

# CTR ENCYCLOPAEDIA ON INDIAN TAX LAWS

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## COMMISSIONER OF INCOME TAX vs. AKTIENGESELLSCHAFT KUHNLE KOPP AND KAUSCH W. GERMANY BY BHEL

HIGH COURT OF MADRAS

N.V. Balasubramanian & K. Raviraja Pandian, JJ.

Tax Case Nos. 265 to 269 of 1998

6th November, 2002

(2003) 181 CTR (Mad) 511 : (2003) 262 ITR 513 (Mad) : (2002) 125 TAXMAN 928 (Mad)

### Legislation referred to

Sections 9(1)(vi),

### Case pertains to

Asst. Year 1978-79, 1980-81, 1982-83

### Decision in favour of

Assessee

**Income deemed to accrue or arise in India—Royalty—Receipts for visit of technicians—Question regarding taxability of same receipts decided by the Tribunal in the assessee's own case for the same assessment years in favour of assessee—Neither Revenue challenged that order of Tribunal nor any material produced to show that earlier order had not become final—Hence, Revenue could not reargue the same question—Tribunal was correct in holding that receipts were not taxable within the meaning of s. 9(1)(vi)**

### Held

The Tribunal has considered the same issue in the earlier appeals for the same asst. yrs. 1981-82 to 1982-83 and it was held that the amounts were not taxable. It is not brought to the attention of the Court that the Revenue has challenged that order of the Tribunal, nor any material was produced to show that the earlier order to the Tribunal has not become final. Therefore it is not open to the Revenue to reargue the same question in the present reference which was the subject-matter in the earlier order of the Tribunal. The Tribunal was correct in holding that the receipts for visit of experts are not taxable within the meaning of s. 9(1)(vi).

(Para 6)

### Conclusion

Question regarding taxability of receipts for visit of technicians having been decided by the Tribunal in the assessee's own case for the same assessment years in favour of assessee, and the decision having become final, the issue could not be reargued in reference; Tribunal was correct in holding that receipts were not taxable within the meaning of s. 9(1)(vi).

Decision in favour of

Assessee

**Income deemed to accrue or arise in India—Royalty—Receipts for special engineering services—Lump sum payment under pre-1976 agreement—Exempt under the proviso to s. 9(1)(vi)**

Held

The amount was paid under pre-1976 agreement. Since the receipt was a lump sum payment, the amount received is exempt under the proviso to s. 9(1)(vi). Therefore, the Tribunal was correct in holding that the amount received for special engineering services is not taxable within the meaning of s. 9(1)(vi).

(Para 7)

Conclusion

Lump sum payment received under pre-1976 agreement for special engineering services was exempt under s. 9(1)(vi), proviso.

Decision in favour of

Assessee

**Income deemed to accrue or arise in India—Royalty—On export sales—Though the royalty was paid by a resident in India, it could not be said that it was deemed to have accrued or arisen in India as the royalty was paid out of the export sales and hence, source for royalty was the sales outside India—Royalty paid on export sales was not taxable**

Held

Though the royalty was paid by a resident in India, it cannot be said that it was deemed to have accrued or arisen in India as the royalty was paid out of the export sales and hence, the source for royalty is the sales outside India. Since the source for royalty is from the source situate outside India, the royalty paid on export sales is not taxable. The Tribunal was therefore correct in holding that the royalty on export sales is not taxable within the meaning of s. 9(1)(vi).

(Para 8)

Conclusion

Royalty received from a resident in India on export sales was not taxable under s. 9(1)(vi), source of royalty being situated outside India.

Decision in favour of

Assessee

Counsel appeared

Mrs. Pushya Sitharaman, for the Applicant : P.P.S. Janarthana Raja, for the Respondent

## Order

### **N.V. BALASUBRAMANIAN, J. :**

There are five assessment years involved and the common question of law referred to us reads as under :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the royalty on export sales, receipts for engineering services and receipts for visit of experts were not taxable within the meaning of s. 9(1)(vi) of the IT Act, 1961 ?"

2. The assessee is a company in West Germany, then known as. The assessee entered into a collaboration agreement with the Indian company, BHEL, Trichy dt. 26th Nov., 1973, and we are concerned with three kinds of payments received by the assessee, namely, royalty, fees for sending technicians to India and special engineering fees for a particular item of work done. The assessee claimed exemption that the receipts were not liable to tax, but the AO did not accept the claim and completed the assessment. The assessee challenged the orders of assessment before the CIT(A) and the CIT(A) confirmed the assessments with reference to the royalty and special fees, but the CIT(A) set aside the assessment in respect of fees received for the visit of technicians and remitted the matter to the AO for fresh consideration. The assessee as well as the Department challenged the orders of the CIT(A) before the Tribunal. The Tribunal set aside all the assessments and restored the same to the AO to consider the question whether the amounts were exempt under Double Taxation Avoidance Agreement.

3. In the fresh assessment, the AO brought to tax all the amounts. When the matter was pending before the Tribunal, the AO, in pursuance of the order of the CIT(A) setting aside the issue relating to the fees for the visit of technicians and remitting the matter to him, held that the amount was taxable. The CIT(A) allowed the appeal by the assessee and held that the amount was not taxable. The Department challenged the order of the CIT(A) for the asst. yrs. 1980-81, 1981-82 and 1982-83, before the Tribunal and the Tribunal in ITA Nos. 4125 to 4127 (Mad) of 1987, upheld the order of the CIT(A) on the ground that the amounts were exempt under the Double Taxation Avoidance Agreement. It was also held that the amounts were exempt as they were received under the pre-1976 agreement and they were not exigible to tax under s. 9(1)(vi) of the IT Act.

4. The AO, on the basis of the directions of the Tribunal rendered earlier, completed the assessment bringing into tax all the items. The CIT(A) upheld the order of the AO and against the order of the CIT(A), the assessee preferred appeal before the Tribunal. The Tribunal held that its earlier order rendered in ITA Nos. 4125 to 4127 (Mad) of 1987, dt. 16th Oct., 1991, has become final and in view of the same, the receipts for the visit of technicians are not taxable. The Tribunal also rejected the specific contention raised by the Revenue that the said sum would form part of royalty, and held that the CIT(A) was not correct in ignoring the order of the Tribunal, dt. 16th Oct., 1991. As far as the special engineering fees received for the year 1980-81 is concerned, the Tribunal upheld the claim of the assessee for exemption on the grounds (i) that the income did not accrue in India as the entire work was done in Germany, (ii) the income arose under a pre-1976 agreement, and (iii) it was also exempt under the Double Taxation Avoidance Agreement. As far as royalty payable on export sales is concerned, the Tribunal held that it could not be regarded as deemed to have accrued in India within the meaning of s. 9(1)(vi) of the IT Act. The Tribunal therefore held that the royalty on export sales is not taxable. It is the order of the Tribunal which is subject-matter of the reference.

5. We heard Mrs. Pushya Sitharaman, learned senior standing counsel for the Revenue and Mr. P.P.S. Janarthana Raja, learned counsel for the assessee. The question that has been referred to us deals with the order of the Tribunal holding that the amounts are not taxable within the meaning of

s. 9(1)(vi). Though the Tribunal has considered the claim of the assessee and held that some of the receipts are exempt under the Double Taxation Avoidance Agreement, the Revenue has not challenged that part of the order of the Tribunal. Though we are of the view that the reference referred to us has become academic in the absence of any challenge to the said finding of the Tribunal, we have gone into the merits of the matter.

**6.** As far as the receipts for visit of technicians are concerned, the same question regarding taxability of the receipts was considered by the Tribunal in the assessee's own case for the same asst. yrs. 1980-81 to 1982-83, and the Tribunal, by order dt. 16th Oct., 1991, held that the receipts were not taxable. Though the assessment years with which we are concerned are 1978-79 to 1982-83, the question regarding the taxability of the receipts for visit of technicians is the subject-matter of assessment in the asst. yrs. 1980-81 to 1982-83. We find that the Tribunal has considered the same issue in the earlier appeals for the same asst. yrs. 1981-82 to 1982-83 and it was held that the amounts were not taxable. It is not brought to the attention of this Court that the Revenue has challenged that order of the Tribunal, nor any material was produced to show that the earlier order to the Tribunal has not become final. We are therefore of the view that it is not open to the Revenue to reagitate the same question in the present reference which was the subject-matter in the earlier order of the Tribunal. We hold that the Tribunal was correct in holding that the receipts for visit of experts are not taxable within the meaning of s. 9(1)(vi).

**7.** As far as the receipts for special engineering services are concerned, the issue arises only in the assessment for 1980-81 and there is no doubt that the amount was paid under pre-1976 agreement. Since the receipt was a lump sum payment, the amount received is exempt under the proviso to s. 9(1)(vi). We therefore hold that the Tribunal was correct in holding that the amount received for special engineering services is not taxable within the meaning of s. 9(1)(vi).

**8.** As far as royalty on export sales is concerned, that amount is also exempt under s. 9(1)(vi). Though the royalty was paid by a resident in India, it cannot be said that it was deemed to have accrued or arisen in India as the royalty was paid out of the export sales and hence, the source for royalty is the sales outside India. Since the source for royalty is from the source situate outside India, the royalty paid on export sales is not taxable. The Tribunal was therefore correct in holding that the royalty on export sales is not taxable within the meaning of s. 9(1)(vi)

**9.** Accordingly, we answer the question of law referred to us in the affirmative, in favour of the assessee and against the Revenue. No costs.

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