IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

BEFORE DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SH. SUDHIR KUMAR, JUDICIAL MEMBER

ITA No.1033/Del/2018
Assessment Year: 2013-14

QAI India Ltd. **1010-12, Ansal Towers, 38, Nehru Place, New Delhi-110019** **PAN No.AAACQ0883C**	**Vs.**	**DCIT** **Circle -21(2)** **New Delhi**
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. Ved Jain, AR Supriya Mehta, AR
Respondent by	Sh. Amaninder Singh, SR. DR

Date of hearing:	04/06/2024
Date of Pronouncement:	10/07/2024

ORDER

PER SUDHIR KUMAR, JM:

This appeal by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-38, Delhi [hereinafter referred to as "CIT(A)"] vide order dated 21.11.2017 pertaining to A.Y. 2013-14 and arises out of the assessment order dated 23.03.2016 under section 143(3) of the Income Tax Act 1961 [hereinafter referred as 'the Act'].

2. Aggrieved by the order of the lower authorities, the assessee is in appeal before us by raising the following grounds:-

> *1. On the facts and circumstances of the case, the order passed by the Commissioner of Income Tax (Appeals) [CIT(A)] Is bad, both in the eye of law and on the facts.*
>
> *2. (i) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in confirming the disallowance of Rs. 54,65,508/- paid to Everest global Inc., made by the Id. AO by Invoking the provisions of Section 40(a)(1) read with Section 195 of the Act.*
>
> *(ii) On the facts and circumstances of the case the Learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the payment made for software training services not being chargeable to tax in India.*
>
> *(iii) Even otherwise, the same being not taxable as per the DTAA, the provisions of Section 195 and 40 (a)(i) will not be applicable to the same.*
>
> *3. The appellant craves leave to add, amend or alter any of the grounds of appeal.*

3. The brief case of the assessee is that assessees company is a limited company engaged in the business of Software development. The company provides the software related services such as software designing engineering, software training and consultancy services. Certification and management services. These services are in the areas of CMMI, PCMM, COPC, six cigma, Project Management, Innovation etc. The assessee company has filed the return of income of 30.11.2013, declaring an income Rs8561870/-. The case was selected for scrutiny and notice u/s 143(2) was issued to the assessee on 05-09-2014. In the compliance of the notice Ld AR submitted the required information. The AO made the addition of Rs 6997143/- and assessed the total income Rs 1,55,59013/-. The assessee preferred the appeal before the Ld CIT(A). The appeal was partly allowed by Ld CIT(A) against which the assessee is in appeal before us.

4. *Ld CIT(A) observed in the order as under :-*

> *"4.6.1 The explanation of appellant for payment of Rs.16,44,268/- to Everest Global Inc. for rendering software training services is completely illogical. The taxable event and, consequently, the occasion for TDS, arose when it made payment of royalty of*

Rs.54,65,508/- to the Everest Global Inc. The submission of appellant has been considered. Appellant has relied on a plethora of judgments in support of its contention that payment to Everest Global Inc. is not chargeable to tax in India. However, it has only offered explanation for payment of Rs. 16,44,268/- and not given any explanation for the total payment of Rs. 54,65,508/- made to Everest Global Inc., It is incomprehensible how providing of services outside India can be construed as separate business when the business is carried on in India. In this connection, a reference may be made to the distinction between a 'source of receipt' and 'source of income made by the Hon'ble Delhi High Court in the case of Havells India Limited (21 taxmann.com 476). Even though the source of receipt may be outside India, the source of income was very much in India. The amount in question is admittedly 'royalty'; not 'fees for technical services'. Hence, In view of the foregoing discussion, it is held that the amounts paid by the appellant to Everest Global Inc. constituted royalty and was chargeable to tax in the hands of the appellant. Since tax was not deducted at source, the disallowance is confirmed. 4.7 The Project

Management Institute (Rs. 84,251/-) According to appellant it paid Annual Membership/ support fees of Rs. 2,64,135/ during the year under consideration to Project Management Institute which is in the nature of membership fees and does not fall under the purview of fee for technical services. There is nothing on record to show that this non-resident person had PE in India. Following the reasoning given above in respect of the payment to Adrian Leach, the addition is deleted. These grounds of appeal are partly ruled in favour of the appellant.

5. Before us at the outset Ld DR supported the order and submitted that the assessee company has been described as professional which used to charge fees for providing software training to Raya Contact Centre Egypt but no details of software training has been mentioned in the work order dated 01-09-2012. He has further submitted that paper work has been fabricated to avoid the tax. He has also submitted that in the instant case even though the source of receipt may be outside of India but source of income was in India so the assessee was bound to deduct the tax at source, which was not deducted. Therefore, he submitted that the order of CIT(A) be up held.

6. The Ld. Counsel for assessee has submitted that project has been carried out, outside of India and services have been utilized outside India, thus income of non-resident is not liable for deduction of tax at source in India as per the provision of section 9(1) (vii)(b) of the Act. He has further submitted that the source of income was located outside India and the payments have been made in respect of services outside India. He has further submitted that Everest Global Inc does not have a permanent establishment in India. In support of his contention, he has filed a Paper book containing pages 1 to 83 in which he has attached the copy of acknowledgment of return of Income, copy of audited financial statement, copy of reply dated 03-03-2016 filed by assessee, copy of details of foreign remittance for the FY 2012-2013 on which no withholding tax is deducted, copy of agreement with Everest global Inc. and copy of submissions filed before the CIA(A) . Reliance has been placed on the following Judgment:-

1-The Dy commissioner of Income Tax company Circle-II (2) Chennai vs M/S Hofincons Infotech And industrial Services Pvt .Ltd

2-Aqua Omega services (p) Ltd vs Assistant Commissioner of Income Tax Co Circle (2) Chennai
3 Dy commissioner of Income Tax company Circle I(1) vs Ajapa Integrated Project Management consultants (P) Ltd.

4. Titan Industries Ltd vs Income tax officer International Taxation Ward 19(1) Bangalore

5. Director of Income Tax Delhi vs M/S Lufthansa cargo India

6. GVK industries Ltd & Another Vs The Income Tax Officer & Another

7. CIT vs Aktiengesellschaft Kuhnle Kopp & Kausch

7. We have heard the rival submissions and perused the material available on record.

8. In the Judgement of Principal Commissioner of Income Tax-2 vs Motif India Infotech (P) Ltd the Hon'ble Gujrat High court held that;

"In the case of ***G.E India Technology Center P. Limited vs. Commissioner of Income Tax & Anr..*** *reported in [2010] 327 ITR 456 (SC), the ratio laid down by the Supreme Court was that we remittance of money to a non resident would not give rise to the requirement of deducting tax at source, unless such remittance contains wholly or partly taxable income. It is true that after such judgment was rendered, the legislature had amended Section 195 of the Act by inserting Explanation Il by the Finance Act, 2012, but with retrospective effect from 1st April 1962. Such explanation provides that for removal of doubts, it is clarified that the obligation to comply with sub-section [1] of Section 195, and to make deduction as provided therein applies and shall be deemed to have always applied to all persons, resident or nonresident, whether or not the nonresident person has a residence or place of business or business connection in India; or any other presence in any manner whatsoever in India. Mere requirement of permanent establishment in*

India was thus done away with. Nevertheless, the basic principle that requirement of deduction of tax at source would arise only in a case where the payment made to a non resident was taxable, still remains. It was observed in a decision dated 9th April 2018 rendered in Tax Appeal No. 200 of 2018 by the Division Bench of this Court, as under:

"It can thus be seen that while confirming the order of CIT (A), the Tribunal relied on judgment off the Supreme Court in the case of G.E India Technology Centre P. Limited vs. Commissioner of Income Tax & Anr., reported in (2010) 327 ITR 456 (SC). In such judgment, it was held and observed that the most important expression in Section 195 [1] of the Act consists of the words. "chargeable under the provisions of the Act". It was observed that, "A person paying interest or any other sum to a nonresident is not liable to deduct tax if such sum is not chargeable to tax under the Act." Counsel for the Revenue, however, drew our attention to the Explanation 2 to sub-section [1] of Section 195 of the Act which was inserted by the Finance Act of 2012 with retrospective

effect from 1st April 1962. Such explanation reads as under:

Explanation 2-For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction there under applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non- resident, whether or not the non-resident person has -

[i] a residence or place of business or business connection in India; or

[ii] any other presence in any manner whatsoever in India.

It is indisputably true that such explanation inserted with retrospective effect provides that obligation to comply with sub-section [1] of Section 195 would extend to any person resident or nonresident... whether or not nonresident person has a residence or place of business or business connections in India or any other persons in any manner whatsoever in India.

This expression which is added fo removal of doubt is clear from the plain language thereof, may have a bearing while ascertaining whether certain payment made to a nonresident was taxable under the Act or not. However, once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, a held by the Supreme Court in the case of GE India Technology Center P. Limited [Supra), sub section [1] of Section 195 of the Act would not apply. The fundamental principle of deducting tax source in connection with payment only, where the sum is chargeable to tax under the Act, continues to hold the field. In the present case, the Revenue has not seven seriously contended the payment to foreign commission agent was not taxable in India."

In this context, we would refer to Section 9 [1] (vii) (b) of the Act. Sub-section [1] of Section 9 en situations under which the income shall be deemed to accrue or arise in India. Clause [vii] conta therein pertains to income by way of fees for technical services payable by the Government or a p who is a resident, or a person who is a nonresident under the circumstances specified

therein. Clause (b) thereof pertains to a person who is a resident and reads as under:

9. Income deeded to accrue or arise in India.

[1] xx xx xx

(a) xx xx xx

(b) xx xx xx

(i) to (vi) xx xx xx

(vii) income by way of fees for technical services payable by

(a)the Government or

(b)a person who is resident, except where the fees are payable in respect of service utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India:

or ....”

As per clause (b) thus, the income by way of fees for technical services payable by a person who is a resident would be deemed to accrue or arise in India.

However, this clause contains two explanations namely where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India, or for the purpose of making or earning any income from any source outside India. In other words, therefore, if the assessment of an assessee falls in either of these two clauses, the income by way of fees or technical services paid by the assessee would still not be covered within the deeming clause of sub-section [1] of Section 9.

In the present case, the Commissioner (Appeals) and the Tribunal have accepted assessee's factual assertion that the payments were for technical services provided by a nonresident, for providing services to be utilized for serving the assessee's foreign clients. Thus, the fees for technical services was paid by the assessee for the purpose of making or

earning any income from any source outside India. Clearly, the source of income namely the assessee's customers were the foreign based companies.

We are fortified in the view by a judgment of Karnataka High Court in the case of Commissioner of Incometax, Bangalore v. ITC Hotels Limited, reported in [2015] 233 Taxmann 302 [Kar.] in which it was held that where the recipient of income of parent company is not chargeable to tax in India, then the question of deduction of tax at source by the payer would not arise.

Learned counsel for the revenue, however, relied on a decision of Delhi High Court in the case of Commissioner of Income tax vs. Havells India Limited, reported in (2013) 352 ITR 376 (Delhi). In such case, however, the Court was of the opinion that the payment made by the assessee to a US based company for certification facilitating export was not in relation to

the source of income which was based in India. The facts were thus different. It was also argued that the Commissioner [Appeals] had relied on a decision in the case of Adani Enterprises [Supra] against which, the Revenue's appeal has been admitted by the High Court. It prima facie appears that the facts in case of Adani Enterprises were different. In the present case, we have primarily gone on the question of the nature of assessee's activities and the nature of services rendered by the parent based company, for which commission was paid. Keeping the question pending before the High Court in the case of Adani Enterprises untouched, we can still dispose of this appeal.

In the result, Tax Appeal is dismissed.

9. Perusal of the order of the Ld CIT(A) reveals that the Everest global Inc do not have any permanent establishment in

India and further the service provided outside India to the assessee.

10. In the present case assessee company has entered in the Teaming agreement (PB page 33-44)with Everest Global Inc and work order was issued and services of Everest global Inc were utilized for carrying out the project work, the source of income was located outside of India and payment also have been made outside of India. The fee for technical services was paid by the assessee for the purpose of making or earning income from any source outside India. Therefore, clearly section 9(1)(vii)(b) of the Act applied and income earned by such non - residents cannot be deemed to accrue or arising in India and the fees for technical services was not taxable. The assessee company has utilized the service of the company outside the India and payment also made outside India and company was not liable for deduction of tax under section 195 of the Act. It is not disputed that the assessee is a resident in India and he has paid fee for technical services to the non-residents of Rs 5465508/-during the year under consideration. Thus, except in two circumstances, firstly, where the fees paid in respect of services utilized in a business carried on by the assessee outside India or secondly fee is paid for the purpose of earning any income from any source outside India, in all other cases the

assessee is liable to deduct tax on the amount of technical fee paid to non -residents.

11. Keeping in view the fact that work order was issued outside country for making an income from a source outside the country. The amount paid are covered in exception provided in section 9(1)(vii)(b). Hence the assessee was not required to deduct tax at source. Addition made by the AO and confirmed by CIT(A) is deleted. The appeal of the assessee is liable to be allowed.

12. In the result, the appeal of assessee is allowed for statistical purpose.

Order pronounced in the open court on 10.07.2024.

Sd/-	**Sd/-**
(DR. B R R KUMAR)	**(SUDHIR KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

NEHA, Sr. PS
Date:-10.07.2024
Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(Appeals)`
5.DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI