

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 70/MUM/2019
Assessment Year: 2012-13**

Samex Agency,
201, 2nd floor, Sabari Samridhi,
Plot No. 10, Opp. Union Park,
V.N. Purav Marg, Chembur,
Mumbai-400071.

**PAN No. AAKFS6502P
Appellant**

Vs. ACIT-17(3),
4th floor, Earnest House, Nariman
Point, Mumbai-400021.

Respondent

Assessee by : Mr. N.B. Gandhi, AR
Revenue by : Mr. Uday B. Jakke, DR

Date of Hearing : 30/01/2020
Date of pronouncement : 27/02/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2012-13. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-28, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

- a) The Ld. CIT (A) has erred in confirming the disallowance u/s 40(a)(i) for not deducting tax u/s 195 on listing fee and 50% of the exhibition expenses aggregating to Rs.12,25,247/- (USD \$ 24636.875) paid to Al-Zahem & Malhotra General Trading Co. W.L.L. P.O. Kuwait.

- b) The Ld. CIT (A) has erred in upholding that the said lifting and exhibition expenses of Rs.12,25,247/- as Managerial Services which are covered by the term Fees for Technical Services (FTS) u/s 9(1)(vii).
- c) The Ld. CIT(A) has erred in upholding that the said listing and 50% of exhibition expenses of Rs.12,25,247/- has domestic connection and the said expenses incurred outside India will have intangible and enduring benefits for furtherance of appellant's business activities in India.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2012-13 on 01.09.2012 declaring total income of Rs.48,68,590/-. The nature of business of the assessee is export of agriculture produce, spices such as cardamom, ginger, black pepper etc. During the year under consideration, it had debited Rs.12,25,247/- in the profit and loss account as foreign sales promotion expenses. No TDS was made on this amount. In response to a query raised by the Assessing Officer (AO) to explain as to why the above deduction should be allowed, since it should be treated as amount paid for “managerial services” that are included in “fees for technical services” as defined in Explanation 2 to section 9(1)(vii) of the Act, the assessee filed a reply dated 23.02.2015. However, the AO was not convinced with the said reply of the assessee on the ground that “the services rendered by the recipients of the amount outside India are composite in nature and it helps in popularizing the brand name of the assessee, listing fee for ‘Emperor Akbar’ brand cardamom in various supermarkets and malls in Kuwait, sales promotions, appraises the assessee about the competition of the products, exhibition to be held and also provides other requisite assistance in enhancing the sale.”

On the basis of the above facts, the AO came to a finding that the payment made to the non-resident are “managerial services that are included in fee for technical services” as defined in Explanation 2 to section 9(1)(vii) of the Act. As tax was required to be deducted at source from the said payment made to the non-resident recipient and it has not been done in the present case, the AO made a disallowance of Rs.12,25,247/- u/s 40(a)(ia) of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 11.12.2018, the Ld. CIT(A) observed that (i) the nature of expense which the appellant has incurred and which is labeled as foreign sales promotion and branding expenses to popularize the products of the Al-Zaham & Malhotra of Kuwait general trading Co. (in short ‘Al-Zaham & Malhotra’ are in no way a case of simple advertising/sales promotion, (ii) the appellant had undertaken multitude of activities ranging from conceptualization of the regimen of the process at hand to taking a series of steps to place the products of the Al-Zaham & Malhotra in the various malls and establishments therein, (iii) one of the essential ingredients of this process leading to the incurring of the said expenses and the essential conceptualization and execution of the same is of such nature, where there is a high degree of managerial involvement.

Observing as above, the Ld. CIT(A) held that the series of activities which ultimately lead to the incurring of the said expenses will necessarily fall within the gamut of the term Fees for Technical Services (FTS). Further, he held that there is definitely an element of domestic connection of the appellant’s activities in Kuwait with the furtherance of the business in India. Thus, he rejected the contention of the Ld. counsel for the assessee that these

expenses do not have any plausible nexus to the business of the appellant in India.

Further observing that the disallowance made by the AO u/s 40(a)(ia) is not correct as the said provision deals with the disallowance on non-deduction of tax in relation to domestic payments, the Ld. CIT(A) observed that the AO should have made the disallowance u/s 40(a)(i)(A) of the Act. With these observations, he directed the AO to make the disallowance u/s 40(a)(i)(A) of the Act and thus dismissed the appeal filed by the assessee.

5. Before us, the Ld. counsel for the assessee submits that during the year under consideration the appellant-firm paid US \$ 24,636.875 equivalent to Rs.12,25,247/- to Al-Zaham & Malhotra of Kuwait towards the following :

Particulars	Amount
a) US \$ 20,000 paid for registration & listing fee for 'Emperor Akbar' Brand cardamom in various Supermarkets & malls in Kuwait.	Rs.9,94,000
b) Paid US \$ 4,636.875 for sales promotion expenses (50%) for Emperor Akbar cardamom during Incredible India Promotion Festival held at Lulu Hypermarket, Kuwait	Rs.2,31,247
Total	Rs.12,25,247/-

It is further stated that payment of US \$ 20,000 to Al-Zaham & Malhotra for registration and listing fees paid to them towards display for sale on the shelves of various supermarkets and malls in Kuwait of 'Emperor Akbar' cardamom pouches and also for registering the said product into the bar code system of those malls in Kuwait are not payments towards 'managerial

services' but reimbursement of registration and listing fees. Further, it is stated by him that the assessee paid US \$ 4,636.875 to Al-Zaham & Malhotra towards 50% of sales promotions expenses incurred by them for 'Emperor Akbar' cardamom products during Incredible India Promotion Festival held at Lulu Hypermarket, Kuwait are not payment for 'managerial services' but appellant-firm's 50% contribution of expenses for exhibition-cum-sales festival organized at Lulu. Further, it is explained by him that the said non-resident person had no permanent establishment in India. Also it is stated by him that the entire expenses of Rs.12,25,247/- is the summation of registration and listing fees amounting to Rs.9,94,000/- and Rs.2,31,247/- towards sales promotion expenses being 50% share of the total exhibition expenses and hence those expenses are not composite in nature but are towards specific purposes detailed therein. Thus it is stated by him that no income has accrued/arisen or deemed to have accrued/arisen in India and hence provisions of section 5, section 9(1) and section 195 are not applicable and therefore, provisions of section 40(a)(i) cannot be invoked.

6. On the other hand, the Ld. Departmental Representative (DR) submits that in the instant case, one of the essential ingredients of the process leading to the incurring of the impugned expenses is of such nature, where there is a high degree of managerial involvement, based on strict supervision, superintendence and control at all stages. Therefore, it is argued by him that the said process can definitely be said to fall within the essence of the managerial services. Thus it is stated by him that the Ld. CIT(A) has rightly directed the AO to make the disallowance u/s 40(a)(i)(A) of the Act.

7. We have heard the rival submissions and perused the relevant materials on record. Admittedly, the assessee explained before the Ld. CIT(A) that Rs.9,94,000/- was paid to Al-Zaham & Malhotra to make the 'Emperor Akbar' brand cardamom for display and sale on the shelves of various supermarkets and malls; the firm had paid listing fees to the supermarkets and malls by virtue of which the different sizes of the 'Emperor Akbar' cardamom pouches are registered into the bar code system of the supermarkets/malls and thus the products of the firm are now available for sale in various supermarkets and malls of Kuwait. The assessee also filed before the Ld. CIT(A) the debit note of Al-Zaham & Malhotra and photographs of the firm's 'Emperor Akbar' product displayed for sale on the shelves of supermarkets and malls in Kuwait.

Further, in respect of payment of the balance amount of Rs.2,31,247/- paid to Al-Zaham & Malhotra, the assessee had submitted debit note of Al-Zaham & Malhotra and photographs of the firm's 'Emperor Akbar' product displayed for sale at Incredible India Promotion Festival.

We find that the assessee-firm had filed the debit notes along with the other details before the AO during the course of assessment proceedings.

A perusal of the documents filed before the AO as well as CIT(A) clearly indicates that the said expenses are mere reimbursement of expenses incurred by Al-Zaham & Malhotra and there is no element of supervision, superintendence, control, direction and guidance which is the essence of managerial services so as to bring the said services within the ambit of FTS. When the above details were filed before the AO and CIT(A), it was incumbent

on them to examine and make further inquiry. Even elementary examination has not been made by them.

In such a situation, considering the facts and circumstances of the case, we set aside the order of the Ld. CIT(A) and delete the addition of Rs.12,25,247/- made by the AO.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 27/02/2020.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 27/02/2020

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai