

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

I.T.A. No.4663/DEL/2016
Assessment Year: 2011-12

M.G. Electronics Ltd., 3, Community Centre, New Delhi.	v.	DCIT, Circle-6(1), New Delhi.
TAN/PAN: AAACM 6538J		
(Appellant)		(Respondent)

Appellant by:	Shri Saumy Agarwal, CA		
Respondent by:	Shri Rinku Singh, Sr.D.R.		
Date of hearing:	23	01	2019
Date of pronouncement:	14	03	2019

ORDER

The aforesaid appeal has been filed by the assessee against the impugned order dated 10.05.2016, passed by Id. CIT(Appeals)-VI, New Delhi for the quantum of assessment passed u/s.143(3) for the Assessment Year 2011-12. The assessee is aggrieved by addition of Rs.9,92,000/- made by the Assessing Officer u/s.40(ia).

2. The facts in brief are that assessee-company is engaged in the business of manufacturing of fibre glass tissue which is used for insulation purposes. During the course of assessment proceedings, the Assessing Officer noted that the assessee has made reimbursement of investment incurred by UP Twiga Fiberglass Ltd. Ltd. (hereinafter referred to as 'UPT'), a separate legal entity, on behalf of the assessee company

towards supervision rendered by personnel of UPT employed to overlook the conversion of their raw material into finished goods and also in the process to overlook any wastage or pilferage of their material in quantitative and qualitative terms under the contract. In response to the show cause notice by the Assessing Officer as to why the expenses claimed under the head 'Material Handling Charges' paid to UPT should not be treated as professional charges, the assessee vide its reply dated 21.03.2014 has submitted as under:

“During the year under the head material handling charges (detail enclosed), there is a debit of Rs.9,92,000/- as supervisory charges paid to M/s U P Twiga Fiber glass Ltd (UPT). As regards TDS on supervision charges paid it is submitted that supervision charges are infect reimbursement of expenses to M/s UPT for deputing their own staff for supervision the job contract of converting UPT's material into fiberglass tissue. Also refer to Q 30 of circular No 715 dated 8.8.95 where it is mentioned that such reimbursement of expenses is not subject to TDS deduction. In this regard please find enclosed the order of Ld. CIT(A)-ix giving relief in the mater for A.Y. 2009-10 on similar ground in the assessee's own matter.”

3. Ld. Assessing Officer rejected the assessee's contention on the ground that this expenditure is incurred for availing technical /managerial/supervisory services, against which payment was made to UPT, which has provided these services by deputing their own supervisors, at the cost of the assessee company. Though these expenses were incurred by way of debit note raised by the said company towards reimbursement of employee cost, but actually payments were

made for technical services performed by the supervisors of UPT, and therefore, such a payment was hit by the provision of Section 194J for which assessee should have deducted TDS. Accordingly, he made the disallowance u/s. 40(a)(ia). Ld. Assessing Officer has discussed this issue threadbare in the assessment order as to how such expenditure falls into category of Fees for technical services in terms of *Explanation 2* to Section 9(1)(vii) after analyzing the entire agreement and the contact of the parties.

4. Ld. CIT(A) too has confirmed the said action of the Assessing Officer and rejected the assessee's contention that supervisory charges was merely in the nature of reimbursement of employee cost expenses incurred by UPT for supervisory of the job contract and also reliance placed by the assessee on Circular No.715 dated 08.08.1995, specifically question no.30. Ld. CIT A) has discussed the assessee's submission in very detail and also required the assessee to submit further details for verification like pay slips of the four supervisors deputed by UPT and had noted that these supervisors were paid certain amounts by UPT which has been charged from the assessee. He has also called for the copy of the debit note issued by UPT, copy of agreement between the assessee and UPT, ledger copy of supervisory charges, etc. After taking note of the various clauses of the agreements, he deduced that there was no obligation on the part of the assessee to reimburse the actual expenses incurred by the UPT and in fact they have charged

from the assessee as supervisory charges. Thus, he rejected the assessee's contention that these supervisory charges are in the nature of reimbursement and accordingly upheld the disallowance made by the assessee.

5. Before us, ld. counsel for the assessee submitted that these supervisory charges were paid by UPT to its personnel and once debit note was raised the same was reimbursed as expenses. Here, the supervisors provided by the UPT were for UPT's on own interest and same has been adjusted through UPT account and it cannot be held that it is a payment for technical services liable for TDS. However, he submitted that even if it is treated to be in the nature of fee for technical services, then also now in view of *2nd proviso* to Section 40(ia) read with *1st proviso* to Section 201(1) brought w.e.f. 01.04.2013, that if the payer has shown this payment as its income in the return of income and also paid taxes, then no disallowance u/s.409A0(ia) can be made. He also relied upon the decision of Hon'ble Delhi High Court in the case of ***CIT vs. Ansal Landmark Township Private Limited (2015) 279 CTR 384 (Del)***, wherein Hon'ble High Court has held *that 2nd proviso* to Section 40(ia) and *1st proviso* to Section 201(1) has to be treated as retrospective. Thus, matter can be restored back to the file of the Assessing Officer to be decided in the light of the amended provisions.

6. On the other hand, learned Department Representative has strongly relied upon the order of the ld. CIT (A) and

submitted that here in this case both Assessing Officer and ld. CIT (A) have threadbare analyzed that the supervisory charges paid by the assessee is nothing but in the nature of fee for technical services for which assessee was required to deduct TDS u/s.194J, therefore, action of the Assessing Officer and ld. CIT (A) should be upheld.

7. Regarding alternate plea raised by the ld. Counsel , he submitted that matter can be restored back to the file of the Assessing Officer to examine, whether the payee has shown this amount as its income tax return and also paid due taxes thereof.

8. After considering the rival submissions and on perusal of the relevant finding given in the impugned orders, we do find substance in the reasoning given by the ld. CIT(A) and Assessing Officer that payment of supervisory charges which though has been claimed as reimbursement of expenses is nothing but a contractual payment made in the terms of the agreement entered between the assessee and UPT, because UPT has deputed their own supervisors to supervise the conversion of raw material into finished goods and to overlook any wastage of pilferage of their material in quantitative and qualitative terms as the assessee was carrying out the job work for UPT. Even if the UPT has made the payment to its personnel but the matter of fact is that assessee has made the payment to UPT for the services carried out by the personnel at the premises of the assessee. Ld. CIT (A) has also analyzed

from the copies of the debit note issued by UPT and the terms of the agreement where UPT has agreed to depute the supervisor at the premise of the factory for which the assessee was required to make the payment or amount was charged by the UPT from the assessee. There is a finding of fact that as per the agreement there was no obligation of the assessee to reimburse the actual expenditure incurred by the UPT in respect of deputed supervisors, which fact has not been controverted. Further, UPT has charged supervisory charges from the assessee at a particular rate and does not have any direct or indirect nexus with the expenses incurred by the UPT on these supervisors. Thus, it has rightly been held by the lower authorities that it cannot be termed as reimbursement of employee's cost incurred by UPT. Though in the submission of the assessee before CIT (A) and also discussed in the impugned order, that there in the Assessment Year 2009-10, ld. CIT (A) has deleted the same addition. However, what is the fate of the earlier order has not been placed before us nor argued before us. In any case, the ld. CIT (A) and Assessing Officer has decided the issue on the basis of material on record, which we are in tandem in so far as treating of such a payment to be in the nature of technical services and therefore, provision of Section 194J was clearly applicable on such payments.

9. However, we agree to the alternate contention of the ld. Counsel that, now in the wake of *2nd proviso* to Section 40(a)(ia) read with *1st proviso* to Section 201(1), if the payee

has furnished its return of income u/s.139; and has taken into account such income for computing the income in its return of income; and has paid the taxes on such income; and also furnished the certificate to this effect from an accountant, then no disallowance u/s.40(a)(ia) can be made. Since such a provision was brought in the statute w.e.f. 01.04.2013, but Legislature had brought this amendment only to remove the rigors and hardship caused to the assessee, because the main purpose of Section 40(a)(ia) was to collect tax on the payment claimed by the assessee as an expenditure. If the payee has paid the taxes thereof then such a disallowance should not be upheld. The Hon'ble Jurisdictional High Court in the case of **CIT vs. Ansal Landmark Township Private Limited** (supra) has held that such an amendment is a curative in nature and hence has to be given retrospective effect. Accordingly, following the binding precedent of Hon'ble Jurisdictional High Court, we hold that the 2nd proviso to Section 40(ia) would be applicable for the impugned Assessment Year 2011-12 also. Accordingly, we set aside this issue to the file of the Assessing Officer to verify, whether the payee has shown this payment as its income in its return of income and has paid taxes thereon. The assessee shall furnish all these documents and evidences to substantiate the said claim. With this direction, the matter is restored back to the file of the Assessing Officer who shall decide the issue in the light of the 2nd proviso to Section 40(ia) read with 1st proviso to Section 201(1) after giving due and

effective opportunity of being heard to the assessee.

10. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 14th March, 2019.

Sd/-
[ANADEE NATH MISSHRA]
ACCOUNTANT MEMBER

DATED: 14th March, 2019

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER