

आयकर अपीलीय अधिकरण “एल” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “L” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./I.T.A. No. 3510/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2007-08)

Fractal Analytics Pvt. Ltd. (Formerly known as Fractal Analytics Ltd.) Unit No. 701/702, 7 th Floor, Silver Metropolis, Western Express Highway, Goregaon (W), Mumbai	बनाम/ Vs.	Dy. CIT-8(1), Aayakar Bhavan, M. K. Marg, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACF 4502 D		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Niraj Sheth
प्रत्यर्थी की ओर से/Respondent by	:	Shri M. V. Rajguru

सुनवाई की तारीख / Date of Hearing	:	25.10.2017
घोषणा की तारीख / Date of Pronouncement	:	01.11.2017

आदेश / ORDER

Per Shamim Yahya, A. M.:

This Appeal by the assessee is directed against the Order by the Commissioner of Income Tax (Appeals)-16, Mumbai ('CIT(A)' for short) dated 27.02.2015 and pertains to the assessment year (A.Y.) 2007-08.

2. The grounds of appeal read as under:

1) That based on the facts and the circumstances of the case, the learned Commissioner of Income-tax (Appeals) - 16, Mumbai, ('CIT(A)') has erred in holding that the reopening of the assessment proceedings under section 147 of the Act was validly initiated by the Deputy Commissioner of Income Tax - 8(1) ('AO') without appreciating the fact that all the relevant details / particulars were available with the assessing officer at the time of framing original assessment order under section 143(3) of the Income-tax Act, 1961 ('the Act') and no new tangible material has come to the knowledge of the learned AO after the completion of the assessment proceedings under section 143(3) of the Act.

2) That based on the facts and circumstances of the case and in law, the learned CIT(A) has erred in considering the SG Business Development Expenses amounting to INR 1,85,90,396 as 'Tees for technical services' ('FTS') under section 9(1)(vii) of the Act and confirming the disallowance made by the AO under section 40(a)(i) r.w.s 195 of the Act.

3) That based on the facts and circumstances of the case and in law, the learned CIT(A) has erred in considering the SG Business Development Expenses amounting to INR 1,85,90,396 as FTS under section 9(1)(vii) of the Act without appreciating that the payments made by your Appellant to Fractal Singapore Pte. Ltd. ('Fractal Singapore') falls within the exclusionary part of section 9(1)(vii)(b) of the Act which provides that FTS shall not be taxable in India where said services are utilized for earning income from any source outside India.

4) That based on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the requirement of withholding of tax at source to transactions entered by your Appellant in AY 2007-08 by applying Explanation to section 9(1) of the Act amended by Finance Act, 2010 with retrospective effect from 01/06/1976 which provides taxability of 'Fees for technical services' in India irrespective of whether or not such services are rendered in India by the nonresident without appreciating that while judging whether the expenses should be disallowed due to not deduction of tax at source, one should consider the position of law that actually existed at the relevant time, namely when the tax ought (allegedly) to be deducted.

That based on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of SG Business Development Expenses without appreciating the applicability of beneficial provision of 'make available' as provided by Article 12 - 'Royalties and Fees for Technical Services' of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Singapore ('India-Singapore tax treaty') which provides that the payment in relation to the FTS will not be taxable in India if such services are not "make available". Further, the learned CIT(A) also erred to

appreciate that Fractal Singapore does not have a Permanent establishment in India as per the Article 5 - 'Permanent Establishment' of the India-Singapore tax treaty and thus, the income of Fractal Singapore cannot be taxed in India as 'Business Profits'.

6. That based on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming disallowance of SG Business Development Expenses amounting to INR 1,85,90,396 without appreciating that the beneficial Circular 23 of 1969 dated July 23, 1969 was in force during the AY 2007-08 since the payments made to the Fractal Singapore were considered by the learned AO as akin to commission.

7) That based on the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the levy of interest under section 234B of the Act amounting to INR 45,91,224. Your Appellant respectfully submits that on granting relief under above grounds, no additional interest is payable by your Appellant under section 234B of the Act.

3. The learned counsel of the assessee has also filed following addition ground:

6. That on the facts and in the circumstances of the case, the CIT(A) erred in not adjudicating the Appellant's Ground of Appeal no. 2 insofar as it challenged the AO's decision to hold that the Singapore BD expenses were not incurred wholly and exclusively for the purpose of Appellant's business.
addition ground

4. For the admission of the addition ground, the learned counsel of the assessee has prayed as under:

Sub: Application for admission of Additional Ground of Appeal - Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 ('the IT AT Rules')

The Appellant is moving this application for admission of additional ground for due adjudication by your Honours. The Appellant had filed the captioned appeal against the order dated 27 February 2015 passed by the Commissioner of Income-tax (Appeals) ('CIT(A)') - 16, Mumbai under section 250 of the Income-tax Act, 1961 ('the Act').

The Appellant wishes to raise an alternate legal plea by raising an additional ground which arises out of the said order of CIT(A)

The Appellant submits that the additional ground being purely a legal ground would be essential for effective and just disposal of the Appeal. The Appellant prays for the admission and adjudication by Hon'ble Tribunal, of the attached additional ground of appeal, which does not require investigation into; or examination of, any new facts or evidences, which were not already available before the CIT(A) and the Assessing Officer.

In the light thereof, we humbly request your Honours to exercise the powers provided in Rule 11 of the ITAT Rules and admit the additional ground of appeal which was inadvertently omitted to be raised in the original memo of Appeal.

The Appellant most humbly pray to your honour to kindly admit and adjudicate upon aforesaid ground of appeal and oblige.

5. Upon careful consideration and hearing both the Id. Counsel, we admit the addition ground. In the present case, the assessment was reopened u/s. 147 of the Income Tax Act. In the reassessment proceeding, the assessing officer made a disallowance of Rs.1,85,90,396/- being commission paid to Fractal Private Limited, Singapore, being the associated enterprise of the assessee. The assessing officer made the disallowance u/s. 40(a)(i) of the Income Tax Act, for non-deduction of tax at source. Over and above the aforesaid deduction u/s. 40(a)(i), the assessing officer held that without prejudice to the above, the payment also cannot be said to have been incurred wholly and exclusively for the purpose of business of the assessee-company.

6. Against the above order, the assessee appealed before the Id. CIT(A), challenging the following :

Validity of reopening, challenging the disallowance u/s. 40(a)(i) and challenging the disallowance as not incurred wholly and exclusively incurred for the purpose of business of the assessee.

7. The ld. CIT(A) dismissed the assessee's appeal by upholding the validity of reopening and holding that disallowance u/s. 40(a)(i) was justified. However, the ld. CIT(A) did not deal with the issue of disallowance as not wholly and exclusively incurred for the purpose of business of the assessee.

8. Aggrieved by the above order of the learned CIT-A, the assessee is in appeal before the ITAT.

9. In the main grounds, the assessee has challenged the reopening and addition u/s.40(a)(i). In the additional ground, the assessee has agitated that the ld. CIT(A) has erred in not adjudicating the issue of disallowance as not wholly and exclusively incurred for the purpose of the business. In this regard, the ld. counsel of the assessee referred to ground no. 2 of the grounds of appeal before the learned CIT-A, where this aspect has been raised as under:

Ground No. 2 - *Objection against the disallowance of expenses amounting to INR 1,85,90,396.*

Notwithstanding Ground no.1`above, the learned AO in the order has erred in disallowing expenses of INR 1,85,90,396 under section 40(a)(i) r.w.s. Section 195 of the Act without appreciating the beneficial exception under Section 9(l)(vii)(b) of the Act available in the case of your appellant and also that the payments are outside the purview of 'Fees for Technical Services' under section 9(1)(vii) of the Act.

Further, the learned AO erred in not applying the beneficial provisions of Article 12 of the Agreement of Double Taxation and Prevention of Fiscal Evasion between India and Singapore (hereinafter referred to as, the 'the India-Singapore tax treaty') whereby if the services are not made available to your appellant then the payment will not be taxable. The amount will only be taxable if Fractal Singapore P. Ltd (hereinafter referred to as 'Fractal Singapore') constitutes a Permanent Establishment in India. As neither services

are not made available nor Fractal Singapore constitutes Permanent Establishment in India, hence, the payment does not qualify to be taxed in India.

'The learned AO has also erred in wrongly alleging that the expenses have not been incurred wholly and exclusively for the purpose of the business of your appellant.

In light of the above grounds, your appellant prays that the disallowance of INR 1,85,90,396 be deleted.

10. Referring to the above, the learned counsel of the assessee pleaded that the Ld. CIT(A) should have adjudicated this aspect of the grounds of appeal raised before him, that the Assessing Officer erred in holding that expenses have not been incurred wholly and exclusively for the purpose of business. In this regard, he referred to the decision of the tribunal in the assessee's own case in ITA No. 4037/Mum/2015 for the assessment year 2006-07 vide order dated 21.08.2017, wherein the matter was remitted back to the file of learned CIT-A to complete the order, as in that case he had omitted to adjudicate the merits of the case, having only decided upon the issue of reopening.

11. Per Contra, the learned departmental representative did not have any objection in the issue being remitted to the file of learned CIT(A) to complete his appellate order.

12. We have carefully considered the submissions and perused the records. We find that this tribunal in assessee's own case in ITA No.4037/Mum/2015 and CO No. 82/Mum/2017 for assessment year vide order dated 21.08.2017 has held as under:

10. Upon careful consideration, in our considered opinion, when the reopening as well as merits of the case were before the learned CIT(A), it was incumbent upon him to pass an order and adjudicate by speaking order on both aspects. In the cross objection assessee is rightly aggrieved that despite filing the appeal and raising the necessary grounds the learned CIT(A) has not adjudicated upon the merits of the case. There are catena of decisions of higher Courts when it has been held that it is incumbent upon lower authorities to decide upon the jurisdictional as well as merits of the case raised before them so that there is a finality in proceeding at lower level and the higher forum can properly appreciate and decide upon the issue.
11. Hence in our considered opinion the interest of justice requires that the adjudication of merits be remitted to the file of the learned CIT(A). Learned CIT(A) is directed to complete the appeal order by considering the merits of the case and passing an order on the merits of the case. Needless to add, assessee should be granted adequate opportunity of being heard. We make it clear that we have not considered the issue of reopening in any manner whatsoever. Revenue is free to take up the issue as required after the order by the learned CIT(A) is completed in terms of our remitting as above. Both the Counsel fairly agreed to the above proposition.
13. We find that in the present case also the ground relating to disallowance of the expenditure by holding it as not incurred wholly and exclusively for the purpose of the business was already before the ld CIT-A, but the same was not adjudicated by him. Hence, following the precedent as above, we remit the adjudication of this aspect to the file of learned CIT-A. Learned CIT-A is directed to complete the appellate order by considering the issue whether the disallowance on account of expenditure being not fully and exclusively for the purpose of business as raised in ground number two before him is justified or not. Needless to add, the assessee should be granted adequate opportunity of being heard. We make it clear that we have not considered the issue of reopening and the disallowance u/s.40(i)(a), i.e., in any manner

whatsoever. Both the parties are free to take up necessary issues as deemed necessary after the order of the Ld. CIT-A is completed in terms of our remitting as above. Both the counsel fairly agreed to the above proposition.

14. In the result, this appeal by the assessee stands allowed for statistical purposes
परिणामतः निर्धारिती की अपील सांख्यकीय उद्देश्य के लिए स्वीकृत की जाती
है ।

Order pronounced in the open court on 01.11.2017

Sd/-
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

Sd/-
(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 01.11.2017

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai