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

ITA No. 6365/Del/2017
(Assessment Year: 2014-15)

M/s. Inspectorate International Ltd, 2, Perry Road, Witham Essex, England CM83TU, PAN: AACCI3544A	Vs.	ACIT, Circle-2(1)(1), International Taxation, New Delhi
(Appellant)		(Respondent)

ITA No. 4938/Del/2016
(Assessment Year: 2010-11)

M/s. Inspectorate International Ltd, 2, Perry Road, Witham Essex, England CM83TU, PAN: AACCI3544A	Vs.	ACIT, Circle-2(1)(1), International Taxation, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Gagan Kumar, Adv Shri Amit Kaushik, Adv
Revenue by:	Shri Surender Pal, Sr. DR
Date of Hearing	21/03/2018
Date of pronouncement	18/06/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the ld Assessing Officer/ DCIT, Circle-2(1)(1)(1), New Delhi dated 25.08.2017 for the Assessment Year 2014-15 U/S 144c(13) read with section 143(3) of the Income Tax Act, 1961 in pursuance of direction of the ld Dispute Resolution Panel wherein the only issue involved is that whether Rs. 18772897/- being amount received by the assessee from its Indian customers is chargeable to tax as fees for technical services as per Double Taxation Avoidance Agreement between India and United Kingdom (in short DTAA).

2. The assessee has raised the following grounds of appeal in ITA No. 6365/Del/2017 for the AY 2014-15:-

"1. That the AO/ DRP grossly erred in law and on the facts and circumstances of the case in confirming and addition of Rs. 18772897/- in the income of the appellant.

2. That the AO/ DRP grossly erred in law and on the facts and circumstances of the case in making an addition of Rs. 18772897/- to the income of the appellant thereby in treating the income received by the appellant from its Indian customers as Fees for Technical Services (FTS) ignoring the provisions of Article 13 of India-UK Double Taxation Avoidance Agreement (India-UK DTAA).

3. That the AO/ DRP grossly erred in law and on the facts and circumstances of the case in treating the amount received by the assessee from its Indian Customers as its income as the same has not accrued or arisen in India.

4. That on the facts and in law, the ld AO erred in initiating penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961.

5. That the ld AO has erred in levying interest under section 234B and 234C of the Act."

3. The brief facts of the case shows that the assessee is a company filed its return of income on 13.09.2014 declaring total income at Rs. Nil. The assessee is foreign company resident of UK. It is claimed that customers of the company in India appoint the assessee at a principal to principal basis to provide certain inspection and testing services for UK. For this purpose customers placed the work order at assessee specifying the scope of work to be carried out in UK. During the Assessment Year the assessee received Rs. 18772897/- from customers in India. Before the ld AO the assessee submitted the copies of the invoices. However, the ld AO asked the assessee that why the above sum should not be treated as business income and royalty/ FTS and taxed accordingly. The assessee submitted that the assessee is a company from UK and therefore, is entitled to the benefit of DTAA between UK and India. It was further stated that fees for technical services should satisfy the

condition of "make available" to be taxed in India. It was stated that the above test is not satisfied and therefore, same is not chargeable to tax in India. The assessee further relied on several decision to support its case. The ld AO held that income is chargeable to tax according to Income Tax Act, 1961 u/s 9(1)(vii)(2) of the Act and further as per article 13 of the DTAA it is chargeable to tax as technical services. After relying on many decisions, it was held that in the present case the recipient of the services is in a position to derive an enduring benefit and is in position to utilise knowledge in future on its own. He therefore, held that services rendered by the assessee are in the nature of inspection, testing and evaluate quality of services provided and ascertain suitability of such products. Therefore, he held that recipient gets equipped of carrying on of business model on their own without reference to the service provider and hence, service provided by the assessee fall within the ambit of 'make available' technical knowledge under the tax treaty'. Consequently, he held that Rs. 18772897/- is chargeable to tax as fees for technical services. The draft assessment order was passed on 31.10.2016. The assessee preferred objections before the ld Dispute Resolution Panel-I, New Delhi. The ld Dispute Resolution Panel issued its direction on 27.06.2017 holding that the ld AO has considered all the arguments of the assessee. It was further held that there is no error in the order of the ld AO in holding that the assessee services satisfy the 'make available' test and therefore, the decision of the ld AO is justified. Consequently, final order was passed by the ld AO on 25.08.2017 taxing the above sum as fees for technical services therefore, the assessee is in appeal before us.

4. The ld AR submitted a detailed note on nature of services provided to Indian customers at page NO. 4 of his paper book. He submitted that the assessee has provided the services of supervision of weighing, sampling and control cargo determination, sample preparation and analysis. It is also carried out crude oil vessel inspection. It was also

carried out analysis of platinum and copper concentrate. He further stated that in most of cases the place of services rendered is outside India. He further stated that this company issues certificate to the recipient of the services for the work carried out. The payment received by the assessee is outside India. He further referred to various invoices and certificate issued and submitted that there is no way if the services are not rendered by the assessee it can be done by the assessee himself. With respect to the various certification he stated that these are the specified certificates issued by the assessee to the recipient of the services. He further stated that they do not 'make available' those services to the assessee. In view of this he submitted that sum are not chargeable to tax in India in view of the DTAA between India and UK. He therefore, submitted that though income is chargeable to tax in India according to domestic tax laws u/s 9(1) but as assessee is a resident of UK it gets the benefit of the DTAA according to which the fees for technical services if not 'made available' recipient of the services is not chargeable to tax in India. He further placed reliance on the decision of the coordinate bench in case of ACIT Vs. DA Javery and Hon'ble Karnataka High Court in case of CIT Vs. DE Beer India Minerals Pvt. Ltd 346 ITR 467. He further submitted a chart on various decisions to support his claim.

5. The ld DR vehemently stated that the ld DRP has also relied upon 12 judgments to show that the assessee has made the service available to the recipient of the services. He therefore, submitted that there is no reason to state that the assessee has not made available the services to the recipient. In view of this he submitted that there is no error in the order of the ld AO which was passed after the direction of the ld Dispute Resolution Panel.

6. We have carefully considered the rival contentions and also perused the orders of the ld AO as well as the ld DRP. The brief facts shows that the assessee company in incorporated in the United Kingdom and is tax

resident of UK. It is not in dispute that the assessee is eligible for the benefit of Indo-UK DTAA. The assessee is principally engaged in the business of providing inspection and testing of wide range of commodities of metal and mineral, oil and petro chemical. The customers of the assessee in India appoints the assessee on a principal to principal basis to provide inspection and testing services. The assessee provides those services mostly outside India. The issue before us has been tabulated at page 4 of the paper book wherein, the assessee has submitted the nature of services, place of services rendered and the country which issue the invoices. Based on the above chart assessee received Rs. 187.72 lacs from the customers in India towards these services. Therefore, the limited issue before us is that whether the same are chargeable to tax in India according to the domestic tax laws as well as according to the Indo-UK Double Taxation Avoidance Agreement. There is no dispute between the parties that the above sum is chargeable to tax according to the provisions of domestic tax laws. Therefore, only issue to be examined is whether the above sum can be taxed in India as per the Articles of Indo-UK Double Taxation Avoidance Agreement. The claim of the assessee is that above sum is chargeable to tax as fees for technical services as per article 13(4)(c) of DTAA if the assessee 'makes available' technical, knowledge, experience, skill etc to the Indian entities. The ld Assessing Officer has agreed that the services provided by the assessee are technical in nature. According to him as the assessee is also carrying analysis, testing and inspection, hence, it is providing the consultancy services also. He therefore, held that on close scrutiny of nature of services the service recipient get equipped to carry on that business model or service model on their own without reference to the service provider. Therefore, according to him such services fall within the ambit of making available technical knowledge under the tax treaty. The ld Dispute Resolution Panel also agreed with the order of the ld Assessing Officer and

accordingly, sum received of Rs. 187.72 lacs was considered as fees for technical services. Now coming to the nature of services rendered by the assessee to the various entities, the assessee has provided services to M/s. Hindalco Ltd and the nature of services is umpire instruction based on which a certificate of Umpire Analysis was given. For the certification there were different methods such as F25, G18, I18, i20 and I23 were employed. It also certified the state of material and element of such certification. The another services rendered to Hindalco Industries Ltd is with respect to weighing, sampling the moisture determination services. After providing these services a certificate of inspection was also provided. The service provided to Grifith India also involvd chemical analysis of different products and then providing a certificate thereof. The services of Indian Oil Corporation is inspection of the vessel on arrival. The services provided to Dell International is also with respect to data security audit and auditing. The services provided to Nirma was also with respect to the certificate of analysis of various parameters of spent pacol catalyst. The services provided to Vedanta Ltd is also pertaining to chemical certification of material. Undoubtedly all the above services provided by the assessee are in the nature of technical analysis and unless the assessee is able to perform those services independently without the help of the service provider then only it can be said that services have been 'made available' by the service provider to the service recipient. According to Article 13 of Double Taxation Avoidance Agreement the fees for technical services can be chargeable to tax in India only such services are 'made available' to the receipt of such services. According to us, the assessee has not at all made available any such services to the Indian entity but has merely provided the services in the ordinary course of its business. We have also perused the several decision cited by both the parties. However, they are with respect to the nature of services involved therein. The revenue has not brought on any material to show that subsequently the

recipient of those services have performed these services on their own without the help of the assessee or any other similar service provider. Inspection and survey of imported/exported cargo and certifying in relation to the quality and price, provision of such services does not make available technical knowledge, experience, skill, know-how or processes to the recipient of the service. Hence, we are of the opinion that the fees for technical services earned by the assessee is not chargeable to tax in India according to Article 13(4)(c) of the DTAA as these services are not made available to the Indian parties. Accordingly, we held that Rs. 18772897/- received by the assessee is not chargeable to tax in India. Accordingly, ground No. 1 to 3 of the appeal are allowed.

7. Ground No. 4 to 6 are now academic or consequential in nature therefore, they are not adjudicated and hence, dismissed.

8. In the result ITA No. 6365/Del/2017 is partly allowed.

9. Now we come to ITA NO. 4938/Del/2016 for AY 2010-11 against the order of the ld CIT(A)-43 dated 30.06.2016 wherein penalty levied by the ld AO u/s 271(1)(c) of the Act of Rs. 1715113/- is confirmed.

10. The assessee has raised the following grounds of appeal in ITA No. 4938/Del/2016 for the AY 2010-11:-

"*1. That on the facts and circumstances of the case, the order under section 250 of the Act dated 30n June 2016 passed by the Commissioner of Income Tax (Appeals) ["CIT(A)"]confirming the penalty imposed u/s 271 (1)(c) ("Impugned Order") by the Learned Assessing Officer ("Ld. AO")dated 27th November, 2013 is erroneous and bad in law.*

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) grossly erred in law and on facts of the case in passing the impugned order without appreciating that the penalty proceedings were initiated for 'furnishing inaccurate particulars while penalty u/s 271 (1)(c) was imposed for 'concealment of income'.

3. That the Ld. CIT (A) erred in law and on facts of the case in passing the impugned order without appreciating that the Ld. AO failed to establish that the Appellant has submitted inaccurate

particulars of income while levying the penalty under section 271(1)(c) of the Act.

4. *That on the facts and in the circumstances of the case, the Ld. C1T(A) grossly erred in law and facts of the case in passing the impugned order without appreciating that income of the appellant was not even subject to tax in India by virtue of the provisions of the Act read with the applicable articles of the Double Taxation Avoidance Agreement between India and United Kingdom.*
5. *That on the facts and in the circumstances of the case, the Ld. CIT(A) grossly erred in law and facts of the case in passing the impugned order without appreciating that penalty u/s 271(1)(c) of the Act cannot be levied on a contentious issue*
6. *That on the facts and in the circumstances of the case, the Ld. CIT(A) grossly erred in law and facts of the case in passing the impugned order without appreciating that the Appellant had neither concealed particulars of income nor furnished inaccurate particulars of such income."*

11. The brief facts of the case are that the assessee filed its return of income on 27.09.2010 declaring Nil income. The assessee received fees for technical services from its customers in India of Rs. 17151133/- and same was held to be fees for technical services chargeable to tax according to Article 13 of Indo-UK DTAA as well as domestic tax provisions. The ld Assessing Officer also invoked the provisions of section 271(1)(c) of the Act holding that assessee has furnished inaccurate particulars of income by not offering the receipts as fees for technical services. During the penalty proceedings assessee submitted its reply and submitted that it has not made such services available to the recipient to those services and therefore, it is not chargeable to tax in India as per article 13(4)(c) of the Act. The assessee further stated that it has neither furnished inaccurate particulars of the income and hence, not liable for penalty. The ld Assessing Officer rejected the contention of the assessee and held that the explanation furnished by the assessee is not satisfactory and levied the penalty of Rs. 1715113/-. The assessee carried the matter before the ld CIT(A), who confirmed the penalty as assessee did not file the copies of the agreement with the

client. Therefore, he held that appellant had concealed the particulars of the income.

12. The ld Authorised Representative on appeal before us contesting the various grounds submitted that income of the assessee itself is not chargeable to tax in India. He submitted a paper book wherein, the nature of services rendered by the assessee to the customers is described. He submitted that such services are similar to the services in ITA NO. 6365/Del/2017 for AY 2014-15 in case of the assessee. He further stated that merely because the contention of the assessee that such services are not made available to the Indian service recipient the amount was charged to tax. It cannot be said that the contention of the assessee is not sustainable. He therefore, stated that penalty cannot be levied u/s 271(1)(c) of the Act.

13. The ld Departmental Representative relied upon the orders of the lower authorities.

14. We have carefully considered the rival contentions and perused the orders of the lower authorities. The assessee is providing the services of technical nature. It is undisputedly the resident of UK and therefore, is eligible for benefit contained therein. The assessee submitted that the services of the assessee are not made available to the Indian entities. Such explanation of the assessee was rejected. We have held in the case of the assessee in AY 2014-15 that such services does not satisfy "make available" test under Article 13(4)(c) of the DTAA. Therefore, for the impugned year though income of the assessee was taxed but whether the penalty can be levied u/s 271(1)(c) or not is the issue before us. According to us it is merely the rejection of the claim of the assessee. It is not the case of the revenue that assessee has made any false claim. Therefore, in view of the decision of the Hon'ble Supreme Court in case of CIT Vs Reliance Petro Products Ltd 322 ITR 158 it cannot be said that the submission or claim of the assessee is not accurate. In view of this we reverse the finding of the lower authorities

and direct the AO to delete the penalty u/s 271(1)(c) of the Act of Rs. 1715113/-.

15. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 18/06/2018.

-Sd/-	-Sd/-
(H.S.SIDHU) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated: 18/06/2018
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi