

**आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH : CHENNAI**

श्री अब्राहम पी. जॉर्ज, लेखासदस्य एवं श्री जॉर्ज माथन, न्यायिक सदस्य के समक्ष  
**BEFORE SHRI ABRAHAM P.GEORGE, ACCOUNTANT MEMBER**  
**AND SHRI GEORGE MATHAN, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No.2002/CHNY/2016

निर्धारण वर्ष /Assessment year : 2008-2009

M/s. Sutherland Global Services  
Private Limited,  
No.45-A, Velachery Main Road,  
Velachery,  
Chennai 600 042.

**Vs.** The Assistant Commissioner of  
Income Tax,  
Company Circle VI(4)  
Chennai.

आयकर अपील सं./I.T.A. No. 2051/CHNY/2016

निर्धारण वर्ष /Assessment year : 2008-2009

The Deputy Commissioner of  
Income Tax,  
Corporate Circle 6(2)  
Chennai.

**Vs.** M/s. Sutherland Global Services  
Private Limited,  
No.45-A, Velachery Main Road,  
Velachery,  
Chennai 600 042.

[PAN AA ECS 8093A]

**(अपीलार्थी/Appellant)**

**(प्रत्यर्थी/Respondent)**

Assessee by  
Department by

: Shri. V. Lakshmikumar, Adv.  
: Shri. Sailendra Mamidi, CIT.

सुनवाई की तारीख/Date of Hearing

: 27-02-2018

घोषणा की तारीख /Date of Pronouncement

: 27-02-2018

**आदेश / ORDER****PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER:**

These are cross appeals filed by the assessee and Revenue respectively directed against an order dated 01.03.2016 of Id. Commissioner of Income Tax (Appeals)-15, Chennai. Appeal of the assessee is taken up first for disposal.

**2. Grounds taken by the assessee are reproduced hereunder:-**

*"I. That the non-taxability of Business Development Commission having been accepted by department pursuant to the order of learned CIT(A) against TDS order under section 201 may kindly be treated as having attained finality in favour of the Appellant.*

*II That the Learned CIT(A) has erred in upholding the disallowance of Business Development Commission and arriving at the conclusion that payments made by the Appellant to US Parent Company towards Business development Commission (marketing services) result in income chargeable to tax in India: -*

*a) Ignoring the decision of Apex court in the case of Toshoku Ltd 125 ITR 525 (SC); principles laid down in Shoorji Vallabhdas v. CIT 39 ITR 775 (SC), Thiagaraja Chetty & Co. v. CIT [1] 24 ITR 535 (SC) and Madras High Court decision in the case of CIT v. Faizan Shoes Pvt. Ltd. 367 ITR 155(Mad).*

*b) Disregarding the legal position that the withdrawal of circular 23 of 1969 does not alter the law settled by Apex court rulings cited above.*

*III. Without prejudice to the generality of the foregoing, the learned CIT(A) has erred in upholding the taxability of Business development Commission Ignoring that the definition of 'fees for included services' in the India - USA DTAA is narrower compared to the definition of 'Fees for Technical services' under the Act".*

3. Grievance raised by the assessee through the above grounds is regarding a disallowance of business development commission for non deduction of tax at source.

4. Facts apropos are that assessee engaged in business process outsourcing, had filed its return of income for the impugned assessment year declaring "Nil" income under normal provisions and ₹39,64,55,782/- u/s.115JB of the Income Tax Act, 1961 (in short "the Act"). During the course of assessment proceedings, there was a reference made by the Id. Assessing Officer to the Transfer Pricing Officer (in short "Id. TPO) for ascertaining Arms Length Pricing of the international transactions undertaken by the assessee with its Associated Enterprise abroad. Id. TPO vide its order dated 27.09.2011 recommended no adjustment to the value of the international transactions. Thereafter, the Id. Assessing Officer, after studying the notes to accounts, filed by the assessee alongwith its Audited Financial Statements, found that it had paid a sum of ₹22,41,69,067/- as business development commission to one M/s. Sutherland Global Services, Inc, (in short "the SCG, USA") 1160, Pittsford, Victor Road, NY 14534, USA. This entity was the parent company of the assessee. Assessee was required to explain why deduction of tax at source as

per Section 195 of the Act was not made while effecting the above payments. Reply of the assessee could be summarized as under:-

- (i) Assessee was providing voice based services to its customers outside India.
- (ii) Promotion and marketing of its business in USA was carried on by its principal SCG, USA.
- (iii) There was a master service agreement entered by SCG USA and customers and assessee only executed work based on statement of work agreements with the customers.
- (iv) SCG, USA was having vast business experience and could generate new business for the assessee.
- (v) SCG, USA identified the market segments, assisted in structuring the relationship between assessee and its prospective customers, actively pursued generation of new business and used its contacts and knowledge to identify new customers, make representations, carried out effective pre-sale follow up, helped negotiating and closing deals.
- (vi) For the marketing and sales promotion services, assessee paid SCG, USA, @5% of its turnover.
- (vii) Commission paid to SCG, USA was for rendering services outside India and no income accrued or arose to SCG, USA in India.
- (viii) Amounts paid to SCG, USA were not chargeable to tax under the Act and therefore there was no requirement of deducting tax at source on such payments
- (ix) SCG, USA was not having any business connection in India, and hence services rendered by it would not be liable for any tax in India.
- (x) Services rendered by SCG, USA were outside India and did not arise from any business connection in India.

5. Ld. Assessing Officer after considering the above submissions of the assessee held as under:-

*"As per the provisions of Section 195, any person responsible for paying to a Non resident any sum chargeable to tax in India, which arise through Business connection in India, under the Section 9(i)(a) should suffer Tax.*

*The provisions of section 9(i)(a) also categorically says that necessary tax has to be deducted on the Business provision commission paid. Hence the said amount is disallowed under Section 40(a)(i)".*

With the above observations, he disallowed the claim u/s.40(a)(i) of the Act.

6. Aggrieved, assessee moved in appeal before the Id. Commissioner of Income Tax (Appeals). Apart from the arguments raised before the Id. Assessing Officer, assessee also raised the following contentions:-

- (i) By virtue of the judgment of Hon'ble Apex Court in the case of *CIT vs. Toshoku, 125 ITR 525*, services of SCG (USA) having been rendered outside India, it fell outside scope of Sec. 9(i)(vii) (b) of the Act.
- (ii) As per Article 12(4) of the DTAA between India and USA, unless technical knowledge was made available, payments could not be deemed as fees for technical services.
- (iii) Provision for marketing and mangement services would not be taxable as Fees for Included Services (FIS) under Article 12(4) of

the DTAA between India and USA.

- (iv) There was no technical knowledge, experience, skill, know-how or processes or technical plan or technical design made available by SGS, USA to the assessee.
- (v) What the assessee paid was 5% of the gross revenue from sale to third parties for the services rendered by SGS USA for market development

**7.** In support of the above contentions, assessee placed reliance on the above following Tribunal decisions :-

*Bharath Petroleum Corporation Ltd. vs. JDIT. (2007) 14 SOT 307, Mumbai*

*Mckinsey & Co Inc vs. ADIT (2006) 99 ITD 549, Mumbai*

*National Organic Chemical Industries vs DCIT, (2006) 5 SOT 317, Mumbai*

*DCIT vs. Boston Consulting Group Pte Ltd. (2005) 94 ITD 31, Mumbai*

*NQA Quality Systems Registrar Ld. vs. DCIT,(2005) 2 SOT 249, Delhi*

**8.** Ld. Commissioner of Income Tax (Appeals) however was not impressed by the submissions of the assessee. He held as under at paras 5.1.4 & 5.1.5 of the order:-

*'5.1.4 I have considered the AO's findings, submission of the appellant alongwith case laws cited. As per the agreement with the service provider, it is stated that Services generally; Pursuant to separate service statements attached hereto and made a part thereof, service provider shall provide to company and company shall purchase from service provider, the services described in such service statements, billing and provision of services shall be as directed by this agreement and the applicable service statement. In the event of a conflict or inconsistency between a service statement and this agreement, the service statement will control.*

*Service locations; (a) service provider shall provide the services from the locations where service provider provides the services as of the effective date or such other location as service provider may choose in its sole discretion unless the applicable service must be performed at a company location.*

*In the decision of the Supreme Court in R.Dalmia Vs CIT 106 ITR 895 in which it was pointed out that management includes the act of managing by direction, or regulation or superintendence. The service provider is not engaged in a one-time agency for merely soliciting clients but also involves itself in the broad gamut of services pertinent to the client identification, soliciting, constant feedback etc. The key factor in managerial services is coordination and marketing and convincing the prospective buyer to make the deal. Therefore, payments made to the service provider are covered under managerial services and is not commission simplicitor. Reliance is placed on SRK Consulting Engineers (1998) 230 ITR (AAR) to hold that the sum payable to non-resident is chargeable u/s. 9W(vii). Hence, TDS should be deducted u/s. 195. Since tax was not deducted payment made to non-resident is disallowed u/s 40(a)(i). Reliance is also placed on Karnataka High Court decision in the case of CIT Vs Samsung Electronics Ltd which held that effect of the judgment in Transmission Corpn. of India was that the moment there was a payment to a non-resident there was an obligation on the payer to deduct tax at source u/s 195(1). Circular No. 23 relied upon by the appellant has been withdrawn by the CBDT vide circular No. 7 of 2009 dt. 22.10.2009. Since the assessee had not*

deducted tax at source on the commission paid, the AO made disallowance u/s. 40(a)(i) of the LT. Act. The submissions made for the appellant, the assessment order and the facts on record have been considered. The 1st issue for consideration as pointed out by the AO is whether the payment is commission simplicitor, or whether this payment for fees for technical services. Section 9(i)(vii) deals with income by way of fees for technical services. Explanation 2 to Sec. 9(i)(vii) provides that for the purpose of clause (vii), "fees for technical services" means any consideration for the rendering of managerial, technical or consultancy services, but does not include consideration which would be income of the recipient chargeable under the head "Salaries". The Agency Agreement entered into by the appellant with the Sutherland Global Services states in the articles that the agent agrees to represent the principal. That the agent shall be responsible for negotiating with all parties in their territory, the agent shall travel in the territory regularly to visit customers, the agent shall assist the principal in collecting outstanding payments. The gamut of services which are being provided by Indijack Ltd. have been spelt out by the Assessing Officer in his order. It has been held in Wallace Pharmaceuticals Pvt. Ltd, in (2005) 198 CTR (AAR) 63, that consultancy services provided whether by way of promoting sales or otherwise having been utilized, by the applicant, an Indian company in India, the monthly consultancy fee as also the commission payable on the orders procured by the non-resident are deemed to be income arising to the said non-resident in India and are subject to TDS under section 195. It was held that consultancy fee payable to the non-resident for developing business with foreign customers falls within the meaning of "fees for technical services" as defined in explanation 2 to clause (vii) of subsection (i) of section 9. In the present case, Indijack Ltd. is providing composite services comprising commission agency as also services for ITA No.8822 of 2010 Armayesh Global Mumbai-A Bench promoting sales of the appellant in the foreign countries, although the nomenclature used by the appellant is commission. The payment thus falls within the meaning of "fees for technical services" which is subject to application of section 195(2) is applicable to a composite payment. In the present case therefore, since the payment made by the

*applicant to Sutherland Global Services is held to be a composite payment, the payment has an element of 'income' chargeable to tax in India, and therefore, the appellant is obligated to deduct tax at source.*

*5.1.5 The Hon'ble Punjab & Haryana High Court in the case of P.M.S.Diesels vs. CIT [ITA No.716 of 2009) (O&M) dated 29.04.2015 has held that consequences under Section 40(a)(ia) of IT Act would operate on account of failure to deduct tax at source under Chapter XVII-B of the Act and the term 'payable' has been used in that source. While disagreeing with the Hon'ble Allahabad High Court in the case of Vector Shipping Services P. Ltd., it has been held that*

*'The argument that section 40(a)(ia) applies only to amounts which are "payable" and not to amounts that are already "paid" is also not acceptable (Commissioner of Income Tax vs. Crescent Export Syndicate (2013) 216 Taxman 258 (cal) and Commissioner of Income Tax vs. Sikandar Khan N. Tunwar (2013) 357 ITR 312 (Guj) followed. Though in Commissioner of Income Tax vs. M/s.. Vector Shipping Services (P) Ltd (2013) 262 CTR (All) 545, 357 ITR 642 it was held that no disallowance could be made u/s 40(a) (ia) as no amount remained payable at the year end and the Special decision of the Tribunal in Merilyn Shipping & Transports, 136 ITD 23 (SB)(Vishakhapatnam) was noted, this cannot be agreed with as there is no reasoning for the finding. The dismissal of the department's petition for special leave to appeal (SLP) was in limine. The dismissal of the SLP, therefore, does not confirm the view of the Al/ahabad High Court. As held by the Supreme Court in V.M.Salgaocar & Bros.(P) Ltd.etc. Vs. Commissioner of Income Tax, etc. (2000) 243 ITR 383 (SC) and in Supreme Court Employees Welfare Association Vs. Union of India (1989) 4 SCC 187, when an SLP is summarily dismissed under article 136 of the Constitution, the Court does not lay down" any law and that the dismissal of an SLP in limine by a non speaking order does not justify any inference that the contentions raised on the merits of the case have been rejected."*

*The Hon'ble Punjab & Haryana High Court has stated that dismissal of SLP does not confirm the view taken*

*by Allahabad High Court. Since the latest decision of Punjab & Haryana High Court is in favour of revenue which has not been examined by the Jurisdictional Tribunal so far, the cases cited by the appellant do not help it. Following the decision of Hon'ble Punjab & Haryana High Court, the action of AO in disallowance u/s 40(a)(ia) is confirmed. These grounds of appeal are dismissed.*

**9.** Now before us, Id. Authorised Representative strongly assailing the orders of the lower authorities submitted that 99% of the Revenue of the assessee was from export of services. According to him, assessee was running call centers and its customers were canvassed by its in principal USA. Relying on an Inter Company Services Agreement dated 1<sup>st</sup> July, 2005, Id. Authorised Representative submitted that services provided by SGS, USA were described, therein as under:-

- 1 Services Description: Service provider will provide company support as requested by company for company's business development activities, including the following:-
  - 1.1 Sales*
  - 1.2 Marketing and*
  - 1.3 Lead generation**
- 2 Location of services. At the facilities of service provider or as may be determined at the sole discretion of service provider*
- 3 Personal. As designated from time to time by service provider*
- 4 Fees. An amount equal to five percent (5%) of the gross revenue recognized by company from the sale of its services to third parties. Gross revenue shall not include any reimbursement of costs or other expenses by third parties for this fee calculation.*
- 5 Cost Reimbursement. None*

According to him, there was no element of any technical services in the work done, by the said SGS, USA. As per the Id. AR what was received by the assessee was purely marketing services. To a question from the Bench, regarding the method in which assessee was billing its customers, Id. Authorised Representative submitted that assessee was following a cost plus method. Id. Authorised Representative stressed that there was no recommendation by the Id. TPO for any adjustment on the value of the international transactions with Associated Enterprise. When the Bench sought copies of the Transfer Pricing Study of the assessee and copies of the bills raised by SGS, USA on the assessee and the assessee on its customers, Id. Authorised Representative submitted that these were not relevant. According to him, issue before the Tribunal was confined to the nature of services rendered by SGS, USA and whether assessee was liable to deduct tax at source. As per the Id. Authorised Representative, this Tribunal could not look beyond the facts necessary for adjudicating the issue in hand and hence it was not required for the Tribunal to look into the TP study. Reliance was placed on the judgment of Hon'ble Apex Court in the case of *Hindustan Petroleum Corporation Ltd vs. Darius Shapur Chennai and Others, (Civil Appeal No.2253 and 2254 of 2005, dated 20.09.2005)*. Specific reliance was placed on the following observations of the Hon'ble Apex Court.

*'The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observation of Bose, J. in Gordhandas Bhanji;;*

According to the Id. Authorised Representative, services rendered by the principal of the assessee abroad was purely in the nature of marketing and assessee was paying commission for such services. As per the Id. Authorised Representative, assessee was not required to deduct tax at source on such payments either under the Act or under DTAA between India and USA. Hence, his submission was that lower authorities fell in error in invoking Section 40(a) (i) of the Act and making a disallowance.

**10.** Per contra, Id. Departmental Representative strongly supported the orders of the lower authorities.

**11.** We have considered the rival contentions and perused the orders of the authorities below. What we find is that assessee had never raised a plea before the Id. Assessing Officer regarding application of DTAA between India and USA. In fact, the only

finding given by the Id. Assessing Officer was that the payments effected by the assessee to its principal abroad was liable for deduction of tax at source u/s.195 of the Act. There is no specific finding by the Id. Assessing Officer, on the nature of the payments made by the assessee to SGS, USA nor has he given the specific reasons why he considered it to be liable for deduction of tax at source. As against this, assessee had indeed raised a contention before the Id. Commissioner of Income Tax (Appeals) that the payments could not be considered as technical services even under DTAA. In our opinion, the nature of the services rendered by its principal to the assessee is not clear from the records. Assessee did not produce the transfer pricing study nor the order of the Id. TPO, before us, which could have given a fair idea of the nature of services rendered by SGS, USA. Further, assessee also did not produce the invoices raised by SGS USA for services rendered by it, nor any communication between the said company and the assessee. Before coming to a conclusion whether services rendered by SGS USA to the assessee was of a nature which required deduction of tax at source as per Section 195 of the Act, it is required to have a look on all the underlying documents. In our opinion, lower authorities should have made a thread-base study of the invoices, agreements entered between the assessee and its customers and the communication

exchanged between assessee and SGS USA as well as assessee and its customers abroad. It was also necessary to verify the cost plus method followed by the assessee for its billing and verify what part of its profit were transferred to SGS USA, and whether such transfer was effectively for shifting of profits camouflaging it as commission. A wholesome view was not taken by any of the lower authorities. Coming to the judgment of Hon'ble Apex Court in the case of *Hindustan Petroleum Corporation Ltd (supra)* relied on by the Id. Authorised Representative, the Revenue in the said case had tried to supplement the finding of the Id. Assessing Officer. In our opinion, this Tribunal being the final fact finding body, cannot be restrained from looking into all the facts that are associated with an issue raised before it, which have a bearing on the ultimate adjudication of such issue. In our opinion, the judgment relied on by the Id. Authorised Representative, will not stop this Tribunal from looking into TP study of the assessee which is very relevant in ascertaining the nature services rendered by the SGS USA. In the fitness of the things, we are of the opinion that the issue requires a fresh look by the Id. Assessing Officer. Id. Assessing Officer has to go through all the necessary documentations and come to a decision whether the payments made by the assessee to SGS USA required deduction of tax at source under the Act and whether there was any concerted effort to

shift profits by camouflaging it as commission on sales. We therefore set aside the orders of the lower authorities and remit the issue back to the Id. Assessing Officer for consideration afresh, denovo, in accordance with law.

**12.** Now, we take up the appeal of the Revenue. Sole grievance of the Revenue is regarding directions of the Id. Commissioner of Income Tax (Appeals) allowing the set off the loss one of the STP unit of the assessee against business income from others.

**13.** In our opinion, the issue raised by the Revenue stands settled in favour of the assessee by the judgment of Hon'ble Apex Court in the case of *CIT vs. Yokogawa India Ltd (2017) 145 DTR 0001*. Considering the above judgment, we are of the opinion that Id. Commissioner of Income Tax (Appeals) was justified in directing the Id. Assessing Officer to allow the set off loss on the STP unit against income from other units. We do not find any reason to interfere with the order of the Id. Commissioner of Income Tax (Appeals) in this regard.

**14.** In the result, the appeal of the assessee is allowed for statistical purpose whereas that of Revenue stands dismissed.

Order pronounced in the open court at the time of hearing on 27<sup>th</sup> February, 2018, at Chennai.

**Sd/-**

(जॉर्ज माथन)

**(GEORGE MATHAN)**

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai

दिनांक/Dated:27th February, 2018.

**KV**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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

**Sd/-**

(अब्राहम पी. जॉर्ज)

**(ABRAHAM P. GEORGE)**

लेखा सदस्य/**ACCOUNTANT MEMBER**