HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

D.B. Income Tax Appeal No. 65/2009
CNR: RJHC010311632009 | URN: ITA / 645U / 2009

Hindustan Zinc Ltd. Through Sh.D.S. Rudra, Yashad Bhawan, UDAIPUR

----Appellant

Versus

The D.C.I.T. (Assessment), Special Range, UDAIPUR.

----Respondent

For Appellant(s)	:	Mr. Deepak Chopra, Sr. Advocate (Through VC) assisted by Mr. Anjay Kothari Mr. Amit Sharma
For Respondent(s)	:	Mr. K.K. Bissa

HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI
HON'BLE MR. JUSTICE PRAVEER BHATNAGAR

Judgment

1. Date of conclusion of arguments	**16.07.2026**
2. Date on which judgment was reserved	**16.07.2026**
3. Whether the full judgment or only the operative part is pronounced:	**Full Judgment**
4. Date of pronouncement	**05.09.2026**

Per Dr. Pushpendra Singh Bhati, J:

1. The instant appeal has been preferred by the appellant-assessee under Section 260A of the Income-tax Act, 1961 against the order dated 20.02.2009 passed by the learned Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur in ITA No.84/JU/1999 pertaining to Assessment Year 1994-95, claiming the following relief:

"(i) Allow the instant appeal and set aside or quash the impugned order of the ITAT dated 20.2.2009.

(ii) Decide the substantial questions of law in favour of the appellant and against the revenue.

(iii) Reframe suitable questions of law, if it is considered necessary, to do justice to the appellant.

(iv) Any other appropriate relief, as may be considered just and proper, including awarding of the costs may be granted in favour of the appellant."

1.1. The record reflects that notice was initially issued in the appeal and, by order dated 10.05.2010, the appeal came to be admitted on the following substantial questions of law:

"1. Whether the provisions of Section 40(a) are attracted in the facts and circumstances of this case when the sum is not payable by the appellant (assessee) outside India to DML (foreign contractor) in terms of the agreement entered into between the parties?

2. Whether upon a true and correct interpretation of the relevant provisions of law, circulars issued, provisions of Double Taxation Avoidance Agreement and various clauses of the treaties and upon a true construction of the agreement, the sum payable to DML by the Crown Agents in U.K. out of grant given by U.K. Government can be said to be income accruing or arising to DML in India or deemed to be income accruing or arising to DML in India *and whether the finding of the learned ITAT in this regard is perverse and contrary to the provisions of law?"*

2. The material facts necessary for adjudication are that the appellant-assessee had claimed deduction under Section 35AB of the Act in respect of expenditure towards acquisition of technical know-how. The claim made was Rs.8,10,37,633/-. The Assessing Officer, taking into account the deduction determined with reference to the earlier assessment year, allowed Rs.3,99,00,468/- and disallowed the balance. The claim concerned technical know-how was obtained from M/s Davy McKee (Stockton) Limited, United Kingdom ("DML"), in connection with the lead-zinc smelter project at Chanderiya.

2.1. The transaction originated in the United Kingdom-India Hindustan Zinc Aid Arrangement, 1987, under which financial assistance was made available for development of the zinc and lead mining and smelter project. Hindustan Zinc Limited was nominated for implementation of the integrated project comprising the zinc-lead mines at Rampura Agucha and the lead-zinc smelter at Chanderiya. Under the financing arrangement, the U.K. Government made available grant assistance, the funds whereof were administered through the Crown Agents in the United Kingdom.

2.2. The appellant entered into an agreement dated 28.02.1987 with DML for basic engineering, technical know-how and allied services concerning the Chanderiya lead-zinc smelter. The agreement identifies Hindustan Zinc Limited as the "Owner" and

DML as the “Contractor”. The scope of services included basic engineering and engineering information, licence/know-how, training and technical assistance connected with implementation of the project. The agreement forming part of the record also contains distinct provisions governing fees, payment and Indian income-tax liability.

2.3. Payments to DML were released by the Crown Agents out of the grant account. The contemporaneous Government correspondence, however, required the appellant to certify the invoices and, upon release of the foreign currency payment, to deposit the corresponding rupee amount with the Government of India from the budgetary/equity support made available for the project. The record thus discloses a funding and disbursement mechanism involving the Governments and the Crown Agents, while the underlying contract for technical know-how and services remained between the appellant and DML.

2.4. The Assessing Officer disallowed the disputed part of the deduction on the premise that tax deductible in respect of the amount payable to the foreign company had not been deducted. The learned Commissioner of Income Tax (Appeals) sustained the disallowance.

2.5. In the earlier round, the learned Tribunal, vide order dated 30.10.2001, recorded findings which this Court, in D.B. Income Tax Appeal No.76/2002 decided on 21.11.2007, found to be irreconcilable. The matter was, therefore, remitted to the learned Tribunal for reconsideration and for arriving at a categorical conclusion in accordance with law. On remand, the learned Tribunal passed the impugned order dated 20.02.2009 and again sustained the disallowance.

2.6. The learned Tribunal found, inter alia, that the payment made by the Crown Agents was a payment made on behalf of the appellant; that the appellant had incurred an enforceable contractual liability towards DML; that the technical know-how and services were acquired for and utilised in the appellant's business in India; and that the circumstance that the foreign currency component was released out of grant assistance through the Crown Agents did not alter the character of the underlying payment.

3. Learned counsel for the appellant submitted that the learned Tribunal had incorrectly treated the appellant as the person making payment to DML. It was urged that the actual foreign currency payment had been made in the United Kingdom by the Crown Agents from funds made available by the U.K. Government and that no amount had travelled from the appellant in India to DML outside India.

3.1. It was submitted that the appellant's role was confined to certification of invoices and thereafter depositing an equivalent rupee amount with the Government of India upon release of budgetary support. According to learned counsel, the payment by Crown Agents out of the grant could not therefore be equated with a payment by the appellant to DML for the purposes of Sections 195 and 40(a)(i) of the Act.

3.2. Learned counsel further urged that DML was a non-resident foreign company and that the consideration received by it outside India could not, merely because the technical know-how was ultimately utilised for the appellant's Indian project, be regarded as income accruing or arising, or deemed to accrue or arise, in India. Reliance was placed upon Sections 4, 5 and 9 of the Act and upon the applicable Double Taxation Avoidance Agreement between India and the United Kingdom.

3.3. It was further submitted that Section 195 could operate only upon a sum chargeable to tax in India. Reliance in this regard was placed upon ***Transmission Corporation of A.P. Ltd. v. Commissioner of Income Tax, (1999) 239 ITR 587 (SC), GE India Technology Centre (P) Ltd. v. Commissioner of Income Tax, (2010) 327 ITR 456 (SC), and Engineering Analysis Centre of Excellence (P) Ltd. v. Commissioner of Income Tax, (2021) 432 ITR 471 (SC)***.

3.4. Reliance was also placed upon ***Grasim Industries Ltd. v. S.M. Mishra, CIT*****, decided by the Bombay High Court on 05.05.2010**, in support of the contention regarding technical services rendered outside India.

3.5. Learned counsel accordingly prayed that the substantial questions of law be answered in favour of the appellant and that the disallowance sustained by the learned Tribunal be set aside.

4. *Per contra*, the case of the Revenue, as reflected from the impugned order and the material forming part of the record, was that the grant had been earmarked for the appellant's project and

the Crown Agents merely constituted the mechanism through which the contractual consideration payable for the appellant's technical services agreement was discharged.

4.1. The Revenue's case was that the invoices were raised by DML upon the appellant; the appellant certified the contractual entitlement before release of payment; and the corresponding rupee amount was thereafter accounted for by the appellant with the Government of India. The fact that the foreign currency component was physically released by the Crown Agents, therefore, did not sever the nexus between the appellant's contractual liability and the payment received by DML.

4.2. It was further the Revenue's case that the technical know-how was acquired for the appellant's business and utilised for its project in India and, consequently, the consideration was chargeable under the statutory provisions governing fees for technical services. Section 195 was therefore attracted and failure to deduct tax attracted the consequence under Section 40(a)(i).

5. Heard learned counsel for the parties and perused the material available on record.

5.1. The two substantial questions of law are interconnected. The principal controversy is whether the payment to DML ceased to be a payment attributable to the appellant merely because, under the financial aid arrangement, the foreign currency was released by the Crown Agents in the United Kingdom, and whether such interposition took the consideration outside the charge created by the Act and the obligation under Section 195.

5.2. Section 195(1), insofar as relevant, fastens the obligation to deduct tax upon a person responsible for paying to a non-resident any interest or "any other sum chargeable under the provisions of this Act". The expression "sum chargeable" is of significance. The Hon'ble Supreme Court in *GE India Technology Centre (P) Ltd. v. Commissioner of Income Tax*, (2010) 327 ITR 456 (SC), explained that Section 195 has to operate in conformity with the charging provisions contained in Sections 4, 5 and 9. The obligation to deduct tax therefore arises only where the payment contains income chargeable to tax in India. The compilation correctly records the principle that the payer cannot be made liable where the payment contains no element of income chargeable under the Act.

5.3. The aforesaid principle does not, however, advance the appellant's case unless the consideration payable to DML is first found not to be chargeable in India. The issue, therefore, is not whether every foreign remittance attracts Section 195; it plainly does not. The issue is whether the present payment was chargeable under Sections 4, 5 and 9 and the applicable treaty.

5.4. Section 9(1)(vii), as applicable to fees for technical services, provides for a source rule. In particular, income by way of fees for technical services payable by a resident is deemed to accrue or arise in India except where the stipulated services are utilised for a business or profession carried on outside India or for earning income from a source outside India. The statutory definition of "fees for technical services" includes consideration, including lump-sum consideration, for rendering managerial, technical or consultancy services.

5.5. The nature and purpose of the payment in the present case are not in doubt. The appellant itself claimed deduction under Section 35AB on the footing that lump-sum consideration had been paid/incurred for acquisition of technical know-how for use in its business. Section 43(2) gives the expression “paid” a meaning which includes an amount incurred according to the method of accounting employed by the assessee. Thus, for claiming the deduction, the appellant treated the contractual consideration as expenditure incurred for acquiring know-how; while resisting the statutory consequence of such payment, it seeks to characterise the same consideration as not being payable by it at all.

5.6. The two positions cannot be reconciled on the record. The source from which the appellant's contractual liability was financially discharged cannot be confused with the existence or character of that liability. A payment by a third person pursuant to an agreed funding mechanism may discharge the liability of the contracting party without converting the third person into the person who incurred the underlying expenditure.

5.7. The agreement assumes particular significance in this regard. Hindustan Zinc Limited is the “Owner”; DML is the “Contractor”; the Crown Agents are identified as the agency through whom the grant account was administered; the fees were contractually referable to the services rendered to the appellant; and the mechanism envisaged release by Crown Agents after the contractual claim had been duly processed and certified. The agreement further contains a separate clause regarding Indian income-tax liability and provides that the contract is governed by Indian law. The subsequent Government correspondence requiring counterpart rupee deposit by the appellant is consistent with the same structure.

5.8. The learned Tribunal was therefore justified in looking to the substance of the contractual arrangement rather than merely the situs of the bank account from which foreign currency was released. The fact that Crown Agents physically remitted the foreign currency does not, by itself, establish that the consideration was neither payable nor incurred by the appellant.

5.9. The applicable treaty does not lead to a different result. Article 13(7) of the India-United Kingdom Double Taxation Avoidance Convention embodies a source rule under which royalties and fees for technical services are deemed to arise in a Contracting State where the payer is that State, its political subdivision or local authority, or a resident of that State. The physical place from which the remittance is transmitted is therefore not determinative of the source of the income. The material inquiry is into the person on whom the obligation to make the payment rests. In the present case, the contractual obligation was undertaken for the appellant's Indian project and the payment was discharged through the Crown Agents under the grant mechanism.

5.10. The decision in ***Engineering Analysis Centre of Excellence (P) Ltd. v. Commissioner of Income Tax*, (2021) 432 ITR 471 (SC),** does not support a contrary conclusion. While reiterating that Section 195 operates only where the payment to the non-resident is chargeable under the Act, the Hon'ble Supreme Court also noticed that the Finance Act, 1976 introduced a specific source-based regime in relation to interest, royalty and fees for technical services. The controversy there concerned whether payments under software distribution/EULA arrangements constituted "royalty". The present case, in contrast, concerns consideration admittedly claimed as expenditure for acquisition of technical know-how for an Indian industrial project.

5.11. ***Transmission Corporation of A.P. Ltd.*** **(supra)** likewise does not assist the appellant in establishing that the present sum was not chargeable. As explained subsequently in ***GE India Technology Centre (supra)***, *Transmission Corporation* dealt with a composite payment which admittedly included an element chargeable to tax in India; Section 195(2) provided the mechanism for determination of the appropriate taxable proportion. The principle remains that chargeability precedes the withholding obligation. On the facts of the present case, that condition is satisfied.

5.12. The reliance placed upon ***Grasim Industries Ltd. v. S.M. Mishra, CIT*** also does not govern the present controversy. That decision dealt with a distinct technical-services arrangement where the Bombay High Court examined the taxability of offshore services in the light of ***Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income Tax, (2007) 288 ITR 408 (SC)***. The judgment in *Grasim Industries* was delivered on 05.05.2010. The Finance Act, 2010 thereafter substituted the Explanation to Section 9 with retrospective effect from 01.06.1976, specifically providing that income falling under clauses (v), (vi) or (vii) of Section 9(1) may be deemed to accrue or arise in India whether or not the non-resident has rendered services in India. More importantly for the present appeal, the question before this Court concerns the legal payer and source of the consideration under the appellant's own contract and the treaty, and not merely the geographical situs from which the Crown Agents transmitted the money.

5.13. The appellant's contention based upon Section 196 also cannot alter the position. The amount under consideration was not income payable to the Government, the Reserve Bank or any other entity falling within that provision. The recipient of the consideration for technical services was DML. The presence of the Government of India and the U.K. Government in the financing arrangement did not make DML's contractual consideration a payment to Government.

5.14. Once the consideration is found to have been incurred by the appellant towards DML, and the income component thereof is chargeable in India, Section 195 becomes attracted. Section 40(a)(i), as applicable to the relevant assessment year, correspondingly denies deduction where tax required to be deducted on royalty, fees for technical services or other chargeable sums payable outside India has not been deducted or paid in accordance with law.

5.15. This Court therefore finds no legal infirmity in the ultimate conclusion of the learned Tribunal that the intervention of the Crown Agents as the agency administering and releasing the U.K. grant did not divest the appellant of its character as the contracting person on whose behalf and towards whose contractual liability the payment was made.

6. Accordingly, the first substantial question of law is answered against the appellant-assessee and in favour of the Revenue, by holding that, in the facts of the present case, the provisions of Section 40(a)(i) were not rendered inapplicable merely because the foreign currency payment to DML was released through the Crown Agents in the United Kingdom.

6.1. The second substantial question of law is likewise answered against the appellant-assessee and in favour of the Revenue. The payment made to DML through the Crown Agents under the grant arrangement represented discharge of the consideration incurred under the appellant's technical know-how agreement for its Indian business and could not be treated as having its source outside India merely by reference to the location from which the Crown Agents released the funds. The finding of the learned Tribunal on this aspect does not suffer from perversity warranting interference under Section 260A of the Act.

7. Consequently, the appeal is ***dismissed*** and the order dated 20.02.2009 passed by the learned Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur in ITA No.84/JU/1999, to the extent challenged in the present appeal, is affirmed.

(PRAVEER BHATNAGAR),J (DR.PUSHPENDRA SINGH BHATI),J

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