

आयकर अपीलीय अधिकरण, ' ए ' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No. 249/Mds/2015

निर्धारण वर्ष/Assessment Year : 2010-11

M/s. Mercury Manufacturing Co. Ltd.,
Plot No. 3-D, Phase III,
MEPZ, Tambaram,
Chennai – 600 045.

Deputy Commissioner of Income Tax,
Vs. Corporate Circle -4(1),
Chennai.

[PAN: AACCM 4808M]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri V.S. Manoj, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Shri S. Nataraja, JCIT

सुनवाई की तारीख/Date of Hearing

: 04.07.2017

घोषणा की तारीख/Date of Pronouncement

: 11.07.2017

आदेश / O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

This is an appeal filed against the order of the Commissioner of Income Tax (Appeals)-VI, Chennai in ITA No. 1409/13-14/A-VI, dated 14.11.2014.

2. M/s. Mercury Manufacturing Co. Ltd., the assessee, is engaged in the manufacture and export of steel furniture. In the assessment made for assessment year 2010-11, the Assessing Officer disallowed Rs. 27,43,333/- of commission paid on foreign agents without deducting tax u/s. 40(a)(ia). Aggrieved, the assessee filed an appeal before the CIT(A). Before the CIT(A) the assessee took the stand that the impugned payments was not a commission as stated by the AO but the payments were made for entire professional services rendered outside India by a non-resident Mr. Jamshed Unwala, a qualified engineer and has vast experience in engineering and consultancy. Further, it stated that such payments are covered under Article 14 of DTAA Canada, furnished copies of 4 invoices raised for making payments to the non-resident and a detailed written submission to the CIT(A). The CIT(A) after considering all of them held as under:

"The explanation furnished by the appellant vide letter dated 25.08.2014 and also the copies of the 4 invoices raised by Jamshed Unwala, the non-resident are examined carefully. The appellant is in the business of manufacturing and export of steel office furniture in completely knock down condition. Mr. Jamshed Unwala, the non-resident is a qualified engineer from Indian Institute of Technology, Mumbai and has been involved in the design and engineering of appellant's products. On perusal of the invoice raised by Mr. Jamshed Unwala, it is seen that the services raised by non-resident are in the nature of providing engineering guidance on correct assembly, and making jigs and furniture's for storage and assembly of mercury's products and for providing consultancy services. The description of the services provided by Mr. Jamshed Unwala in its invoices raised on

02.05.2009, 23.06.2009, 14.10.2009 and 22.01.2010 are similar and the description given in the invoice dated 02.05.2009 is reproduced for proper appreciation of the case.

"Professional services during the period included the following:

1. Onsite visits to sturdymet, Toronto, for engineering guidance on correct assembly and making jigs and fixtures for storage and assembly of Mercury's products.

2. Video consultations on skype, with Accent, Winnipeg and Tradewest, Regina, on problems faced by them in warehousing and assembly of products.

3. Tele consultations with Sistemas, Venezuela, on understanding Lateral Filing Cabinets, features, and benefits, and re-packaging after assembly."

Please transfer CAD 20,000.00 out of the Annual Fees of CAD 60,000.00"

I find from the evidences on record that the nature of the services rendered by Jamshed Unnwala fall in the category of included services within the meaning of the clause (4) of article 12 of the DTAA between India and Canada. In the instant case, Jamshed Unnwala provides consultancy services in the form of providing engineering guidance and also providing tele consultations services to the appellant. Sec.9(1)(vii)(b) provide for taxability of the income by way of fees for technical services payable by a resident. The explanation [2] clause (vii) of Sec.9(1) provide for definition of the fees for technical services which included any lumpsum consideration for rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personal). The experience of the Jamshed Unnwala was utilized by the appellant company in improving the quality of the product. The services provided by Jamshed Unnwala definitely fall in the clause] 4) of article 12 of DTAA read with clause (2) of the article 12 of DTAA between India and Canada which provide for taxation of technical or consultancy services in the contracting state in which they arise and according to the laws of that state. The services provided by Jamshed

Unnwala would not fall under the clause (2) of article 14 of DTAA between India and Canada as contested by the appellant. The appellant has not discharged its burden completely to prove that the services rendered by Jamshed Unnwala fall under the category of independent personal services as provided under article 14 of the DTAA between India and Canada. Rather, the services fall under the category of included services under clause (4) of article 12 of DTAA. Though AO proceeded to make disallowance of Rs.27,43,333/- on the ground of export commission, the same was required to be taxed u/s 9(1)(vii) of the IT Act in the hand of the recipient as discussed above. There is no dispute that no TDS was made by the appellant at the time of making payment. In view of the above facts and circumstances of the case, I am of the considered view that the provisions of sec 40(a)(i) is attracted on the amount of Rs.27,43,333/-. Therefore, I confirm the disallowance made by the AO.”

3. Aggrieved, the assessee filed this appeal before us, pleading that the CIT(A) failed to appreciate that the consultant is no way connected with the design, manufacture of the products namely steel furniture. In fact, the consultant provides the assistance during the course of finalization of orders and sometimes after dispatch of the goods. The AR submitted that the Commissioner of Income Tax (Appeals) failed to appreciate that the activity of manufacture takes place in the factory of the Appellant and the consultant is engaged to provide assistance in technical aspects of the finished products for better understanding and use of the products. The technical clarification that has been provided to a prospective customer/a customer who procured the goods cannot be linked to design of the product because the design and

manufacture happens much earlier in India. There is no assistance provided before or during the course of manufacture or in design of the product. The products are designed and manufactured entirely by the Appellant and the Commissioner of Income Tax (Appeals) failed to appreciate that the reliance in the narration of the invoice raised by the consultant makes it abundantly clear that the service is provided to a customer who intended to buy the product or to a person who purchases the product. This itself makes clear that the consultancy is a post manufacturing/ post export activity. The finding that the activity falls under Article 12(4) of the Double Taxation Avoidance Agreement (DTAA) between India and Canada is therefore factually and legally incorrect etc. Per contra, the DR invited our attention to the paper book, wherein a copy of professional services agreement entered by the assessee with Shri J.A. Unwalla (JAU) dated 01.01.2015 was placed. He invited our attention to the scope of work which is extracted as under:

- "The scope of work of JAU would include the following services:*
- a) Review business potential for Mercury's products in U.S.A., Canada and other markets and advise on various aspects such as specifications, certification and other market requirements.*
 - b) Visit prospective customers and present Mercury's product offerings and its suitability to meet their needs, and competitive advantages.*
 - c) Engineering support on product assemble, storage and handling and other requirements for shipments made to customers.*
 - d) Other services to be specified by Mercury and in relation to its business in these regions. "*

The DR pleaded that the impugned payments were made for the services rendered in clause a and c of the above agreement. Shri J A Unwalla rendered advice on various aspects such specifications, certification and other market requirement and engineering support on product assemble, storage and handling and other requirements for shipments made to customers. Further, he pleaded that for the reasons stated by the CIT(A), the disallowance made may be upheld.

4. We have considered the rival submissions. As pointed out by the CIT(A), Shri Jamshed Unwala has rendered services which include

- "1. Onsite visits to sturdymet, Toronto, for engineering guidance on correct assembly and making jigs and fixtures for storage and assembly of Mercury's products.*
- 2. Video consultations on skype, with Accent, Winnipeg and Tradewest, Regina, on problems faced by them in warehousing and assembly of products.*
- 3. Tele consultations with Sistemas, Venezuela, on understanding Lateral Filing Cabinets, features, and benefits, and re-packing after assembly."*

when we read them with clauses (a) & (c) of the professional services agreement extracted, supra in Para 3, it is clear that the services rendered by Shri J. A. Unwalla falls under the category of included services within the meaning of clause (4) of article 12 of the DTAA between India and Canada.

The assessee could not lay any material to prove that the services rendered by Mr. J A Unwalla falls under the category of independent personal services as provided under article 14 of the DTAA between DTAA India and Canada and hence the order of the CIT(A) does not require any interference.

5. In the result, the assessee's appeal is dismissed.

Order pronounced on Tuesday, the 11th day of July, 2017 at Chennai.

Sd/- (एन.आर.एस. गणेशन) (N.R.S. GANESAN) न्यायिक सदस्य/Judicial Member	Sd/- (एस जयरामन) (S. JAYARAMAN) लेखा सदस्य/Accountant Member
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चेन्नई/Chennai,

दिनांक/Dated: 11th July, 2017

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |