

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.1483/Chny/2017

निर्धारण वर्ष / Assessment Year : 2013-14

M/s Panasonic Corporation,
C/o Panasonic India Pvt. Ltd.,
12th floor, Ambience Corporate
Office, Tower-2, Ambience Island,
NH-8, Gurgaon 122002, Haryana.

v. The Deputy Commissioner of
Income Tax,
International Taxation -2(2),
Chennai - 600 006.

PAN : AAACM 7746 A

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri R.K. Kapoor, FCA

प्रत्यर्थी की ओर से/Respondent by : Shri M. Sreenivasa Rao, CIT

सुनवाई की तारीख/Date of Hearing : 12.07.2018

घोषणा की तारीख/Date of Pronouncement : 02.08.2018

आदेश / O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

This appeal of the assessee is directed against the order passed by the Assessing Officer consequent to the direction issued by the Dispute Resolution Panel dated 24.03.2017 and pertains to assessment year 2013-14.

2. The first issue arises for consideration is failure of the Assessing Officer to give TDS in respect of royalty income of ₹1,15,84,022/-.

3. Shri R.K. Kapoor, the Ld. representative for the assessee, submitted that M/s Panasonic Carbon India deducted tax at source while making payment towards royalty to the extent of ₹1,15,84,022/-. However, the Assessing Officer has not given any credit.

4. We heard Shri M. Sreenivasa Rao, the Ld. Departmental Representative, also. According to the Ld. D.R., the Assessing Officer can verify the fact of deduction of tax and may pass order in accordance with law.

5. We have considered the rival submissions on either side and perused the relevant material available on record. Even though the Ld. representative for the assessee claims that Panasonic Carbon India deducted tax of ₹1,15,84,022/-, it is not known for which year the tax was deducted and whether the corresponding income was declared by the assessee for taxation during the year under consideration need to be examined by the Assessing Officer.

Therefore, this Tribunal is of the considered opinion that as rightly submitted by the Ld. D.R., the fact needs to be verified by the Assessing Officer. Accordingly, the order of the Assessing Officer is set aside and the issue of TDS credit by Panasonic Carbon India and royalty of ₹1,15,84,022/- is remitted back to the file of the Assessing Officer for reconsideration. The Assessing Officer shall re-examine the matter in the light of the material that may be filed by the assessee and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

6. The next issue arises for consideration is treating ₹7,14,097/- as income of the assessee without allowing corresponding tax deducted at source.

7. Shri R.K. Kapoor, the Ld. representative for the assessee submitted that tax was deducted to the extent of ₹73,734/- at source and the same was also reflected in Form 26AS. However, according to the Ld. representative, the Assessing Officer has not given credit to the tax deducted.

8. We heard Shri M. Sreenivasa Rao also. If the tax was deducted at source in respect of income of ₹7,14,097/- for the year

under consideration, it is not known why the tax deducted was not given credit? Therefore, this Tribunal is of the considered opinion that the matter needs to be re-examined by the Assessing Officer. Accordingly, the order of the Assessing Officer is set aside and the issue is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine whether the income of ₹7,14,097/- is taken as income by the assessee. It also needs to be verified whether tax was deducted at source in respect of the income of ₹7,14,097/- and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

9. The next issue arises for consideration is assessment of ₹1,49,48,380/- said to be received from M/s Panasonic Appliances India Co. Ltd. towards royalty.

10. Shri R.K. Kapoor, the Ld. representative for the assessee, submitted that the royalty income of ₹1,49,48,380/- is taxable on receipt basis as per Article 12(4) of Double Taxation Avoidance Agreement between India and Japan. On receipt basis, the assessee has already disclosed the income of ₹1,49,48,380/- during the assessment year 2015-16. Therefore, according to the Ld.

representative, it cannot be assessed for the year under consideration.

11. On the contrary, Shri M. Sreenivasa Rao, the Ld. Departmental Representative, submitted that M/s Panasonic Appliances India Co. Ltd. disclosed in Form 3CEB the details of payment of royalty to the assessee. Therefore, according to the Ld. D.R., the Assessing Officer has rightly brought to tax during the year consideration.

12. We have considered the rival submissions on either side and perused the relevant material available on record. M/s Panasonic Appliances India Pvt. Ltd. apparently reported the royalty payable to the assessee in Form 3CEB. Correspondingly, the assessee has reported the same in Form 3CEB. The assessee claimed before the Assessing Officer that a provision was made by M/s Panasonic Appliances India Co. Ltd. and no tax was deducted on the said sum. These details have not been verified by the Assessing Officer. Therefore, this Tribunal is of the considered opinion that the Assessing Officer has to re-examine the issue afresh. Accordingly, the order of the Assessing Officer is set aside and the entire issue is remitted back to the file of the Assessing Officer. The Assessing

Officer shall re-examine the matter and thereafter decide the issue afresh in accordance with law, after giving a reasonable opportunity to the assessee.

13. The next issue arises for consideration is reimbursement of employee cost / secondment of employee.

14. Shri R.K. Kapoor, the Ld. representative for the assessee, submitted that M/s Panasonic Corporation is a company incorporated in Japan. M/s Panasonic Corporation engaged itself in the business of development, production and sale of electrical and electronic products, systems and components for a wide range of consumer, business and industrial uses. According to the Ld. representative, during the course of business activity, M/s Panasonic Corporation Japan deputed some of its employees to M/s Panasonic India Pvt. Ltd. The salary of the employees of M/s Panasonic Corporation Japan, who are working in India, was reimbursed by M/s Panasonic India Pvt. Ltd. According to the Ld. representative, the assessee-company paid salary initially which was reimbursed by M/s Panasonic India Pvt. Ltd. Since it is only a reimbursement, according to the Ld. representative, it cannot be taxed as income in the hands of the assessee.

15. Referring to the order of the Transfer Pricing Officer, the Ld. representative for the assessee submitted that the Transfer Pricing Officer found that no adjustment is considered necessary to the value of international transaction entered into by the assessee. In fact, according to the Ld. representative, the reimbursable expenditure received by the assessee was considered specifically by the Transfer Pricing Officer and found that no adjustment is required. Once the Transfer Pricing Officer found that no adjustment is required, according to the Ld. representative, the Assessing Officer is bound by the finding recorded by the Transfer Pricing Officer and pass an order as per the order of the Transfer Pricing Officer. Referring to Section 92CA(4) of the Act, the Ld. representative submitted that the Assessing Officer is bound to follow the order of the Transfer Pricing Officer. The Ld. representative also placed his reliance on several judgments including that of the Supreme Court.

16. On a query from the Bench, when the Assessing Officer referred the matter to the Transfer Pricing Officer for determination of arm's length price in respect of the cost of salary received from Panasonic India Pvt. Ltd., and instead of passing order in

compliance to the order of the Transfer Pricing Officer as required under Section 92CA(4) of the Act, preferred to pass a draft assessment order as provided in Section 144C(1) of the Act, whether the assessee is challenging the jurisdiction of the Assessing Officer to pass a draft assessment order under Section 144C(1) of the Act instead of passing order under Section 92CA(4) of the Act? The Ld. representative for the assessee very fairly submitted that the assessee is not challenging the jurisdiction of the Assessing Officer to pass the draft assessment order under Section 144C(1) of the Act. According to the Ld. representative, the reimbursement of salary cannot be considered to be income in the hands of the assessee. Therefore, there is no question of any addition or disallowance in the hands of the assessee while computing the taxable income.

17. The Ld. representative for the assessee further submitted that the very object of secondment of employees was to support the Indian subsidiary company by a parent company. There was no economic benefit to the assessee-company. Therefore, according to the Ld. representative, the judgments of various Courts referred by the Assessing Officer in the draft assessment order as well as by

the Dispute Resolution Panel in its order are not applicable to the facts of the case. According to the Ld. representative, what was received by the assessee from Panasonic India Pvt. Ltd. is only a reimbursement of cost of salary of the employees. Therefore, according to the Ld. representative, the same cannot be construed as income, hence, the Assessing Officer is not justified in assessing the same as income of the assessee.

18. On the contrary, Shri M. Sreenivasa Rao, the Ld. Departmental Representative, submitted that it is not a case of transfer pricing adjustment as projected by the Ld. representative for the assessee. No doubt, according to the Ld. D.R., the Transfer Pricing Officer in his order suggested that no adjustment was required in respect of the payment received by the assessee from its Indian subsidiary company, namely, Panasonic India Pvt. Ltd. towards reimbursement of cost of employees deputed to the Indian company. According to the Ld. D.R., the Assessing Officer has passed draft assessment order since the assessee has not deducted tax while making payment to the employees of Panasonic Corporation Japan in India. According to the Ld. D.R., what was received by the assessee is fee for technical services.

Moreover, the salary paid by the assessee is subjected to taxation in India. The employees are bound to pay tax in India. According to the Ld. D.R., the assessee-company is, therefore, liable to deduct tax while making payment to the employees of Panasonic Corporation Japan in India. Admittedly, tax was not deducted. Therefore, according to the Ld. D.R., the Assessing Officer disallowed the claim of the assessee while passing draft assessment order under Section 144C(1) of the Act.

19. Shri M. Sreenivasa Rao, the Ld. D.R. further submitted that the assessee filed objections before the Dispute Resolution Panel. The Dispute Resolution Panel after considering the objections of the assessee, found that the assessee is liable to pay tax. According to the Ld. D.R., the assessee contended before the Dispute Resolution Panel that the reimbursement was on account of social security benefits / staff welfare of such employees, which was required to be deposited in Japan. According to the Ld. D.R., the Dispute Resolution Panel directed the assessee to reconcile the receipts to the actual payments so as to verify the veracity of the claim made by the assessee by an order sheet entry dated 15.02.2017. However, the assessee could not explain / reconcile before the

Dispute Resolution Panel. The Ld. D.R. further submitted that no such reconciliation was made even before the Assessing Officer. Therefore, according to the Ld. D.R., the Dispute Resolution Panel found that routing salary through the assessee serves two major purposes for the assessee. Firstly, to have a complete control on the seconded employees. Secondly, to not let the customer know as to what is the actual salary of these employees and how much margin was kept by the assessee. What was received by the assessee is fee for technical service. The service rendered by the employees of the assessee clearly demonstrates that the technology was made available to the Indian subsidiary, therefore, there is no need for the assessee's employees to come again.

20. We have considered the rival submissions on either side and perused the relevant material available on record. It is not in dispute that the Transfer Pricing Officer found that there was no adjustment required in respect of reimbursement of salary cost received by the assessee towards employees deputed to Panasonic India Pvt. Ltd. Taking advantage of the Transfer Pricing Officer's order, the Ld. representative for the assessee claimed before this Tribunal that the Assessing Officer is bound by the order of the

Transfer Pricing Officer, therefore, he is bound to pass an order in conformity with the order of the Transfer Pricing Officer. On a query from the Bench, when the Assessing Officer chose to pass a draft assessment order under Section 144C(1) of the Act instead of passing an order in conformity with the order of the Transfer Pricing Officer, whether the assessee is challenging the jurisdiction of the Assessing Officer in passing the draft assessment order, the Ld. representative for the assessee very fairly submitted that he is not challenging the jurisdiction of the Assessing Officer in passing the draft assessment order under Section 144C(1) of the Act. In view of this submission of the Ld. representative for the assessee, we are not going into the controversy whether the Assessing Officer can pass a draft assessment order under Section 144C(1) of the order instead of passing an order in conformity with the order of the Transfer Pricing Officer as provided under Section 92CA(4) of the Act.

21. Now, coming to merit of the appeal, the Assessing Officer disallowed the claim of the assessee only on the ground that the assessee received assessee fee for technical service. The Assessing Officer and DRP also found that the technical knowledge

was made available to the Panasonic India Pvt. Ltd. The assessee also could not file reconciliation with regard to receipt and the actual payment made by the assessee before the DRP and before this Tribunal. The Assessing Officer as well as the DRP found that the payment received by the assessee is for technical service. The Assessing Officer has observed as under:-

- "The personnel seconded are all in senior Technical / Managerial positions who report to the president and vice president who in turn report to the assessee and hence the ultimate responsibility and the direction, control and supervision of the personnel vested with Panasonic Japan.
- The case of employment with Panasonic India is, unlike an independent employment comes with a lien marked on the employment with the parent and the employee is not at a free will to move anywhere but only to go back to the parent on expiry of their tenure.
- The employees never ceased to be the employees of overseas entities. As submitted by assessee there are no termination of employment with Panasonic Corporation. Hence the salary paid to the employees of Panasonic Corporation has borne out of the inherent obligation in the Panasonic Corporation as the employer.
- Panasonic Japan on a request / requisition from Panasonic India deposes its / group entities staff based on Indian company's requirement. The personnel seconded are all in the Senior Managerial positions. On completion of their tenure, the personnel are repatriated to the parent company. The personnel retain their lien when they come to India. They lend

their experience as an employee of Panasonic Japan only and not otherwise as the groups / processes standards are sought to be implemented.

- The deputed personnel have come to India, to imbibe the culture of the group and ensure the application of the Panasonic group policies / processes and other quality standards in Panasonic India. This clearly demonstrates once the processes and policies are imbibed / retained, there is no need for the personnel again and Panasonic India can apply the same by itself. Hence the services have also made available the technical knowledge / skill and experience."

22. The DRP has observed as follows at para 4.4 of its order:-

"4.4. Thus these employees had just been deputed with Panasonic India for providing certain services to it as they had specific skill set and expertise. As per clause B on page 1 of the agreement, the Panasonic India requires support from the assessee as the expertise can be provided by its staff alone and not by local recruitment. In its reply dt 28.09.2016, the assessee had submitted that the purpose of seconding these employees was the utilization of technical as well as leadership skills of the group entities for specific time and establishing the global practices in new markets etc. for the Indian entities to which they were deputed. These aspects make it evident that the agreement for seconded employees with the AE is nothing but provision of certain technical services being provided by the assessee to Panasonic India. The mere fact that as per the agreement these employees would be performing under direction and control of the assessee, does not change their status of employment with the assessee, of which they are employees. This is a very common method, which a service provider uses for providing services to its customers. The service provider deposes its employees with the customer and those employees perform the requisite tasks or provide requisite services to the customer. Here in this case the work being

performed by the employee for the parent employer is providing services to the customer, while the work performed for the customer, with whom he is deputed, is the providing requisite services. This kind of functioning is not only prevalent in private sector but in Government sector also, when employee of one Government (say Central Government) moves to the State Government or vice versa on deputation etc."

23. Moreover, the DRP placed its reliance on the decision of Bangalore Bench of this Tribunal in Food World Supermarkets Ltd. v. DDIT (International Taxation) (2015) 63 taxmann.com 43. The DRP concluded that the receipt has to be considered as fee for technical services in respect of non-resident irrespective of the fact whether it was received with mark up or cost to cost basis. The DRP also placed its reliance on the judgment of Delhi High Court in Centrica India Offshore (P.) Ltd. v. CIT (2014) 44 taxmann.300. After referring to the failure of the assessee to reconcile the receipts to the actual payments in order dated 15.02.2017, the DRP found that what was reimbursed is a part of salary and it is not social security benefit alone. This observation of the Assessing Officer as well as DRP could not be controverted by the assessee by producing necessary material before this Tribunal. In view of the fact that the employees of Panasonic Corporation Japan are all senior technical / managerial position who reported to the President and Vice President who, in turn, was expected to report to the

assessee herein, the seconded employees have to work as per the direction, control and supervision of the Panasonic Corporation Japan. Since the employees deputed by the assessee are high level technical executives and they are rendering highly technical services to Panasonic Corporation India Pvt. Ltd., the payments for such services would fall within the ambit of fee for technical services as defined in Explanation 2 to Section 9(1)(vii) of the Act. Moreover, as rightly observed by the Assessing Officer, the technology was made available to the subsidiary in India, therefore, there is no need for the employees of the assessee to come again. Hence, this Tribunal do not find any reason to interfere with the order of the lower authorities and accordingly the same is confirmed.

24. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on 2nd August, 2018 at Chennai.

sd/-

(ए. मोहन अलंकामणी)

(A. Mohan Alankamony)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 2nd August, 2018.

Kri.

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त /CIT(Int.Txn), Chennai
4. ITO (OSD), DRP-2, Bangalore.
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.