THE HIGH COURT OF DELHI AT NEW DELHI

WP (C) 13854/2004

Judgment delivered on:16.11.2004

ERICSSON INDIA TELEPHONE CORPORATION ...Petitioner

- versus -

DEPUTY DIRECTOR OF INCOME TAX AND ORS...Respondents

Advocates who appeared in this case:
For the Petitioner : Mr. Vibhu Bakhru with Mr.V.U.Eradi
For the Respondents : Mr. Sanjiv Khanna with Mr Ajay Jha and Mr S. C. Sharma

CORAM:-

HON'BLE MR JUSTICE B.C. PATEL, CHIEF JUSTICE
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

B.C. PATEL, CJ (ORAL)

CM No.13345/2004

1. Earlier on 20th August,2004 a similar application for stay was heard and disposed of. We are told that the CIT, by an order, has arrived at an arrangement for the assessee to make payments and, therefore, this application is not required to be

entertained at this stage. Hence, the application is rejected.

W.P (C) 13854/2004

1. It may be noted that earlier the matter was adjourned to 27th March, 2005. However, the learned counsel requested that the matter may be taken up today as they were facing some difficulties. The date 27th March, 2005 is cancelled and the petition is taken up for hearing today itself.

2. This petition is filed by the assessee who is a foreign company under the Income Tax Act, 1961 (hereinafter referred to as "the Act") challenging the legality and validity of the provisions of Section 44D read with Section 115A of the Act. The assessee also prays that a proper writ order or direction be issued declaring the opening words of Section 44D -- "notwithstanding anything to the contrary contained in Sections 28 to 44C" -- alongwith the provisions contained in Section 44D (b) read with Section 115A(1)(b) and Section 115A(3), to the extent of denial of benefits under Section 28 to 44C to foreign companies having established places in India, to be arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

3. The assessee known as Ericsson India Telephone Corporation A.B is a company incorporated under the laws of

Sweden. The company has set up a branch office in India to undertake activities in the telecom field with the approval of the Reserve Bank of India. The branch office in India was set up somewhere in 1995 and according to the petitioner, business activities are carried on in India for generating revenues for which books of accounts are maintained separately with regard to all revenues earned as well as expenditure incurred. According to the assessee, the books and accounts are duly audited and income tax returns are filed after claiming the expenses and deductions that are permissible under Section 28 to 44C of the Act.

4. This Court is not required to examine merits of the claim but has to only examine the question of validity of the provisions contained in the Act. We may point out that an assessment order was made by the Assessing Officer (a copy of which is produced on record) against which an appeal has already been preferred by the assessee and the appeal is pending before CIT (appeals). The relevant provisions which are required to be considered by the Court are as under:-

Section 115A. (1) Where the total income of -

(a) xxxx xxxxx xxxxx xxxx xxxxx

(b). [a foreign company, includes any income by

way of royalty or fees for technical services] received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976, and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy, then, subject to the provisions of sub-sections (1A) and (2), the income-tax payable shall be the aggregate of,-

[(A) the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of thirty per cent if such royalty is received in pursuance of an agreement made on or before the 31st day of May, 1997 and twenty per cent where such royalty is received in pursuance of an agreement made after the 31st day of May, 1997;

(B) the amount of income-tax calculated on the income by way of fees for technical services, if any, included in the total income, at the rate of thirty per cent if such fees for technical services are received in pursuance of an agreement made on or before the 31st day of May, 1997 and twenty per cent where such fees for technical services are received in pursuance of an agreement made after the 31st day of May, 1997; and]

(C) the amount of income -tax with which it would have been chargeable had its total income been reduced by the amount of income by way of royalty and fees for technical services.

Explanation.- For the purposes of this section,-

(a) "fees for technical services" shall have the same meaning as in *Explanation 2* to clause (vii) of sub-section (1) of section 9;

(b) "foreign currency" shall have the same meaning as in the *Explanation* below item (g) of sub-clause (iv) of clause (15) of section 10;

(c) "royalty" shall have the same meaning as in *Explanation* 2 to clause (vi) of sub-section (1) of section 9 ;

(d) "Unit Trust of India" means the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963).]

(1A) xxxx xxxx xxxx xxxx xxxx xxxx

(2) xxxx xxxx xxxx xxxx xxxx xxxx

[(3) No deduction in respect of any expenditure or allowance shall be allowed to the assessee under sections 28 to 44C and section 57 in computing his or its income referred to in sub-section(1).

(4) xxxx xxxx xxxx xxxx xxxx xxxx

(5) xxxx xxxx xxxx xxxx xxxx xxxx]

Section 44D. Notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee, being a foreign company-

(a) xxxx xxxx xxxx xxxx xxxx xxxx xxxx

(b) "no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty or fees for technical services received [from Government or an Indian concern in pursuance of

an agreement made by the foreign company with Government or with the Indian concern] after the 31st day of March, 1976 .

5. The learned counsel for the petitioner submitted that the case is fully covered by the decision of the Supreme Court in the case of ***Union of India and Another*** **vs.** ***A.Sanyasi Rao and Others:*** **(1996) 3 SCC 465.** Before the Apex Court the validity of Section 44AC read with Section 206C was under challenge. The Court upheld the validity of sections 44AC and 206C as under:-

> "Considered in the light of the practical difficulties envisaged by the Revenue to locate the persons and to collect the tax due in certain trades, if the legislature in its wisdom thought that it will facilitate the collection of the tax due from such specified traders on a "presumptive basis," there is nothing in the said legislative measure to offend Article 14 of the Constitution. In the light of the legal principles stated above, we are unable to hold that Section 44-AC read with Section 206-C is wholly hit by Article 14 of the Constitution of India."

The Court also held as under:-

> "However, the denial of relief provided by Sections 28 to 43-C to the particular businesses or trades dealt with in Section 44-AC calls for a different consideration. Even according to Revenue, the provisions (Sections 44-AC and 206-C) are only "machinery provisions". If so, why should the normal reliefs afforded to all assessees be denied to such traders? Prima facie, all assessees similarly placed under the

> Income Tax Act are entitled to equal treatment. In the matter of granting various reliefs provided under Sections 28 to 43-C, the assessees carrying on business are similarly placed and should there be a law, negativing such valuable reliefs to a particular trade or business, it should be shown to have some basis and (sic) fair and rational. It has not been shown as to why the persons carrying on business in the particular goods specified in Section 44-AC are denied the reliefs available to others. No plea is put forward by Revenue that these trades are distinct and different even for the grant of reliefs under Sections 28 to 43-C of the Act. The denial of such reliefs to trades specified in Section 44-AC, available to other assessees, has no nexus to the object sought to be achieved by the legislature. To this extent it appears to us that the non obstante clause in Section 44-AC denying such reliefs has no basis and so unfair and arbitrary and equality of treatment is denied to such persons, necessitating grant of appropriate relief".

In para 24, while pointing out that Section 44-AC is a valid piece of legislation, the direction ultimately given was as under:-

> "It does not dispense with the regular assessment, as provided in accordance with Sections 28 to 43-C of the Act. A direction will issue to that effect and to this limited extent the writ petitions, civil appeals and the special leave petitions filed by the assessees shall stand partly allowed. In all other respects, the batch of cases shall stand dismissed. In the circumstances of the case, there shall be no order as to costs."

6. In the instant case on behalf of the petitioner, our

attention was drawn to para 12 of the petition which reads as under:-

> "It is stated that in the Explanatory Notes to the Finance Bill 1976, the reason for the special differentiation between income by way of fees for technical services from Indian concerns and non-Indian concerns has been suggested as under:-
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> > '34, At present, net income from royalties received under agreements made after 31st March, 1961, and approved by the Central Government are taxed in the hands of foreign companies at the rate of 50 per cent plus a surcharge of 2.5 per cent. Fees for technical services received under agreements after 29th February, 1964, and approved by the Central Government are also taxed on the same basis. In view of the practical difficulties experienced in determining the net income in such cases, it is proposed to provide that no deduction will be allowed in computing income by way of royalties and fees for technical services received under agreements entered into by foreign companies with Indian concerns after 31st March, 1976. Foreign companies will, however, be charged to tax on a concessional basis if such agreements are approved by the Central Government. Lump sum payments received by foreign companies under approved agreements for the supply of industrial know-how (designs, drawings, documentation, etc.) outside India are proposed to be taxed at the rate of 20 per cent of the gross amount of such payments. Income by way of royalties (excluding lump sum payments referred to above) and fees for technical services received by foreign companies under approved agreements will be charged to tax at the flat rate of 40 per cent of the gross amount of such income.'

7. It is in view of this, that it was submitted that merely because there are some practical difficulties the benefit which otherwise is available to the assessee cannot be denied. It was also submitted that, in fact, there are no practical difficulties because the account books are being maintained separately and the Assessing Officer can examine the books of accounts and come to the conclusion as to whether he is required to extend the benefits which are otherwise available as if there is no obstante clause. On behalf of the revenue, it was submitted that even the Apex Court in the case of Union of India & Another vs. A Sanyasi Rao and Others (supra), after considering various other judgements of the Apex Court, pointed out as to what is required to be considered. There is no unreasonable restriction on the fundamental rights of the citizens. There is no question of having conferred unbridled power on the proper authorities. On behalf of the revenue, it was further submitted that there is no question of unconstitutional discrimination. The learned counsel pointed out that the Court found nothing wrong with Section 44AC of the Act.

8. In the instant case, there is a classification between foreign companies and Indian companies. Our attention was invited to the decision of the Apex Court in the case of ***Twyford***

Tea Co. Ltd. vs. State of Kerala 1970 SCC (1) 189 where the classification between a foreign company and Indian/domestic company has been held to be reasonable.

9. It is in view of this decision of Apex Court as well as the facts of the present case, that the question is required to be considered. The learned counsel for the revenue pointed out that the assessee having a permanent establishment in India and maintaining books of accounts should be called upon to pay the tax in the way in which the assessing officer has called upon. In other words it is submitted that there may be a distinction between a foreign company having no permanent establishment in India and a foreign company having a permanent establishment in India. There would be further classification if the submission is accepted. In the instant case there is a classification between foreign companies and Indian Companies. The object is to obviate practical difficulties as pointed out above. There is an intelligible differentia on the basis of which the classification is made and there is a nexus between the classification and the object sought to be achieved. In view of this we are of the opinion that no interference is called for and the petition is required to be dismissed.

CHIEF JUSTICE

BADAR DURREZ AHMED, J

November 16, 2004
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