आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1163/PUN/2017
निर्धारण वर्ष / Assessment Year : 2008-09

John Deere Equipment Pvt. Ltd.,
(Now merged with John Deere India Pvt. Ltd.)
Tower XIV, Cybercity,
Magarpatta City, Hadapsar,
Pune – 411028 …. अपीलार्थी/Appellant

PAN: AAACL7331A

Vs.

The Dy. Commissioner of Income Tax,
Circle 14, Pune …. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.1164/PUN/2017
निर्धारण वर्ष / Assessment Year : 2008-09

John Deere India Pvt. Ltd.,
Tower XIV, Cybercity,
Magarpatta City, Hadapsar,
Pune – 411028 …. अपीलार्थी/Appellant

PAN: AAACJ4233B

Vs.

The Dy. Commissioner of Income Tax,
Circle 14, Pune …. प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Nikhil Pathak
प्रत्यर्थी की ओर से / Respondent by : Ms. Nandita Kanchan

सुनवाई की तारीख / **Date of Hearing : 07.06.2019**		घोषणा की तारीख / **Date of Pronouncement: 26.06.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Both the appeals filed by connected assessee are against respective orders of CIT(A)-7, Pune, both dated 31.01.2017 relating to assessment year 2008-09 against respective orders passed under section 143(3) r.w.s. 147 of the Income-tax Act, 1961 (in short 'the Act').

2. Both the appeals relating to the connected assessee on similar issue were heard together and are being disposed of by this consolidated order for the sake of convenience. However, in order to adjudicate the issues, reference is being made to the facts and issues in ITA No.1163/PUN/2017.

3. The assessee in ITA No.1163/PUN/2017 has raised the following grounds of appeal:-

1] The learned CIT(A) erred in holding that the reopening u/s. 148 was justified in law and accordingly, the reassessment order passed by the learned Assessing Officer u/s 147 r.w.s. 143(3) was valid.

1.1] The learned CIT(A) erred in not appreciating that the reopening u/s. 148 and the consequential reasst. Order passed u/s. 147 was not justified on account of the following reasons -

a. The assessment u/s 143(3) was completed and the reopening is beyond 4 years from the end of the relevant assessment year and since all the material facts were duly submitted by the assessee in the course of original assessment proceedings, the reopening is not valid since there is no failure on the part of the assessee to furnish the material facts.

b. The reopening is made on a mere change of opinion and hence, the same was not justified at all.

c. The reopening is being made on the basis of retrospective amendment in law which cannot be the basis for reopening the case and accordingly, the reassessment u/s. 147 be declared null and void.

2] The learned CIT(A) erred in confirming the disallowance of Rs.12,837,828/- u/s. 40(a)(i) of the Act in respect of information system charges and telecommunication expenses debited by the assessee without appreciating that no disallowance was warranted on facts of the case.

2.1] The CIT(A) erred in holding that the assessee was liable to deduct TDS in respect of the payments of Rs.12,837,828/- made to Deere & Co., USA towards IT software licenses, internet access charges and IT support services and thereby disallowing the said amount u/s 40(a)(i) of the Act.

2.2] The learned CIT(A) erred in holding that the payments made towards internet connectivity charges and right to use computer software were taxable as royalty both under the Income Tax Act as well as DTAA and hence, the assessee should have deducted TDS in respect of the said payments made to Deere & Co., USA.

2.3] The learned CIT(A) further erred in holding that the payments made by the assessee company to Deere & Co., USA for various IT support services were in the nature of 'fees for technical services' under the Income Tax Act as well as DTAA and since the assessee has not deducted TDS in respect of the above payments, the disallowance u/s 40(a)(i) is attracted in the case of the assessee.

2.4] The learned CIT(A) failed to appreciate that the above payments were merely in the nature of 'reimbursement of costs' incurred by Deere & Co., USA for providing the above services to the assessee company and therefore, the assessee was not liable to deduct TDS in respect of the same and thus, the disallowance u/s 40(a)(i) of Rs.12,837,828 /- is not justified.

2.5] The learned CIT(A) failed to appreciate that when the actual payments were made by it for right to use software and internet connectivity charges, the explanation to Section 9(i)(vi) was not introduced and it was absolutely impossible for the assessee to withhold tax at source on such payments and hence, the disallowance u/s 40(a)(i) is not justified on the ground that the assessee had failed to deduct TDS on such payments.

2.6] The learned CIT(A) further erred in not appreciating that the IT Support Services did not "make available" any technology to the assessee by Deere & co. and therefore, the said services could not be termed as fees for technical services as per in Article 12(4) of the India-USA DTAA and accordingly, the assessee was not liable to deduct TDS on the payments made for IT Support Services.

2.7] The learned CIT(A) erred in confirming the grossing up of amounts as per the provisions of Section 195A without appreciating that the said Section was not applicable and hence, the grossing up of the amounts was not justified as per law.

3] The learned CIT(A) erred in enhancing the income of the appellant company by making a disallowance of Rs.1,256,650/- u/s. 40(a)(i) of the Act in respect of payment on account of web based training made by assessee on the ground that the said payment was on account of fees for technical services and hence, the appellant should have deducted TDS on the said payment made.

3.1] The learned CIT(A) erred in not appreciating that the training charges charged by Deere & Co did not make available any technical service and hence, the same was not taxable under Article 12 of the DTAA between India and USA and hence, there was no reason for the appellant company to deduct TDS on the said payments.

4] The learned CIT(A) erred in enhancing the income of the appellant by making a disallowance of Rs.31,437,185/- u/s. 40(a)(i) of the Act in respect of Reimbursement of expatriate salary on the ground that the said payment was on account of fees for technical services and hence, the appellant should have deducted TDS on the said payment made.

4.1] The learned CIT(A) erred in holding that Deere & Co. by deputing its employees to the appellant company was providing technical services to the appellant company and accordingly, the TDS was required to be deducted on such payments.

4.2] The learned CIT(A) failed to appreciate that as per the secondment agreement between the appellant company and Deere & Co., all the expat employees are on the roll of the appellant company and TDS u/s 192 is deducted in respect of the salary paid to them and hence, there is no question of holding that the services rendered by these employees constituted fees for technical services under the Income Tax Act as well as under the DTAA between India and USA.

4.3] The learned CIT(A) erred in not appreciating that Deere & Co. was not providing any fees for technical services to the appellant company by deputing its employees to the appellant company and therefore, there was no question of deducting any TDS on the reimbursement of the salaries of the expat employees.

5] Without prejudice to the above grounds, the assessee submits that the disallowance u/s 40(a)(i) is attracted only in respect of the expenditure which remains payable as at the year end and no disallowance u/s 40(a)(i) in respect of the expenses which have already been paid off during the year.

6] Without prejudice to the above, the learned A.O. failed to allow set off of brought forward losses of Rs.973,961,798/- while computing the total income of the assessee company for this year.

4. The learned Authorized Representative for the assessee at the outset pointed out that re-assessment proceedings were initiated against assessee on the ground that it had failed to deduct tax at source on the payments made for software license, leased line charges and IT support services. He further stated that initially order under section 201(1) of the Act was passed and thereafter, re-assessment proceedings were initiated under section 147 of the Act in order to make the disallowance under section 40(a)(ia) of the Act. The next contention of learned Authorized Representative for the assessee was that while deciding appeal against order passed under section 201(1) of the Act, an enhancement was made by CIT(A), wherein the assessee was held to be in default for non deduction of tax at source against training fees; reimbursement of salary of expatriate, which were held to be fees for technical services. In the order passed under section 143(3) r.w.s. 147 of the Act, the Assessing Officer had made disallowance under section 40(a)(ia) of the Act on account of

payment of software license, leased line charges and IT support services. However, while deciding the appeal against order passed under section 143(3) r.w.s. 147 of the Act, enhanced the disallowance on account of training fees and reimbursement of salary of expatriates, against which the present appeal has been filed by assessee.

5. The learned Authorized Representative for the assessee then referred to order of Pune Bench of Tribunal in assessee's own case against order passed under section 201(1) of the Act, wherein the addition on both the accounts has been struck down. The learned Authorized Representative for the assessee pointed out that grounds of appeal No.1 and 1.1 are not pressed. He further referred to grounds of appeal No.2 to 2.7 which were against disallowance made under section 40(a)(ia) of the Act in respect of non deduction of tax out of software license charges, leased line charges and IT support services. The grounds of appeal No.3 and 3.1 are vis-à-vis disallowance made under section 40(a)(ia) of the Act in respect of web based training charges paid by assessee on the ground that these were fees for technical services. The grounds of appeal No.4 to 4.3 are similarly against disallowance made under section 40(a)(ia) of the Act against reimbursement of expatriate's salary being on the ground that same were fees for technical services. The grounds of appeal No.5 and 6 are not pressed. The learned Authorized Representative for the assessee then referred to order of CIT(A), which first decided the issue raised by Assessing Officer and upheld the order of Assessing Officer and then vide para 6.6 it refers to issue of enhancement i.e. payment made on account of web based training and reimbursement of expatriate's salary and also held the assessee to be in default for non deduction of tax at source and hence, the disallowance warranted under section 40(a)(ia) of the Act.

6. The learned Departmental Representative for the Revenue on the other hand, placed heavy reliance on the orders of authorities below.

7. We have heard the rival contentions and perused the record. The issue which arises before us is whether the disallowance under section 40(a)(ia) of the Act is warranted in the hands of assessee on the ground that the assessee had failed to deduct tax at source out of certain payments made to its AEs. The Assessing Officer had made the aforesaid disallowance under section 40(a)(ia) of the Act against payments made on account of software license charges, leased line charges and IT support services. The basis for making aforesaid disallowance was the order passed under section 201(1) of the Act by Assessing Officer on the ground that such payments were in the nature of royalty and there was obligation on the part of assessee to deduct tax at source out of such payments both in view of section 9(1)(vi) of the Act and also in view of DTAA between India and USA.

8. The Pune Bench of Tribunal in John Deere India Pvt. Ltd. Vs DDIT (International Taxation) (2019) 70 ITR (Trib) 73 (Pune) had adjudicated the issue of deduction of tax at source in the hands of assessee and had vide different paras concluded by holding that there is no obligation on the part of assessee to deduct tax at source out of such payments. Vide para 90, the Tribunal decided the issue of non deduction of tax at source out of software license charges; vide para 93, similar decision in respect of IT support services and vide paras 100 and 101, it was held that in the absence of any equipment royalty, there was no requirement to deduct tax at source and at best payment of lease line charges was reimbursement of expenses. In such circumstances where there is no obligation on the assessee to deduct tax at source, then the assessee cannot be held to be in default for the aforesaid non deduction of tax

at source and hence, there is no merit in making any disallowance under section 40(a)(ia) of the Act. Accordingly, we reverse the orders of authorities below in this regard and direct the Assessing Officer to delete the disallowance made on this count.

9. Coming to the order of CIT(A), who in addition to the disallowance made by Assessing Officer had made enhancement i.e. it had further made disallowance under section 40(a)(ia) of the Act on account of non deduction of tax at source against the amounts paid for web based training and reimbursement of salary of expatriates. Both these amounts were held to be fees for technical services, which warranted deduction of tax at source and the assessee was held to be in default under section 201(1) of the Act.

10. The Tribunal while deciding appeal of assessee in John Deere India Pvt. Ltd. Vs DDIT (International Taxation) (supra) against the order passed under section 201(1) of the Act in para 106 (web based training) and para 110 (reimbursement of salaries to expats) had adjudicated the said issue and has held that there was no requirement to deduct tax at source out of such payments and for non-deducting the tax at source, the assessee could not be held to be in default. Consequently, the order of CIT(A) in the present case needs to be reversed as where there was no requirement to deduct tax at source under section 197 of the Act, then the assessee could not be held to be in default. Where the assessee was held to be not in default under section 201(1) of the Act, then there is no requirement for making any disallowance under section 40(a)(ia) of the Act. Accordingly, we reverse the order of CIT(A) in this regard. The grounds of appeal No.2 to 4.3 are thus allowed. The grounds of appeal No.1 & 1.1 and 5 & 6 are not pressed and hence, the same are dismissed as not pressed.

11. We have decided the issue in ITA No.1163/PUN/2017 i.e. John Deere Equipment Pvt. Ltd., which now stands merged with John Deere India Pvt. Ltd. The assessee in John Deere India Pvt. Ltd. for the same assessment year has also filed an independent appeal in ITA No.1164/PUN/2017 and our decision in ITA No.1163/PUN/2017 shall apply *mutatis mutandis* to ITA No.1164/PUN/2017.

12. In the result, both the appeals of assessee are allowed as indicated above.

Order pronounced on this 26th day of June, 2019.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 26th June, 2019.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-7, Pune;
4. The Pr.CIT-6, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune