Central Board Of Direct Taxes & Ors. New ... vs Oberoi Hotels (India) Pvt. Ltd on 30 March, 1998

Equivalent citations: AIR 1998 SUPREME COURT 1666, 1998 (4) SCC 552, 1998 AIR SCW 1431, 1998 TAX. L. R. 520, 1998 (1) UPTC 521, 1998 (2) SCALE 516, 1998 (4) ADSC 411, 1998 UPTC 1 521, 1998 ADSC 4 411, (1998) 2 SCR 501 (SC), (1998) 97 TAXMAN 453, (1998) 2 JT 717 (SC), (1998) 231 ITR 148, (1998) 29 CORLA 81, (1998) 144 TAXATION 306, (1998) 3 SUPREME 512, (1998) 2 SCALE 516, (1998) 146 CURTAXREP 222

Author: D.P. Wadhwa

Bench: Sujata V. Manohar, D.P. Wadhwa

PETITIONER:
CENTRAL BOARD OF DIRECT TAXES & ORS. NEW DELHI

Vs.

RESPONDENT:
OBEROI HOTELS (INDIA) PVT. LTD.

DATE OF JUDGMENT: 30/03/1998

BENCH:
SUJATA V. MANOHAR, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T D.P. Wadhwa, J.

Central Board of Direct Taxes (CBDT) is in appeal. It is aggrieved by the judgment dated May 29, 1981 of a Division Bench of the Delhi High Court quashing its non approval under Section 80-0 of the Income Tax Act, 1961 (for short 'the Act') to an agreement dated November 29, 1969 entered into by the respondent with M/s. Soaltee Hotel Pvt. ltd. Kathmandu (Nepal) a foreign enterprise.

Section 80-0 is as under:

> "80-0, Where the gross total income of an assessee being an Indian company 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 services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, under an agreement approved by the Board in this behalf, and such income is received in convertible foreign exchange in India, or having been received in convertible having been converted into convertible foreign exchange outside India, or having been converted into convertible foreign exchange outside India, is brought into India, buy 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 the whole of the income so received in, or brought into India in computing the total income of the assessee;
>
> Provided that the application for the approval of the agreement referred to in this sub-section is made to the Board before the 1st day of October of the assessment year in relation to which the approval in first sought:
>
> Provided further that approval of the Board shall not be necessary in the case of any such agreement which has been approved for the purposes of the deduction under this section by the Central government before the 1st day of April, 1972 and every application for such approval of any such agreement pending with the Central Government immediately before that day shall stand transferred to the Board for disposal.
>
> Explanation. - The provisions of the Explanation to Section 80N shall apply for the purposes of this Section as they apply for the purposes of that section....."

The impugned judgment is reported in (1982) 135 ITR 257 (Del).

As required by Section 80-0, the respondent sought approval of the agreement as falling within the purview of the section. CBDT declined to grant approval. However, it did not communicate any ground as to on what basis approval was not granted Respondent filed a writ petition in the Delhi High Court, it being Civil Writ Petition No. 1301 of 1975. The writ petition was allowed by a Division Bench of the Delhi High Court on January 5, 1979 with a direction to the CBDT to consider the matter afresh and give a decision after granting hearing to the respondent. This order of the Division Bench is reproduced hereunder:

"The impugned order declining to give approval to the agreement under Section 80-0 of the Income Tax Act, 1961, does not give any reasons for the decision. The reasons now stated in the counter affidavit have become known to t he petitioner for the first time. The petitioner had no opportunity of meeting the same. The impugned order is, therefore, set aside and the case is sent back to the Board for a fresh consideration of the request of the petitioner for the approval of the agreement under Section 80-0 and the new decision by the Board will be given after giving a hearing to the petitioner. The writ petition is allowed in the above terms. No order as to costs."

After that respondent represented its case before CBDT but again CBDT did not find any ground under the Section to approve the agreement and by order dated February 26, 1980, communicated its decision to the respondent. We reproduce the relevant portion of this order of CBDT as under : (pages 63-64 of the PB) "2. The Board have carefully reconsidered the matter in pursuance o the directions contained in the judgments of the Delhi High Court in the Civil Writ Petition Nos. 429 of 1974 and 1301 of 1975, on the basis of the written and oral arguments advanced by you. It is regretted that the Board does not consider it necessary to revise the decisions already communicated to your in the Board's orders referred to above owing to the following reasons:-

(1) The services being rendered by you to the foreign party in both cases are in the nature of managerial services. As observed by the Delhi High Court in Civil Writ No. 901 of 1975 (M/s. J.K. Bombay Ltd. vs. CBDT and another) the running of a business or the management of a business does not amount to the rendering of technical services.

(2) What is being given under the agreements can also not be viewed as information concerning industrial, commercial or scientific knowledge or skill. It is not as if some information is being supplied by you which is made use of by the foreign parties.

Under the two agreements, you are yourself functioning in the foreign countries.

(3) Though your name is being utilised by the two foreign hotels, and the fee received for the use of your trade name would be covered by the provisions of Section 80-0 yet the amount relatable to this aspect of the total services rendered under the two agreements would be so small that it is not easy to quantity the same for purpose of Section 80-0 of the Income Tax Act, 1961"

This led the respondent to approach the High Court again by filing writ petition on July 28, 1980 which was allowed by judgment dated May 29, 1981, which is now impugned before us. In order to appreciate the rival contentions, it will be appropriate to refer to some of the clauses of the agreement which the respondent entered into with the foreign enterprise.

Foreign enterprise owned and operated in Kathmandu (Nepal) a hotel under the name and style of Soaltee and a restaurant at Tribhuvan Airport, Kathmandu. This

foreign enterprise wanted to construct and add to its hotel approximately 190 more rooms and also wanted to obtain contracts for various airlines catering operating at Tribhuvan Airport. Respondent had a name and worldwide reputation in the hotel field and was experienced and had the technical skill for providing professional, architecture, engineering and decorating services and was qualified to assist in planning, designing, constructing, furnishing and equipping of hotels and was also engaged in the development, leasing and operation of hotels under the name "Oberoi Group" in the interest of facilitating international travel and trade. In view of the name and tradition, experience and skill of respondent in hotel industry for profitable operation of hotels and for bringing the hotel to international standards and for ensuring better operational results and promotion of business of Hotel, foreign enterprise desired that its operations be taken over by the respondent with effect from December 1, 1969 on terms and conditions set out in the agreement. Parties agreed (formulated form the agreement): (1) During the term of the agreement hotel of the foreign enterprise shall be known and designated as the Hotel Soaltee Oberoi.

(2) Agreement will remain in force for fifteen years. It could be extended for a further period of five years at the option of the respondent on the same terms and conditions. (3) Respondent would recruit and train the requisite staff of the hotel through such training programme including hotel schedule, if any, and other training techniques, as it shall deem necessary. Respondent shall select suitable personnel for adequate and proper training in hotel management and operation, always giving preference however to Napalese nationals.

(4) Respondent would use its best efforts to advertise and promote the business of the hotel through the existing facilities. Soaltee Hotel, the foreign enterprise, subject to later amortisation and reimbursement as provided in the agreement shall pay or reimburse the respondent in full for all costs and expenses of the said training and for all the costs of advertising, promotion, literature, travel and business entertainment including celebrations and ceremonies incurred prior to or concurrently with the beginning of full operation of the hotel by the respondent. (5) Respondent in consultation with foreign enterprise will make available for the hotel, its staff of consultants and specialists who were qualified to provide advice in the various departments and aspects of hotel operations. The services of the members of respondent staff and of any outside consultants engaged by respondent on retainer will be rendered on the basis of reimbursement by the foreign enterprise through the respondent of the salaries of respondent personnel during the time they rendered services directly for hotel Soaltee and reimbursement of the amounts paid to such consultants under their retainer plus other expenses incurred by such personnel and consultants in performing services for the hotel of the foreign enterprise. (6) Respondent was to provide training and instruction for key personnel for the hotel Soaltee in order to prepare them to serve the hotel in the capacities for which they would be trained. Such key personnel to be trained will be placed in existing hotels of

the respondent and will be instructed and supervised by the Management of such hotels and progress reports will be made to the Board on such personnel.

Travelling and other expenses of the trainees shall be borne by the foreign enterprise though the respondent shall make arrangement for their boarding and lodging at its own costs and also pay suitable pocket allowances to them. (7) Respondent to use the hotel Soaltee solely for the operation of a first class hotel on international standards and all activities in connection therewith which are customary or usual for such operation. It is understood that respondent shall have within the term and provisions of the agreement, absolute discretion in the operation of the hotel but the same shall always be and be deemed to be owned by the foreign enterprise exclusively.

(8) Foreign enterprise and the respondent shall be entitled to 85% and 15% respectively of the Gross Operating Profits as defined under the terms of the agreement. The agreement prescribed as to how payments of their respective shares would be met for each financial year.

(9) The respondent to maintain full and adequate books of accounts and other records reflecting the results of the operation of the hotel in accordance with the uniform system of accounts for hotels though not inconsistent with the provisions of law applicable in Nepal.

(10) Provision to be made as to how the amount received during the operation of the hotel shall be deposited in the bank account and how that account had to be operated. Respondent was to submit monthly budget of estimated income and expenditure in detail and the Gross Operating Profits in terms of the agreement to the foreign enterprise. The agreement contained details as to how allocation was to be made for meeting different expenses and for payment of taxes etc. Gross Operating Profits and Gross Operating Losses were defined. Limit was put on expenses to be incurred for advertisement etc. which could not be more than 3% of the total sales.

(11) For worldwide promotion of the hotel, foreign, enterprise desired that respondent shall, in any manner it regards fit and proper, make necessary arrangements with any company or companies, agency or agencies in any one or more countries for specialised hotel services and worldwide reservation facilities.

(12) At the time of taking over the operation of the Hotel Soaltee, respondent to purchase the existing stock of food and beverages etc. and the foreign enterprise shall be paid the cost thereof. The amount paid by respondent to the foreign enterprise shall be payable to the respondent out of the revenue of the hotel before the expiry of one year. (13) There is provision for repairs, maintenance, alterations, structural repairs and changes in the hotel. (14) Respondent to deliver to the foreign enterprise on or prior to the end of each month a profit and loss statement showing the results of the operation of the hotel for the preceding calendar month and year to-date and containing other details.

(15) Respondent to have due representation in the Board of Directors of the foreign enterprise and at least one person nominated by respondent which always would represent it in all the meetings, deliberations any decisions arrived therein in connection with the hotel business.

These are some of the main terms of the agreement which according to the appellant did not satisfy the requirement of Section 80-0 of the Act.

High Court in the impugned judgment, after examining the term of the agreement in detail, observed that it could not be disputed that the running of a modern hotel required highly specialised management techniques, i.e., combination of scientific management and highly specialised inn-keeping and that the modern system of preparation of food and beverages also involved considerable technical skill and know-how. High Court, however, negatived the plea of the respondent that it was making available to the foreign enterprise the information concerning industrial, commercial or scientific knowledge, experience or skill as High Court did not find any such provision in the agreement. High Court was, therefore, of the opinion that the respondent was rendering technical services to the foreign enterprise and would in any case fall within the purview of Section 80-0 of the Act.

