आयकर अपीलीय अधिकरण ,'ए' न्यायपीठ,चेन्नई

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

श्री एनगणेशन .एस.आर., न्यायिक सदस्य एवंश्री 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. 1264/Mds/2016

निर्धारण वर्ष/Assessment Years : 2006-07

M/s. Tractors and Farm Equipment Ltd., No. 35, Nungambakkam High Road, Nungambakkam, Chennai 600 034.	Vs.	Assistant Commissioner of Income Tax, Corporate Circle -3(1), Chennai.
[PAN: AAACT 2771Q]		
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

आयकर अपील सं/.I.T.A. No. 1922/Mds/2016

निर्धारण वर्ष/Assessment Years : 2006-07

Assistant Commissioner of Income Tax, Corporate Circle -3(1), Chennai.	Vs.	M/s. Tractors and Farm Equipment Ltd., No. 35, Nungambakkam High Road, Nungambakkam, Chennai 600 034. **[PAN: AAACT 2771Q]**
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

अपीलार्थीकीओरसे/Appellant by	**:**	Shri. R. Vijayaraghavan, Advocate
प्रत्यर्थीकीओरसे/Respondent by	**:**	Shri. Nataraja, JCIT

सुनवाईकीतारीख/Date of Hearing	:	03.07.2017
घोषणाकीतारीख/Date of Pronouncement	:	27.09.2017

आदेश/ O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

These appeal and cross appeal are filed by the assessee and the Revenue, respectively, against the order of the CIT(A) in ITA No. 394/14-15/CIT(A)-11 dated 15.03.2016 for ay 2006-07.

2. M/s. Tractors and Farms Equipment Limited, the assessee, is engaged in the manufacture and selling of tractors and farm equipments. In the assessment made for the assessment year 2006-07, the AO disallowed export commission paid at Rs. 28,91,685/-, reimbursement of expenses to TAFE USA Inc., at Rs. 5,20,42,800/-& reimbursement of expenses to overseas representative office at Rs. 2,93,68,570/- u/s. 40a(i) r.w.s. 195. Such issues were before this Tribunal in ITA No. 815/Mds/2012. The tribunal found that none of the authorities have verified the agreement between the assessee and the other persons, whether there existed any DTAA between India and USA, whether the services rendered fall within the ambit of technical services under the DTAA between India and USA and hence, it remitted these issues back to the AO. Subsequently, the Assessing Officer passed an order u/s. 143(3) r.w.s. 254 on 30.01.2015 adding them to the returned income for the reason that the assessee has not deducted TDS on such payments. Aggrieved, the assessee filed an appeal before the CIT(A).

3. On the issue of claim of reimbursement of expenditure paid to TAFE USA Inc at Rs. 5,20,42,800/-, the CIT(A) after examining the assessee's submissions, the terms and conditions of the agreement and clause 4 of article 12 of DTAA dismissed the appeal. Against such decision of the CIT(A), the assessee filed an appeal. With regard to the claim of reimbursement of expenses to overseas representative office at Rs. 2,93,68,570/-, the CIT(A)

after considering the assessee's plea and other material held that this disallowance is made without any basis and hence allowed the appeal. Aggrieved against that decision, the revenue filed the cross appeal. Let us first examine the assessee's appeal as under :

4. Assessee's grounds of appeal are extracted as under :

> *"2. The Commissioner of Income tax (Appeals) erred in confirming the disallowance of Rs.5,20,42,800/- on reimbursement of expenses to TAFE USA Inc u/s 40(a)(i).*
>
> *2.1 The Commissioner of Income tax (Appeals) ought to have appreciated that disallowances u/s 40(a)(i) does not apply reimbursement of expenses incurred by the American subsidiary on behalf of the appellant has no element of income chargeable to tax under the income tax Act and hence no tax need be deducted from such payments.*
>
> *2.2 The Commissioner of Income tax (Appeals) ought to have appreciated that provisions of section 195 are attracted only on the portion of amount paid to non-resident which is taxable in India. All the payments are made to non-residents and services are rendered and utilized outside India and hence income does not accrue I arise or deemed to accrue in India. Hence deduction of TDS does not arise.*
>
> *2.3 The Appellant relies on the decision of the Supreme Court in the case of G E Technology Centre V. CIT, reported in 327 ITR 456(SC)."*

5. Before the CIT(A),the assessee submitted that it has been exporting tractors to various countries in Asia, America, Europe and Africa. In USA, it has a subsidiary by name TAFE USA Inc through which tractors are sold in

USA. The assessee has entered in to an agreement TAFE USA Inc. for assisting it in selling its tractors through advertisement, promotional activities like participation in fairs, campaigns etc, to get market inputs to enable increased sale of its tractors and maintain stock. All the promotional activities were carried out through TAFE USA Inc. which was reimbursed to them based on all relevant supporting documents. In order to get market inputs, TAFE USA Inc. engaged services of persons in USA and this information was utilised by them to improve sales in USA. TAFE Inc USA claimed the expenditure incurred by it from the assessee by providing all the relevant documents. The details of the expenditure incurred is given below:

Promotion Expenses	Rs.2, 52, 09, 976
Advertisement Expenses	Rs. 47,29,146
Export Warranty - Exports	Rs. 49,977
Travel - Others	Rs. 11,10,427
Maintenance of Stock	Rs.1, 79, 75,355
Product Insurance	Rs. 20,42,699
Miscellaneous Expenses	Rs. 9,25,220

This was duly verified and paid by the Company. No additional payments were made to TAFE USA Inc. In none of the above transactions, there was any element of profit for TAFE USA Incas all are reimbursement of expenses only. Therefore, tax deduction on reimbursement of expenses does not arise. It can be seen from the above heads of expenditure that none of the above can be concluded as fees for technical/ consultancy services. The assessee had paid

for the above heads of expenditure as reimbursement to TAFE USA Inc. The above services were rendered and utilized outside India and payment was made to TAFE USA Inc., a non-resident foreign company. Therefore, these payments are not chargeable to tax in India. To attract the provisions of section 195, incomes should be chargeable to tax in India. This is the principle laid down by the Hon'ble Supreme Court of India in the case of G E Technology Centre v. CIT [2010] 327 ITR 456 (SC). Chargeability to tax comes only when the income arises/ accrues in India or deemed to accrue or arise in India. In all the above circumstances, all the payments are made to non-residents and services are rendered and utilised outside India and hence income does not accrue/ arise or deemed to accrue or arise in India. Therefore the Asst. Commissioner erred in disallowing the above referred sum u/ s 40(a)(i).

5.1 Without prejudice to the above contention, even if the above payments were to be taxable in India , the taxability of such payments has to be seen as per the provisions of the DTAA between India and USA. Payments of the kind mentioned above will fall under "Business Profits" as per Article 5 of the DTAA and not under Article 12 "Royalties and Fees for Included Services". The payments cannot be construed as Fess for Included Services as no technical/managerial service that made available the knowledge and skill to the appellant. Relying on the decision of the Hon'ble High Court of Karnataka

in the case of CIT vs De Beers Minerals India P Ltd. (ITA No.549/2007) wherein it is held that in order to attract liability, the technical knowledge, experience, skill, knowhow or process which is used by the service provider to render technical service should also be made available to the recipient of the services so that the recipient also acquires the technical knowledge, experience, skill, knowhow or process, the assessee submitted that since no such services knowledge, skill were made available by TAFE USA Inc. to the asseessee, the above payments cannot be construed as fees for included services. Even on this argument, the ACIT has erred in holding that the reimbursement of expenses to TAFE USA Inc. as chargeable to tax and are liable for TDS. Therefore, the assesssee submitted that the Asst. Commissioner erred in disallowing the payments made to TAFE Inc. USA u/s 40(a)(i) and it is entitled to claim the above sum as allowable expenditure.

6. The CIT(A) held that in the original assessment, the AO had disallowed u/s 40(a)(i) r.w.s. 195 as the assessee had failed to deduct TDS on re-investment of expenditures paid to TAFE USA Inc. As directed by the Hon'ble ITAT while remitting to the AO, the AO has considered the DTAA and the terms and conditions with regard to the aforesaid expenditure. The AO has referred to clause 10 of the appellant's Distribution agreement with M/s TAFE USA Inc. which is reproduced as under:

"Marketing Development Expenses

10. In order to provide inputs for new Product Development - Improvements in the present range of products, TAFE shall reimburse to the maximum extent to US $210,000 p.a., payable in 3 (three) instalments to TAFE USA Inc towards the market survey expenses to be incurred in USA."

6.1 It is clear from the clause 10 of the appellant's Distributor Agreement with M/s TAFE USA Inc that the payment is towards the services rendered by TAFE USA Inc to provide input for new product development including market survey expenses to be incurred in the USA. As directed by the ITAT, the AO has also perused the DTAA with the USA. Under Article 12 of DTAA with the USA, the definition for "fee for included services" mentioned under clause 4 which is reproduced below:

"4. For the purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other Personnel) if such services:

(a) Are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) Make available technical knowledge, experience, skill know-how, or processes, or consist of the development and transfer of a technical plan or technical design" (emphasis supplied).

6.2 It is clear from clause 4 of Article 12 of DTAA, "Fees for included services" means payments any kind to any person in consideration for rendering even consultancy services if such services are ancillary and subsidiary to the application. From the above, it is clear that the services rendered by TAFE USA Inc clearly fall within the definition of 'Fees for included services. Perusal of the break-up the aforesaid expenditure also supports the Assessing Officer's view. The decision relied on by the appellant in the case of GE Technology Centre Vs CIT, cited supra, is not applicable to the appellant's case. In view of the retrospective amendment 'under Explanation 2 of section 9(2), the income of a non-resident shall be deemed to accrue or arise in India in respect of fee for technical services and shall be included in the total income of the non-resident whether or not the non-resident has a residence, or a place for business or a business connection m India, or the non-resident has rendered services in India. This retrospective amendment with effect from 01.06.1976 is very much applicable to the appellant's case in the assessment year under consideration. The appellant's reliance on the decision in the case of CIT vs De Beers Minerals India Pvt Ltd, cited supra, is not applicable to its case. In view of the fact that as per the agreement with TAFE USA Inc. it is clearly mentioned that TAFE USA Inc is supposed to render technical services to the appellant company as mentioned in the Distribution Agreement and discussed above. In view of the above, the CIT(A) upheld the disallowance made by the AO's u/s 40(a)(i) r.w.s. 195 .

7. We heard the rival contentions and gone through the copy of the Distribution agreement in the paper book furnished by the assessee. Clause 9is extracted as under :

> *"9.TAFE INC in order to promote the sale of new model/range of TAFE tractors , shall undertake promotional activities / advertisement campaigns such as display of the said tractors in exhibitions, demonstrations, banner display, advertisement in newspapers, magazines and such other effective methods for which TAFE shall reimburse the promotional / advertisement expenses to be incurred in USA , to the maximum extent to US $400,000 payable in 4 (four) equal monthly instalments to TAFE USA INC."*

7.1 From the above, it is clear that the assesssee has paid to M/s TAFE USA Inc on two types of services. One is Sales Promotional Expenses as per clause 9, supra, and the other is for Marketing Development Expenses, as mentioned in clause 10, extracted, supra. The AO and the CIT(A) have recorded findings about the transactions on clause 10 alone and there is no finding about the nature of transactions falling under clause 9, supra, and hence the transactions falling under clause 9 are remitted to the AO for fresh verification and a decision in accordance with law. In this regard, the AO shall offer adequate opportunity to the assesssee before passing the order. As per clause 10 of the assessee's Distribution agreement with M/s TAFE USA Inc, the payments made are " to provide inputs for new Product Development - Improvements in the present range of products, to the maximum extent to US

$210,000 p.a., payable in 3 (three) instalments to TAFE USA Inc towards the market survey expenses to be incurred in USA." Thus, these payments are made towards the services rendered by TAFE USA Inc to provide input for new product development including market survey expenses in the USA. Such services fall within the definition of 'Fees for included services' under clause 4 of Article 12 of DTAA, as extracted, supra. It is seen from the copy of Debit Note : TAFE/USA/Mar'06, in the paper book of the assessee that $169900 is claimed towards reimbursement for conducting a detailed review of all the specifications of compact tractors available in the US market, get feed back on different models from dealers/end users, consult Experts/ Professional Engineers regarding current use and future requirements and evolve broad specifications for a new range of compact utility models between 25 and 40 HP for the market in USA between October 2005 and March 2006. This debit note also evidences the fact that the services rendered under clause 10 of Distribution agreement fall within the definition of 'Fees for included services' under clause 4 of Article 12 of DTAA, which would be made available to the assessee . On the above facts and circumstances, the decision of the CIT (A) does not require any interference to the extent of US $210,000 p.a. The AO is directed to verify whether the payments made under clauses 10 are within the limits as specified in the agreement and if it is so , disallow the claim made under clause 10, after giving adequate opportunity to the assessee.

8. Now let us examine the Revenue's cross appeal by extracting its grounds of appeal as under:

> *"2.1 The ld. CIT(A) erred in deleting the disallowance u/s 40(a)(i) of Rs.2,93,68,570/- paid to M/s. Wallace Cartwright and Company Limited (Through it's employee, Shri V.P. Ahuja's account) on and above the commission payment holding that the AO has not given any convincing reason as to how the payment can be regarded as an income accrued or arised in India so as to attract section 9.*
>
> *2.2 The ld. CIT(A) ought to have seen that the payment is made for consultancy and managerial services regularly rendered by the above company and hence the income is deemed to be accrued or arise in India and hence liable for TDS u/s 195 of the Income Tax Act as per explanation (b) to section 9(1)(vii) and also in the light of decision of Hon'ble Supreme Court in the case of M/s. GVK Industries Limited Vs. ITO (371 ITR 453)(SC.) irrespective of the fact that the employee of the assessee company is authorized signatory in this company.*
>
> *2.3. The ld. CIT(A) ought to have upheld the disallowance in the same line of decision taken by him with respect to reimbursement of expenses to M/s. TAFE USA Inc in this current order."*

9. The assessee has overseas office in London, Vienna and Belgrade for the purpose of sale of tractors outside India, coordinating with agents and distributors and for exploring markets for export of tractors. It has remitted certain money to meet the regular expenses and for maintenance of these offices. The remittances were made to the account of the Mr. V P Ahuja, an employee of the assessee. Detailed accounts with documents for expenditure

incurred on behalf of the company were submitted by the employee periodically. The AO disallowed the above sum on the ground that the payment was made to Mr V P Ahuja, who was an employee of another company in addition to being the employee of the assessee .

9.1 Before the CIT (A), the assessee has justified its claim stating that these were its own offices and were not third parties or agents. The maintenance expenses - eg. Rent, telephone charges, conveyance, printing and stationery, salaries of local employees etc. incurred by these offices are met out of periodic transfers of funds effected from India from time to time to the account of the employee director who was overseeing these offices. Therefore, these payments did not attract any tax deduction at source. The assesse submitted that the ACIT after going through the details held that since Mr. V. P Ahuja had acted on behalf of two entities the payments can at best be only to a consultant and such payments are taxable as fees for technical services and since no TDS has been made such expenditure was disallowed u/ s 40 (a)(i) of the Act. The only Point raised by the ACIT was that the payments have been made to the same person who had signed an invoice raised by a different entity with whom the asseessee had transaction. Wallace Cartwright and Co. Ltd. is a fellow sister concern of the assesse. Mr. V.P. Ahuja is an authorized signatory in that entity. It is normal business practice that same person can be an authorized signatory in more than one

entity in a group of entities coming under the same management. Merely because Mr. V.P. Ahuja, an employee of the assessee is also an authorized signatory in another entity does not make such person a consultant. Mr. V.P. Ahuja has been an employee of the assessee for more than 30 years and continues to be so even during the year relevant to the asst. year 2006-07. A copy of the Form 16 issued to the Mr. V.P. Ahuja was also produced before the ACIT. All the expenditure in relation to maintaining a representative office, in Belgrade and Vienna has been incurred by the employee and the same has been reimbursed to him on production of a detailed statement. The details of such expenditure incurred are given below. It can be seen that the above expenditure is not taxable in India. The expenditure incurred was in the nature of office expenses like salaries, rent, travel, conveyance, electricity etc. All these expenditure were payments made to non-residents and services are rendered and utilised outside India and hence income does not accrue/ arise or deemed to accrue hr arise in India. To attract the provisions of section 195, incomes should be chargeable to tax in India. This is the principle laid down by the Hon'ble Supreme Court of India in the case of G E Technology Centre v. CIT [201 DJ 327 ITR 456 (SC),. It is therefore submitted that the Asst. Commissioner erred in disallowing the expenses of the Company's overseas offices and the Company is entitled to claim the above sum as allowable expenditure.

10. The CIT(A) held that " the AO's only observation is that Mr V P Ahuja is also an employee of another company and therefore should be regarded as a consultant. This observation is not acceptable as it is not relevant to the issue under consideration. The AO has not given any convincing reason as to how the payment can be regarded as an income accrued or arisen in India so as to attract section 9. Therefore, I am convinced that the AO has made disallowance u/ s 40(a)(i) r.w.s 195 on the payment towards reimbursement of expenditure pertaining to overseas representative office of the appellant's company without any basis. In view of the above remarks, the AO's aforesaid disallowance is deleted and the appellant's ground is allowed".

11. We heard the rival contentions and gone through relevant material. The assessee has overseas office in London, Vienna and Belgrade for the purpose of sale of tractors outside India, coordinating with agents and distributors and for exploring markets for export of tractors. It has remitted certain money to meet the regular expenses and for maintenance of those offices. The remittances were made to the account of the Mr. V P Ahuja, an employee of the assesse . Detailed accounts with documents for expenditure incurred on behalf of the company were submitted by the employee periodically. Neither the AO has doubted the genuineness of the expenditure nor brought any material for any disallowance. He has also not given any reason as to how the impugned payment can be regarded as an income accrued or arisen in

India so as to attract section 9. Thus, the decision of the CIT(A) does not require any interference and hence the grounds of the Revenue fail.

12. In the result , the assessee's appeal is treated as partly allowed and the Revenue's cross appeal is dismissed.

Order pronounced on Wednesday, the 27th day of September, 2017 at Chennai.

Sd/-	**Sd/-**
(एन.आर.एस. गणेशन)	**(एसजयरामन)**
(N.R.S. GANESAN)	**(S. JAYARAMAN)**
न्यायिकसदस्य/Judicial Member	**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated: 27th September, 2017
JPV
आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT 5. विभागीयप्रतिनिधि/DR 6. गार्डफाईल/GF