

David Kenneth White vs Commissioner Of Income-Tax on 14 October, 1997

Equivalent citations: [1998]231ITR464(AAR)

RULINGS A.A.R. No. 348 of 1997 Decided On: 14.10.1997 Appellants: David Kenneth White Vs. Respondent: Commissioner of Income-tax Hon'ble Judges:

S. Ranganathan, J. (Chairman) and Subhash C. Jain, Member Counsels:

For Appellant/Petitioner/Plaintiff: Prayaag Joshi, Kunal Kashyap and Arun Acharya, Chartered Accountants For Respondents/Defendant: None Subject: Direct Taxation Acts/Rules/Orders:

Income Tax Act, 1961 - Sections 6, 10(5B), 245Q, 245Q(1) and 245R(2) Cases Referred:

Monte Harris v. CIT, [1996] 218 ITR 413 (AAR) RULING

1. The applicant, David Kenneth White, is a British national. He is at present employed with Modicom Network Private Limited (MNP) which is a joint venture between Distacom Communications Limited (DCL), Motorola Inc. and the B. K. Modi Group of Industries Limited in India. DCL is a Hong Kong based company, active in telecommunications joint ventures throughout Asia. Its activities are focussed in Japan, Greater China, India and South East Asia. It has been at the leading edge of telecommunications for more than two decades, introducing paging products and services and cellular services in Canada and Hong Kong.

2. In the middle of 1995, DCL, through a consortium which included the B. K. Modi and Motorola groups, got incorporated in India a project company MNP, under the Companies Act with DCL holding 39 per cent. shareholding therein. MNP bid for tenders issued by the Government of India for the grant of cellular licences and succeeded in obtaining two Groups Speciale Mobile (GSM) cellular licences, one each for the States of Karnataka and Punjab. Highly sophisticated telecommunications network being new to India, persons experienced in planning, designing, setting up and operating such networks had to be borrowed by MNP from DCL and one of the persons whose services were obtained by MNP is the applicant, David Kenneth White.

3. Under an employment agreement dated September 25, 1996, MNP appointed David Kenneth White to its Chandigarh office with a liability to be transferred to any place in India. His salary and performance bonus were fixed at Rs. 57,60,000 per annum and Rs. 18,36,000 per annum, respectively, payable every month and the

applicant was also entitled to certain other perquisites under the agreement. The agreement, however, provides as follows :--

"Now, it is hereby agreed as follows :

GENERAL Taxation

13. Subject to the executive being granted a "technician status", under Section 10(5B) of the Income-tax Act, 1961, he shall be compensated on a net-of-tax basis, i.e., the company will bear his income-tax liability arising out of this agreement.

It will be the executive's responsibility to meet all requirements under the Indian tax laws, including tax compliance and the filing of tax returns. The company has retained Arthur Andersen and Company for the executive's assistance. Any penalty and/or interest due, which is caused by the executive's failure to provide Arthur Andersen and Company with relevant information or failure to sign the tax returns will be the executive's responsibility. . . ."

4. The applicant's employment with MNP commenced on July 16, 1996, and is stated to be for a period of 24 months. It appears that the applicant had earlier been in India only for the periods between May 31, 1995, and February 19, 1996, amounting to in all 85 days. However, the applicant has not been resident in India within the meaning of Section 6 of the Income-tax Act, 1961 ("the Act"), either in the financial year 1995-96 or earlier financial years. He is, therefore, entitled to maintain the present application, though he has become a resident in the financial year 1996-97, for the reasons explained by this Authority in the case of *Monte Harris v. CIT* [1996] 218 ITR 413 (AAR).

5. The applicant filed a return of income for the assessment year 1997-98 before the income-tax authorities at Bangalore but claimed that he was entitled to exemption under Section 10(5B) of the Act. This return was filed on June 15, 1997, after the present application which was filed on March 27, 1997.

6. The applicant is a B.Sc. Honours in electrical engineering having graduated from Trinity College in 1974. Since then he has had extensive experience in power conditioning, having shouldered several technical responsibilities in DCL at Vancouver as managing director from February, 1974, till January, 1986. Between 1986 and 1993, he is stated to have been involved with the establishment and installation of the Hutchison paging and later cellular phone company in Hong Kong. The papers filed clearly show that the applicant is fully qualified and has also had extensive experience in the field of cellular communications.

7. This application has been filed by the applicant seeking the ruling of this Authority on the following questions :--

1. Whether in the facts and circumstances explained in detail in annexure I, the applicant is a qualified technician as defined under Section 10(5B) ; and accordingly

2. The applicant would be entitled to the exemption under Section 10(5B) of the Act.

Section 10(5B) of the Act reads as follows :

"(5B) in the case of an individual who renders services as a technician in the employment (commencing from a date after the 31st day of March, 1993) of the Government or of a local authority or of any corporation set up under any special law or of any such institution or body established in India for carrying on scientific research as is approved for the purposes of this clause or Sub-clause (viia) of Clause (6) by the prescribed authority or in any business carried on in India and the individual was not resident in India in any of the four financial years immediately preceding the financial year in which he arrived in India and the tax on his income for such services chargeable under the head "Salaries" is paid to the Central Government by the employer (which tax, in the case of an employer, being a company, may be paid notwithstanding anything contained in Section 200 of the Companies Act, 1956 (1 of 1956), the tax so paid by the employer for a period not exceeding forty-eight months commencing from the date of his arrival in India:

Provided that the Central Government may, if it considers it necessary or expedient in the public interest so to do, waive the condition relating to non-residence in India as specified in this clause in the case of any individual who is employed in India for designing, erection or commissioning of machinery or plant or supervising activities connected with such designing, erection or commissioning.

Explanation.--For the purposes of this clause, "technician" means a person having specialised knowledge and experience in--

(i) constructional or manufacturing operations, or in mining or in the generation of electricity or any other form of power, or

(ii) agriculture, animal husbandry, dairy farming, deep sea fishing or ship building, or

(iii) such other field as the Central Government may, having regard to availability of Indians having specialised knowledge and experience therein, the needs of the country and other relevant circumstances, by notification in the Official Gazette, specify, who is employed in India in a capacity in which such specialised knowledge and experience are actually utilised."

8. In exercise of the powers conferred by Clause (iii) of the Explanation to Section 10(58), the Central Government has issued a Notification No. S.O. 569(E) (see [1993] 203 ITR (St.) 56), dated July 27, 1993, specifying the following fields for the purposes of Section 10(58) :

(i) grading and evaluation of diamonds for diamond export or import trade ;

(ii) cookery ;

(iii) information technology including computer architecture systems, platforms and associated technology, software development process and tools.

9. The applicant's claim is that he has knowledge and expertise in the field of information technology specified in the above notification.

10. Before dealing with the question on the merits, it is necessary to refer to the terms of Clause (a) of the proviso to Section 245R(2) which requires the Authority to reject an application "where the question raised in the application is already pending in the applicant's case before any income-tax authority, the Appellate Tribunal or any court." Prima facie, this clause of the proviso seems to be attracted here since, as already mentioned, the applicant has raised the question posed before the Authority in its return filed in the assessment proceedings for the assessment year 1997-98. This, however, is not so because the words in quotations have to be given a practical interpretation consistent with the scheme of the Act. By the present application, filed on March 27, 1997, the applicant had exercised his choice to have recourse to the proceedings under Chapter XIX-B. But this did not give him immunity from his obligation to file a return of income under the Act on or before June 30, 1997, or to present other proceedings arising therefrom. To hold that the subsequent act of filing a return would vitiate and render infructuous the application filed earlier under Section 245Q(1) would render the entire procedure of seeking an advance ruling otiose. Such an interpretation of the Act would not be correct. What the clause prohibits is the attempt to raise before the Authority questions which, on the date of the application before the Authority, were being agitated in other fora. This Authority has held to this effect in the case of *Monte Harris v. CIT* [1996] 218 ITR 413 (AAR) already referred to earlier on a different point. The present application is not, therefore, liable to be rejected in limine on a preliminary ground,

11. Turning to the provisions of Section 10 (5B) extracted earlier, it will be seen that the exemption thereunder is available to an employee on fulfilment of the following:

(a) He must be a "technician" as defined in the Explanation read with the relevant notification ;

(b) He should be in the employment, inter alia, of any business carried on in India ;

(c) He must not have been resident in India in the four financial years preceding the date of his arrival in India ; and

(d) He is provided with a tax-free salary, there being an agreement that the tax payable on his remuneration will be paid to the Government by his employer.

12. In the present case, there is no dispute that conditions (b), (c) and (d) are fulfilled and the only contested issue is as to whether the applicant qualifies as a technician within the meaning of Section 10(5B).

13. As already mentioned, the applicant claims to fall under the definition by virtue of the notification dated July 27, 1993. According to the Department, however, the expression "information technology" has a much narrower meaning. The expression should be understood only in relation to computer systems and software systems. Attention is invited to the definition in The New Shorter Oxford Dictionary and The New Encyclopaedia Britannica. The former defines it as "technology that deals with the storage, processing and dissemination of information especially using computers" and the latter as "having references to advances in computer software and their ramifications". It is said, therefore, that the expression deals with storage of data, information, files, records, etc., and their retrieval. It is said that "telecommunication services", such as are being set up under the contract in the present case, are not covered under the definition. Attention is drawn to Section 80-IA which specifically uses the words "telecommunication services, whether basic or cellular", to Section 80HHE which gives tax deduction in respect of profit derived from "export of computer software or its transmission from India to a place outside India by any means" and Section 10B which defines "manufacture" to include "any recording of programmes on any device". The submission is that things related to computer technology or associated devices have been dealt with separately in the statute and that such activities do not cover provision of telecommunication facilities, basic or cellular. The applicant, therefore, cannot, it is said, be treated as a technician within the meaning of Section 10(5B) read with the notification dated July 27, 1993.

14. This Authority is of the opinion that the applicant's contention that he is a "technician" within the meaning of Section 10(5B) read with the notification dated July 27, 1993, has to be accepted. The construction sought to be placed by the Department on the expression "information technology" is very narrow. Longman's Dictionary of Contemporary English (New Edition, 1987) defines "information technology" as "the science or practice of collecting, storing, using and sending out information by means of computer systems and telecommunications". Even the definitions referred to by the Department do not exclude the field of cellular telephones from the purview of the expression "information technology" as they also refer to the process of dissemination of information through the medium of computers. The working of the system has been explained thus by the applicant :

"A cellular telecommunication network consists of the following components/equipment:

--Mobile/cellular telephone handsets using the GSM protocol which are the subscriber interface;

--Base station (Base Transceiver Station or "BTS") equipment;

--Power conditioning equipment ;

--Backbone signal transmission equipment (linking cables, digital transmission products, radio and wireless equipment, etc) ;

--Digital switching equipment ;

--Distribution system ; and

--Billing software and equipment.

Specialised software is used for communicating and transmitting information and instructions between the component computers and devices that make up the computer architecture system of the network. The interconnected computers and other devices form the platform on which the specialised software functions, in order to operate the cellular network. The manner in which messages are transmitted through a cellular telecommunications network is explained below.

The signals sent from a communicating mobile handset are transmitted to the cellular tower (BTS) through a GSM radio link and thereafter via the microwave backbone circuit to the central switch. The central switching centre routes the call to either the point of interconnection with the Department of Telecommunications network, or through the backbone and BTS to a receiving mobile handset. The above process is achieved purely through software and programme development specially for such purpose, used on a complex, structure computer architecture system and the related computer platforms. In addition, highly sophisticated computer programmes and computers are used to maintain cellular identity security and effect billings. In view of the complex structure of the incentive schemes being offered, the use of such sophisticated billing systems achieves greater importance.

Each of the above components/equipment fulfils a vital function in the operation of the cellular telecommunications network. Further, the functions are inter-dependent and work in close conjunction with one another to ensure the smooth working of the network. The basic platform on which the network is built, is a computer architecture system which uses software for running such a system."

15. It is clear from the above that the cellular network is a medium for dissemination through a system of computers and is essentially a computer network. In the light of this information, there can be no doubt that the expression "information technology", as elaborated in the notification of July 27, 1993, also covers the area of cellular networks.

16. For the reasons discussed above, this Authority is of the opinion that the applicant fulfils the definition of the expression technician in Section 10(56) and the answers to the questions raised by him should be in the affirmative. The Authority therefore pronounces the following Ruling :

Ruling Questions Answers

1. In the facts and circumstances explained in detail in Annexure I, the applicant is a qualified technician as defined under section 10(5B) ; and accordingly Yes
2. The applicant would be entitled to the exemption under section 10(5B).

Yes