

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President)
And Ravish Sood (Judicial Member)]**

ITA No. 1859/Mum/2017
Assessment year: 2007-08

Standard Chartered Securities (India) Ltd. Appellant
*(formerly known as Standard Chartered-
STCI Capital Markets Ltd.) (Prior to that
UTI Securities Ltd.) 2nd Floor, 23-25,
M.G Road, Fort, Mumbai 400001
[PAN:AAACU0622M]*

Vs

Assistant Commissioner of Income TaxRespondent
Circle 4(2),
Mumbai

Appearances by

Nitesh Joshi and Amit Kirve *for the appellant*
Avaneesh Tiwari *for the respondent*

Date of concluding the hearing: September 19th, 2019
Date of pronouncement : December 17th, 2019

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of CIT's order dated 09.12.2016 in the matter of assessment under section 143(3) r.w.s. 254 of the Income Tax Act 1961 for the assessment year 2007-08.

2. Grievances raised in the appeal are as follows:

Payment made to M/s. Auerbach Grayson and company, USA on the premises that such payments constitutes income in the hands of the recipient in India and hence liable to tax in India. As the appellant, has not deducted tax at source on the same, the payment has been disallowed under section 40(a)(i) of the Income Tax Act, 1961.

3. This is second round of proceedings. In the first round of proceedings, when the matter travelled before a coordinate bench of this Tribunal, the matter was remanded back to the file of the CIT(A) by observing as follows:-

3. Ground No.1B of the assessee is stated to be covered by the earlier decision of the Tribunal for A.Y 2006-07 in the case of the assessee itself, which is dated 21/3/2012 in ITA No.1873/M/10, wherein similar disallowance of Rs.31,77,416/- was made on account of payments made to non-residents disallowed under section 40(a)(ia)of the Act on account of non-deduction of tax. For the sake of completeness the relevant portion of the order of the Tribunal is reproduced below:

"8. Ground No.1.2 is with reference to disallowance under section 40(a)(i) of the Income Tax Act. Briefly stated the assessee made payment of Rs..31,77,416/- as professional fees paid to foreign party Aurbach Grayson & Co (AGC) resident of New York, USA. On the basis of certificate issued by the CA that the amounts were covered under article 7 of the DTAA between India and USA, the assessee had not deducted Tax while remitting the amount. The Assessing Officer was of the opinion that in view of the judgment of the Hon'ble Supreme Court in the case of Transmission Corporation of India 239 ITR 587, the amount is covered by section 195 and the assessee should have deducted the tax. Therefore, the provisions of section 40(a)(i) are applicable and accordingly the amount was disallowed. The Assessing Officer made discussion in Para 7 from Page 33 to 38 of the order.

9. Before the CIT (A) it was submitted that the payments to Overseas Non-Resident were made as per the terms and conditions and they were paid for the services rendered overseas which were not utilized in

India. It was further submitted that the said concern does not have any PE in India. Therefore, no part of income payable to them is liable to tax in India. Hence no TDS was made while effecting the payments to them. The assessee relied upon the decision of the ITAT, in the case of Venkat Shoes Pvt Ltd, Madras (citation not mentioned in order). The CIT (A) however, without examining the merits of the case upheld the action of the Assessing Officer by stating as under:

"4.2 It is not for the appellant to decide whether the income is taxable in India or not. The appellant should have made application before the Assessing Officer and obtained approval under section 195(2) of the Income Tax Act. The appellant made no application to the Assessing Officer under section 195 and on its own decided not to deduct TDS which is clear violation of section 195 of the Income Tax Act as has been held in case of Samsung Electronics 320 ITR 209 by the Karnataka High Court that it is not open to payer to argue that the payment does not result in taxable income in the hands of the non-resident recipient, referring to Supreme Court judgment in case of Transmission Corporation of India 239 ITR 587 that the moment there is a payment to a non-resident, there is an obligation on the payer to deduct tax under section 195(1)".

10. Before us the learned Counsel submitted that the CIT (A) did not examine the merits of the assessee's contention that the amounts are not covered by TDS provisions but only decided the issue on the basis of the Hon'ble Karnataka High Court in the case of Samsung Electronics 320 ITR 209. It was submitted that the Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd 327 ITR 456 reversed the decision of the Hon'ble Karnataka High Court (supra) and held that the expression "chargeable under the provisions of the Act" in section 195(1) shows that the remittance has got to be of trading receipts, the whole or part of it is liable to tax in India. If tax is not so assessable, there is no question of tax at source being deducted. It was submitted that the assessee is covered by the provisions of the DTAA as there was no PE in India. On the basis of the CA certificate, the amount was remitted without any TDS. However, it was fairly submitted that arguments of the assessee are not examined by the CIT (A) as he followed the decision of the Karnataka High Court in the case of Samsung

Electronics 320 ITR 209 to confirm the additions so made.

11. The learned Departmental Representative while admitting that the above decision of the Hon'ble Karnataka High Court was reversed by the Hon'ble Supreme Court submitted that the issue on merits requires examination.

12. Considering the arguments of the rival parties and examining the record, we are of the opinion that the issue requires detailed examination by the CIT (A). The CIT (A) has not adjudicated whether the amount paid by the assessee was chargeable under the provisions of the act so as to attract the provisions of section 195 and consequently 40(a)(i). The contentions of the assessee with reference to the nature of the payment, applicability of various provisions of the Act and the DTAA between India and USA require detailed consideration. Since these aspects were not examined, we are of the opinion that the issue is to be restored to the file of the CIT (A) with a direction to adjudicate the issue on merits accordingly. Therefore, we set aside his order to that extent and restore the issue in Ground No.1.2 to the file of the CIT (A). Ground No.1.2 is considered as allowed for statistical purposes."

3.1 Referring to the aforementioned order it was pleaded by Ld. A.R that with similar directions the matter may be restored back to the file of Ld. CIT(A).

3.2 On the other hand, Ld. D.R relied upon the order passed by ld. CIT(A).

3.3 We have carefully considered the rival submissions in the light of the material placed before us. Though for A.Y 2006-07 the issue has been restored back to the file of Ld. CIT(A) but it was the request of assessee that since the issue regarding disallowance under section 14A of the Act is being restored to the file of AO this matter may also be restored back to the file of AO with similar direction. Therefore, we restore this issue to the file of AO with similar directions as have been given in the aforementioned order of the Tribunal. This ground of the assessee is considered to be allowed for statistical purposes.

4. In this round of proceedings, however, even though the Assessing Officer did take note of the invoices received from Auerbach Grdyson & Co. Inc regarding the payments made during the previous year amounting to Rs. 5,88,254/-, he declined to grant relief in the matter on the ground that "the assessee has failed to substantiate it's claim". Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Reiterating his reliance in Hon'ble Supreme Court's decision **Transmission Corporation of AP Ltd & Another vs CIT (239 ITR 587)**, he confirmed the disallowance. The assessee is not satisfied and is in further appeal before us.

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

6. As a plain look at the invoices would show, the impugned payments were made for "consultancy charges for advice on research and investment strategies". It is also an undisputed position that the assessee did not have any permanent establishment (PE) in India. As the chartered accountant's certificates, copies of which were admittedly. Available to the authorities below, indicate, in the absence of a PE or fixed base in India, these payments are not taxable in India under the Indo US tax treaty to the benefits of which the assessee, being a US tax resident, is eligible. Article 12(4) (b) specifically states that fees for included services will be taxable in the source state only if "such services make available technical knowledge, experience, skill, know how or processes, or consist of the development and transfer of technical plan and design". Protocol of the Indo US tax treaty further provides as follow:-

"Paragraph 4(b) of Article 12 refers, to technical or consultancy services that make available to the person acquiring the service technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, . . . or transferee of such person.) This category is narrower. . . because it excludes any service that does not make technology available to the person acquiring the service. Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provisions of the service may require technical input by the person providing the service does not per se means that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b)."

7. As for the connotations of "make available" clauses, we may only refer to the following observations in *Shell Global Solutions International BV vs ITO [(2016) 157 ITD 24 (Ahd)]*:

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.'

8. It is not even the revenue's case that the services rendered by the US based company resulted in any transfer of technology. We have also noted that the detailed submissions on this aspect before the authorities below, and get these submissions have been simply brushed aside.

9. As regards learned CIT(A)'s reliance of Transmission Corporation's case (supra), only if he bothered to read paragraph 10 quoted in our order dated 21.03.2012, his doubts would have been set at rest. In the case of **GE Technology Centre Pvt. Ltd. (327 ITR 456)**, Hon'ble Supreme Court has clarified that when income embedded in a foreign remittance is not exigible to tax in India, the tax withholding obligations do not arise, and , to that extent, Transmission Corporation's case (supra) is not good law. In the present case, the income embedded in payments to US entity is not taxable in India. There is as such, no tax deduction at source requirement. The

disallowance under section 40(a)(i), as such, does not come into play.

10. For the reasons set out above, we uphold the plea of the assessee. The disallowance of Rs.5,88,254/-, accordingly, stands deleted.

11. In the result, the appeal is allowed, in the terms indicated above. Pronounced in the open court today on the 17th day of December, 2019

Sd/-

Ravish Sood
(Judicial Member)

Sd/-

Pramod Kumar
(Vice President)

Mumbai, dated the 17th of December, 2019

Nishant Verma Sr.PS

Copies to: (1) The appellant (2) The respondent
 (3) CIT (4) CIT(A)
 (5) DR (6) Guard File

By order

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