IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

(THROUGH VIDEO CONFERENCE)

SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.9056/Del./2019
(ASSESSMENT YEAR : 2016-17)

M/s. Digi Drives Pt. Ltd., Plot No.148, Sector 58, Faridabad – 121 004.	vs.	ACIT, Circle 1, Faridabad.

(PAN : AAACD7387A)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Somil Agarwal, Advocate
REVENUE BY : Shri Saras Kumar, Senior DR

Date of Hearing : 18.08.2020
Date of Order : 24.08.2020

<u>O R D E R</u>

<u>PER KULDIP SINGH, JUDICIAL MEMBER :</u>

Appellant, M/s. Digi Drives Pvt. Ltd. (hereinafter referred to as the 'appellant') by filing the present appeal sought to set aside the impugned order dated 31.10.2019 passed by the Commissioner of Income - tax (Appeals), Faridabad on the grounds inter alia that:-

> ***"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not deleting the***

disallowance made by Ld. AO amounting to Rs.39,70,224/- (i.e. 30% of Rs.1,32,34,080/-) on account of commission paid to M/s. Taiyo Enterprises Inc. (NRI) and has erred in enhancing the disallowance by Rs.92,63,856/- by wrongly observing the commission receipts in the hands of TEI as fee for technical services u/s 9(1)(vii) of the Act read with explanation 2 and further erred in applying the provisions of section 195 and that too without any basis and by recording incorrect facts and findings and without appreciating the facts and circumstances of the case and in violation of principles of natural justice and without considering the submission filed by the assessee.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in not deleting the addition made by Ld. AO amounting to Rs.39,70,224/- and has erred in enhancing the disallowance by Rs.92,63,856/-, aggregating to Rs.l,32,34,080/- by wrongly observing the commission receipts in the hands of TEI as fee for technical services u/s 9(1)(vii) of the Act read with explanation 2 and further erred in applying the provisions of section 195, in bad in law and against the facts and circumstances of the case.

3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging interest u/s 234B and 234C of Income Tax Act, 1961."

2. Briefly stated the facts necessary for adjudication of the issue at hand are : Assessee company is into the business of manufacturing and trading of panels, cold rolling mills and into export business and filed return of income at Rs.3,17,11,520/- for the year under assessment i.e. AY 2016-17, which was subjected to scrutiny and assessment was framed under section 143 (3) of the Income-tax Act, 1961 (for short 'the Act') at Rs.5,15,93,770/-. Assessing Officer (AO) made addition of Rs.39,70,224/- being 30% of the amount claimed to have been paid to M/s. Taiyo Enterprises Inc. (for short 'TEI') to the tune of Rs.1,32,34,080/- as

commission without deducting the tax at source (TDS) on the ground that u/s 195 of the Act, TDS was required to be deducted on payment made to a non-resident company i.e. TEI and thereby framed the assessment at Rs.5,15,93,770/-.

3. Assessee carried the matter by way of an appeal before the ld. CIT (A) who has enhanced the income of the assessee by disallowing entire commission paid of Rs.1,32,34,080/- u/s 40(a)(i) of the Act as against disallowance of 30% i.e. Rs.39,70,224/- made by the AO. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Undisputedly, assessee company being into export business availed of services of TEI, Japan for procuring order for supplying, installing and successful commissioning of cold rolling mill (turnkey project) to Mabati Rolling Mills, a Kenyan company and paid commission @ 6% to the tune of $34,90,000. Assessee company entered into a Memorandum of Understanding (MOU) with TEI, copy of MOU available at page 105 of the paper book, to

carry out their business deal. The relevant clauses thereof are extracted for ready perusal as under:-

> ***"1. The Second Party will introduce the prospective buyer with the First Party and shall also help to First Party in getting order from the prospective buyer.***
>
> ***2. The First Party completes the order as per terms 7 conditions of the order to the satisfaction of the prospective buyer.***
>
> ***3. All the technical discussions shall be held by First Party directly with the prospective buyer. In case of any problem relating to getting of the order, The First Party shall inform the same in writing to the Second Party.***
>
> ***4. In lieu of above the First Party has agreed to pay a referral commission @ 6% of the total base value of the order received from the above said prospective buyer.***
>
> ***5. The above commission shall be all inclusive and no expenses shall be reimbursed by the First Party to the Second Party. The Second Party will render its services entirely from out of India.***
>
> ***6. That this understanding is limited to the order to be procured from this customer form Kenya.***
>
> ***7. Terms of Payment : The total commission shall be paid in two installments,***
>
> > ***(I) 50% on receipt of at least 30% (of the order value) advance from the customer;***
> >
> > ***(II) Balance 50% on receipt of at least 90% (of the order value) payment from the customer.***
>
> ***8. The payment shall be made in USD after deducting withholding tax, if any."***

6. AO as well as ld. CIT (A) rejected the contentions raised by the assessee that such income is not taxable in India in terms of Article 12 of Double Taxation Avoidance Agreement (DTAA) entered into between India and Japan as the commission income in

the hands of TEI in this case is not chargeable to tax in India as ‘fee for technical services’ under Article 12 and not as business income under Article 7.

7. In the backdrop of the aforesaid facts and circumstances of the case, order passed by the ld. lower Revenue Authorities and contentions raised by the ld. AR and ld. DR for the parties to the appeal, the sole question arises for determination in this case is :-

> ***“as to whether payment of $2,09,400 being 6% of $34,90,000 made by the assessee company to TEI without deducting any TDS is to be treated as a ‘commission payment’ or ‘fee for technical services’ as has been held by the ld. CIT (A)?”***

8. Ld. AR for the assessee company challenging the impugned order passed by the ld. CIT (A) contended that services rendered by a non-resident company to the Indian assessee for procurement of export order cannot be treated as managerial/consultancy services and relied upon the order passed by the coordinate Bench of the Tribunal in case of ***DCIT vs. M/s. Tej International Pvt. Ltd. in ITA NO.6140/Del order dated 20.07.2018***. However, ld. DR for the Revenue relied upon the order passed by the ld. CIT (A).

9. We have perused the order passed by the coordinate Bench of the Tribunal in case of ***DCIT vs. M/s. Tej International Pvt. Ltd.*** (supra) bearing identical facts and the Tribunal by relying

upon the decision rendered by ***Hon'ble Apex Court in the case of GVK Industries Ltd. vs. CIT*** (supra), decision rendered by the coordinate Bench of the Tribunal in ***Adidas Sourcing Ltd. vs. ADIT (International Taxation) 150 TTJ 801 (Delhi),*** decision rendered by ***Hon'ble Allahabad High Court in case of CIT vs. Model Exims (2014) 363 ITR 66 (All)*** and decision rendered by ***Hon'ble Delhi High Court in case of DIT (International Taxation) vs. Panalfa Autolektrik Ltd. 49 taxmann.com 412 (Delhi)*** reached the conclusion that mere rendering of service of procurement of export orders by a non-resident company for the Indian company does not fall in the category of managerial/consultancy services as explained in Explanation 2 to section 9(1)(vii) of the Act.

10. Hon'ble Delhi High Court in the case of ***DIT (International Taxation) vs. Panalfa Autolektrik Ltd.*** (supra) has explained the consultancy services and technical services by returning following findings :-

> ***"The expression 'managerial, technical and consultancy services' have not been defined either under the Act or under the General Clauses Act, 1897. The said terms have to be read together with the word 'services' to understand and appreciate their purport and meaning. One has to examine the general or common usage of these words or expressions, how they are interpreted and understood by the persons engaged in business and by the common man who is aware and understands the said terms. [Para 14]***

The services rendered, the procurement of export orders, etc. cannot be treated as management services provided by the non-resident to the respondent-assessee. The non-resident was not acting as a manager or dealing with administration. It was not controlling the policies or scrutinizing the effectiveness of the policies. It did not perform as a primary executor, any supervisory function whatsoever. This is dear from the facts as recorded by the Commissioner (Appeals), which have been affirmed by the Tribunal. [Para 15]

The non-resident, it is dear was appointed as a commission agent for sale of products within the territories specified and subject to and in accordance with the terms set out, which the non-resident accepted. The non-resident, therefore, was acting as an agent for procuring orders and not rendering managerial advice or management services. Further, the respondent-assessee was legally bound with the nonresidents' representations and acts, only when there was a written and signed authorization issued by the respondent-assessee in favour of the non-resident. Thus, the respondent- assessee dictated and directed the non-resident.

The Commissioner (Appeals) has also dealt with quantification of the commission and as per agreement, the commission payable was the difference between the price stipulated in the agreement and the consideration that the respondent-assessee received in items of the purchase contract or order, in addition to a predetermined guarantee consideration. Again, an indication contra to the contention that the non-resident was providing management service to the respondent-assessee. [Para 16]

The revenue has not placed copy of the agreement to contend that the aforesaid clauses do not represent the true nature of the transaction. The Assessing Officer in his order had not bothered to refer and to examine the relevant clauses, which certainly was not the right way to deal with the issue and question. [Para 17]

Further, would be incongruous to hold that the non-resident was providing technical services. The non-resident had not undertaken or performed 'technical services', where special skills or knowledge relating to a technical field were required. Technical field would mean applied sciences or craftsmanship involving special skills or knowledge but not fields such as arts or human sciences. [Para 19]

The moot question and issue is whether the non-resident was providing consultancy services. [Para 20]

The word 'consultant' refers to a person, who is consulted and who advises or from whom information is sought. In Black's Law Dictionary, Eighth Edition, the word 'consultation' has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the form of an advice or consultation given by the non-resident to the resident Indian payer. [Para 21]

In the present case commission paid for arranging of export sales and recovery of payments cannot be regarded as consultancy service rendered by the non-resident. The non-resident had not rendered any consultation or advice to the respondent-assessee. The nonresident no doubt had acquired skill and expertise in the field of marketing and sale of automobile products, but in the facts, as noticed by the Tribunal and the commissioner (Appeals), the nonresident did not act as a consultant, who advised or rendered any counseling services.

The skill, business acumen and knowledge acquired by the nonresident were for his own benefit and use. The non-resident procured orders on the basis of the said knowledge, information and expertise to secure their commission. It is a case of self-use and benefit, and not giving advice or consultation to the assessee on any field, including how to procure export orders, how to market their products, procure payments etc. The assessee upon receipt of export orders, manufactured the required articles/goods and then the goods produced were exported. There was no element of consultation or advice rendered by the non-resident to the respondent-assessee. [Para 22]

The technical services consists of services of technical nature, when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allows him to do so. In the present case, the aforesaid requisites and required necessities are not satisfied. Indeed, technical, managerial and consultancy services may overlap and it would not be proper to view them in watertight compartments, but in the present case this issue or differentiation is again not relevant. [Para 25]"

11. Hon'ble Allahabad High Court in case of ***CIT vs. Model Exims*** (supra) has dealt with the identical issue by holding that

"the agreement with non-resident commission agents for procuring orders does not involve rendering of any managerial or technical services and consequently, no tax withholding required on payment of said commission."

12. When we examine the relevant clauses of MOU entered into between assessee company and TEI vide which payment has been made to TEI, it leads to the conclusion that TEI was to procure the order for supplying product of assessee company to some Kenyan buyer for which commission @ 6% of the total order was agreed to be paid in two installments. In other words, coordination and liasoning role as a channel of communication has been assigned to TEI to procure the order for sale of product of assessee company.

13. When we peruse para 13 of the impugned order passed by the ld. CIT (A), we find that ld. CIT (A) proceeded on the premise that TEI was having expertise, skill and knowledge about the market access in Kenya about the cold rolling mill to understand the technical requirement of such field of operation. TEI procured the order for assessee and provided its advice, skill and expertise. Ld. CIT (A) also relied upon the judgment rendered by Hon'ble Apex Court in the case of ***GVK Industries Ltd. vs. CIT (2015) 371 ITR 453 (SC)***.

14. Ld. CIT (A) reached the conclusion that services rendered by TEI to the assessee company were in the nature of "consultancy services" covered under the provisions of section 9(1)(vii) of the Act read with Explanation 2 as 'fee for technical services'. For ready perusal, Explanation 2 to section 9(1)(vii) is extracted as under:-

> ***"Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries""***

15. Explanation 2 to section 9(1)(vii) is categoric enough to explain the 'fee for technical services' which is, *'any consideration for rendering any managerial, technical or consultancy services'*. From the facts on record and terms & conditions contained in the MOU, it is difficult to deduce if the TEI has rendered any type of managerial, technical or consultancy services for installation and successful implementation of cold rolling mill (turnkey project) rather introduced M/s. Mabati Rolling Mills, a Kenyan company for supply of cold rolling mills and thereby procured order of $34,90,000. There is not an iota of evidence on file as to what type of managerial, technical or consultancy services have been

rendered by TEI to the assessee company for installation or successful commissioning of cold rolling mill. There is also not an iota of evidence on file if TEI was having any such technical expertise and skills, as its functional profile is not on record nor claimed to have perused by AO/CIT(A), for installation and successful commissioning of cold rolling mill (turnkey project).

16. Furthermore, when we examine clause 3 of the MOU it is categoric enough to explain that all the technical discussion shall be held by the first party (assessee company) directly with the prospective buyer. In case of any problem relating to getting of the order, the first party shall inform the same in writing to the second party. So, the limited role has been assigned to TEI as per MOU to introduce the prospective buyer for getting order for sale of the product of the assessee company.

17. Even otherwise, when undisputedly TEI is not having any Permanent Establishment (PE) in India the income of TEI received as commission from assessee company was not chargeable to tax in India as the same was neither accrued in India nor received in India and as such was not required to deduct tax at source u/s 195 of the Act. So the question framed is answered in favour of assessee as the payment made by assessee company to TEI is "commission payment" and not a "fee for technical services".

18. In view of what has been discussed above, we are of the considered view that the AO as well as ld. CIT (A) have merely made addition on the basis of conjectures and surmises because no evidence whatsoever has been brought on record if TEI was having any managerial or technical expertise to provide technical services to the assessee company apart from procuring orders for the assessee company on commission basis as per MOU. So, the AO/ld. CIT (A) have erred in making disallowance / enhancing the disallowance u/s 40(a)(i) of the Act of entire commission of Rs.1,32,34,080/- which is not sustainable in the eyes of law, hence ordered to be deleted. Consequently, the appeal filed by the assessee stands allowed.

Order pronounced in open court on this 24th day of August, 2020.

Sd/-	**sd/-**
(R.K. PANDA) **ACCOUNTANT MEMBER**	**(KULDIP SINGH)** **JUDICIAL MEMBER**

Dated the 24th day of August, 2020
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Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A), Faridabad.
5.CIT(ITAT), New Delhi.

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NEW DELHI.