

आयकर अपीलीय अधिकरण, "सी" न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'C' BENCH, CHENNAI
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य एवं श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष
Before Shri Abraham P. George, Accountant Member &
Shri Duvvuru RL Reddy, Judicial Member

आयकर अपील सं./I T.A. No. 2394/Chny/2017
निर्धारण वर्ष/Assessment Year:2007-08

&
C.O. No. 188/Chny/2017
[In I.T.A. No. 2394/Chny/2017]

The Assistant Commissioner of
Income Tax,
Large Taxpayer Unit 2,
Chennai 600 034.

M/s. Saint Gobain Glass India Ltd.,
Vs Plot No. A-1, Sipcot Industrial Park,
. Sriperumbudur, Kanchipuram 602 105.

[PAN:AABCS4338M]

(Appellant)

(Respondent/Cross Objector)

अपीलार्थी की ओर से / Appellant by

:

Shri R. Clement Ramesh Kumar,
Addl. CIT

प्रत्यर्थी की ओर से/Respondent by

:

Shri R. Vijayaraghavan, Advocate

सुनवाई की तारीख/ Date of hearing

:

10.09.2018

घोषणा की तारीख /Date of Pronouncement

:

29.10.2018

आदेश /ORDER

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal preferred by the Revenue is directed against the order of the Id. Commissioner of Income Tax (Appeals) 17, Chennai dated 30.06.2017 relevant to the assessment year 2007-08. The only effective ground raised in the appeal of the Revenue is that the Id. CIT(A) has erred in deleting the addition made under section 40(a)(i) of the Income Tax Act, 1961 ["Act" in short] and failed to observe that as per the Indo Belgium

DTAA – Article 12, the payment related to the managerial services was categorized as “fees for technical services” and was taxable in the other contracting state.

2. Brief facts of the case are that the assessment under section 143(3) r.w.s. 144C(13) of the Act was completed on 19.10.2011, wherein, due to additions/disallowances made on certain issues, the Assessing Officer determined the loss at ₹.23,52,67,331/- and taxable book profit under section 115JB of the Act was determined at ₹.47,78,83,022/-. Subsequently, the assessment order was subjected to revision under section 263 of the Act dated 28.12.2012. Accordingly, after considering the submissions of the assessee, the assessment under section 143(3) r.w.s. 263 of the Act was completed by making various additions.

2.1 With regard to the addition made under section 40(a)(i) of the Act, the assessee has paid in foreign currency, a sum of ₹.10,78,21,791/- as export commission, on which no tax was deducted at source. Since the non-resident agents received export commission for managing the affairs of the assessee company at abroad and the payment towards such managerial services are to be treated as fees for technical services under section 9(1)(vii) of the Act as observed by the Id. CIT in his order dated 28.12.2012, the Assessing Officer called for various details, etc. Pursuant to the

provisions of section 9(1)(vii) of the Act and by considering specific provisions contained in the Indo- Belgium DTAA vide Article 12, wherein, the payment related to the managerial services is categorized as “fees for technical services” and is taxable in the other contracting state, the Assessing Officer disallowed ₹.5,02,99,206/- and brought to tax.

3. On appeal, after considering the submissions of the assessee and by following the decision of the Tribunal in the case of DCIT v. Ford India Limited in I.T.A. Nos. 673 & 840/Chny/2015 dated 31.01.2017 as well as in the case of CIT v. D.A. Jhaveri in I.T.A. No. 3758/Mum/2013 dated 30.11.2016 [(2016) 76 taxmann.com 284 (Mumbai – Trib.)], the Id. CIT(A) has held that the payment made to SG Exprover cannot be considered to partake of the nature of “fees for technical services” and allowed the ground raised by the assessee.

4. Aggrieved, the Revenue is in appeal before the Tribunal. By relying on the grounds of appeal, the Id. DR submitted that as per Indo Belgium DTAA- Article 12, the payment related to the managerial services was categorized as “fees for technical services” and liable for taxation in the other contracting state. Thus, the Id. DR pleaded that the order of the Id. CIT(A) should be reversed. On the other hand, the Id. Counsel for the assessee strongly supported the order passed by the Id. CIT(A) on this issue.

5. We have heard both sides, perused the materials available on record and gone through the orders of authorities below. We have also perused the paper book filed by the assessee. With regard to the non-deduction of TDS on the commission payment, the inferences made by the Assessing Officer that the services rendered by the assessee are in the nature of managerial services, as has been categorized as “fees for technical services” in the Indo-Belgium DTAA – Article 12, appears to be reasonable since the definition of “fees for technical services” in the Indo-Belgium DTAA is an expressively expanded definition and the same is reproduced as under:

“ARTICLE 12 : Royalties and fees for technical services:

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

[2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and, according to the laws of that State, but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.]

3. [(a) ...]

(b) The term "fees for technical services" as used in this Article means payments of any kind to any person, other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 14, in consideration for services of a managerial, technical or consultancy nature, including the provision of services of technical or other personnel.

Since the above said payments have been considered as the payment made for the purpose of managing the sales affairs, the payment made to the

company situated in Belgium is liable for taxation specifically only in India as per Article 12 of the Indo - Belgium DTAA. The Id. CIT(A) was also of the same opinion as stated above. The assessee has alternatively claimed that the payment made to SG Exprover is not taxable in terms of the tax treaty. Though the Id. CIT(A) noted that the definition of the term “fees for technical services” under the treaty between India and Belgium includes services of managerial nature, having regard to the MFN clause in the India-Belgium Treaty, the restrictive definition of the term “fee for technical services” in the India-UK Treaty can be applied and by following various decisions as referred hereinabove, the Id. CIT(A) held that the payment made to SG Exprover cannot be considered to partake of the nature of “fees for technical services” and allowed the ground raised by the assessee without obtaining any comments from the Assessing Officer. Under the above facts and circumstances, we direct the Assessing Officer to examine the MFN clause available in the Protocol of Indo-Belgium DTAA as to whether the same shall override the specific provisions laid down under Article 12 and decide the issue afresh in accordance with law. Thus, the ground raised by the Revenue is allowed for statistical purposes.

6. Coming to the Cross Objection, the contention of the assessee is that the only service rendered by the SG Exprover is procurement of export orders for the assessee and the payments made to them are only

commission for procurement of export orders and therefore, the Id. CIT(A) erroneously held that the services rendered by SG Exprover is managerial services. By considering the materials furnished by the assessee, it was the observation of the Assessing Officer that the services rendered by the assessee are in the nature of managerial services in view of the Article 12 of the Indo-Belgium DTAA and the Id. CIT(A) found considerable merits in the above observations. Thus, we find no infirmity in the order of the Id. CIT(A). Accordingly, the ground raised in the Cross Objection stands dismissed.

7. In the result, the appeal filed by the Revenue is allowed for statistical purposes and the Cross Objection filed by the assessee is dismissed.

Order pronounced on the 29th October, 2018 at Chennai.

Sd/-
(ABRAHAM P. GEORGE)
ACCOUNTANT MEMBER

Sd/-
(DUVVURU RL REDDY)
JUDICIAL MEMBER

Chennai, Dated, the 29.10.2018

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/ Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.