IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH DELHI

BEFORE SHRI AMIT SHUKLA, JM
&
SHRI M.BALAGANESH, AM

ITA No.2210/Del/2015
(Assessment Year : 2009-10)

M/s. Omron Automation (P) Ltd., No.43, G.N. Complex St. John Road, Bangalore – 560 042	Vs.	DCIT Circle- 19(1) (Old Circle 13(1)) New Delhi
PAN/GIR No. AAAC08103D		
(Appellant)	..	**(Respondent)**

Assessee by	Dr. Rakesh Gupta & Shri Somil Agarwal
Revenue by	Shri Amit Kumar Jain
Date of Hearing	**21/01/2020**
Date of Pronouncement	**01/07/2020**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.2210/Del/2015 for A.Y.2009-10 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-7, Mumbai in appeal No.772/14-15 dated 27/02/2015 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 25/03/2013 by the ld. Dy. Commissioner of Income Tax- Circle-13, New Delhi (hereinafter referred to as ld. AO).

2. The only effective issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in confirming the disallowance made

by the ld. AO u/s.40(a)(i) of the Act in respect of computer maintenance expenses of Rs.58,48,567/- in the facts and circumstances of the case.

3. The brief facts of this issue are that Omron is a Japanese corporation, world leader in industrial automation and control components like Sensors, PLC, Power supply, timers, relays, controllers, switches etc, which caters to the industries in automobile, food and beverages, electronic and heavy manufacturing sectors. Omron started its operation in India through its liaison office - Omron Asia Pacific Ltd which is a part of Omron Asia Pacific Ltd, of Singapore. This office is involved in the liaison activities for the marketing, after sales services, support to the customers and distributors. Omron Automation Pvt Ltd. is a subsidiary of Omron Pacific Ltd, which holds 96% shares of Omron Automation Pvt Ltd. Omron Automation imports its products from its Singapore entity and sells it to the channel partners across India.

3.1. During the year under consideration, it was noticed that the assessee has incurred expenses in foreign currency amounting to Rs.58,48,567/- as reported in notes to accounts schedule 17. The assessee was required to furnish the details and nature of expenses. The assessee submitted that it had incurred / reimbursed a sum of 58,48,567/- during the year under consideration towards computer maintenance expenses payable to Omron Asia Pacific Pte. Ltd., Singapore. The assessee submitted the copies of invoice dated 15/12/2008 raised by the said party. The assessee also furnished the copy of system maintenance and support agreement for the period 01/04/2008 to 31/03/2009. The assessee company did not deduct tax at source in terms of Section 195 of the Act on the ground that income of Omron Asia Pacific Pte. Ltd., Singapore is not chargeable to tax in India.

3.2. The assessee company further pleaded that it had only reimbursed Rs.58,48,567/- to Omron Asia Pacific Pte. Ltd., Singapore for system maintenance and support services and there is no element of income involved therein and hence, tax deduction at source provisions are not applicable for the same. The assessee also submitted that the Tax Auditor in the Tax Audit report had not qualified or made any adverse comment with regard to the subject mentioned incurrence of expenditure vis a vis its TDS obligation. The assessee also drew attention of the ld. AO that the entire transactions including the impugned transaction with AE was subject matter of verification by the ld. Transfer Pricing Officer (Ld. TPO) and no adverse inference with regard to international transaction of Rs.58,48,567/- was drawn thereon. The assessee further pleaded that in terms of Article 12 (4)(b) on DTAA between India and Singapore, the said transaction did not fulfill the ''make available" clause and hence, the said payment cannot be categorized as ''fee for technical services" in the hands of the recipient entity. The assessee also submitted that Omron Asia Pacific Pte. Ltd., Singapore does not have permanent establishment (PE) in India and hence, its income is not chargeable to tax in India. The assessee stated that it is a separate legal entity registered and incorporated in India. The assessee is doing the business from its holding company Omron Asia Pacific Pte. Ltd. on principal to principal basis and the transactions have been done at arm's length. It was also pleaded that the assessee company being a subsidiary does not act as an agent of the parent company as it is a separate legal entity. The assessee stated that it had made import of computers and as per the agreement, Omron Asia Pacific Pvt. Ltd., Singapore was required to provide information system maintenance services as a part of inter-company support function. As per the agreement, Omron Asia Pacific Pte. Ltd., Singapore has to make available subscription for Microsoft office professional licenses symantic

anti-virus enterprises licenses, symantic personal firewall licenses, Win zip licenses, Microsoft Office Professional addition and Notes user etc. Basically Omron Asia Pacific Pte Ltd., Singapore has provided licensed softwares for use in India and the same has been debited to computer maintenance expenses. Accordingly, it was pleaded that no technology has been ''made available" as per Article 12(4)(b) of India-Singapore DTAA. Accordingly, the assessee pleaded that the said income is not chargeable to tax in terms of Section 195 of the Act in the hands of recipient entity and hence, there was no requirement for deduction of tax at source by the assessee while incurring the expenditure.

3.3. The ld. AO did not agree to the aforesaid contentions of the assessee. The ld. AO observed that the provisions of Section 9(1)(vi) and 9(1)(vii) have undergone change by way of explanation inserted by the Finance Act 2010 with retrospective effect from 01/06/1976 wherein the services rendered by the non-recipient services would be ''fee for technical services" and same would be taxable in India even though the said non-recipient does not have any residence or place of business or business connection in India or even if the services were rendered outside India, the income shall be deemed to accrue or arise in India. Accordingly, the ld. AO held that pursuant to this amendment, it is no longer necessary that in order to attract taxability in India, the services must also be rendered in India and once, the services are utilized in India, the same is enough to attract its taxability in India in the hands of the recipient entity, thereby the TDS liability gets fastened in the hands of the assessee payer automatically. The ld. AO further observed that the assessee's case falls under Article 12(4)(a) of Indo-Singapore Treaty which reads as under:-

The term ''fees for technical services'' as used in this Article means payments of any kind to any person in consideration for services of managerial, technical or consultancy nature (including the provisions of such services through technical or other personnel) if such services;

(a) are ancilliary and subsidiary to the application or enjoyment of the right, property or information for which the payment described in paragraph 3 is received, or

3.4. The ld. AO observed that the rights of software acquired by the assessee along with computers are very much ancillary to the application or enjoyment of the software rights and therefore, the requirement of "make available" as contested by the assessee is not required in the instant case. He finally concluded that since the rights to enjoy the software are embedded, therefore, it is chargeable to tax in India as per DTAA and as well as Section 9 (domestic law) of the Act. Accordingly, the ld. AO concluded that the payment of Rs.58,48,567/- by the assessee to Omron Asia Pacific Pte. Ltd., Singapore is chargeable to tax in India in the hands of the recipient entity as the services have been utilized in India and the source of payment / income is in India both as per provisions of domestic law as well as under DTAA and since the said expenditure was incurred without deduction of tax at source, the expenditure requires to be disallowed u/s.40(a)(i) of the Act.

3.5. Before the ld. CIT(A), the assessee submitted that nature of services rendered as per the agreement dated 01/04/2008 was as under:-

- Apps care for CRM application pivotal, including technical support and bug fixes, with not more than 45 users.
- Apps care of ERP applications nexus, including technical support and bug fixes with not more than 4 users.
- Notes care for 93 notes users.
- Service Care (Manpower support for Development, Trouble shooting, Consultation,etc) upto 20 man-days, with minimum of 0.5 man-day per incident.
- Business Care to perform IT compliance check.

- Subscription (entitlement to use latest version) for 91 Microsoft office professional licenses till March 2009.
- Subscription (entitlement to use latest version) for 91 Symantec Anti-virus enterprises license till March 2009.
- Subscription (entitlement to use latest version) for 91 win zip licenses till March 2009.
- Host care for 91 users.
- License required for 36 Microsoft office professional editions.
- License required for 21 Symantec Anti-virus Enterprise Edition.
- Licenses required for 24 notes users

3.6. For the aforesaid services, the bill of USD 116260 was raised on the assessee. The payment was made by the assessee on 18/06/2009 i.e. during the F.Y.2009-10 relevant to the A.Y.2010-11, without deduction of tax at source. The assessee submitted that on perusal of the support of maintenance contract, it could be inferred that the contract was merely for supply of certain licensed softwares to the assessee and that the Singapore entity had procured software and supplied them to the assessee. It was a simple transaction of purchase and sale of software. The characterization of income in the hands of Singapore entity was therefore, business income and since the Singapore entity had no PE in India, the same was not liable to tax in India. The assessee further submitted that the income in the hands of the Singapore entity cannot be categorized as ''fee for technical services". It submitted that the basic characteristic of service transaction is the involvement of human element. When there is no human intervention, the same falls outside the ambit of ''fee for technical services" as has been held for following decisions:-

a) Hon'ble Delhi High Court in the case of CIT vs Bharti Cellular Ltd. reported in 319 ITR 139 (Del)
b) Hon'ble Madras High Court in the case of Skycell Communications Ltd and another vs. DCIT and others reported in 170 CTR (MAD) 238.

3.7. The assessee further pleaded that similar payment was made in A.Y.2008-09 and the ld. AO made similar disallowances in A.Y.2008-09 also and the same was deleted by the ld. CIT(A) in A.Y.2008-09. The assessee placed a copy of the said appellate order before the present ld. CIT(A) in the appellate proceedings for A.Y.2009-10.

3.8. During the course of appellate proceedings, the ld. CIT(A) directed the assessee to furnish his explanation as to why the said expenditure incurred should not be considered as royalty. The assessee pleaded before the ld. CIT(A) that it had only purchased licensed software from the Singapore entity and as per the system maintenance and support agreement, the entity had only rendered services and had given entitlement to the assessee to subscribe to the latest version of the license provided by it. Hence, the same would not fall within the ambit of royalty. The ld. CIT(A) did not agree to the said explanation of the assessee and observed that software is a conceptual entity which is a set of computer programs, procedures and associated documentation concerned with the operation of data processing system. The ld. CIT(A) observed that in contrast to hardware, software is intangible. The ld. CIT(A) also observed that sometimes the term includes data that has not been traditionally being associated with computers such as film, tapes and records. The ld. CIT(A) finally concluded that the consideration for right to use the copyright in the software can be royalty. The ld. CIT(A) also placed reliance on the decision of Karnataka High Court in the case of CIT vs. Samsung Electronics Co. Ltd. reported in 16 Taxman.com 141 and Co-ordinate Bench of Mumbai of Tribunal in case of Reliance Infocomm in ITA No.837/Mum/2007, and ultimately concluded that the expenditure reiumbursed by the assessee to Omron Asia Pacific Pte. Ltd., Singapore is in the nature of royalty as per Section 9(1)(vi) and Article 12

of Indo-Singapore DTAA, since the said expenditure was incurred without deduction of tax at source, the same has been rightly disallowed by the ld. AO u/s.40(a)(i) of the Act.

4. Aggrieved, the assessee is in appeal before us.

5. We have heard rival submissions and perused the materials available on record. The aforesaid primary facts stated hereinabove including the nature of service rendered by the Singapore entity to the assessee pursuant to the system support and maintenance agreement dated 01/04/2008 are not in dispute and hence, the same are not reiterated herein for the sake of brevity. From the bare perusal of the nature of services rendered by the Singapore entity to the assessee, it could be seen that Items Nos. 1-5 talks only about pure rendition of services and Items No.6-12 talks about entitlement of subscription to use to the latest version of the software supplied. It is not in dispute that the Singapore entity had also purchased software and also sold the same to the assessee. From the scope of services rendered by the Singapore entity to the assessee, it could be safely concluded that the said case does not fall within the ambit of purchase of any copyrighted article by the assessee so as to constitute the same to be in the nature of royalty. The Singapore entity buys various licenses from third party manufacturers and in turn sells the same to the Indian assessee. The Singapore entity is not the owner of any copyright. This is a clear case of providing services by the Singapore entity to the assessee company. Hence, the same cannot fall within the ambit of royalty. We also find that the ld. CIT(A) had placed reliance on the Co-ordinate bench decision of Mumbai Tribunal in the case of Reliance Infocomm in ITA No.837/Mum/2007 which we find has been subsequently recalled in Miscellaneous application proceedings by Mumbai Tribunal and in the

recalled proceedings, after considering the decision of Hon'ble Karnataka High Court in the case of Samsung Electronics and by placing reliance on the decision of the Hon'ble Delhi High Court in the case of Erricson AB, New Delhi reported in 343 ITR 470, the Mumbai Tribunal had decided the issue in favour of the assessee. Hence, the reliance placed by the ld. CIT(A) does not come to the rescue of the revenue and rather it advances the case of the assessee.

5.1. Though the ld. AO had categorized the issue to be in the nature of fee for technical services, both under the domestic law as well as under the DTAA on the ground that services have been utilized in India and source of payment / income is in India, the same has not been discussed by the ld. CIT(A) and the ld. CIT(A) had upheld the disallowance totally on a different footing by treating the nature of expenditure to be in the nature of royalty. Against this finding, the revenue is not in appeal before us. Hence, what is to be adjudicated by us is whether the subject mentioned incurrence of expenditure by the assessee could be characterized as royalty in the facts and circumstances of the case. We have already held hereinabove that the subject mentioned expenditure cannot fall within the ambit of royalty. Hence, the disallowance made u/s.40(a)(i) of the Act cannot be made in the facts of the instant case. Since, the relief is granted to the assessee on first principle, the other argument advanced by the ld. AR that money is actually not paid by the assessee during the year under consideration and hence, the same would not be liable for deduction of tax at source, is not adjudicated herein and the same is hereby left open. Accordingly, the ground Nos. 1 & 2 raised by the assessee are allowed.

6. The ground No.3 raised by the assessee is with regard to charging of interest u/s.234A, 234B & 234C which are consequential in nature.

7. The ground No.4 raised by the assessee is general in nature and does not require any specific adjudication.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 01/07/2020

Sd/-	Sd/-
(AMIT SHUKLA)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 01 /07/2020
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

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BY ORDER,

(Asstt. Registrar)
ITAT, Delhi