

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, CHENNAI**

श्री चंद्र पूजारी, लेखा सदस्य एवं श्री जी. पवन कुमार, न्यायिक सदस्य के समक्ष
**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं/I.T.A. No. 650 & 651/Mds/2016

निर्धारण वर्ष/Assessment Year : 2009-10 & 2010-11

Deputy Commissioner of Income
Tax,
Corporate Circle -1(2),
Chennai - 600 034.

M/s.BASF Catalysts India P. Ltd.,
Vs. E-17, Indl. Complex,
Maraimalai Nagar,
Kancheepuram 603 209.

[PAN: AAACE 2545B]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Applicant by :

Shri Shiva Srinivas, JCIT

प्रत्यर्थी की ओर से/Respondent by :

Shri N. V, Balaji, Advocate

सुनवाई की तारीख/Date of Hearing

: 24.08.2016

घोषणा की तारीख/Date of Pronouncement

: 10 .11.2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The Revenue has filed appeals against the different orders of CIT(A) for the assessment year 2009-10 ITA No. 70/13-14 dated 15.12.2016 and for the assessment year 2010-11 ITA No. 101/14-15 dated 15.12.2016 passed u/s. 143 r.w.s. 92 CA and 250 of the Income Tax Act. Since, the issue is common in the

appeals and are heard together and for the purpose of convenience, we take up facts narrated in the Revenue appeal in ITA No. 651/2016 assessment year 2010-11.

2. The Revenue has raised the following grounds:

2.1 The Ld. CIT(A) erred in directing the AO to delete the addition of Rs. 92,17,894/- made u/s. 40(a)(i) of the I.T. Act.

2.2 The Ld. CIT(A) erred in holding that the services rendered by the foreign company to the assessee company cannot be held to be either 'managerial' or 'consultancy' or 'technical' within the meaning of sec. 9(1)(vii) r.w. Explanation thereto.

2.3 The Ld. CIT(A) ought to have appreciated the fact that the Accounting Services and consultancy Services rendered by the foreign company are professional and consultancy services which require high degree of technical expertise in Finance, Accounting, H.R. Management, Software analysis.

2.4 The Ld. CIT(A) ought to have appreciated the fact that the services offered are not mere data entry operations which require high degree of skill sets in the above said areas.

3. The brief facts of the case that the assessee company is in the business of manufacture and sale of catalysts for the automobile industry and filed the return of income electronically on 29.09.2010 with total income of Rs. 33,08,48,051/- the case was selected under scrutiny and notice under 143 (2) of the Act was issued. In

compliance to the notice, the Ld. AR of the assessee appeared and filed details called for and the case was discussed from time to time. The Ld. Assessing Officer found that the Assessee Company has international transactions with its AE and the Ld. TPO has passed order dated 11.11.2013 with no adjustments to the value of international transactions. The Assessing Officer called for the explanations on details and found that the assessee company has claimed an amount of Rs. 92,17,894/- paid to its AE at Malaysia in respect of international transaction on Accounting and Human Resource services provided without deduction of TDS/withholding tax. The assessee company explained that the services provided by BASC Malaysia are not technical services or managerial or consultancy nature as defined in explanation 2, to section 9(1)(vii) of the Act and also as per the Article 12(3) of the DTAA between India and Malaysia. The assessee company emphasised that the services rendered by BASC are from Infrastructure located in Malaysia and the amount paid would not be taxable u/s. 9(1)(i) of the Act as income from the services are not accrued or arise in India. Further, the Ld. AR produced copy of agreement with details of consideration, training and services. The Ld. AO on perusal of agreement referred at page 5 to 7 of the order is of the opinion that the services are covered under provisions of sec. 9(1)(vii) of the Act and are in the nature of technical services. The services agreement explained that there was a visit of BASC team during the financial year 2009-10 and the Ld. AO further referred at page 9 of his order that there is a clause provided in the agreement on knowledge up gradation and to serve assessee company. The Ld. AO referred to the Article 13 of India-Malaysia DTAA for proper definition of "Technical Services" and the nature of services are covered under Article 13 of DTAA and it is not in the nature of

business profits envisaged in the Article 7 to gain immunity from withholding tax as per Article 5 of DTAA. With these observations, the Assessing Officer is of the opinion that the services are in the nature of managerial, technical services from an overseas association and covered under Article 13 of DTAA between India and Malaysia and assessee company is liable to deduct tax on payments to BASF Asia Pacific Service Centre, (BASC) Malaysia u/s. 195 of Income Tax Act and since tax is not deducted on Rs. 92,17,897/- the said payment is disallowed u/s. 40(a)(i) of Income Tax and passed Order with other disallowances u/s. 143(3) r.w.s. 92CA determining total income of 34,22,23,938/-and raised the demand.

4. Aggrieved by the assessment order the assessee has filed an appeal with the CIT(A). In the appellant proceedings, the Ld. AR of the assessee argued the grounds reiterated the submissions and information of assessment proceedings and contested that the Ld. AO erred in disallowing expenditure of Rs. 92,17,984/- incurred by the assessee company in respect of shared service payments to BASC, Malaysia. As per the agreement, BASF India Ltd (BIL) has outsourced the entire payroll functions to BASC Malaysia relating to clerical activities and managerial position have been reorganised, further the BASC is engaged in the business of providing services relating to the Accounting, book keeping, payroll generation and payroll data managing and these service functions are not in the nature of technical services as per the DTAA between India and Malaysia.

5. Further, the BASC, Malaysia is not providing any technical services to the assessee, as per the explanations 2 to section 9(1)(vii) of the Act and services are in the nature of business activities rendered in Malaysia and not taxable u/s. 9(1)(i) of

the Act, were the income from these services are not accrued or arise from any business connection from India. The income of the service provider is taxable in India only were the such provider carried business operations through Permanent Establishment (PE) in India. The Ld. AO relied on the judicial decisions and came to conclusion that income of the non resident entity has arised in India and services are utilized irrespective of the services physically rendered India. The managerial services are not defined in the Act and includes control, directing, managing or administrating the business or part of business and the term technical services would mean service requiring expertise in technology and the nature of services rendered by BASC Malaysia is neither technical or managerial or consultancy services and the payment are not subject to deduction of tax / withholding of tax and provisions of section 40(a)(i) are not applicable and prayed for allowing the appeal.

6. The Ld. CIT(A) considered the grounds and submissions and the findings of the Assessing Officer has dealt elaborately at page no. 3 to 9 of his order on various aspects of service agreements and functions of accounting and the submissions of by assessee in the appellant proceedings through letters reiterating that the payments does not fall within the purview of technical service or managerial technical or consultancy fee. The Ld. CIT(A) made the analysis on the Human Resource (HR) services and considered the facts and provisions and found that the assessee company is in the business of manufacture of catalyst and outsourced Accounts and HR services to its Associate BASC, Malaysia which are purely administrative services in nature and does not fit into FTS u/s. 9(1)(vii) of the Act. Further, the CIT(A) found that the services rendered are in the nature of Data entry

operations and relied on High Court decisions and concluded that the services cannot be held as managerial or consultancy or technical under the provisions of section 9(1)(vii) and directed the Assessing Officer to amend the Assessment Order and delete the addition and allowed the appeal of the assessee.

7. Aggrieved by the order of Ld. CIT(A), Revenue has filed an appeal before the tribunal. The Ld. DR argued that the order of Ld. CIT(A) is erred in directing Assessing Officer to delete the addition made u/s. 40(a)(i) of the Act and the findings that the services are not in the nature of managerial, consultancy or technical u/s. 9(1)(vii) of the Act and the Ld. CIT(A) erred that the Assessee company is assisted by foreign company for professional consultancy services, which require high degree of technical expertise in financial accounting and requires high degree of skill and reiterated the submissions on the terms of the service agreement referred in Assessment Order. The assessee company entered into services disclosed at para 7.7 of the Assessment Order and such services are covered under Article 13 of DTAA India-Malaysia and shall be treated as technical services and relied on the judicial decisions and prayed for setting aside the order of CIT(A).

8. Contra, the Ld. AR of the assessee argued that the services rendered by the Malaysia Company are in the nature of data operating and there is no expertise or high degree of skill required for operations and the services are not in the nature of fee for technical services or managerial services covered u/s. 9(1)(vii) of the Act. The ERP has been installed as a technology with AE Malaysia and only instructions are provided from India to Malaysia (BASC) and the Ld. AR supported with the DTAA

agreement applicability under Article 7 and the Malaysia company purely relied on the terms of agreement in providing services and the provisions of section 40(a)(i) are not applicable. Further, the services provided does not fall within the Article 13 of DTAA and there is not Permanent Establishment (PE) of Malaysia company in India and filed paper book with details of services agreements, sample invoices and Journal vouchers and prayed for dismissal of Revenue appeal.

9. We heard the rival submissions perused the material on record and judicial decisions, the Ld. AR submitted that assessee company has entered into agreement with BASF-Asia Pacific Service Centre (BASC), Malaysia for providing the services of Financial and Accounting, Human Resource and such other services from time to time. The financial services includes Accounts payable and Accounts receivable and other Financial Reports and where as Human Resource (HR) includes payroll processing, salary payments and general ledger posting, employee data administration and processing, training, administration and others. The assessee company has made payment to the Malaysia company for services rendered in the financial year as per the agreement these payments are not covered as technical services or managerial services to be taxable for deduction of TDS/withholding of tax and applicability of provision of 40(a)(i) of the Act.

10. Whereas, the Ld. DR submitted that these services require expertise and high degree of skills on financial accounting management and fall within the provisions of section 9(1)(vii) of the Act and liable for TDS. The Ld. AR further explained that the assessee has entered into the service agreement with Malaysia Company for rendering financial accounting services and the information /Data is

sent by Indian Company to Malaysia and they enter the data information and submit to the assessee company. The Ld. AR demonstrated with copy of vouchers filed in the paper book at page 36 and invoice copies of services at page 40 to substantiate that the services are in the nature of data entry operations and there is no expertise is necessary for making such transactions. We also perused the provisions of section 9(1)(vii) of the Act where the fees for technical services have been considered and the services being international transaction the DTAA agreement between India and Malaysia shall come into effect. In Article 13 of DTAA " fees for technical services for services being rendering of any managerial, technical or consultancy services and includes the provision of services for technical or other which does not include payment for services mentioned in Article 15 , 16 of the agreement.

11. The Malaysia Company (BASC) provides services under Article 13 r.w.s Article 5 and Article 7 of DTAA. The Article 5 deal with permanent establishment defined as the fixed place of business through which the business of enterprise is wholly or partly carried on. The facts are not disputed by the Revenue that there is no PE of the Malaysia Company in India and the services are rendered outside the country. Whereas, the Article 7 deals with the profits of establishment taxable through PE of foreign company having operations. Considering the apparent facts, provisions of law, DTAA and undisputed facts that there is no PE in India and the services are in the nature of data operating entry of Accounts and Human Resource (HR) Service duly supported with evidence of samples invoices and Journal voucher produced, we found that the services of BASC Malaysia does not fall in the category u/s. 9(1)(vii) of the Act and provisions of section 40(a)(i) are not applicable, we

found Ld. CIT(A) has dealt on this disputed issue exhaustively in his order Vis-a-vis explanations of the assessee and passed reasoned order in treating the services as not in the nature of technical services and provision of section 40(a)(i) of the Act are not applicable and we uphold the same and dismiss the Revenue appeal.

12. Since, the facts are similar in the appeal ITA No. 650/Mds/2016 for assessment year 2009-10 the Revenue grounds are dismissed.

13. In the result, the revenue appeal ITA No. 650/Mds/2016 of assessment year 2009-10 and ITA No. 651/Mds/2016 of assessment year 2010-11 are dismissed.

Order pronounced on Thursday, the 10th day of November, 2016 at Chennai.

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai,

दिनांक/Dated: 10th November, 2016

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent

4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR

Sd/-

(जी. पवन कुमार)

(G. PAVAN KUMAR)

न्यायिक सदस्य/JUDICIAL MEMBER

3. आयकर आयुक्त (अपील)/CIT(A)

6. गार्ड फाईल/GF.