INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4480 to 4486/Del/2014
(Assessment Year: 2000-01 to 2006-07)

SMS Iron Technology Pvt. Ltd, (formerly known as SMS Demag Pvt. Ltd,), B-402, Somdutt Chamber, 5, Bhikaji Cama Place, New Delhi PAN:AAACI1682F	Vs.	ITO, Ward-2(2), International Taxation, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Rajan Bhatia, CA Shri Deepak Sharma, CA
Revenue by:	Shri T. M Shivkumar, CIT DR (International Taxation)
Date of Hearing	26/09/2017
Date of pronouncement	25/10/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. All these appeals for AY 1999-2000 to 2006-07 have been filed by the assessee against the order of the ld CIT (A) passed on 28.02.2014 upholding the action of the ld Assessing Officer in passing order u/s 201 and 201(1A) of the Income Tax Act, 1961 dated 28.09.2006 holding that the tax should have been deducted on remittance made by the assessee to M/s. SMS Demag AG, Germany without deducting tax at source u/s 195 of the Act.

2. The assessee has raised the following grounds of appeal in all these appeals as under:-

   1. That the order of the ld Commissioner of Income-tax(Appeals) (CIT(A) is bad, both in law and on facts of the case.

2. That the ld CIT(A) has erred in upholding the tax demand of Rs. 8774548/- including interest of Rs. 3065522/-.

3. That the ld CIT(A) has erred in upholding the decision of the ld Assessing Officer treating the appellant as assesse in default u/s 201(1) Income Tax Act, 1961.

4. That the ld CIT(A) has erred in upholding the decision of the ld Assessing Officer that the appellant has failed to comply with the provisions of Section 195 of the Act without appreciating the facts of the case.

5. That the ld CIT(A) has erroneously upheld that the payment as made by the appellant to the German Enterprise towards reimbursement of costs for intranet, SAP charges, represented income of the nature of Royalty and were changeable to tax @10% on the gross amount.

6. That the ld CIT(A) has erred in rejecting the various contentions of the assessee in respect of non taxability of the relevant amounts in terms of provisions of agreement for avoidance of Double Taxation (ADDDT) and provisions of the Act.

7. That the ld CIT(A) has erred in not following the decision of the Hon'ble Income Tax Appellate tribunal New Delhi on same issue in appellant's own case for AY 2000-01, and in various decisions of High Courts and other courts cited by the appellant.

8. That the appeal is within the time as order of the ld CIT(A) was received on 19th June 2014.

3. The brief facts of the case is that the assessee is a subsidiary of a German company, engaged in the business of supply of assemblies / sub assemblies of metallurgical equipment, provisions of consultancy and technical services in design and engineering to ferrous and non-ferrous sectors. On the basis of certification of Chartered Accountant with the authorized dealers i.e. Bankers for foreign remittances, it was noticed that for FY. 2004-05 the assessee has remitted money to its parent company M/s SMS Demag AG, Germany without deduction of tax at source u/s 195 of the act and therefore, enquiry was made. It was found that certain payments were made on which tax are not deducted at source u/s 195 of the Act. Such payments are pertaining to intranet charges, payment of SAP software. The ld Assessing Officer held that above services constitute royalty u/s 9(1)(vi) of the Act and it has deemed to accrue or arise in India hence, chargeable to tax u/s 5(2) of the Act in the hands of the non-resident recipient. Therefore,

u/s 195 of the Act tax should have been deducted thereon. With respect to the applicability of double taxation avoidance agreement it was held by him that same is also chargeable to tax as 'Royalty' under Article 12(3) of the Double Taxation Avoidance Agreement between India and Germany. Hence, according to him the tax was also required to be deducted as per DTAA. Therefore, the ld Assessing Officer held that assessee has paid following sums for intranet charges and SAP software for respective financial years as under:-

FY	Intranet expenses Booked/ debited	SAP maintenance Exp
1999-2000	-	18248673
2000-01	-	2503235
2001-02	9847197	6837057
2002-03	3613633	-
2003-04	1507672	-
2004-05	5165815	-
2005-06	1491658	* 7864822
	21625975	35453787

*Exchange fluctuation difference

4. Based on this the ld Assessing Officer was of the view that tax chargeable on the royalty income according to DTAA is 10% and therefore, short deduction of tax was worked out thereon. Consequently, tax liability u/s 201(1) was worked out for all the years together at Rs. 5708206/-. Consequently, the interest was also worked out u/s 201(1A) of the Act amounting to Rs. 3066522/-. The order u/s 201 and 201(1A) of the Act was passed on 29.09.2006.

5. Assessee aggrieved with the order of the ld Assessing Officer preferred an appeal before the ld CIT(A) who vide order dated 28.02.2014 confirmed the

finding of the ld Assessing Officer by the consolidated order. Therefore, the assessee is in appeal before us.

6. The ld AR submitted that the issue is squarely covered in favour of the assessee as in the case of the recipient of the income i.e. SMS Demag AG for AY 2012-13 the ld DRP has held that above sum received by the assessee in relation to SAP and intranet charges are not fees for technical charges as well as the royalty as per DTAA. He therefore, submitted that according to the directions of the ld DRP in the case of the recipient when such sum is not chargeable to tax in India there cannot be any withholding tax liability on the assessee. He further submitted that the coordinate bench in case of the assessee for AY 2000-01 in ITA No. 3636/Del/2008 has held that disallowance u/s 40(a)(i) cannot be made in the hands of the assessee for non deduction of tax at source on these payments. Therefore, he submitted that assessee cannot be asked to deduct tax at source. He further submitted that actually the amount is payable as reimbursement of the expenditure to the holding company and therefore, no tax is required to be deducted. For this he relied upon the decision of Hon'ble Supreme Court in Case of DIT Vs. AP Moller Maersk AS 78 Taxmann.com 287 (S.C). He further relied upon the decision of Hon'ble Andhra Pradesh High Court in Sriram Refregeration Industries Vs. ITO 49 Taxmann.com 131 (AP). He further submitted that as payment is made to the group concern and is in nature of reimbursement the concept of mutuality applies and therefore, no tax is required to be deducted on such sum. For this he relied on the decision of ITAT Mumbai Bench in case of DCIT Vs. KPMG 81 Taxmann.com 118. In the end he raised an additional argument that the proceedings are initiated on 01.03.2006 for all the financial year concerned above and therefore, in view of the decision of the Hon'ble Delhi High Court in case of NHK Japan Broadcasting Corporation Vs. CIT 305 ITR 137 the notices cannot be issued beyond 4 years and hence, the notices are time barred and accordingly the orders too.

7. The ld DR vehemently relied on the orders of lower authorities and submitted that tax is required to be deducted on both the above sum as

they are neither reimbursement nor mutual concerns. He further submitted that there is no time limit prescribed for respective years u/s 201(1) of the Act for those years. He further submitted that the ld DRP has decided the issue on the basis of the order of the coordinate bench which has not considered the retrospective amendment to section 9 of the act. Therefore, the DRP orders do not decide the issue correctly. He further submitted that the ld DRP has accepted the claim of the assessee that it is reimbursement without any basis.

8. We have carefully considered the rival contentions. The Assessing Officer has issued the show cause notice on 01. 03.2006 to the assessee for FY 1999-2000 to 2005-06. The Hon'ble Delhi High Court in CIT Vs. NHK Japan Broadcasting Corporation in 305 ITR 137 in para No. 21 has held that where no limitation is prescribed as in section 201 of the Act then action must be initiated within the period of 4 years. Accordingly, the notice issued on 01.03.2006 can cover only the period of four years preceding that year. In the present case the financial year are FY 1999-2000 to 2005-06, therefore, the ld Assessing Officer cannot assume jurisdiction for FY 1999-2000 and 2000-01 accordingly, the ld AO cannot work out short deduction of tax on SAP Maintenance expenses of Rs. 18248673/- and Rs. 2503235/- for FY 2000-01 respectively. Accordingly, respectfully following the decision of the Hon'ble Delhi High Court we direct the ld Assessing Officer to not to treat the assessee in default u/s 201(1) as well as not to charge interest consequently, u/s 201(1A) of the Act for these two financial years. Accordingly, the orders passed u/s 201 (1) / 201(1A) for F Y 1999-2000 and 2000-01 , consequent tax and interest thereon covered in the order for these two years are cancelled.

9. Now coming to the next contentions raised by the assessee that it is a reimbursement of expenses and therefore, no tax is required to be deducted thereon. It was further pleaded by the assessee that the issue is squarely covered in favour of the assessee by the order of the coordinate bench in assessee's own case for assessment year 2000 – 01 in ITA No. 3636/del/2008, dated 29/01/2010 as well as by the order of the Ld. DRP in

case of the recipient of the income. We have carefully perused the above argument. It was also raised before the Ld. CIT (A) which was rejected by him. The Ld. CIT (A) asked the appellant to file the copies of all agreement, in contracts in pursuance to which payments for SAP and intranet charges were made so that the nature of the contracts in transactions could be examined in detail, particularly with reference to the provisions of the act and the provisions of the India Germany double taxation avoidance agreement. Only from those agreements it could have been determined that whether the amount paid by the assessee is reimbursement of expenditure or not. The above agreements despite repeated query were not filed by the assessee before the Ld. CIT (A). It was stated by the appellant that the agreements are not located at present and further they were not relevant for deciding the case according to the assessee. Unless the assessee produces the agreement before the authorities it is not possible to accept that the above payments are merely reimbursement of the expenditure. The assessee has also not produced any debit notes or working of such reimbursement before us also. In absence of basic details that the amount of expenditure paid by the assessee to its associated enterprises is only reimbursement of expenditure, arguments of the assessee cannot be accepted. If assessee would like to have the benefit of various decisions cited before us it is the duty of the assessee to make proper claim thereof by producing what was the original cost incurred by the recipient of the income globally and how the expenses have been allocated to the assessee substantiated by agreements. If the expenditure are incurred by the assessee and same were paid by the associated enterprise on the basis of the actual charges pertaining to the assessee, then only it can qualify as a reimbursement of expenditure. When Indian subsidiary company incurs expenses or avails any service from some third party abroad and payment to such third party is routed through its holding or related company abroad, provision for deduction of tax at source apply as if assessee has made payment to such independent party de hors routing of payment through holding company. The remission of amount to the holding or related company for finally

making payment to the third person will be considered as payment to third party. It cannot be termed as reimbursement of expenses to the holding company. If the contention of the assessee is accepted and the payment to third party, routed through its holding co. is considered as reimbursement of expenses to the related party, then probably all the relevant provisions in this regard will become redundant. Hence, we reject the argument of the Ld. authorised representative that it is merely an reimbursement of expenditure. The next argument was that coordinate bench has decided this issue in favour of the assessee in assessment year 2000 – 01 in ITA No. 3636/del/2008 is also not sustainable. The Ld. CIT appeal has given detailed reasons that coordinate bench concluded on the basis of the findings that the assessing officer would not be justified in disallowing 50% of depreciation on the ground that provisions of section 40 (a) (i) were applicable. He further held that that coordinate bench was not on the issue whether the tax is required to be deducted or not. But was on the issue of whether the depreciation disallowance made by the Ld. assessing officer by applying the provisions of section 40 (a) (i) is proper or not. The coordinate bench has also not given any finding about the deductibility of tax at source on the payment of SAP charges and intranet charges. In view of this, reliance upon the decision of the coordinate bench in assessee's own case for assessment year 2000 – 01 is not proper, hence, rejected. Further regarding the reliance placed by the assessee on the decision of the Ld. dispute resolution panel in case of the recipient of the assessee is also not correct in view of the fact that Ld. DRP has relied upon the order of the coordinate bench in assessee's own case for assessment year 2000 – 01, while deciding that that royalty is not chargeable to tax in India. Further, the Ld. DRP has also not examined whether the agreement pertaining to the payment of these charges by the assessee to the recipient's on basis of the actual cost incurred by the assessee or merely crossed charged facilities. Further more for the reasons best known to the assessee agreement of such payment have never been produced before the lower authorities as well as before us. In view of this the reliance on the direction of the Ld. dispute

resolution panel in case of the recipient of the income does not serve any purpose. Consequently, the decisions placed before us do not apply to the facts of the case before us in absence of any document produced by the assessee showing the agreement and the terms of such expenditure as well as the details of reimbursement of the expenditure made by the assessee as claimed. The Ld. authorised representative has further relied on the decision of the coordinate bench in 81 Taxmann.com 118 in case of DCIT versus KPMG wherein it is been held that Where amount remitted by assessee company to its member concerns, in nature of reimbursement of cost, was made to enable them in discharging its function within terms of membership agreement between assessee and its member concerns, same would not be subjected to TDS on basis of doctrine of mutuality. In that particular case in para No. 10 the coordinate bench has discussed the copies of the membership agreement entered into by that assessee with its member firms and after that they have reached at the conclusion. In the present case, in absence of any such agreement produced before the lower authorities or before us the benefit of above decisions cannot be given to the assessee. In view of this the reliance placed by the assessee on that decision is rejected. Further more, the assessee has also stated that issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in case of CIT versus infra soft Ltd 220 Taxmann 273. On examination of the arguments of the assessee it is noted that in that particular case the issue before the Hon'ble high court was that whether amount received by assessee, a non-resident company, for granting license to use its copyrighted software for licencee's own business purpose only, could not be brought to tax as 'royalty' under article 12(3) of India-US DTAA. In the present case, license of the copyrighted software of the parent of the assessee is not given to the assessee for use of its own business. In the present case before us it is an payment made by the assessee for use of SAP software which was customised for the group concern , further more intranet charges paid are also not copyrighted article. Furthermore, the assessee has also not given any agreement that what kind of software

assessee was using, hence, benefit of the above decisions cannot be given to the assessee. In view of this the reliance placed by the assessee on that decision is distinguishable on facts. To test the payment made by the assessee for SAP charges it is important to note that payment of such charges are made for use of licensed software on the Internet/ intranet and payment is also contingent on the basis of number of the user license or number of sessions for which the software is used. In the present case the technical support would also be provided by S AP, a German company and not by the recipient of the expenditure. In view of this, the above software receipt is scientific equipment under the Act and India Germany Tax Treaty. Hence, such payment is correctly regarded as royalty by the lower authorities according to article 12 of the DTAA. In view of this, the above payment made by the assessee to its holding company is chargeable to tax as royalty according to the income tax act as well as according to the double taxation avoidance agreement. Therefore, on such payment assessee should have deducted tax at source under the provisions of section 195 of the income tax act at the beneficial rate of 10% provided under the double taxation avoidance agreement. In view of this, the order passed by the Ld. assessing officer under section 201/201 (1A) for financial year 2001 – 2002 to 2005 – 2006 are correctly confirmed by the Ld. CIT (A). Hence, appeal of the assessee with respect to the financial years 2001 – 2002 to 2005 – 2006 are dismissed.

10. In the result appeal of the assessee for financial year 1999-2000 and 2000-2001 are allowed Whereas appeals for FY 2001 – 02 to 2005 – 06 are dismissed.

Order pronounced in the open court on 25/10/2017.

(H.S.SIDHU)
JUDICIAL MEMBER

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 25/10/2017
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi