

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"C" BENCH, CHENNAI**

**श्री चंद्र पूजारी, लेखा सदस्य एवं**  
**श्री वी. दुर्गा राव, न्यायिक सदस्य के समक्ष**  
BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER &  
SHRI V. DURGA RAO, JUDICIAL MEMBER  
आयकर अपील सं./ **I.T.A. Nos.484 & 1057/Mds/2014**  
(निर्धारण वर्ष / Assessment Years : 2007-08 & 2009-10)

Conference Call Services India  
Pvt. Ltd,  
No.135, 1st floor, RMZ Titanium,  
Old Airport Road,  
Bangalore 560 017.

Vs The Asst. Commissioner of  
Income Tax,  
Company Circle I(3),  
Chennai.

[PAN: AACCC 6574A]  
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri. T. Banusekar, C.A.  
प्रत्यर्थी की ओर से / Respondent by : Shri. A.V. Sreekanth, IRS, JCIT.

सुनवाई की तारीख/Date of hearing : 09.06.2015  
घोषणा की तारीख /Date of Pronouncement : 17.07.2015.

**आदेश / O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER**

The appeal of the assessee for the assessment year 2007-2008 is directed against the order of the Commissioner of Income Tax (Appeals)-II, Chennai dated 20.11.2013, whereas the appeal for the

assessment year 2009-2010 is directed against the order of the Assessing Officer dated 17.12.2014 consequent to the direction of the Dispute Resolution Panel (DRP), Chennai.

2. First we take up ITA No.484/Mds/2014. In this appeal, the first ground is with regard to disallowances of ₹33,91,949/- u/s.40(a)(i) and ₹1,46,48,969/- u/s.40(a)(ia) of the Income Tax Act, 1961.

3. The brief facts of the case are that the assessee was engaged in the business of providing audio, video and web conferencing services to various customers across the globe. The most essential tool in its business activity was the hyper bandwidth connection service. During the year under consideration the assessee had incurred operation cost of ₹2,21,63,895/- towards connectivity services. The Assessing Officer disallowed a sum of ₹33,91,949/- and ₹1,46,48,969/- by invoking provisions of Section 40(a)(i) and u/s.40(a)(ia) of the Act respectively. Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) confirmed the disallowances. Against this, the assessee is in appeal before us.

4. The Id. Authorised Representative for assessee submitted that the amount paid to foreign service providers was towards international

toll free services. According to the Id. Authorised Representative for assessee these do not amount to payment for technical services under section 9 and therefore tax was not required to be withheld on these payments made by the assessee to a non-resident. The Department has taken a stand that the payment should be subject to tax unless an application has been made u/s.195(2) or 195(3) of the Act. The Karnataka High Court in the case of *CIT vs. Samsung Electronics Company Ltd 320 ITR 209*, wherein held that that in the absence of an application u/s.195(2) or 195(3) by the assessee, it was liable to deduct tax u/s.195. The assessee has failed to apply and get exemption under these sections and hence has violated the provisions of section 195. The Id. Authorised Representative for assessee contends that the objective of section 195 is to ensure that tax liability on the income element of the amount paid should be subjected to tax. It stated that payments in respect of carriage cost, data variable cost etc., do not have income element and therefore, the withholding tax liability does not rise. Without prejudice to the interest of Revenue, the Id. Authorised Representative submitted that short deduction of TDS cannot be a reason for disallowance. He relied on the following judgments.

- (i) CIT vs. Vector Shipping Services (P) Ltd. in CC No.8068/2014 (SC) (SLP)
- (ii) CIT vs. Vector Shipping Services (P) Ltd (2013) 357 ITR 642 (All)
- (iii) ACIT vs. Eskay Designs in ITA No.1951/Mds/2012, dt 9.12.2013.
- (iv) ITO vs. Theekathir Press in ITA No.2076/Mds/2012,dt. 18.9.2013

5. On the other hand, the Id. Departmental Representative submitted that unlike standardized services provided by a telecom company where user makes the payment on actual use, in the instant case, there is a instant case, there is a implied contract between the assessee and the service provider for offering certain specialized facilities including a toll free number. The payment is not restricted to actual usage of airtime and is bundled to other facilities provided by the service provider. In the case of *Dell International Services Pvt. Ltd 305 ITR 37*, wherein held that an issue decided on the basis of DTA agreement, the authority for advance ruling had observed that "having regard to the fact that the entire operations are carried on by the applicant in India and the income is earned from such operations taking place in India, it would be futile to contend that the source of income earning activity is outside India i.e. in the country of the customer. Source is referable to the starting point or the origin or the spot where something springs into existence". The corollary of this finding is also true and therefore the non-resident certainly has income

arisen in India and in the case of *Cargo Community Network Pvt. Ltd. 289 ITR 355*, the authority for advance rulings had held that payment made by an Indian subscriber to the Cargo community network pvt. Ltd at Singapore, for providing a password to a access and use the portal hosted at Singapore, is taxable in India and is subject to deduction of tax at source. The assessee makes payments to the international toll free serves provider to tenable its clients outside India access its services. It therefore, falls squarely under the ambit of Section 195 and therefore, payments made without deducting withholding tax and remitting the same would not qualify as expenditure u/s.40(a)(i) of the Act.

6. We have heard both the parties and perused the material on record. A similar issue was considered by the Tribunal in the case of *Frontier Offshore Exploration (India) Ltd. vs. DCIT, 118 ITD 494 (Chennai)* wherein held that

*"The provisions of section 195 clearly show that any person responsible for Making payment to a non-resident in respect of any interest or any other sum chargeable under the provisions of this Act has to deduct tax at the rates in force. Obviously 'any other sum' chargeable under the provisions of this Act would mean that portion of the sum on which tax is payable by such a non- resident; but as to how much that portion is actually there needs an investigation and there may be situations where 100 per cent of such sum is chargeable to tax and there may be situations where practically the whole of such sum is not chargeable to tax. That would depend on the facts and the circumstances of each case. Whenever an assessee making*

payment to a non-resident finds that only a particular portion is chargeable, then obviously he has been given a right in terms of sub-section (2), which the assessee has called a beneficial section. There was no dispute in whether that section is called a beneficial section or a machinery provision because for working out the amount of tax to be deducted on a particular portion of sum chargeable, that provision is absolutely necessary. As per sub-section (2), whenever a person responsible for paying any sum chargeable to tax considers that whole of such sum would not be income chargeable in the case of recipient, he may make an application to the Assessing Officer to determine the appropriate portion of such sum so chargeable and upon such determination, tax would be deducted under sub-section (1) only, on that proportion of sum which is so chargeable, which means that the person responsible for making payment, etc cannot himself decide what is the appropriate proportion which is chargeable to tax. The expression 'by general or special order' and the 'appropriate proportion' in this sub-section are key words to understand the meaning in the sense that there may be situations where only one particular portion of such sum is taxable in case of a similar assessee and the income-tax authorities may make a general "order that in the case of such type of assessee a particular proportion of the sum has to be considered as income chargeable to tax and tax can be deducted accordingly. It seems that the Central Board of Direct Taxes has already issued a circular in respect of advertisement income earned by non-resident TV channels, etc., where a proportion of income has been fixed to be considered as income. But there can be situations which can be generalized and the proportion of the sum can be determined on a general basis. In all other situations, where 'appropriate proportion' is required to be determined, the assessee has to go before the taxing authorities and get such "appropriate proportion" of the same on which tax is to be deducted, determined and accordingly deduct tax. Therefore, wherever a general situation exists a general order is passed by the Department in the form of circular etc. No such circular has been issued by the CBDT, which means such parties must apply under section 195(2) for special order so as to get the "appropriate proportion" determined. Also the word "appropriate proportion" is significant. If the payer of such sum was to decide the proportion of amount which was chargeable, then there was no need to use the words "appropriate proportion". The use of these words clearly suggests that somebody needs to determine such appropriate proportion after considering all the facts and circumstances of the case. Naturally this somebody cannot be the assessee himself. Therefore, assessee is to come before the income-tax authorities in the form of application under

*section 195(2) and make a claim that only a particular proportion is chargeable and the appropriateness of the same is to be decided by the Assessing Officer and only after that, such sum is to be determined. This clearly shows the requirement of application of mind by the taxing authorities and, therefore, this sum cannot be decided by the payer of such sum, whatever may be the circumstances. If such appropriate proportion was to be decided by the payer or the assessee, then section 195(2) will become redundant.*

*It has been observed that the provision of section 195(1) is for "tentative deduction" which means, the initial assumption should be that the tax has to be deducted on the whole of the amount because same is subject to regular assessment and it was specifically pointed out that the rights of the parties were not in any manner adversely affected, because wherever the assessee had any doubt that tax is to be deducted on the lower proportion, then such assessee had the option to make an application under section 195(2). Even the recipient of such payment can make an application to the Assessing Officer that he may be allowed to receive the payment without any deduction of tax. We would again reiterate that though sub-section (2) of section 195 is of beneficial nature definitely and is an optional one, but it does not mean that if the assessee chooses not to take the benefit, then he should be allowed to get away without deduction of tax at source, because the assessee has some other logic. How income has to be computed or tax is to be deducted etc., these things have been clearly laid down in Chapter IV and Chapter XVII-B and it is the prerogative of the tax authorities to determine these things as per the provisions of the Act and not the prerogative of the assessee, except in case of tax to be deducted under section 192 in case of salaries, where the average rate of tax has to be deducted depending upon the income of the assessee, otherwise tax has to be deducted on the rates specified. We have already clarified in the initial portion of the order that the provisions regarding computation of income and tax cannot be mixed up and confused with the provisions regarding deduction of tax at source. We fail to understand, what prevented the assessee from making an application under section 195(2) and claim the so-called benefits under section 44BB. We are at a loss to understand how the assessee sitting in his own office can take such a decision that whatever payments it was making to the non-residents ultimately would be covered under section 44BB, even when such non-resident had never filed any return. We think, by adopting this course of action, the assessee tried to decide everything on his own ignoring all statutory provisions".*

Being so, this issue is squarely covered by the above order. Taking a consistent view, we are inclined to hold that the assessee is liable to deduct TDS for payment made to foreign service provider. However, if there is short deduction of TDS then the payment cannot be disallowed as short deduction is different from no deduction of TDS. Accordingly, the Assessing Officer is directed to segregate the short deduction and no deduction of TDS on the payments made to foreign provider and he has disallowed only payment where there is no deduction of TDS. Accordingly, this ground is partly allowed.

7. The next ground is with regard to disallowance of ₹.1,46,48,969/- made u/s.40(a)(ia) of the Act. This issue is squarely covered by the order of the Special Bench of the Tribunal (Vizag) in the case of *Merilyn Shipping and Transports vs. ACIT (2012) 136 ITD 23 (Visakhapatnam)* wherein it was held that the provisions of section 40(a)(ia) are applicable only to the expenses that are "payable" and outstanding at the end of the close of the financial year relevant to the assessment year and not to the amount already paid. The same view was taken by the High Court of Allahabad in the case of *CIT vs. M/s. Vector Shipping Services (P) Ltd in ITA No.122 of 2013 dated 09.7.2013* by holding that sec 40(a)(ia) is not applicable when there is

no outstanding balance at the end of the close of the year relevant to the assessment year and SLP filed by the Revenue in Supreme Court of India in CC No.8068/2014 dated 02.07.2014 is also dismissed. Being so, in our opinion an amount outstanding at the end of the close of the assessment year is not to be allowed as business expenditure in view of provisions of section 40(a)(ia) of the Act. Further, we make it clear that the Assessing Officer should consider only payment which are not subject to TDS for disallowance and not short deduction of TDS. In view of the above order of the Special Bench, we are not inclined to follow the order of the Mumbai Bench in the case of *M/s. Pratibhuti Viniyog Ltd in ITA No.1689/Mum/2011 dated 23.08.2014* relied by Departmental Representative. With these observations, this ground is partly allowed for statistical purposes. This appeal is partly allowed for statistical purposes.

8. Now, we take up ITA No.1057/Mds/2014 for the assessment year 2009-2010.

In this appeal, the first ground is with regard to disallowance u/s.40(a)(i) of the Act. The facts of the case are that during the year under consideration, the assessee company had paid management fees to its group companies InterCall Inc, InterCall Singapore Pvt. Ltd.

and InterCall Australia Pvt. Ltd. The assessee claims that such services are not taxable under the relevant tax treaty as the same had not satisfied the 'make available' test. As per the relevant tax treaty, the services availed from service provider would constitute "Fees for Technical Services" only if such services pass the "make available" test. Technical knowledge, experience, skill etc should be considered to have been 'make available' when the person acquiring the service is enabled to apply the same knowledge, technology, etc. independently. The service recipient should be able to make use of the knowledge, by itself in its business for its benefit and without the recourse to the service provider in future. In other words the recipient of the services can independently provide it to others. The assessee claims to be only utilising the services of the service provider and not in a position to provide similar service to third parties independently. The assessee is not learning or gaining knowledge, skill set while receiving the said services. Thus, the 'made available' test of the tax treaty has not been satisfied as the assessee is not enabled to independently perform such services. The Assessing Officer had given the following reasons for the disallowance.

7.1 The management services are provided by the associated enterprises for the business activity of the assessee. As per Section 9, which is a deeming provision, to determine an income that has accrued or arisen in India. As per Section 9(1)(vii) which brings in deemed income by way of 'fees for technical services' wherein, the sum is paid by a resident except to a person outside India for the purpose of making or earning any income from any source outside India. In the present case, the payment is made by a resident for the purpose of services utilized in the business or profession carried on by a person in India and for earning an income from such source in India. Further, as per Explanation(2) to Section 9(1)(vii) fee for technical services means any consideration for rendering of any managerial, technical or consultancy services including the provision of services or technical of other personal. Therefore, the management fees paid by the assessee to the non resident falls within the definition of fee for technical services as provided in Explanation 2 to Section 9(1)(vii). Since the amount received by the non residents as a deemed income as per section 9 r.ws. 5. Section 195 is applicable in this case. Therefore, there is a failure on the part of the assessee to deduct tax and hence, expenditure claimed by the assessee warrants disallowance u/s.40(a)(i) of the Act. The submission of the assessee that the relevant tax treaty between the countries provides that fee for technical services would constitute only if it fails within the make-available test is not acceptable. Section 90 provides for relief to an assessee as per the DTAA entered into by India with other countries. As per the provisions of the Income Tax Act, if an income is taxable in India as well as in the taxes paid in other country, then to that extent the relief is, given to the assessee and the payment is taxed accordingly. In the present case, it was clear that the management fee paid by the assessee fall within the definition of fee for technical services as provided in section 9(1)(vii). Hence, the income accrued to a non-resident on management fee received is an income in India. The make available test need not be applied in this case since any managerial services rendered by the non-resident will fall within the definition of 'fee for technical services'. Therefore, the claim of the assessee was not accepted.

9. The Dispute Resolution Panel ('DRP') observed that it was apparent that the services in question are managerial services. The

make available clause should apply differently in the case of managerial services than the way it was applied to purely technical services. Managerial consultancy is basically aimed at increasing the productivity of the business by improving skill set or efficiency of the employees or by improving the systems etc., Thus, the recipient of the services is made available the knowledge and skills of the managers. It was observed by DRP that no material was placed before DRP to interfere with the Assessing Officers findings. In the limited time allowed to the DRP, the panel cannot launch its own investigation of facts. Hence, the Assessing Officer is directed to examine the issue with reference to the relevant Double Taxation Avoidance Agreement (DTAA) and then make the disallowance if required and accordingly the DRP not given any findings for the assessment year 2009-10. Thus, the assessee is in appeal before us.

10. In our opinion, the DRP has not given any findings and only given direction to the Assessing Officer to examine the entire issue afresh in the light of DTAA and to decide thereupon. Being so, at this stage we are not in a position to express any opinion on the findings of the DRP. This issue is required to be properly examined by the

Assessing Officer with reference to the relevant DTAA. Accordingly the findings of the DRP is confirmed.

11. The assessee has also raised another ground with regard to levy of interest u/s.234B and 234D of the Act. Since, the interest is consequential and mandatory in nature, the same to be considered by Assessing Officer while passing consequential order. With these observations, the appeal of the assessee is dismissed.

12. In the result, the appeals of the assessee in ITA No.484/Mds/2014 is partly allowed for statistical purposes and ITA No.1057/Mds/2014 is dismissed.

Order pronounced on Friday, the 17th day of July, 2015, at Chennai.

Sd/-

(वी. दुर्गा राव)

**V. DURGA RAO**

**न्यायिक सदस्य / JUDICIAL MEMBER**

Sd/-

(चंद्र पूजारी )

**(CHANDRA POOJARI)**

**लेखा सदस्य/ ACCOUNTANT MEMBER**

चेन्नई/Chennai.

दिनांक/Dated:17.07.2015.

**KV**

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant 2.प्रत्यर्थी/ Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.

