* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **ITA No. 752/2005**

Date of Decision: November 18 , 2005

\# ANAND & ANAND ...... Appellant
! Through Mr. Ajay Vohra, Ms. Kavita Jha, Advocates.

versus

$ COMMISSIONER OF INCOME TAX ...... Respondent
^ Through : Mr. Sanjeev Sabharwal, Adv.

%

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
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 the Digest?

Yes

: **T.S. THAKUR, J.**

This appeal under Section 260A of Income Tax Act, 1961 arises from an order passed by the Income Tax Appellate Tribunal whereby it has upheld the order passed by the Commissioner, Income Tax (Appeals) and affirmed the finding that a sum of Rs.92,91,442/- out of a total foreign receipt of Rs.2,13,35,647/- did not qualify for deduction under Section 80-O of the Act. The facts are few and may be set out at the threshold.

2. The appellant is a partnership concern comprising legal practitioners specializing in cases involving intellectual

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property rights and disputes relating to Patents, Trademarks, Copyrights and Designs etc. For the assessment year 1997-98, the appellant declared a total professional receipt of Rs.2,79,09,740/- which included receipts to the tune of Rs.2,13,35,647/- in foreign exchange. Claiming deduction under Section 80-O for an amount of Rs.1,06,68,824/-, the appellant declared its net taxable income at Rs.19,05,515/- only.

3. The Assessing Officer completed the assessment in the process holding that the deduction allowable under Section 80-O of the Income Tax Act was limited to a sum of Rs.34,22,040/-. Consequently, he added back an amount of Rs.72,46,782/- to the income of the assessee disallowing the remainder of the claim for deduction made by the appellant. Aggrieved, the appellant appealed to the Commissioner of Income Tax (Appeals) who dismissed the appeal and repelled the contention urged before her that the amount of deduction claimed by the appellant represented fees received for services rendered from India. The Commissioner held that since the amount of Rs.92,91,442/- represented fees received by the appellant for filing and arguing cases on behalf of foreign clients in courts within the country, the services corresponding to the said receipts were rendered in India and, therefore, did not qualify for deduction. A further appeal taken by the assessee to the Income Tax Appellate

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Tribunal also proved unsuccessful. The Tribunal concurred with the view taken by the Commissioner, that the amount of Rs.92,91,442/- received in foreign exchange represented fees for services rendered by the appellant 'in' India and not 'from' India as claimed by them. The said amount, therefore, did not qualify for deduction under Section 80-O. The present appeal, as noticed earlier, calls in question the correctness of the said view.

4. We have heard learned counsel for the parties and perused the record. Section 80-O of the Income Tax Act, 1961 as it stood at the relevant time and to the extent the same is material for the present case may be gainfully extracted :

> "**Section 80-O** : 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 received by the assessee from the Government of a foreign State or foreign enterprise in consideration for the use outside India of any patent, invention, design or registered trademark 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 -
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> (i) forty per cent for an assessment year beginning on the 1st day of April, 2001;
> (ii) thirty per cent for an assessment year beginning on the 1st day of April, 2002;

(iii) twenty per cent for an assessment year beginning on the 1st day of April, 2003;
(iv) ten per cent for an assessment year beginning on the 1st day of April, 2004,

of the income so received in, or brought into, India, in computing the total income of the assessee and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year.

Provided that such income is received in India 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;

Provided further that no deduction under this section shall be allowed unless the assessee furnishes a certificate, in the prescribed form, along with the return of income, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

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;
(iv) "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

5. A careful reading of the above would show that a

deduction is admissible under the provision only if the income of the assessee includes receipts by it from the Government of a foreign state or a foreign enterprise, payments in convertible foreign exchange in consideration among others of technical and professional services rendered or agreed to be rendered outside India to such Government or enterprises by the assessee. Explanation III to Section 80-O makes a clear distinction between services rendered or agreed to be rendered 'outside India' which expression includes services rendered 'from India' on the one hand and services rendered 'in India' on the other. The crucial test, therefore, is whether the services in respect whereof payments have been received in convertible foreign exchange were rendered 'outside India' or 'in India'.

6. Mr. Vohra, learned counsel for the appellant, argued that while the amount of Rs.92,91,442/- was received by the appellant for services rendered in relation to legal proceedings in courts within this country yet since the services related to clients who are stationed outside the country and since the payment for such services had been received from outside the country, such services even when relevant directly to litigation pending in Indian courts must be deemed to be services rendered outside India or services rendered from India. It was contended by Mr.Vohra that services could be rendered only to a client and if

the beneficiary of any such services was located outside the country, the said services must necessarily be deemed to have been rendered outside the country, no matter the provider of such service was doing so from India and in relation to proceedings pending in Indian courts.

7. There is, in our opinion, no merit in the contention urged by Mr.Vohra. The legislative intent behind the provision of Section 80-O is much too clear from Explanation III to the same to need any detailed exercise involving interpretation of that provision. The Explanation makes it abundantly clear that a deduction under Section 80-O is not allowable if the foreign receipts are relatable to services rendered in India. A professional's service can be rendered within India as much as it can be rendered from India. It would depend upon the nature of the service and not on whether the provider and the recipient of the service are located in two different countries. For instance, in cases where a professional offers his professional advice to a client who is stationed outside India, the service can be said to be rendered from India because it is only the rendition of advice from the professional to the recipient that is flowing outside the country. The flow of technical or professional expertise and knowledge of an expert located in India to a recipient outside India would doubtless constitute service rendered from India. At

the same time, the service rendered by the expert may be limited to his advice or opinion on a subject. It may at times be accompanied by the experts doing various other acts within or outside the country. If the service is limited to advice with or without acts to be performed outside the country, payments received in foreign exchange would qualify for deduction. That may not be so in cases where a professional, as in the case of the appellant before us, offers its professional services in courts within the country and receives payment for rendition of such services. In such a situation, what the client gets is services of the professional rendered in India in relation to a matter which is pending in the courts here. The fact that the client who eventually benefits from such service in India is stationed outside the country not the sole criterion. Payments received by any such professional for such services would not, therefore, qualify for deduction under Section 80-O.

8. Mr. Vohra placed strong reliance upon the decisions of this court in *Commissioner of Income Tax vs. Mittal Corporation* **272 ITR 87** and *Commissioner of Income Tax vs. Inchcape India (P) Ltd.* **(2005) 193 CTR (Del) 290**. Both these decisions do not, in our view, state the law differently. In Mittal Corporation's case (supra), the assessee had received commission as buying agent of a foreign enterprise. The question was whether information

concerning commercial knowledge, experience and skill to outside parties for its use outside India qualified for a deduction under Section 80-O. The court answered the question in the affirmative and upheld the view taken by the Tribunal that the receipts qualified for deduction under the provisions of Section 80-O.

9. In Inchcape India's case (supra), the assessee was providing information in respect of research, local suppliers for various products, availability of products and information regarding market conditions. The question was whether receipts in foreign exchange for these services qualified for deduction especially when the information was to be used by the foreign client in India. The court held that the assessee was entitled to the deduction in the light of the provision of Section 80-O and the circular issued by the CBDT which was to the following effect:

> "The matter has been considered by the Board. It is clarified that as long as the technical and professional services are rendered from India and are received by a foreign Government or enterprise outside India, deduction under s.80-O would be available to the person rendering the services even if the foreign recipient of the services utilises the benefit of such services in India."

10. We may at this stage refer to a Division Bench's decision of the High Court of Bombay in *Searle (India) Ltd. v.*

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Central Board of Direct Taxes and Another 145 ITR 673. That was a case where an agreement was executed between the assessee company and a foreign enterprise which imported pysllium husk from India. The assessee, under the agreement, required to carry out certain test in its laboratory in India and forward to the foreign buyer the results of those tests with a certificate that each lot of pysllium husk conformed to the specification of the foreign company. The agreement envisaged a payment of US$50 for each lot of pysllium husk in respect of which the assessee conducted the quality assurance test. The assessee applied to the CBDT for the approval of the agreement under Section 80-O of the Act as it then existed. The Board rejected the request for approval on the ground that the technical service was not rendered outside India. The writ petition, challenging that view, was dismissed by a Single Judge in limine. In appeal, against the said order, the Division Bench of the High Court of Bombay held that the assessee rendered a technical service by testing the samples and giving the results to the foreign company. Since the testing and certification were done by the assessee in India, observed their Lordships, the assessee was not entitled to a deduction of the technical service fee received from the foreign company under Section 80-O of the Act. The position in the instant case is analogous to the above decision of the Bombay

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High Court. In the present case also, while the ultimate beneficiary of the service rendered by the petitioner is located outside the country, the service for which the payments have been received by the appellant was rendered in relation to litigation pending in Indian courts. The amounts received by the appellant, therefore, represented the remuneration of the work which the appellant company had done for a foreign client in India. The professional services could not, therefore, be said to have been rendered from or outside India so as to qualify for a deduction under Section 80-O of the Act.

11. There is, in that view, no error in the orders passed by the Tribunal, no substantial question of law arises for consideration of this Court. The appeal accordingly fails and is hereby dismissed.

T.S. THAKUR, J

BADAR DURREZ AHMED, J

NOVEMBER 18, 2005
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