section 80-O of the Act should not be withdrawn, as the assessee was neither rendering any technical nor professional services,. It thus appears that from the very inception there was misreading of Section 80-O of the Act by the Assessing Officer. The Commissioner (Appeals) has correctly interpreted the provisions of Section 80-O (at pages 147-148) as under:-

> "One plank of the Deputy Commissioner's argument is that assessee's services cannot be termed as technical services. The assessee is not claiming it as technical services being rendered by it. The term used as "commercial knowledge, experience or skill made available or provided to outside enterprise by the assessee." This is the basis of assessee's claim to deduction under Section 80-O of the Act. Can the department say that assessee is not providing the

commercial knowledge acquired and developed by it? The sole basis of the claim of the assessee is that it is providing information concerning commercial knowledge, experience and skill to outside parties" for its use "outside" India."

5. It is also to be noted that considering the facts and material placed on record, the Commissioner came to the conclusion that the assessee who provides industrial or commercial or scientific knowledge or experience or skill is entitled to this benefit. It is not necessary to provide technical services only. Section 80-O of the Act reads as under (we have segregated the provision into parts for convenient reading) :-

> **"80-O. Deduction in respect of royalties, etc. from certain foreign enterprises**
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> 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 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 enterprises by the assessee.

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 an amount equal to fifty percent of the income so received in, or brought into, India, in computing the total income of the assessee".

6. The first part of section refers to the gross income of the assessee. It includes any income by way of royalties, commission, payment received by the assessee. The second part indicates the source, such as, from the Government of a foreign state or foreign enterprises. The third part has two sub parts, one reads as -- "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 or agreed to be made available, or provided to such Government or enterprise by the assessee". The second sub-part reads as -- "in

consideration of technical (or professional) services rendered or agreed to be rendered outside India to such Government or enterprises by the assessee". The fourth part is the mode of receipt, such as, income received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India etc. The fifth and last part refers to the deduction to be allowed under the said section.

7. The section is required to read as indicated hereinabove. The two sub-parts of the third part are alternatives as they are separated by the word "or" and cannot be read conjunctively. Thus, it cannot be said that the assessee must provide "technical services" even where it receives consideration for only providing commercial information. The section is required to be interpreted accordingly. On facts, the Tribunal clearly held that there is no dispute that it is commercial information which the assessee provided to the foreign buyers and in consideration thereof, the assessee received commission which was in convertible foreign exchange. In view of this, the claim made by the assessee cannot be denied under Section 80-O of the

Act.

8. We may point out that at the commencement of arguments itself, the learned counsel for the assessee pointed out, by drawing our attention to sub-section (4) of Section 260A of the Act, that in the instant case there is no question of law as it is dependent on facts only. It is neither a case of mixed question of fact and law nor a substantial question of law, but, one entirely on facts which, in any event, has been concluded by the Tribunal after examining the case in detail. In our opinion, in keeping with the interpretation to be given to the provisions of section 80-O as indicated above, there is much substance in what the learned counsel for the assessee has submitted that the matter is substantially on the question of facts rather than on the question of law and, therefore, we dismiss the appeal without adverting to the question.

Sd/-

CHIEF JUSTICE

Sd/-

November 01, 2004 BADAR DURREZ AHMED, J.
as

Original Signed order placed in ITR 15/01