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.4842/Mum/2016
(**निर्धारण वर्ष /** Assessment Year: 2012-13)
&
आयकर अपील सं./I.T.A. Nos.4843, 4844 & 4556/Mum/2016
(**निर्धारण वर्ष /** Assessment Year: 2011-12)

Asst. CIT-16(2), Room No.440, 4th Floor, Aayakar BHavan, M. K. Road, Mumbai-400 020	**बनाम**/ Vs.	M/s. BSR and Company Lodha Excelus, 1st Floor, Appollo Mills Compound, N. M. Joshi Marg, Mumbai-11
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAIFB 0630 K		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri M. V. Rajguru
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Arijit Chakravarti & Shri Abhishek Tilak

सुनवाई की तारीख / **Date of Hearing**	:	24.10.2017
घोषणा की तारीख / **Date of Pronouncement**	:	04.01.2018

आदेश / O R D E R

Per Shamim Yahya, A. M.:

These are appeals by the Revenue directed against the respective orders of the ld. Commissioner of Income Tax (Appeals) for the concerned assessment years. Since the issues are connected and the appeals were heard together, these are being consolidated and disposed of by this common order.

2. The first common issue raised is that the ld. Commissioner of Income Tax (Appeals) erred in holding that the assessing officer was not justified in disallowing sums by invoking the provisions of section 40(a)(i). The details of disallowance was as under:

ITA No. 4842/Mum/2016

Sr. No.	Name of non-resident	Amount (Rs.)
1	KPMG Australia	3,76,989/-
2	KPMG LLP, USA	12,25,988/-
3	KPMG USCMG LLC, USA	12,21,410/-
	Total	28,24,387/-

ITA No. 4843/Mum/2016

Sr. No.	Name of non-resident	Amount (Rs.)
1	KPMG LLP, USA	6,82,800/-
2	KPMG, Mauritius	1,01,982/-
	Total	7,84,782/-

ITA No. 4844/Mum/2016

Sr. No.	Name of non-resident	Amount (Rs.)
1	KPMG LLP, USA	3,98,070
2	Manabat Sanagustin & Co., Philippines	12,27,430
	Total	16,25,500

ITA No. 4556/Mum/2016

Sr. No.	Name of non-resident	Amount (Rs.)
1	KPMG LLP, USA	3,51,300
2	KPMG United Kingdom Plc. UK	10,18,416
3	KPMG United Kingdom Plc. UK	4,48,744
4	Manabat Sanagustin & Co., Philippines	4,50,896
	Total	22,69,356

3. In these cases, the asseessee is the firm of chartered accountants and during the years under consideration it has paid sums to various entities on account of professional fee. On being show caused as to why the requisite tax was not deducted

at source, the asseessee firm explained that the payment was made to various non-residents and it is not in the nature of income chargeable to tax in India and, thus, tax was not required to be deducted in terms of section 195 of the Act. The assessing officer however did not accept the submissions of the assessee and instead held that tax was required to be deducted at source and on the failure to do so, the impugned expenditure was disallowed in terms of section 40(a)(i) of the Act.

4. Before the ld. Commissioner of Income Tax (Appeals), the assessee made various submissions contending that invoking the provisions of section 40(a)(i) was not justified. It was contended that the payment made to various non-resident entities were governed by the respective provisions of double taxation avoidance agreement with respective countries, in terms of which such payments were not income chargeable to tax in India.

5. The learned Commissioner of Income Tax (Appeals) referred to earlier decision of the ld. Commissioner of Income Tax (Appeals) in assessee's own case and its sister concern's and accepted that assessee's contention and decided the issue in favour of the asseessee.

6. Against the above order, the assessee is in appeal before us.

7. We have heard both the counsel and perused the records. Learned counsel of the assessee submitted that the issue is squarely covered in favour of the asseessee by the decisions of ITAT in assessee's own case earlier. Per Contra, the learned

departmental representative fairly accepted that ITAT has decided identical issue in favour of the assessee in assessee's own case.

8. Up on careful consideration we find that ITAT in *KPMG vs. Jt. CIT* (in ITA No. 2497/Mum/2009 dated 22.02.2013) on similar issue has expounded as under:

> 26. We have carefully considered the rival contentions and the case laws relied upon by either party. We find that the Assessing Officer has made the disallowance of the payment made to various persons mentioned above under section 40a(i) on the basis of the judgment of Hon'ble Supreme Court on Transmission Corporation of A.P. Ltd. (supra). Looking to the nature of services rendered by all these persons, which has been discussed in detail, it is seen that, firstly, none of these services fall in the nature of make available of any technical knowledge, experience, skill, know-how or process. The provisions of Indo-U.S. and U.K. treaties are absolutely clear that in case of fees for technical services, it is essential that technical knowledge skill know-how should be made available to the assessee and the assessee should be at liberty to use them in its own right. If the service does not result in making available of any such thing, then the same would not fall within the ambit of fees for technical service. These payments also cannot be taxed under Article-7 as none of them were having any P.E. or fixed base in India and the duration of their visit in India was also for a very less period as has been discussed upon. Therefore, such a payment does not attract the provisions of TDS under section 195. Provisions of section 195(1) uses the expression "chargeable under the provisions of the Act". The payer is bound to deduct tax at source only if the sum paid is assessable to tax in India. The obligation to deduct tax is limited to the appropriate proportion of income which is chargeable under the Act and not otherwise. The Hon'ble Supreme Court in G.E. India Technology Centre Pvt. Ltd.(supra), after analyzing the provisions of section 195 and the decision in Transmission Corporation of KPMG A.P. Ltd. (supra) has given its observation on section 195(1) of the Act.

9. Further, we note that ITAT in assessee's own case on similar issue in the case of Asst. CIT vs. M/s. BSR & Co. (in ITA No.1917/Mum/2013 dated 06.05.2016) has expounded as under:

5. In the above background, we have carefully considered the rival submissions. Pertinently, the issue revolves around the payments made by the assessee to certain non-resident entities for professional services rendered by them outside India. It has been consistently explained by the assessee that the services of such entities were availed during the course of the execution of engagements of assessee firm. The assessee firm did not deduct the tax at source and, therefore, the Assessing Officer invoked the provisions of section 40(a)(i) of the Act and disallowed such expenditure. The details of the entities alongwith the amounts paid have been culled out by the Assessing Officer in Para-3 of the assessment order and the same is not being repeated for the sake of brevity. The payments have been made to 12 different professional entities based in 10 different countries. In so far as the payments that are made to KPMG LLP, USA and KPMG LLP, Canada are concerned, the same has been made on account of professional services rendered in relation to taxation and transfer pricing. Undisputedly, the professional services have been rendered by the aforesaid entities outside India. The stand of the Revenue is that such services are in the nature of 'fee for technical services' and, therefore, tax was liable to be deducted at source in India. Factually speaking, the aforesaid stand of the Revenue is devoid of any support because there is no material to establish that any technical knowledge, skill, etc. has been made available to the assessee so as to consider it as falling within the purview of Article-12 of Indo-US Double Taxation Avoidance Agreement. It is also an established fact that such non-resident recipients do not have permanent establishment in India and, therefore, in the said background the same can, at best, be treated as independent personal services covered by Article-15 of the Indo-US Double Taxation Avoidance Agreement. As a consequence and in the absence of any fixed base in India, such income cannot be held chargeable to tax in India so as to require deduction of tax at source. Therefore, invoking of section 40(a)(i) of the Act to disallow such expenditure is not tenable.

5.1 In so far as payments to KPMG LLP, UK and KPMG USMCG Ltd. UK are concerned, herein also the said entities do not have permanent establishment in India. The CIT(Appeals) has found that such entities are eligible for the benefit of Article -15 of Indo-US Double Taxation Avoidance Agreement dealing with independent personal services and hence, payments are not chargeable to tax in India so as to require deduction of tax at source. The aforesaid findings have not been disputed before us on the basis of any cogent material and, therefore, we hereby affirm the same. Consequently, invoking of section 40(a)(i) in the context of aforesaid payments is also not justified.

5.2 In the context of payments made to KPMG Tax Services Pvt. Ltd., Singapore, KPMG LLP, Singapore and KPMG Tax Advisor, Belgium, the CIT(Appeals) noted that they are companies registered in the respective

countries, who have rendered services outside India. Such services related to assistance in audit, taxation, information technology services, conducing background checks, etc. Considering the nature of the services rendered, which is not disputed by the Revenue, in our view, the CIT(Appeals) made no mistake in holding that the payments are not 'fee for technical services'. The aforesaid services have been rightly held to be outside the purview of Article-12 and/or Article-13 of the respective tax treaties, and instead such income falls within the scope of Article-7 thereof i.e. in the nature of 'business profits'. It has also not been disputed that such entities do not have a permanent establishment in India, therefore, such incomes are not chargeable to tax in India so as to require deduction of tax at source. On this aspect also, we affirm the stand of the CIT(Appeals) that such payments are not liable for disallowance under section 40(a)(i) of the Act.

5.3 With regard to the payments to KPMG, Mauritius, KPMG Hazen Hassan, Egypt, KPMG Dubai, UAE and KPMG, Sri Lanka are concerned, the CIT(Appeals) has noticed that the tax treaties with the respective countries do not have any Article defining 'fee for technical services'; and that the services were being rendered in relation to taxation matters. In this back ground, the CIT(Appeals) held that the payments for such services fall within the scope of article 14/15 of the respective treaties dealing with independent personal services and in the absence of any fixed place of business of the recipient in India, income from such services was not chargeable to tax in India. Therefore, there was no requirement to deduct tax at source and accordingly the invoking of section 40(a)(i) of the Act has been set-aside by the CIT(Appeals). The aforesaid factual matrix brought out by the CIT(Appeals) has not been assailed by the Revenue before us on the basis of any cogent material and, thus, the same is hereby affirmed.

5.4 The last item remaining is payment made by assessee to KPMG, Malaysia for audit services. It is not in dispute that the said services have been rendered outside India and the same cannot be construed as managerial or technical services so as to be governed by Article-13 of India-Malaysia tax treaty, as contended by the Revenue. Clearly, they are in the nature of independent personal services falling for consideration under Article-14 of Indo-Malaysia tax treaty and, therefore, in the absence of any fixed place of business of the recipient in India, the impugned income is not chargeable to tax in India. Therefore, in such a situation, assessee is not liable for deduction of tax at source in India so as to invoke the provisions of section 40(a)(i) of the Act. The stand of the CIT(Appeals) on this aspect is also affirmed by us on the basis of his findings, which have remained uncontroverted before us by the Revenue.

5.5 Apart therefrom, even if we were to accept, for the sake of argument, that the services by the aforesaid entities are in the nature of technical services and

are rendered and utilized in India so as to be taxable in terms of section 9(1)(vii) of the Act, even then the disallowance is not warranted as the following discussion would show. Ostensibly, the requirement of rendering services in India in order to attract section 9(1)(vii) of the Act was removed by insertion of Explanation by the Finance Act, 2010 with retrospective effect from 1/4/1976. This has been understood by the Revenue to say that inspite of the services having been rendered by the recipients outside India, the same is taxable in India by applying the aforesaid amendment. In our view, such retrospective amendment would be determinative of the tax liability in the hands of the recipients of income. So however, in the present case, what is held against the assessee is the failure to deduct tax at source at the time of payment of such income. Ostensibly, dehors the aforesaid amendment, the impugned income was not subject to tax deduction at source in India as per the prevailing legal position. Taxability of a sum in the hands of recipient, on account of a subsequent retrospective amendment would not expose the assessee-payer to an impossible situation of requiring deduction of tax at source on the date of payment. Therefore, on this count also the assessee cannot be held to be in default in not deducting tax at source so as to trigger the disallowance under section 40(a)(i) of the Act. Ld. Representative for the assessee has relied upon the decision of the Mumbai Bench of the Tribunal in the case of Channel Guide India Ltd. vs. ACIT, 25 taxmann.com 25 (Mum.) in support of the above said proposition. In the absence of any contrary decision, the said plea of the assessee is also liable to be upheld and the disallowance made by the Assessing Officer under section40(a)(i) of the Act is untenable. The disallowance has been rightly deleted by the CIT(Appeals), which we hereby affirm.

10. From the above, we find the issues raised are covered in favour of the assessee except for the following:

We find that the ITAT in its earlier orders has dealt with DTAA with recipients in all countries except Australia and Philippines. As regards DTAA with Philippines is concerned, the ld. Commissioner of Income Tax (Appeals) has given finding that the same is similar to DTAA with Mauritius. The DTAA with Mauritius has already been dealt with by the ITAT in its orders as above. Hence, we consider this issue also of payment recipients in Philippines covered in favour of the assessee. However, as

regards the payment to KPMG Australia is concerned, the concerned DTAA has not been commented upon by the ld. Commissioner of Income Tax (Appeals). He has followed earlier year order in which there is no reference to DTAA to Australia. Hence, we remit this issue to the file of the ld. Commissioner of Income Tax (Appeals) to examine the issue of payment made to KPMG Australia with reference to the concerned DTAA as mentioned in ITA No. 4842/Mum/2016 and, accordingly, give a finding and pass an order.

11. Another common ground reads as under:

> On the facts and in the circumstances of the case and in law, whether the Ld.CIT(A) erred in holding that the KPMGI Co-operative, Switzerland, is a mutual association and its receipts would not constitute income chargeable to tax an dis not obliged to withhold and any tax without appreciating the facst, thereby deleting the disallowance u/s. 40(a)(i).

On this issue also the learned counsel of the assessee submitted that identical issue has been decided in favour of the assessee by ITAT in assessee's own case. Per Contra the learned counsel of the assessee did not dispute this proposition.

12. Upon careful consideration we find that identical issue was considered by this tribunal in assessee's own case in ITA No. 2493/Mum/2012 & CO No. 97/Mum/2013 dated 07.04.2017 very elaborately and the conclusion read as under:

> 19. With the above discussion we may conclude that in the case in hand, there is a complete identity between the contributors and participators; the actions of the participators and contributors are in furtherance of the mandate of the association. There seems be no element of profit by the contributors from a fund made by them, which could only be expended or returned to themselves. Based on these conditions and respectfully relying on the case laws as the Hon'ble Apex Court and various High Courts laid down that the case of the

assessee falls within the four corner of the ambit of the 'Principle of Mutuality'. Thus, we do not find any reason or ground to interfere in the order passed by learned Commissioner (Appeals) hence the appeal filed by the revenue is dismissed.

13. Since the issue has already been decided in favour of the assessee by the ITAT, following the aforesaid precedent we uphold the order of the ld. Commissioner of Income Tax (Appeals) and decide the issue in favour of assessee.

14. In the result, the Revenue's appeal in ITA No. 4842/Mum/2016 is partly allowed for statistical purpose and the Revenue's appeals in ITA Nos. 4843, 4844 & 4556 are dismissed.

Order pronounced in the open court on 04.01.2018

Sd/-	Sd/-
(Sandeep Gosain)	(Shamim Yahya)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 04.01.2018

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**