Mr. Shukla, learned counsel for CBDT, contended that since the High Court did not agree with the respondent that it was giving any information to a foreign company as there was no provision in the agreement, it was only the first part of Section 80-0 which this Court was to examine if the agreement was in consideration of technical services rendered or agreed to be rendered out side India by the respondent that it could claim deduction of the Income received in India or abroad in computing the total income of the respondent which is received by way of royalty, commission fee or any other similar payment. We do not think, however, that we can debar the respondent from bringing its case in the first part of Section 80-0 which provides for similar payment received by the assessee in consideration for use outside India, information concerning industrial, commercial and scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to a foreign enterprise by the assessee. Respondent can certainly support the agreement as falling under Section 80-0 on any ground on which it had approached the High Court in its writ jurisdiction. We, therefore, have to examine if the agreement in question falls within the purview of Section 80-0 on any of the conditions stipulated therein entitling the respondent to claim deduction. Mr. Shukla referred to the guidelines issued by the CBDT to examine if the agreement provides of technical services or managerial services or bot. He also referred to circular No. 187 dated December 23, 1975 of the CBDT. The circular is reproduced in (1976) 102 ITR 83 (Statutes). The circular also sets out the form of the application for approval of the agreement under Section 80-0 of the Act. We may reproduce relevant part of the circular as under:

> "Circular No. 187, dated December 23, 1975.
>
> Subject : Section 80- 0 of the Income-tax Act, 1961 -
>
> Guidelines for approval of agreements.
>
> With the twin objectives of encouraging the export of Indian technical know-how and augmentation of the foreign exchange resources of the Country, Section 80-0 of the Income-tax Act, 1961, provides for concessional tax treatment in respect of income by way of royalty, commission fees or any similar payment received from a foreign

Government or a foreign enterprise, subject to the satisfaction of certain conditions laid down in the said section.

2. One of the conditions for availability of the tax concession under Section 80- 0 is that the agreement should be approved by the Central Board of Direct taxes in this behalf. The application for the approval of the agreement is required to be made to the Central Board of Direct Taxes before the 1st day of October of the assessment year in relation to which the approval is first sought. The form of application for this purpose has been standardised and a specimen is given in the Appendix.

3. The object of the provision when it was first introduced as Section 85C in the Income-tax Act, 1961, was stated in Board's Circular No. 4P (LXXVI- 61) of 1966, to be to encourage Indian companies to export their technical know-how and skill abroad and augment the foreign exchange resources of the country. This was reiterated in Board's Circular No. 72 explaining the changes introduced by the Finance (No.2) Act, 1971. Keeping in view the purpose behind this tax incentive and the requirements of the statutory provisions, the Board have evolved the following guidelines for the grant of such approval:-

(i) ....

(ii) An agreement which is in very general or broad terms or is either vague or does not give sufficient details may not be approved.

(iii) .....

(iv) Information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided, or agreed to be made available or provided, should be information not merely of a statistical type collected or collated from commercial or scientific journals or other commonly available sources of information, but it should be information concerning the industrial, commercial or scientific knowledge, experience or skill possessed or developed by Indian party and which is made available or provided to the foreign party under the agreement.

Information regarding trade enquiries or reports regarding the credit or trade worthiness in individual cases will not qualify for this purpose.

(v) The technical services rendered or agreed to be rendered to the foreign party should relate to productive fields such as (a) mining, or (b) generation or distribution or electricity or any other form of power, or (c) constructional, industrial or manufacturing operations, or

(d) engineering services.

Services such as those relating to managements, organisation, sales finance and accounts, will not qualify for this purpose. technical services which are rendered or to be rendered in India will also not qualify for this purpose.

(vi) Agreements for recruitment or mere supply of technical personnel from India for service outside India will not be eligible for approval.

(vii) Agreements which provide for participation in business or management operations abroad simpliciter in return for a specified percentage of commission or profit will not be eligible for approval.

(viii) .....

(ix) .....

(x) .....

(xi) .....

It may be pointed out that these guidelines are merely illustrative and should not be taken as exhaustive. these may be modified or supplemented in due course in the light of the different types of cases which come up for approval. Even where the agreement is bona fide and genuine, the Board may refuse approval in appropriate cases where in the opinion of the Board, grant of approval would not be in the larger public interest or where it would not further the objectives underlying the tax concession. (4) .....

(5) .....

(6) .....

(7) .....

It was submitted that taking into account the provisions of Section 80-0 and the guidelines on the subject, CBDT rightly came to the conclusion that the agreement did not justify itself for approval. There was no arbitrariness or discrimination in the guidelines. Mr. Shukla said that the agreement was basically for the respondent to manage and run the entire hotel of the foreign enterprise. He stressed on the recital in the agreement which said that the agreement was to be run and operate the hotel by the respondent for a period of 15 years with an option to extend the agreement for a further period of 5 years. Mr. Shukla referred to other clauses of the agreement relating to operation, the amount payable, accounts, capital, representation in the Board of Directors, filing of suits and to defend the same as agents of the foreign enterprise and also the clauses relating to training of hotel personnel and providing

consulting services and the like clauses. he said that other clauses of the agreement merely provided as to how the agreement was to operate and what were the rights, duties and obligations of the respondent while operating the hotel of the foreign enterprise. It was only the expertise of the respondent in the area of running hotel which it was going to provide.

Mr. Shukla, said that it was, in fact, only the managerial services that were to be provided under the agreement and that management of hotel of foreign enterprise would not fall within the provision of Section 80-0. It was submitted that it could not be said that CBDT did not consider the terms of the agreement with reference to Section 80-0 and the guidelines issued by it and arrived a decision which was unreasonable under the circumstances. He said that considering the scope of judicial review of administrative decisions which might even be quasi judicial, this Court should set aside the impugned judgment of the High Court as that court wrongly interfered in exercise of its power of judicial review of the decision taken by the CBDT not granting approval to the agreement. After all, it was the CBDT which was the best judge to see if the agreement fulfilled the requirements of law as it was the CBDT which was concerned authority to grant or not to grant approval and had the advantage of various agreements which came for its approval by other assesses. Mr. Shukla said that two earlier judgments of the Delhi High Court in J.K. (Bombay) Ltd. vs. Central Board of Direct Taxes & Anr. (1979) 118 ITR 312 (Del)] and Ghai Lamba Catering Consultants P. Ltd. vs. Central Board of Direct Taxes & Anr. [(1980) 124 ITR 301 (Del) were not correctly distinguished by the High Court. In the present case, he said that if t he principles laid down in those two judgments were applied, the agreement certainly would not come within the scope of grant of approval. Mr. Shukla said that the respondent took complete charge of running the hotel of the foreign enterprise as terms of agreement showed and as a matter fact respondent took over the hotel of the foreign enterprise itself for 20 years. He referred to the decision of the Karnataka High Court in HMT Ltd. vs. Central Board of Direct Taxes & Anr. [(1991) 188 ITR 457 (Kar)]. Finally, Mr. Shukla said that one did not have to render services by becoming master. He said that respondent might be good in hotel management and it might earn profit and bring the money to the country but then it had to pay taxes as per the law of this country and that it was not that all agreements entered by any assessee with a foreign enterprise must fall under Section 80-0 merely because the agreements would bring precious foreign exchange to the country.

Mr. Dave, learned counsel for the respondent, submitted that there was no contradiction in the principles laid by the Delhi High Court in its earlier two decisions and in the present impugned judgment. He referred to the decision of this Court in Continental Construction Ltd. vs. Commissioner of Income- tax [(1992) 195 ITR 81 (SC)]. Mr. Dave submitted that perception of management had undergone a big change. He said the distinction drawn by the CBDT was superficial and the agreement squarely satisfied the ingredients of Section 80-0. What Section 80-0 provided was allowance of a deduction of an amount equivalent to 50% of t he income received by way of royalty etc. in consideration of use outside India information concerning industrial, commercial for scientific knowledge, experience or skill or alternatively payment received in consideration or technical services made available outside India. Mr. Dave dwelled at length as to what would be technical services. He referred to the dictionary meaning of the terms 'technical assistance' and 'technology'. But then one has to refer to dictionary definition if there is a dispute if

the services rendered are of technical nature or not.

Mr. Dave referred to us the judgment of the Delhi High Court in J.K. (Bombay)'s case and Ghai Lamba's case and said that these judgments considered a very; narrow concept of "technical services" or the "managerial services". He said there was a qualitative difference in the agreements in those two cases and the subject matter of the agreement in the present case. The statement in J. K. Bombay's case [(1979) 118 ITR 312) that the management as a process is practised throughout in every organisation from top management through middle management to operational management and, on the other hand, technical services occupy a much narrow field than the field occupied by the management was explained in the case of Continental Construction Company's case by the Supreme Court Judgment of this Court in Continental Construction Company's case widened the scope of term used in Section 80-0.

Mr. Dave referred to the "New Encyclopedia Britannica"

> where the term "technical assistance" had been consider. It states that technical assistance may involve sending experts into the field to teach skills and to help solve problem in their areas of specialization, such as irrigation, agriculture, fisheries, education, public health, or forestry. In "New Webster's Dictionary of the English Language" the word "technical" means what is characteristic of particular art, science, profession, or trade and the word "technology" means the branch of knowledge that deals with the industrial arts and sciences; utilisation of such knowledge; the knowledge and means used to produce the material necessities of a society. it is submitted that the term "technical" should receive broad interpretation to include professional services as well. The term "professional" was added in Section 80-0 w.e.f. April 1, 1992 by amending the section. This court in continental Construction Company's case had stated that the insertion of the term "professional" in Section 80-0 was merely of clarificatory nature and "technical services" always included in it "professional services". Reference was then made to CBDT circular No. 72 dated January 6, 1972 which dealt with the scope and effect of amendment of Section 80- 0 which was substituted in place of earlier one by finance (No.2) Act, 1971 w.e.f. April 1, 1972. According to this circular, the objective of this provision is to encourage Indian companies to develop technical know-how and made it available to foreign companies so as to augment our foreign exchange earnings and establish a reputation for Indian technical know-how in foreign countries and further in this concessions which were earlier available to companies only are now available in all cases where the technical know-how or technical services are provided to a foreign Government or a foreign enterprise, regardless of whether t he foreign enterprise is a corporate body or not. Referring to the later circular No. 187 dated December 23, 1975 of the CBDT, Mr. Dave said that the case of the respondents squarely fell within clause (iv) and he said that Clause (v) might even require reconsideration by the CBDT in view of the judgment of this Court in Continental Construction Company's case. He also referred to clause (vii) of circular No. 187. It was also the submission of Mr. Dave that construction which benefited the assessee should be adopted and that

> circular should receive liberal interpretation keeping in view the object of introduction of Section 80-0 in the statute. In this context, he referred to certain decisions of this Court. In CIT, Bombay vs. M/s. Gwalior Rayon Silk Manufacturing Co. Ltd. (1992) 3 SCC 326 this Court said that the words in the taxing statute should be given liberal interpretation. Nothing is to be read in, nothing is to be implied; one can only look fairly at the language used and nothing more and nothing less. It went on to add that it was settled law that the expressions used in a taxing statute would ordinarily be under stood in the sense in which it was harmonious with the object of the statute to effectuate the legislative animation.
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> In Hotel Balaji and others vs. State of A.P. and others (1993) Supp (4) SCC 536 this Court observed as under:
>
> "Though the Central Sales Tax is levied and collected by the Government of India, Article 269 of the Constitution provides for making over the tax collected to the States in accordance with certain principles. Where, of course, the sale is an export sale within the meaning of Section 5(1) of the Central Sales Tax Act (export sales) the State may not get any revenue but larger national interest is served thereby. It is for these reasons that tax on the purchase of raw material is waived in these two situations. Thus, there is a very sound and consistent policy, underlying the provision".

In Commissioner of Income Tax, Amritsar vs. Straw Board manufacturing Co. Ltd. 1989 Supp (2) SCC 523 the assessee had claimed concessional rates of income tax, development rebate at higher rate and deduction under Section 80-E of the Income Tax Act, 1961 on the ground that the manufacture of straw board was a priority industry. The question before this Court was whether straw board could be said to fall within the expression "paper and pulp" mentioned in the Schedule. The Income-tax Authority held that the assessee could not be described as priority industry and the manufacture of straw board was not covered by the words "paper and pulp " This Court said:

> "We have no doubt in our minds that it does. The expression has been used comprehensively. It is necessary to remember that when a provision is made in the context of a law providing for concessional rates of tax for the purpose of encouraging an industrial activity a liberal construction should be put upon the language of the statute. From the material before us, which we have carefully considered, that is the only reasonable conclusion to be reached in these cases."

In Central Board of Direct Taxes and others vs. Aditya vs. Birla 1988 (Supp) SCC 120 this Court was considering the scope of the term "remuneration" as appeared in Section 80- RRA of the Act. Under this Section assessee was entitled to certain relief in respect of remuneration received by him in foreign currency from any employer for any service rendered by him outside India if he is a technician and the terms and conditions of his service outside India are approved in this behalf by the Central Government or the prescribed authority. Various terms like foreign currency, foreign employer, technician are defined in the section. The question involved in the appeal before this

Court was whether any remuneration was received by the respondent in foreign currency from his employer, being a foreign employer for service rendered by him outside India. It was the contention of the revenue that construction of the term "remuneration" should be confined to deduction to be given only in the case of remuneration given to an employee and not the fees paid to a consultant or a technician. This court did not accept this contention and said that there was nothing to warrant a restricted construction was canvassed by the revenue. The Court said that it was significant that Section 80-RRA of the Act used the expression "remuneration" and not salary to be entitled to deduction and that there was no warrant to restrict the meaning of the expression "remuneration" to a salary revived by an employee abroad.

In Commissioner of Income-tax, Madras vs. South Arcot District Co-operative Marketing Society Ltd. [(1989) 176 ITR 117] this Court was considering if certain amount described as a commission received by the assessee from the madras Government under an agreement for stock and distribution of ammonium sulphate was exempted under Section 14(3)(iv) of the Income Tax Act, 1992. This Court observed as under:

> "We have considered the matter carefully and to our mind, it seems clear that the Appellate Tribunal and High Court are the right in the view adopted by them. As was observed by the Gujarat High Court in CIT vs. Ahmedabad Maskati Cloth Dealers Co-operative Warehouses Society Ltd. (1986) 162 ITR 142, While considering the analogous provision of Section BOP(2) (e) of the Income-tax Act, 1961 the provision for exemption was intended to encourage cooperative societies to construct warehouses which were likely to be useful in the development of rural economy and exemption was granted from income-tax in respect of income derived from the letting of such warehouses for the storage of fertilisers and other related commodities concerned with cooperative marketing. Having regard to the object with which the provision has been enacted, it is apparent that a liberal construction should be given to the language of the provision and that, therefore, in the circumstances of the present case, it must be regarded that what the assessee did was to let out its godowns for the purpose of storing the ammonium sulphate handed over to it by the State Government."

As to what is the scope of a circular issued by the CBDT, reference was made to a decision of this Court in Keshavji Ravji and Co. and Anr. vs. Commissioner of Income- tax [(1990) 2 SCC 231] wherein this Court was considering the contention that circular of 1965 of the Central Board of Direct Taxes was binding on the authorities under the Act and should have been relied upon by the High Court in support of the court's construction of Section 40(b) to accord with the understanding of the provision made manifest in the circular. This Court held as under:

"This contention and the proposition on which it rests, namely, that all circulars issued by the Board have a binding legal quality, incurs, quite obviously, the criticism of being too broadly stated. The Board cannot pre-scope and ambit of a provision of the 'Act' by issuing circulars on the subject. This is too obvious a proposition to require any argument for it. A circular cannot even impose on the tax payer a burden higher than what the Act itself on a true interpretation of the laws is the exclusive

domain of the courts. However, - this is what Sri Ramachandran really has in mind -

circulars beneficial to the assessee and which tone down the rigour of the law issued in exercise of the statutory power under Section 119 of the Act or under corresponding provisions of the predecessor Act are binding on the authorities in the administration of the Act. The Tribunal, much less the High Court, is an authority under the Act. The circulars do not bind them. But the benefits of such circulars to the assessees have been held to be permissible even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law. But that is not the same thin as saying that such circulars would either have a binding effect in the interpretation of the provision itself or that the tribunal and the High court are supposed to interpret the law in the light of the circular. There is, however, support of certain judicial observations for the view that such circulars constitute external aids to construction.

In State Bank of Travancore vs. CIT, however, this Court referring to certain circulars of the Board Said: (SCC p.51 para 43:

> ITR p. 139) " ... The earlier circulars being executive in character cannot alter the provisions of the Act. These were in the nature off concessions and could always be prospectively withdrawn.
>
> However, on what lines the rights of the parties should be adjusted in consonance with justice in view of these circulars is not a subject matter to be adjudicated by us and as rightly contended by counsel for the revenue, the circulars cannot detract from the Act."
>
> The expression 'executive in character' is, presumably, used to distinguish them from judicial pronouncements. The circulars referred to in that case were also of the Central Board of Direct Taxes and were, presumably also, statutory in character.
>
> However, this contention need not detain us, as it is unnecessary to examine whether or not such circulars are recognised, legitimate aids to statutory construction. In the present case, the circular of 1965 broadly accords with the view taken by us on the true scope and interpretation of Section 40(b) insofar as the quantification of the interest for purposes of Section 40(b)."
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> On Board Circular Collector of Central Excise, Patna vs. Usha Martin Industries (1997) 7 SCC 47, this Court was considering the binding effect of a circular issued by the central Board of Excise and Customs under Section 37-B of the Central Excise Act 1944. The Court observed that there were catena of decisions of this Court holding that the revenue could not be permitted to take a stand contrary to the instructions issued by the Board and that it was a different matter that an assessee could contest the validity or legality of a departmental instruction. But that right could not be conceded to the Department, more so when others had acted according to those instructions. It was observed that of course the appellate authority was also not

bound by the interpretation given by the Board but the assessing authority could not take a view contrary to the Board's interpretation. This Court referred to its earlier decision in Poulose and Mathen vs. Collector of Central Excise & Anr. [(1997) 3 SCC 50= (1997) 90 ELT 264] to paragraph 15 therein which is as under:

" 15. One aspect deserves to be noticed in this context. The earlier Tariff Advice No. 83 of 1981 on the basis of which Trade Notice No. 220 of 1981 was issued by the Collector of Central Excise and Customs is binding on the department. It should be given effect to. There is no material on record to show that this has been rescinded or departed from, and even so, to what extent. Even assuming that the later different view - about which there is no positive material - the facts point out that the department concerned itself was having considerable doubts about the matter. The position was not free from doubt. It was far from clear. In such a case, where tow opinions are possible, the assessee should be given the benefit of doubt and that opinion which is in its favour should be given effect to. In the light of the above, it is unnecessary to adjudicate the other points involved in the appeal on the merits."

Mr. Dave then referred to a treatise on the business of hotels by S. Medlik to contend that to run a hotel skills and techniques are required like hotel reception, housekeeping, food and drink service and especially food preparation and accounting and marketing, personnel management, maintenance and other specialist functions of a hotel. He also dwelved on the importance of hotel in modern day life and the role which hotels play in many countries in providing facilities for the transaction of business, for meetings and conferences, for recreation and entertainment and as attraction for visitors, foreign currency earners, employers of labours, outlets for the products of other industries and as an important source of amenities for local residents. We do not think it is necessary for us to go into all these aspects of hotel management as we are concerned with the origin of the law in its application to the agreement in question.

Lastly, Mr. Dave said that use of the name of respondent was not ordinary matter and it could not be said as held by the appellant in its impugned order that the fee received for the use of the trade name of respondent though covered by the provisions of Section 80-0 yet the amount relatable to this aspect of the total services rendered would be so small that it was not easy to quantify the same for the purpose of Section 80-0.

We may now consider the judgments referred to during the course of arguments in somewhat greater detail.

In J.K. (Bombay) Ltd. vs. Central Board of Direct Taxes and another (1979) 118 ITR 312 (Del) a Division Bench of the Delhi High Court was considering the question whether services of managing agents rendered by an Indian company to a foreign company were not "technical services" within the meaning of Section 80-0 of the Act. The Court said that managerial service may be professional service like legal or medical service, but that would not be technical service like engineering service. After examining the provisions of Section 80-0 and the relevant Board Circular No. 187 dated 23rd December, 1975, the High Court held as under:

> "To sum up, the main reason why the word 'technical' in s.80-0 cannot be given a wider meaning to include 'managerial' or 'Commercial' is that the performance of managerial or commercial services by an Indian company for a foreign enterprise would amount to virtually managing or running the foreign company and remuneration obtained by running or managing a foreign company would be in the nature of profits, while s.80-0 deliberately restricts itself to income by way of royalty, commission or fees and excludes other types of remunerations."

The Court, therefore, held that the petitioner was not entitled to allowance under Section 80-0 or any payment from the foreign company received by it towards such services as managing agents.

In Ghai Lamba Catering Consultant P. Ltd. vs. Central Board of Direct Taxes and another (1980) 124 ITR 301 (Del) Delhi High Court was again considering the scope and intent of Section 80-0. On the facts of the case the High Court held that the agreement which the petitioner had entered with a foreign enterprise was nothing but a joint venture. It noted that under the agreement the main function of the petitioner was to manage and run the restaurant of M/s. G.L. Restaurant Ltd., an English company, in return for a certain percentage of the profits. The Court held that the agreement did not in terms state as to what type of technical services were to be rendered by the petitioner to the foreign company. The Court referred to its earlier decision in J.K. (Bombay) Ltd. vs. CBDT (118 ITR 312) where it had said that if the Indian Company was in fact running the foreign company it was difficult to separate the management function exercised by the Indian company from the day to day working of the foreign company and that Section 80-0 postulated that the Indian company did not become a part of the foreign enterprise. Applying those tests, the Court upheld the refusal to grant approval to the agreement by the respondent under Section 80-0 of the Act.

In Godrej and Boyce Mfg. Co. Ltd. vs. S.P. Potnis, Chief Commissioner of Income-tax and others (1993) 203 ITR 947 (Bombay), a Division Bench of the Bombay High Court (where one of us was a member) held that the order denying approval under Section 80-0 was not justified. In that case the petitioner entered into two agreements with the foreign company for establishing a plant in Indonesia for the manufactured by it. One agreement was titled "technical assistance agreement" . The second agreement titled "management service agreement" provided for the petitioner to take over the responsibility for the working and management of the foreign company for a period of twenty- five years. For this purpose the petitioner was required to loan to the foreign company the services of it "fully qualified and experienced managers, engineers, technicians, production specialists and such other personnel as may be necessary not only for the setting up of the Company's said plant but also for the overall working and management of the company". The agreement also contained wide-ranging provisions for the giving of all marketing, industrial, manufacturing, commercial and scientific knowledge, experience and skill for the efficient working and management of the foreign company. Petitioner was also required to have control over "general management" of the foreign company's business transactions and charge and custody of all the property, books of account, papers, documents and effects belonging to the foreign company. While the respondent granted approval to the first agreement it denied its approval to the second agreement. Respondent was of the view that the second agreement did not qualify for approval

under Section 80-0 of the Act, since the crux of the management service agreement was that the petitioners would take over responsibility for the working and management of the foreign company for a stipulated period and that managerial services did not amount to "technical services" within the meaning of Section 80-0. On this the respondent had relied on the decision of the Delhi High Court in J.K. (Bombay) Ltd.'s case. Bombay High Court took notice of the later decision of the Supreme Court in Continental construction Ltd. vs. CIT (1992) 195 ITR 81 where this court took the view that even professional service, perhaps, amounted to technical service within the meaning of Section 80-0 of the Act. Notice was also taken of the impugned decision of the Delhi High Court in Oberoi Hotels (India) Pvt. Ltd. vs. CBDT (1982) 135 ITR 257 where Delhi High Court struck somewhat a different note to its earlier decision in J.K. (Bombay)'s case. The court also noted another decision of this Court in Bajaj Tempo. Ltd. vs. CIT (1992) 196 ITR 188 where this Court highlighted that a provision in a taxing statute granting incentives for promotion of growth and development should be construed liberally and hat since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed strictly so as to advance the objectives of the provision and not to frustrate it. Keeping in view this principle and on the terms of the agreement the High Court was of the view that when the respondent did not grant approval it was not having the benefit of the decision of the Supreme Court in Continental's case. The Court said that it was not possible to postulate, as a general proposition of law, that all managerial service must necessarily be nontechnical services and that it depended on the nature of the expertise required for rendering the managerial services. The Court, therefore, held that the respondent took somewhat rigid view of the matter in refusing to grant approval to the second agreement. It, therefore, quashed the order of the respondent refusing to grant approval to the second agreement. The application of the petitioner for grant of approval was sent back to the respondent for reconsideration in accordance with the law.

In HMT Ltd. vs. Central Board of Direct Taxes and another (1991) 188 ITR 457 (Karnataka) the petitioner had entered into an agreement with Nigerian Government and sought approval of the agreement under Section 80-0 of the Act. The agreement consisted of various types of passing of technical information, know-how, designs, trade mark, logo and also training of Nigerian personnel in India among other matters. On the questions of training of Nigerian personnel in India and technical fee paid thereof, the respondent stated that the training of Nigerian personnel in India would mean a service rendered in India and therefore, the fee receivable in that respect would not be entitled to the benefit of Section 80-0 of the Act. The High Court upheld the view of the respondent and this is how the Court dealt with the matter:

> "I will proceed on the basis that the service rendered by the petitioner in imparting training to the Nigerian personnel in India is not a technical service for the purpose of this case. It is not necessary to decide whether such imparting of knowledge also falls within the expression of "rendering of technical service". The petitioner gives training to the personnel of the Nigerian Government in India. Section 80-0 of the Act provides that, where any considered consideration is received in respect of any patent, invention, model, design, secret formula or processor similar property right, or information concerning industry, commerce or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such

> enterprises by the assessee for use outside India, the deduction would be attracted. It is clear from a reading of this clause that imparting of scientific knowledge, experience or skill made available shall be of the assessee as the latter clause " by the assessee" Clearly controls the earlier expressions used in this connection. Here, in the present case, the Nigerian personnel are trained in India and, once they go out of the country, it is not the skill of the assessee that it used outside. Therefore, even assuming for a moment that the argument of learned counsel for the petitioner is right, that does not come within the expression "technical service", and as such service is not rendered by the assessee outside India, by imparting training to the personnel of the Nigerian Government, it cannot be said that the same would fall within the deduction granted under Section 80-0 of the Act.
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> Therefore, the view of the Board on this aspect of the matter appears to be correct."

In Continental Construction Ltd vs. commissioner of Income-tax (1992) 195 ITR 81 (S.C.) one of the questions before this court was if the Appellate Tribunal was right in holding that the income arising from the activities of the petitioner in pursuance to seven agreements for construction of various project with foreign Government/enterprise were governed by the provisions of Section 80HHB and not Section 80-0 of the Act. Petitioner had claimed deduction under Section 80-0 which provides for a deduction, in computing the total income, in respect of royalties etc. from certain foreign enterprises. The Court noted that this topic was originally dealt with in Section 85-C . Section 80-0 was substituted in its place with effect from April 1, 1968 and that the section had since undergone amendments from time to time. It is not necessary for us to analyse this judgment in any detail and as here we are not concerned only with the interpretation of Section 80-0. What judgment lays down for our purposes is:

> (1) The job of the assessee involved survey, soil investigation, design, detailed drawings and construction of all civil works and pipelines (other than trunk pipe lines).

Even these activities involve technical knowledge and expertise. It cannot, therefore, be doubted that the assessee under the contract, had to make use, outside India, of its industrial, commercial and scientific knowledge, experience and skill.

(1-A) There is equally no doubt that, in executing the contract, the assessee has rendered technical services. Any engineering contract involves technical services; more so, a contract of the nature and magnitude involved in the present case.

(2) Where a person employs an architect or an engineer to construct a house or some other complicate type of structure such as a theater, scientific laboratory or the like for him it will not be incorrect to say that the engineer, in putting up the structure, rendering him technical services even though the actual construction and even the design thereof may be done by the staff and labour employed by the engineer or architect. Where a person consults a lawyer and seeks opinion from him on some issued the advice provided by the lawyer would be a piece of technical service provided

by him even though he may have got the opinion drafted by a junior of his or procured from another expert in the particular branch of the law.

(3) No doubt that "professional services" have been brought within the scope of Section 80-0 only by and amendment by the Finance (No.2) Act, 1991 and that too, with effect from April 1, 1992, which is proposing to substitute the worked "technical or professional services" in place of the word "technical services" now used in the Section. It seems to us that this amendment may only of a clarificatory nature. the expression "technical services" has a very broad connotation.

(4) Firstly whatever may be the position regarding other "professional services", there can hardly be any doubt that service involving specialised knowledge, experience and skill in the field of constructional operations are "technical services". would be "technical services" or not has no impact on the point we are trying to make, viz., that, in order to say that a person is rendering such services to another, it is not necessary that the services should be rendered by the former personally and not through the medium of others.

(5) It is a well-settled principle that excitability of an item to tax or tax deduction can hardly be made to depend on the label given to it by the parties. As assesses cannot claim deduction under Section 80-0 in respect of certain receipts merely on the basis that they are described as royalty, fee or commission in the contract between the parties. By the some taking, the absence of a specific label cannot be destructive of the right of an assessee to claim a deduction, if, in fact, the consideration for the receipts can be attributed to the sources indicated in the section. contracts of the type envisaged by Section 80-0 are usually very complex ones and cover a multitude of obligations and responsibilities. It is not always possible or worthwhile for the parties to dissect the consideration and apportion it to the various ingredients or elements comprised in the contract.

There is no gainsaying that running a well equipped modern hotel is no ordinary affair. One needs a great deal of expertise skill and technical knowledge for the purpose. If we examine the agreement, it provides for rendering of technical services and also professional services for obtaining of Hotel Soaltee, a foreign enterprise. CBDT fell into an error in considering particularly the clause in the agreement which provided for operation of the Hotel Soaltee by the respondent. The agreement has to be seen as a whole and so examined it is quite apparent that it provided for rendering of not only technical services for operating the hotel of the foreign enterprise but also providing for professional and other services in connection with operating of the hotel. Section 80-0 was enacted with the twin objects of encouraging the export of Indian technical know-how and augmentation of foreign exchange resources of the country. We have seen above that after the amendment of section 80-0 by Finance (No. 2 Act of 1991) the words "technical or professional services" have been inserted in place of the words "technical services". But this Court in Continental Construction Ltd. case took the view that the amendment was only of clarificatory nature and the term "technical services" always included within it professional services as well. This Court has gone even to the extent that when a person consults the lawyer and seeks his opinion on certain issue the advice rendered by the lawyer would be a piece of technical service. Considering the scope of the agreement and the width of Section 80-0 we are of the opinion that the agreement provides for "information concerning industrial, commercial or scientific knowledge, experience or skill made available" by the

respondent to the foreign enterprise for running of the Hotel Soaltee. Mr. Dave is right when he submits that in view of the judgment of this court in Continental Construction Ltd. case Circular No. 187 dated December 23, 1975 of the CBDT may perhaps require certain changes so as it is in conformity with Section 80-0 of the Act. In J.K. (Bombay) Ltd. case Delhi High court was of the view that remuneration obtained by running or managing a foreign company would be in the nature of profits while Sections 80-0 deliberately restricted itself to income by way of royalty, commission or fees and included other types of remuneration. We do not think that this is a correct statement as the royalty, commission or fees can be in terms of percentage of profits earned by the foreign enterprise on account of services rendered by the Indian Company. It is substance of the case which matters and not the name. The view taken by the Bombay High Court in Godrej and Boyce Mfg. Co. Ltd. case (203 ITR 947) commends to us. As it is more in consonance with the provision of Sections 80-0 and the object which it seeks to achieve. Karnataka High Court in the case of HMT Ltd. (188 ITR 457) has rather taken a narrow view of the provision of Sections 80-0. Applying the principles of law as laid down by Court in Continental Construction Ltd. case and the term "technical services"

> which included "professional services" and the nature of services agreed to be rendered by the respondent to the foreign enterprise we are of the view that CBDT was not right in not granting approval of the agreement to the respondent under Sections 80-0 of the Act. We have also seen the scope of circulars issued by the CBDT and had these are to be acted upon in various decisions of this Court. In the matter of the nature as in the present case and the legislative intention to give relief we have to draw interpretation to the term "technical services" which includes "professional services" as well. basic purpose of Sections 80-0 is the spread by an Indian assessee 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 of the assessee for use outside India and it that process to receive income to augment the foreign exchange resources of the country. The assessee can also made available to foreign enterprise technical and professional services expertise of which it possesses for earning foreign exchange for the country.
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> When exercising power of judicial review, courts have to see that the authority acts within the scope of its powers and, if discretion is conferred on the authority, it exercises the same in reasonable manner keeping in view the object which the statute seeks to achieve. We have no doubt that the decision of CBDT in not granting approval to the agreement was in good faith and it is the latest development of law both on the scope of judicial review and interpretation of Sections 80-0 that the decision has to be reversed. As law stands today with reference to Section 80- 0, it can be said that CBDT took into account the considerations which were not relevant or germane to the real issue. In this view of the matter there is no ground for interference in the impugned judgment of the High Court. It was submitted by Mr. Shukla that in view of the decision in Godrej and Boyce Mfg. Co. Ltd. (supra) of the Bombay High Court, this Court, if it decides to hold that the decision of the CBDT was not correct, the matter should be again remanded back to CBDT to grant approval or otherwise of the agreement keeping in view the latest development in law

and the parameters laid down by us in this case. Normally, we would have adopted this very course, but in the present case, the matter relates to the year 1970 we do not find it will be proper for us to interfere in the impugned judgment of the High Court and sent the matter back to the CBDT for fresh appraisal.

Accordingly, the appeal is dismissed and the judgment of the Delhi High Court is affirmed.