IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH: 'C' NEW DELHI

BEFORE SHRI R. S. SYAL, ACCOUNTANT MEMBER

AND

SMT SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A .No.-4586/Del/2011 (A.Y 2006-07)
I.T.A .No.-1111/Del/2012 (A.Y 2008-09)

Goldratt Consulting Ltd. Chancery Pavilion Boycott Avenue Oldbrook Miltion Keynes-MK 62 TA UK AACCG5262D **(APPELLANT)**	vs	ADIT Circle-1(2), International Taxation, New Delhi **(RESPONDENT)**

Appellant by	**Sh. S. D. Kapila & Sanjay Kr. Adv & Mr. R. R. Maurya, Adv & Mr. Amit & Sahil, CA**
Respondent by	**Sh. Amrit Lal, Sr. DR**

Date of Hearing	**03.01.2017**
Date of Pronouncement	**24.01.2017**

ORDER

PER SUCHITRA KAMBLE, JM

These appeals are filed by the assessee against the order dated 18/7/2011 &3/10/2011 passed by CIT(A)-XI, New Delhi and CIT(A)-XXIX, New Delhi for the Assessment Years 2006-07 & 2008-09 respectively.

2. The Ld. AR submitted that vide application dated 30th April 2012 the assessee submitted amended ground no. 2 which was taken on record as DR is not having any objection to the same.

3. The grounds of appeal are as under:

(ITA No. 4586/Del/2011 Assessment Year 2006-07)

"1. That on the facts and circumstances of the case and in law, the Ld. Commissioner of Income tax (Appeals)- XI ["CIT(A)"] erred on facts and in law in passing the impugned appellate order dated July 18, 2011.

2. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in upholding the action of the Assessing Officer ("A.O") in making an addition of Rs.17,687,327/- to the income of the Appellant by treating the reimbursements received from various customers as income by way of Fee for Technical Services ("FTS").

2.1. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in not accepting the contention of the Appellant that the reimbursements received by the Appellant do not qualify as income under the Act being pure reimbursements that do not contain any mark up.

3. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in confirming the order of the A.O and upholding the addition of Rs.256,530/- being the amount received on account of introductory educational programs/workshops to the income of the Appellant by treating the same to be FTS under the India-UK Double Taxation Avoidance Agreement ("DTAA").

3.1. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in not accepting the contention of the Appellant that such income was not in the nature of FTS because the implementation of such educational programs does not make available any knowledge or technology to the recipient.

4. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in upholding the order of the A.O for involving the proceedings u/s 201(1) and 201(1A) of the Act on account of failure to withhold taxes u/s 194J on the payments and reimbursements made to the sub-contractors by the Appellant.

4.1. That on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating that since the Appellant does not have any presence in India, the withholding tax provisions should not be applied to be appellant.

5. That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding the order of the A.O in charging of interest under the provisions of Section 234A and 234B of the Act.

Each of the ground is independent and without prejudice to the other grounds of appeal preferred by the Appellant."

4. The grounds of appeal are as under:-

(I.T.A No. 1111/Del/2012 Assessment Year 2008-09)

"1. *That on the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals)-XXIX ["CIT(A)"] erred on facts and in law in passing the impugned appellate order dated October 2, 2011.*

2. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in upholding the action of the Assessing Officer ("A.O") in making an addition of Rs.3,982,152/- to the income of the Appellant by treating the reimbursements received from various customers as income by way of Fee for Technical Service ("FTS").

2.1. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in not accepting the contention of the Appellant that the reimbursements received by the Appellant do not quality as income under the Act being pure reimbursements that do not contain mark up.

3. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in upholding the order of the A.O in charging interest under the provisions of Section 234A of the Act.

3.1. That on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in upholding the order of the A.O in charging interest u/s 234B and 234C of the Act by not appreciating the fact that the entire income of the Appellant was subject to tax withholding and, therefore, interest under the said provisions was not leviable.

4. *That on the facts and circumstances of the case and in law, the appellate order passed by CIT(A) is bad in law and against the principles of natural justice, equity and fair play.*

Each of the ground is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

5. The brief facts of the case are as under:

(A.Y 2006-07)

The assessee is a company incorporated in UK on 20/09/2002 and was engaged in the business of providing consulting services in the name and style viable vision which helps in organizational effectiveness viz decision making procedure. Increasing profitability etc. The assessee filed its return of income on 20/1/2007 declaring total income at Rs.24,68,50,612/-. The return was processed u/s 143(1) of the Act and thereafter the case was selected for scrutiny. The Assessment was completed on 23/12/2008 u/s 143(3) of the Act, computing total income at Rs.26,45,37,939/- as against returned income of Rs.24,68,50,612/- as declared by the assessee. The addition/disallowance inter-alia includes i) on a/c of reimbursement of expenses treated as fee received in US$ (Rs.1,70,72,274/-) ii) on a/c of reimbursement of expenses treated as fees received in INR (Rs.6,15,053/-). The total addition was of Rs.1,76,87,327/- the assessment resulted in a demand of Rs.35,80,500/-.

6. The CIT (A) held that the amount of reimbursement is nothing but Fee for Technical Services (FTS) as decided by the Assessing Officer. The CIT(A) confirmed the reimbursement of expenses as consideration for rendering of services and confirmed the action of the Assessing Officer. As regards to direction of the Assessing Officer to initiate proceedings u/s 201(1) and 201(1A) of the Act, the CIT(A) sustain the same and further held that charge of interest u/s. 234B is consequential and sustained the same. Thus, the CIT(A) dismissed the appeal of the assessee for A.Y. 2006-07.

7. **(A.Y 2008-09)**

For A.Y. 2008-09 the assessee filed its return of income declaring income of Rs.11,86,37,994/-. The tax was paid at the rate of 15% of gross receipts as per the provisions of Indo-UK Double Taxation voidance Agreement (hereinafter referred to as "the treaty") with regard to the agreement entered into before 1st June 2005. In respect of the agreement entered into after 1st June, 2005, the tax has been paid at the rate of 10% of gross receipts (along with surcharge and education cess) as per the provisions of the Act because the rate provided in the act was lower than the rate provided in the treaty. However, the assessee did not include an amount of Rs.39,82,152/- received by it as reimbursement of expenses incurred on travelling, boarding and lodging etc. from various customers while computing its gross receipts from fee from technical services. The CIT(A) dismissed the appeal of the assessee by holding that identical issue was involved in assessee's own case for the A.Y. 2006-07 and thus upheld the order of the Assessing Officer. The CIT(A) also observed that the scheme of taxation of royalty/FTS under the treaty or the act was similar to that of computing profits and gains in the case of non-residents under Section 44B or 44BB, i.e. in both the cases, the income is taxed on presumptive basis and without allowing any deduction for any expense/allowances. Therefore, the principle laid down by judgments in cases of CIT Vs. RBF Reg. Coopn. 313 ITR as well as ACIT vs. Enron Global 128 TTJ 84 and CIT v. Halliburton Offshore Inc. 300 ITR 265 was applied by the CIT(A) in the present case.

8. The Ld. AR submitted that fees for technical services do not include reimbursement expenses. The Ld. AR also relied upon the order in the case of Mahindra & Mahindra Ltd. Vs. DCIT 122 ITD 260 passed by the ITAT Mumbai Special Bench. The same held as under:

> *"We have considered the nature of services rendered by the non-resident in an earlier part of this order. Such services commenced prior to the*

bringing out FCCB issue; and continued during the period when the issue was open for subscription and continued even after its closing. A meticulous look at the nature of such services taken note of above, clearly reveals that these are in the nature of technical, managerial or consultancy services. To be more specific the 'management' is aptly brought within the scope of "fees for technical services." 'Underwriting commission' is basically consideration for assuring that if the Issue is not fully subscribed then the underwriters shall take up the unsubscribed portion of the shares and in return for such undertaking, the underwriting commission is paid at a specific percentage of the amount of the total issue. Underwriting commission is only for incurring the liability of subscribing to the unsubscribed portion left over by the general public. The services by the underwriter. The underwriting commission is de hors the rendering of any managerial, technical or consultancy services and hence cannot fall within the definition of fees for technical services u/s 9(1) (vii) last item is the reimbursement of expenses. The Assessing Officer has not disputed that the sum of rs.1.68 crores is in the nature of expenses reimbursed by the assessee to the lead managers. When a particular amount of expenditure is incurred and that sum is reimbursed as such, that cannot be considered as having any part of it in the nature of income. Any payment, in order to be brought within the scope of income by way of fees for technical services u/s 9(1) (vii), should be or have at least some element of income in it. Such payment should involve some compensation for the rendering of any services, which can be described as income in the hands of the recipient. In other words the component of income must be present in the total amount of fees paid for technical services to constitute as an item falling u/s ((1) (vii). Where the expenditure incurred is reimbursed as such without having any element of income in the hands of the recipient, it cannot assume the character of income deemed to accrue or arise in India. We therefore, hold that the amount of 'Management commission' in respect of FCCB issue amounting to Rs.1.62 crores and the 'Selling commission' of

Rs.6.07 crores fall within the scope of income by way of fees for technical services in terms of Section 9(1) (vii). However, the other two amounts namely the 'Underwriting commission', at Rs. 2.43 crores and the 'expense reimbursed' at Rs. 1.68 crores are not income by way of fees for technical services."

10. The Ld. AR further submitted that the CIT(A) was not correct in upholding the addition made by the Assessing Officer. The interpretation of Section 9(1)(vii) of the Income-tax Act along with Article 13 of DTAA between India & UK clearly mention that reimbursement charges/expenses will not be considered as fees for Technical Services.

11. As relates to Ground No. 3 for A.Y. 2006-07, the Ld. AR submitted that the income of Rs.256,530 is an exempt income under the provisions of the DTAA as this amount was received on account of introductory educational programmes/workshops in respect of Assessment Year 2008-09. The Ld. AR further submitted that there is separate finding by the CIT(A) which states that Section 44 BB of the Income Tax Act is applicable in the present case. But the said Section is not at all applicable because it is related to the technical support for extracting minerals and oils which is not a business of the assessee in the present case.

12. The Ld. DR relied upon the orders of the Assessing Officer and CIT(A).

13. We have heard both the parties and perused relevant records. As relates Ground No. 2 for A.Y. 2006-07 and 2008-09, the same is squarely covered by the Special Bench Judgment in the case of Mahindra & Mahindra. In the present case also, the assessee has given the details of the reimbursement of expenses in detail which was pointed out in the Assessment Order in para 8. There is a mention that the company has received the fee as well as the reimbursement of expenses. In para 9 of the Agreement also clause (c) clearly mentions that company will be reimbursed out of pocket expense subject to cap of USD 350,000. The travel within India is also to be reimbursed separately

and is not included in the reimbursement cap of USD 350,000. The interpretation of Section 9(1)(vii) of the Income-tax Act along with Article 13 of DTAA between India & UK clearly mention that reimbursement charges/expenses will not be considered as fees for Technical Services. The CIT(A) has overlooked these aspect. Thus, this ground No. 2 is allowed for both Assessment Years.

14. As relates Ground No. 3 for A.Y. 2006-07, the assessee himself claimed an exemption for introductory educational programmes/workshops, but the assessee is not an educational institution or teaching in an educational institute. The consideration was in the nature of Fee for Technical Services only. Thus, the Assessing Officer was rightly made and addition which was confirmed by the CIT(A). There is no need to interfere with the order of the CIT(A) in respect of this issue. Ground No. 3 for A.Y. 2006-07 is dismissed.

15. The CIT(A)'s finding for A.Y. 2008-09 regarding applicability of Section 44B and 44BB of the Act were not at all the issues before the CIT(A) and was never part of the Assessment Order. Therefore, the judgments relied upon by the CIT(A) are not relevant at all to the present case. As regards other grounds in both the Assessment Years the same are consequential, hence not dealt in the present order.

16. In result, both the appeals are partly allowed for statistical purpose.

Order pronounced in the Open Court on 24th January, 2017.

Sd/-	Sd/-
(R.S. SYAL)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 24/01/2017

*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

		Date	
1.	Draft dictated on	03/01/2017	PS
2.	Draft placed before author	03/01/2017	PS
3.	Draft proposed & placed before the second member	.2017	JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	.01.2017	PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk	.01.2017	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		