

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
AHMEDABAD “D” BENCH, AHMEDABAD**

**[Coram: Pramod Kumar VP and Mahavir Prasad JM]**

ITA No. 3594/Ahd/2015  
Assessment year: 2012-13

**Anjani Synthetics Ltd**  
4, New Cloth Market,  
O/S. Raipur Gate,  
Ahmedabad-380002 [PAN:AABCA 2789 E]

.....**Appellant**

**Vs**

**The Dy. Commissioner of Income-tax**  
Circle 1(1)(2), Ahmedabad

.....**Respondent**

**Appearances by**

**Gaurav Nahta, for the appellant**

**Lalit P Jain, for the respondent**

Dates of hearing of the appeal : September 10, 2018  
Date of pronouncing this order : December 5, 2018

**O R D E R**

**Per Pramod Kumar, VP:**

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 30<sup>th</sup> October, 2015 passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13.
2. Ground no. 1 is general in nature, and, as the learned representatives fairly agree, does not call for any specific adjudication.
3. In ground no. 2, the assessee is aggrieved of the disallowance of Rs 4,11,279 on account of late payment of contribution to PF and ESI.
4. Learned representatives fairly agree that the issue is now covered against the assessee by Hon'ble jurisdictional High Court's judgment in the case of CIT Vs Gujarat State Road Transport Corporation (366 ITR 170). We, therefore, decline to interfere in the findings of the CIT(A), which are in consonance with the law so laid down by Their Lordships, on this aspect of the matter.
5. Ground no. 2 is, accordingly, dismissed.
6. In ground no. 3, the assessee is aggrieved of the disallowance of Rs 1,67,090 on account of testing expenses.

7. The relevant material facts are like this. The assessee has made payment aggregating to Rs 1,67,090 to Testex AG, a Zurich (Switzerland) based entity. The assessee, a textile exporter, needed this testing so as to get "Oeko tex" certification which is quality parameter certification required by the European customers. In the course of assessment proceedings, the Assessing Officer noted that as the assessee has not deducted tax at source from these payments, the same are disallowable under section 40(a)(i) of the Act. It was also noted that the testing fees is clearly covered by the scope of Section 9(1)(vii) of the Act, and hence the income embedded in the testing fees is taxable in India. Accordingly, in the opinion of the Assessing Officer, assessee had an obligation to deduct tax at source under section 195, and the lapse on the part of the assessee, by not deducting tax at source, is to be visited *inter alia* by disallowance under section 40(a)(i). Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

8. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

9. We find that it is only elementary that the provisions of the Income Tax Act 1961 have to make way for the provisions of any applicable tax treaty covering the assessee when such treaty provisions are beneficial to the assessee. In terms of the provisions of the India Switzerland Double Taxation Avoidance Agreement dated 2<sup>nd</sup> November 1994, read with its protocol clause and the subsequent tax treaties that India has entered into with a number of OECD countries, including, e.g. India Canada DTAA dated 11<sup>th</sup> January 1996, the "make available" clause has application in the context of fees for technical services. Under this clause, the fees for technical services For purposes of this Indo Swiss tax treaty, therefore, "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described is taxable in the source country; or (b) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. Clause (a) is clearly not fulfilled on the facts of this case. As for clause (b), it is a condition precedent that the services should enable the person acquiring the services to apply technology contained therein, but then it is nobody's case that services rendered by the Swiss entity were such that the assessee was enabled to apply technology contained therein. The services were simply testing services which did not involve any transfer of technology. Therefore, the clause (b) could not come into play either. In these circumstances, the taxability under the tax treaty provisions clearly fail to bring the testing fees paid to a Swiss entity within the ambit of its income chargeable to tax in India. As for the connotations of 'make available' clause in the treaty, this issue is no longer *res integra*. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi

High Court in the case of DIT v. Guy Carpenter & Co Ltd. [2012] 346 ITR 504 and Hon'ble Karnataka High Court in the case of CIT v. De Beers India (P.) Ltd. [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 in favour of the assessee, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. In De Beers India (P.) Ltd. case (supra), their Lordships posed the question, as to "what is meaning of 'make available'", to themselves, and proceeded to deal with it as follows:

*'.....The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.'*

10. In view of the above discussions, in our considered view, the assessee did not have any tax withholding obligations from payments made to the Swiss entity in respect of the testing fees. Accordingly, the very foundation of impugned disallowance under section 40(a)(i) is devoid of any legally sustainable basis. We delete the same.

11. Ground no. 3 is thus allowed.

12. In ground no. 4, the assessee is aggrieved of the disallowance of Rs 2,50,000 being sustained by the CIT(A) out of motor car running expenses as claimed by the assessee.

13. So far as this grievance of the assessee is concerned, the relevant material facts are like this. The short reason for which the CIT(A) has sustained this disallowance out of Motor

Car Expenses is that “the partial use of cars by directors for personal use cannot be ruled out”. The assessee is aggrieved and is in appeal before us.

14. Having heard the rival contentions and having perused the material on record, we are of the considered view that this disallowance deserves to be deleted not only for the reason that it is based purely on surmises and conjectures, but also because the assessee being a juridical person, even if there is some element of personal use of car by the directors, it continues to be for business purposes of the assessee nevertheless. We delete the impugned disallowance of Rs 2,50,000.

15. Ground no. 4 is thus also allowed.

17. In the result, the appeal is partly allowed in the terms indicated above. Pronounced in the open court today on the 5<sup>th</sup> day of December, 2018.

*Sd/-*

**Mahavir Prasad**  
(Judicial Member)

**Ahmedabad, Dated the 5<sup>th</sup> day of December, 2018**

*\*\*P/G/F/B\**

*Copies to:*

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

*Sd/-*

**Pramod Kumar**  
(Vice President)

*By order*

*True Copy*

*Assistant Registrar*  
*Income Tax Appellate Tribunal*  
*Ahmedabad benches, Ahmedabad*