

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'C', NEW DELHI**

Before Sh. H. S. Sidhu, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 6489/Del/2016 : Asstt. Year : 2012-13

Asstt. Commissioner of Income Tax, Circle-52(1), New Delhi	Vs	M/s Grant Thornton India LLP, L-41, Connaught Circus, New Delhi-110001
(APPELLANT)		(RESPONDENT)
PAN No. AACFG9740K		

Assessee by : Sh. Sh. Vinod Bindal, CA

Revenue by : Sh. Amit Katoch, Sr. DR

Date of Hearing: 25.07.2019

Date of Pronouncement: 25.07.2019

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the Revenue against the order of the Ld. CIT(A)-18, New Delhi dated 01.09.2016.

2. The assessee has raised following grounds of appeal:

"On the facts and circumstances of the case, the Ld. CIT (A) has erred in deleting the addition of Rs.1,98,28,897/- made by the AO as assessee failed to deduct tax at source on payments made to Non-resident parties on account of professional fee and committed a default u/s. 40(a)(ia) of the Income Tax Act, 1961.

2. On the facts and in the circumstances of the case, the CIT(A) failed to follow notification No. 91/2008, dated 28.08.2008 that was issued by Central Government in exercise of powers conferred by subsection (3) of section 90 of the Income Tax Act, 1961, whereby such payments would be taxable in India and those entities shall avail relief in accordance with method for elimination or avoidance of double taxation provided in such agreement."

3. At the outset, it was brought to our notice that the similar issue has been adjudicated in the assessee's own case for the assessment year 2010-11. We have gone through the order of the Co-ordinate Bench of ITAT in the case of the assessee in ITA No. 4143/Del/2015 wherein the similar matter was taken up at ground no. 1 of that appeal and adjudicated at para no. 3 to 3.11 of the order. For the sake of ready reference, the relevant part of the said order is reproduced as under:

"3. The ground number (i) to (iii) of the appeal are related to the issue of disallowance of Rs.1,41,08,805/- under section 40(a)(i) of the Act.

3.1 Before us, the learned DR relied on the order of the Assessing Officer and submitted that Article 15 of respective DTAA is applicable in case of individual whereas the payment has been made to various limited liability partnership firms and thus Ld. CIT(A) was not justified in deleting the disallowance.

3.2 On the contrary, the Ld. counsel of the assessee relied on the order of the Ld. CIT(A) and submitted that the Ld. CIT(A) has made detailed analysis of the provisions of Article 15 of various DTAA and found the payments made by the assessee eligible under Article 15 of the relevant DTAA. The Ld. counsel also submitted that payments are also not Fee for Technical Services in view of the "make available" clause of relevant DTAA as the consultancy provided is of routine nature and no technical knowledge has been provided to the assessee. Accordingly, she submitted that order of the Ld. CIT(A) on the issue in dispute might be upheld.

3.3 We have heard the rival submissions and perused the relevant material on record. We find that the Ld. Assessing Officer has rejected the contention of the assessee that services rendered by the 6 non-resident entities are not in the nature of independent personal services. The Ld. CIT(A) has mentioned that those parties have rendered professional services pertaining to the field of lawyering (giving reviews and opinions) and accounting e.g. SAS70 engagement, review and filing of form

number1120, due diligence, review of US GAAP financials etc. We note that there is no dispute as far as the nature of services rendered. The only dispute which has been raised by the Revenue is that the benefit of Article 15 of relevant DTAA's can be availed by the individual nonresidents, whereas in the instant case the nonresident parties are limited liability partnership firms. We note that this objection of the Revenue has been analysed in detail by the Ld. CIT(A) after referring DTAA with UK, observing as under:

"4.2.2 Thus, it can be seen from the above DTAA's that an income derived by an individual or a partnership firm by rendering of professional services is taxable in the Country / State of his / its residence. If DTAA of UK is considered for illustration, income of a UK firm for rendering professional services in UK will be taxable in UK. However, such income may also be taxable in India if the individual or any partner of the professional firm is present in India up to 90 days in a previous year or the person / firm has a fixed base regularly available to him / it in India for performing his / its activities. However, in this case, none of the members / employees of M/s Grant Thornton UK LLP came to India. It is categorically submitted that there is no fixed base or office or permanent establishment (PE) of the said UK LLP in India. Therefore, in the absence of a PE / fixed base of the recipient (i.e., M/s Grant Thornton UK LLP) in India and on account of the fact that no one from the said firm had even a single day stay in India, professional fees for rendering services in UK will be taxable only in UK and not in India."

3.4 The Ld. CIT(A) has further analysed the Article 15 of DTAA in respect of USA, Netherland, and France as under:

“4.2.4 It must be appreciated that the explanation of the appellant that the impugned professional services were covered under the Article on “Independent Personal Services” of DTAAAs with UK and other countries was rejected by the Assessing Officer on a flimsy ground that the said Article is applicable for professional fees paid to an individual only, whether in his own capacity or as a member of a partnership, and since the recipients of professional fees in this case are Limited Liability Partnership firms (LLPs), the said Article under the relevant DTAAAs did not apply in this case.

4.2.5 Needless to point out that in the case of DTAAAs with USA, UK and France, it is unambiguously written in the said Article on “Independent Personal Services” itself that it is applicable on Income derived by a person who is an individual or firm of individuals; or by an individual, whether in his own capacity or as a member of a partnership; or by an individual or partnership of individuals.

4.2.6 In the case of Netherlands, the word ‘resident’ is used in Article 14 on ‘Independent Personal Services’, and it has been explained by Clause 1 of Article 4 of the said DTAA as: “For the purposes of this Convention, the term ‘resident of one of the States’ means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.” Further, ‘person’ has been defined by Clause 1(e) as: “the term ‘person’ includes an individual, a company, any other body of persons and any other entity which is treated as a taxable unit, under the taxation laws in force in the respective States.”

4.2.7 Thus, even in this case, Article 14 on ‘Independent Personal Services’ is definitely applicable on the income derived by a partnership firm or an LLP.

4.2.8 Accordingly, the only contention of the AO in refusing to accept the applicability of Article on 'Independent Personal Services' in respect of professional fee paid to various foreign parties by the appellant on the ground that it is applicable only if the recipient of income is an 'individual' and not a 'Limited Liability Partnership firm' has no legs to stand.

4.2.9 Moreover, in each of these DTAA's the term "professional services" includes the independent activities of 'lawyers' and 'accountants' amongst other such professional. The appellant is undisputedly engaged in rendering accounting and advisory services of international standards to various clients in India and abroad. Photocopies of the bills raised by the said parties towards rendering of services along with photocopies of form no. 15CA and 15CB filed are enclosed. Interestingly, the AO has also admitted vide para no. 5 at page 17 of the assessment order that "it is important to point out that the same 'professional fees' paid by the assessee within India is covered for deduction of tax u/s 194J of the Income-tax Act, 1961. Accordingly, the payment of professional fees made abroad to the parties referred to in the foregoing paras is also covered u/s 195 of the Income-tax Act, 1961..."

4.2.10 Therefore, it cannot be doubted that the impugned professional fees paid are squarely covered by the provisions of Article on "Independent Personal Services" of the said DTAA's. Furthermore, it has been held in Maharashtra State Electricity Board Vs. Deputy Commissioner of Income Tax (supra) that the provisions of Article 15 being specific provisions for professional services will override the relatively general provisions of Article 13 which apply to broader category of 'managerial, technical or consultancy services'.

4.2.11 In view of the above submissions, the impugned professional fees received by the foreign Grant Thornton LLPs from the appellant

is not taxable in India as per Articles on "Independent Personal Services" of the relevant DTAA with those countries and, therefore, the same is not liable to tax deduction at source in terms of section 195 of the Act, and accordingly no disallowance of the same can be made u/s 40(a)(i) at all.

3.5 The Ld. DR could not controvert the finding of the Ld. CIT(A) that the article on "independent personal services" is applicable on income derived by a person who is an individual or firm of individuals or by an individual, whether in his own capacity or any member of a partnership firm. Further in the DTAA with Netherland, the word resident has been used for the benefit of independent personal services, which is wider than individual and the firm, who has rendered services is entitled to benefit of said provision. In view of above, we do not find any error in the order of the Ld. CIT(A) on this issue.

3.6 Further the Ld. CIT(A) has also analysed in view of the various DTAA that the services rendered by the those non-resident parties are not Fee for Technical Services. The relevant finding of the Ld. CIT(A) is reproduced as under:

"4.3.7 Furthermore, paragraph 4(c) of Article 13 of DTAA states that the rendering of technical and consultancy services includes making available of the technical knowledge, experience or skill in India or development and transfer of a technical plan or technical design.

4.3.8 The appellant is engaged in rendering of advisory and consultancy services in lawyering and accounting fields. These services are purely individual-based services of professionals. It is not a production or manufacturing concern where technical designs or processes are involved or required. Thus, there is question of 'transfer or development of any technical plan or technical design'

being involved in this case. Even the AO has not mentioned about any such technical plan or design anywhere in the assessment order. Thus, the second limb of clause (c) above is not applicable in this case.

4.3.9 Now there remains only the first limb of clause (c) above as per which the technical knowledge, experience or skill should be made available in India. For this purpose it is necessary to examine the meaning and concept of "make available" in India.

4.3.10 "Make available" implies that the technical knowledge, skill, etc. remains with the person utilizing the services even after the particular transaction is over. In other words, it means that the technical knowledge, skills, etc. must remain with the person receiving the services even after the particular contract comes to an end. The recipient of service must be able to absorb and apply the technology on its own in its future activities."

3.7 The Ld. CIT(A) in support of his finding, has relied on following decisions: a) Cushman & Wakefiled (S) Pte., reported in (2008) 305 ITR 208; b) Sandvik Australia Pty. Ltd. Vs. DDIT (International Taxation), reported in (2013) 141 ITD 598 (Pune); c) CIT Vs. De Beers India Minerals Pvt. Ltd., reported in (2012) 346 ITR 467 (Karn.) d) ISRO Satellite Centre (ISAC), (2008) 307 ITR 59 (AAR) e) Intertek Testing Services India (P) Ltd., reported in Authority for Advance Rulings (2008) 307 ITR 418; f) BhartiAxa General Insurance Co. Ltd., reported in (2010) 326 ITR 477 (AAR); g) Cable & Wireless Networks India Pvt. Ltd., reported in (2009) 315 ITR 72; h) Invensys Systems Inc., reported in (2009) 317 ITR 438; i) Guy Carpenter & Co. Ltd. Vs. ADIT, reported in (2012) 18 ITR (Trib.) 414 (Del.) j) WNS North America Inc. Vs. ADIT (International Taxation), reported in (2013) 25 ITR (Trib.) 582 (Mum.); and k) Ernst & Young Pvt. Ltd., reported in (2010) 323 ITR 184

3.8 Before us, the Learned DR could not establish that any technical knowledge was made available in the process of providing services by the non-resident parties to the assessee. In absence of not making available, the technical knowledge to the assessee, in view of the Article 13 of the respective DTAA's, the payment for services cannot be held as fee for technical services under the provisions of the respective DTAA's. We do not find any error in the order of the Ld. CIT(A) on this issue also.

3.9 The Ld. CIT(A) has further observed that Article 13 of DTAA's provisions defining Fee for Technical Services being more favourable to the assessee as compared to the provisions of section 9(1)(vii) of the Act which has defined Fee for Technical Services, and thus the assessee was having option of choosing more favourable provisions of the DTAA's. In our opinion, the finding of the Ld. CIT(A) is in accordance with the established legal position on the issue.

3.10 Further the Ld. CIT(A) in view of the decision of the Hon'ble Delhi High Court in the case of Van Oord ACZ India (P) Ltd versus CIT (2010) 323 ITR 130 (del) has held that the sum payable to the nonresidents was not chargeable to income tax in their hands and thus the assessee was not liable for deduction of tax at source on such payment under the provisions of section 195 and no disallowance under section 40(a)(i) could be made.

3.11 We find that the order of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any infirmity in the same. Accordingly, we uphold the same. The grounds of the appeal of the Revenue are, accordingly, dismissed."

4. We also find that there is no material change in the facts pertaining to this ground in the appeal before us. The Id. DR could not bring anything

controverting the facts on record. Hence, based on the order of this Tribunal in the assessee's own case and the rationale of the Tribunal given above, the appeal of the Revenue for this year is hereby dismissed.

5. In the result, the appeal of the Revenue is dismissed.
(Order Pronounced in the Open Court on 25/07/2019).

Sd/-

(H. S. Sidhu)
Judicial Member

Dated: 25/07/2019

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR