IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'H' : NEW DELHI)

BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.3092/Del/2019
(Assessment Year : 2012-13)

M/s. Hemera India Pvt. Ltd. B-9/6991, Vasant Kunj Vasant Vihar, Delhi-110070 PAN No. AACCH0915L	Vs.	DCIT, Circle 11(1), New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Sh. Ranjan Chopra, FCA
Revenue by	Shri Tufail Tahir, Sr. DR

Date of hearing:	01.06.2022
Date of Pronouncement:	13.06.2022

ORDER

PER ANUBHAV SHARMA, JM:

The assessee has come in appeal against order dated 29.01.2019 in appeal no. 120/18-19/CIT(A)-22, New Delhi for the assessment year 2012-13 passed by Commissioner of Income Tax (Appeals)-22, New Delhi (hereinafter referred to as the 'First Appellate Authority' or in short 'Ld. F.A.A.') in appeal before it against order dated 23.12.2016 u/s 143(3) of the

Income Tax Act, 1961 passed by DCIT, Circle 11(1), New Delhi (herein after referred to as 'Ld. Assessing officer or in short Ld. AO').

2. The facts in brief are the assessee the appellant had filed his Income Tax Return for the year under reference declaring total income at Rs. 44,57,430/- on 30.11.2012. Assessee claims that during the assessment proceedings, all the relevant information and documents called from time to time by the learned AO were filed with the department. However, learned AO observed that assessee had debited Rs. 32,02,446/- under the head Consultancy fee in P & L Account on which no TDS was deducted at the time of making payment. In response thereto, assessee had submitted the reply, however AO did not accept the contention of the assessee and made addition of Rs. 32,02,446/- u/s 40(a)(ia) of the Act treating the same in the nature of " Fee for technical services". Further, learned AO had given credit of TDS of only Rs. 23,04,688/- instead of Rs. 37,09,355/ claimed by the assessee in ITR form without giving any reason or basis for doing the same.

The Ld CIT(A) observed in para 5.6 to 5.8 of its impugned order;

"5.6 *I have considered the finding of the AO, submission of the Ld. AR and the case laws relied upon by the Ld. AR. The only issue is to be decided that whether the amount received by the assessee as consultancy fees from CCTL constituted fees for technical services u/s 9(l)(vii) of the Act. It is noted that as per sub-clause (b) of clause(vii) where FTS is paid by a person who is a resident in India, the income shall be deemed to accrue or arisen in India. Further the definition of FTS given in Explanation 2 to section 9(l)(vii) according to which FTS means any consideration including any lump sum consideration for rendering of any managerial, technical or consultancy*

services. In my opinion the services provided by the CCTL in the form of referring client to the appellant would amount to rendering market and sales promotion services which are covered in the bracket of managerial and consultancy services and the same, therefore, would fall in the definition of FTS. The amount received by the CCTL from appellant under the consultancy charges thus was chargeable to tax in India as fees for technical services. It is held that consultancy fees paid to CCTL in the present case was for services utilized for the purpose of business carried on in India, the amount of consultancy fees should be deemed to accrue or arisen in India.

5.7 *The Ld. AR relied on plethora of judgments including Delhi High Court decisions i.e. CIT Vs. Grup Ism (P) Ltd. [2015] 57 taxmann.com 450(Delhi), DIT (Intl. Tax) Vs. PanalfaAutolectrick Ltd. [2014 49 taxmann.com 412 (Delhi) and also on ITAT Delhi decision i.e. Welspring Universal Vs. JCIT, New Delhi [2015] 56 taxmann.com 174 (Delhi-Trib.). I have carefully gone through these decisions but I find these decisions are on a different facts that relates to commission paid for services rendered outside India. In these cases commission was paid for arranging clients engaged in the business outside India. However, in the present case the appellant has paid a consultancy charge which is nothing but rendering market and sales promotion services to CCTL for arranging a client engaged in the business in India itself. The consultancy charges is paid for introduction of client i.e. Assam Company India itself. The Consultancy charges is paid for introduction of client i.e. Assam Company India Ltd. located and engaged in the business in India. Therefore the case laws relied upon by the Ld. AR will not be applicable to the facts of the present case of the appellant. In this case it cannot be said that services is rendered outside*

India as the client referred is in the business in India itself.

5.8 *In view of the aforesaid discussion it is held that the consultancy fees received by the CCTL from appellant was in the nature of fees for technical services and the same being income of the assessee arisen in India was rightly brought to tax in India in its hands. The appellant is liable to deduct tax on the consultancy charges paid to CCTL, UK. Therefore, I find that the AO has correctly disallowed the payment without TDS of Rs.32,02,446/- to CCTL u/s 40(a)(i) of the Act. The disallowance made by the AO is confirmed."*

3. The assessee has come in appeal raising following grounds of appeal:-

1. *The learned CIT(A) has totally erred in upholding the addition of Rs. 32,02.446/- made by the AO under section 40(a)(i) of the Act altogether ignoring the fact that the Service fee paid by the Appellant to CCTL (UK resident company) as a percentage of goods sold is in the nature of 'commission on sale of goods' and cannot be treated as Fees for technical services by way of managerial or consultancy services deemed to accrue or arise under Section 9(1)(vii) of the Income Tax Act (the Act).*
2. *Without prejudice to above, the Learned CIT(A) has totally erred in failing to appreciate that the Section 90 of the Act overrides all other provisions of the Act and if any relief is available to the UK Resident under Section 90 of the Act read with Article 7 & 5 of the Double Taxation Avoidance Agreement between India and UK and the claim whereof is not rejected by the CIT(A), the said relief shall override the provisions of section 9(1)(vii).*
3. *The appellant craves leave to add, alter, amend or forgo any grounds of appeal at the time of hearing."*

4. Heard and perused the record.

4.1 On behalf of the assessee it was submitted that the Ld. Tax Authorities below have fallen in error in considering the consultancy fees received by the assessee company to be in the nature of "Fees for technical services". It was

submitted that the amount was paid for facilitating sale of agricultural goods by way of introduction to a Client i.e. Assam Company India Ltd. It was submitted that it was a normal business payment that was covered within the scope of Article 7 read with Article 5 of DTAA between India and United Kingdom. It was submitted that the foreign entity did not provide any 'managerial service' to the assessee company and merely on conjecture concept of fees of technical services has been introduced. It was submitted that services provided were akin to advisory services provided by the non-resident. Ld. Counsel for the assessee submitted that all the relevant case laws cited on behalf of the assessee were arbitrarily distinguished. Ld. Counsel placed on record a copy of a debit note issued by Cross Continental Credit, the foreign entity, where the invoice is raised against service on the basis of percentage of the worth of agricultural product of sold to Assam Company India ltd.

4.2 On the other hand, Ld. DR supported the findings of the ld. Tax Authorities below on the basis that the services provided whereof an expert in the field and where not merely consultancy services in the nature of FTA.

5. Appreciating the matter on regard it can be observed that Ld. CIT(A) has sustained the order of ld. AO with his findings in para no. 5.6 to 5.8 as reproduced above and what transpires is that the Ld. CIT(A) believed that as the commission was paid for services rendered in India. Therefore, the judgments relied on behalf of the assessee were not applicable. Now as a matter of fact the judgment relied by Ld. AR for the assessee before Ld. CIT(A) and distinguished are as under :

(i) CIT Vs. Grup Ism (P) Ltd. [2015] 57 taxmann.com 450(Delhi),
(ii) DIT (Intl. Tax) Vs. Panalfa Autolectrick Ltd. [2014 49 taxmann.com 412 (Delhi)
(iii) and also on ITAT Delhi decision i.e. Welspring Universal Vs. JCIT, New Delhi [2015] 56 taxmann.com 174 (Delhi-Trib.)

6. Taking up judgment in CIT vs. Grup Ism (P) Ltd. (supra) the issue involved was whether consultancy services would mean something akin to advisory services provided by non-resident and it was held that where agent of an assessee company at UAE acted as a liasioning agent for the assessee and received remuneration from each client successfully solicited for assessee. Such services could not be said to be included within meaning of consultancy services and consequently, remittances made by assessee to it would not come within the scope of phrase 'fees for technical services' as employed in section 9(1)(vii) of the Act.

6.1 Similarly in DIT (Instl. Tax) vs. Panalfa Autolectrick Ltd. (Supra) it was held that commission paid by assessee to its foreign agent for arranging of export sales and recovery payments could not be regarded as fee for technical services.

6.2 In Wellspring Universal vs. JCIT (Supra) the Delhi Bench of Tribunal has held that commission in hands of non-resident can neither be considered as received or deemed to be received in India or accruing or arising or deemed to accrue or arise to him in India in terms of section 5(2) r.w.s. 195 and the assessee was not liable to deduct tax at source u/s 95.

7. However, Ld. CIT(A) in its findings in para no. 5.7 and 5.8 as reproduced above has tried to distinguish the case of assessee on a erroneous understanding that as the consultancy charges were paid for introduction of client located and engaged in the business in India. Therefore, it was not a case of payment made to any intermediary which is normal business payment falling in the scope of Article 7 read with Article 5 of the DTAA between India and UK.

8. Further, the Bench is of considered opinion that once the revenue admitted that they were consultancy charges paid for introduction of client then that would fall in the definition of payments made to intermediary or liaison agents for channelizing, arranging or soliciting work order. There is no finding whatsoever that any inquiry was made by the Ld. Tax Authorities below as to what was the nature of agreement between the assessee and the foreign entity in terms to find out if the foreign entity was extending any technical know-how or expertise in the field of procurement of business or any other purpose, on a permanent basis. Thus, the finding arrived by the Ld. CIT(A) are liable to be reversed and it is held that the nature of transaction between the assessee and the foreign entity was not of providing any technical service but was a payment in the nature of a normal business payment to a intermediary. Accordingly, what can be concluded is that the Ld. CIT(A) has failed to apply the precedents as cited on behalf of the assessee in correct context of the facts.

Consequently, the ground raised by the assessee are sustained and **the appeal of Assessee is allowed.**

Order pronounced in the open court on 13th June, 2022.

Sd/-	**Sd/-**
(SHAMIM YAHYA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 13th .06.2022
Binita, SR.P.S

Copy forwarded to:
1. Appellant
2. Respondent

3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI