

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.2358/Bang/2018
Assessment Year: 2015-16

M/s. Ilantus Technologies Pvt. Ltd. 1 st Floor, No.57, Novel Business Park 13 th Cross, Baldwins College Road Gajendra Nagar Bangalore-560 030 PAN NO : AAACI7139K	Vs.	Deputy Commissioner of Income-tax Circle-3(1)(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri S. Ramasubramanyam, A.R.
Respondent by	:	Smt. R. Premi, D.R.

Date of Hearing	:	02.12.2020
Date of Pronouncement	:	02.12.2020

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The appeal filed by the assessee is directed against the order dated 12.6.2018 passed by Ld. CIT(A)-3, Bengaluru and it relates to the assessment year 2015-16. The assessee is aggrieved by the decision of Ld. CIT(A) in confirming the disallowance of Rs.68,05,703/- made u/s 40(a)(i) of the Income-tax Act,1961 [the Act' for short] for non-deduction of tax at source.

2. The facts relating to the above said issue are stated in brief. The assessee company is engaged in the business of Global Technical, implementation and Service opportunities in Identity and

Access Management Solutions. The A.O. noticed that the assessee has claimed business promotion expenses of Rs.94,37,335/- in the profit & loss account. It was noticed that the above said expenses were incurred towards membership and subscription charges paid to leading marketing analysts like Gartner, D&B etc. The A.O. took the view the above said payment is in the nature of royalty. The A.O. noticed that the assessee did not deduct tax at source from the above said payments. Accordingly, the A.O. disallowed the claim of the assessee u/s 40(a)(i) of the Act for non-deduction of tax at source.

3. Before Ld. CIT(A) the assessee submitted that the business promotion expenses claimed by it consisted of expenses incurred in its USA branch to the tune of Rs.68,05,703/- and in India to the tune of Rs.26,31,632/-. It was submitted that the payments made in India were subjected to TDS. Accordingly, the Ld. CIT(A) directed the A.O. to verify the compliance of TDS provisions in respect of payment of Rs.26,31,632/- made in India. In respect of the payments made outside India, it was contended that the payments to the extent of Rs.52,26,325/- only are in the nature of subscriptions, which are in the nature of royalty. It was contended that the above said payments were made in respect of business carried on by the assessee outside India and hence the same is covered by exception provided u/s 9(1)(vi)(b) of the Act, in which case above said payment is not liable for taxation in the hands of the recipient. In that view of the matter, the said payment is not liable for deduction of tax at source u/s 195 of the Act. Accordingly, it was contended that no disallowance is called for u/s 40(a)(i) of the Act.

4. The Ld. CIT(A) observed that the assessee has not brought anything on record to show that the expenditure was restricted to earning income outside India and it was also not shown that the business carried on by the assessee in India did not benefit from the

same. Accordingly, he took the view that there is nothing on record to suggest that the entire expenditure was for earning income outside India. The Ld. CIT(A) also referred to an invoice issued by M/s. Discover ORG and observed that the sale is made to the assessee in India and not to the branch in USA. The Ld. CIT(A) also extracted the copy of invoice issued by M/s. Discover ORG at page 13 of his order. The Ld. CIT(A) also observed as under in respect of a payment of Rs.30,61,575/- made to M/s. Gartner.

“5.7 In addition, a payment of \$49,500/- (Rs.30,61,575) to M/s. Gartner relates to purchase of ‘Software advisor’ for having access to database maintained by the said marketing analyst. The software is password based and there is nothing to suggest that the same was used by the appellant only in relation to its overseas business. Some other Invoices relating to M/s. Gartner, totaling to \$27500 (Rs.17,00,875/-) are in name of the Director Ms Padma Priya, who is operating from India.”

Accordingly, the Ld. CIT(A) confirmed the addition of Rs.68,05,703/- Aggrieved the assessee has filed this appeal before us.

5. The assessee has filed an additional ground before us, wherein it is stated that out of the amount of Rs.68,05,703/- disallowed u/s 40(a)(i) of the Act, the assessee has reversed a sum of Rs.32,93,513/- during the current year itself. The above said amount was erroneously shown under “miscellaneous income”. Accordingly, he submitted that the assessee has claimed net amount of Rs.35,12,190/- only in the profit & loss account in respect of payments made to parties outside India. Accordingly, the Ld. A.R. submitted that the disallowance to the extent of Rs.32,93,513/- requires to be reduced.

6. The Ld. D.R. submitted that the assessee is making a new claim before the Tribunal. She further submitted that it is not known as to whether the reversal of expenditure claimed to have been made

by the assessee relate to/included in the amount of Rs.68,05,703/- disallowed by the A.O.

7. We heard the parties on this issue and perused the record. We find merit in the submissions made by Ld. D.R. We notice that the assessee has all along been claiming payment of Rs.68,05,703/- as payment made towards subscription charges. It is for the first time the assessee is claiming before us that a sum of Rs.32,93,513/- has been reversed during the year under consideration. The Ld A.R submitted that the above said amount has been shown under the head "miscellaneous income" in the Profit and Loss account, instead of reducing the same from the relevant expenditure. Accordingly, he submitted that the net amount of payment alone is required to be considered for the purpose of disallowance u/s 40(a)(i) of the Act. The Ld A.R invited our attention to page no.51 of the paper book, which contains break-up details of miscellaneous income.

8. We notice from the details of miscellaneous income that a sum of Rs.32,93,513/- has been shown as reversal of the amount payable to M/s Gartner. If the said reversal was made out of the expenditure of Rs.68,05,703/- originally booked by the assessee during the year under consideration, then there is merit in the claim of the assessee, i.e., what is payable to M/s Gartner for the year under consideration would be the net amount. However, as submitted by Ld D.R, it is not clear as to whether the above said reversal was related to the expenditure originally booked or it related to any other liability. Accordingly, we are of the view the above said claim of assessee requires examination with reference to the books of accounts and profit & loss account of the assessee. If the reversal pertains an expenditure booked/included in Rs.68,05,703/-, the disallowance requires to be restricted to the net amount of expenditure claimed by

the assessee. Accordingly, we restore this claim of the assessee to the file of AO for examining it properly.

9. The Ld. A.R. submitted that the remaining amount of Rs.35,12,190/- was made towards subscription charges in respect of business carried on by the assessee in USA. Accordingly, he submitted that the above said payment is not liable for deduction of tax at source in view of section 9(1)(vi)(b) of the Act.

10. The Ld.D.R, on the contrary, submitted that the assessee is carrying on business from India and activities carried on by its USA branch is not known. Accordingly, the Ld. D.R. submitted that the assessee has not proved that it is carrying on separate business from USA. The Ld. D.R. submitted that the Ld. CIT(A) has also expressed the view that the assessee has failed to show that the data base was used only by USA branch and not by the assessee. She submitted that the Ld CIT(A) has also noticed that one of the companies have made sale in India. She submitted that the Ld CIT(A) has properly addressed all the contentions of the assessee and rejected the same.

11. We heard the parties on this issue and perused the record. We notice that the exception provided under sec.9(1)(vi)(b) would apply only if the royalty is paid by a resident assessee for the purposes of business or profession carried on by such person outside India. We notice that the assessee has, for the first time, made the claim before Ld CIT(A) that its USA branch is carrying on business separately and subscription services are exclusively used by it. We have noticed earlier that the Ld CIT(A) has rejected the said claim for the reason that the assessee has failed to substantiate its claim; that the assessee has failed to show that the impugned services were used by its foreign branch only and that certain bills have been found at the Indian address of the assessee.

12. Before us, the Ld A.R prayed that the assessee may be provided with one more opportunity to prove all its claims. Hence, in the interest of natural justice, we are of the view that the assessee may be provided with an opportunity to substantiate its claim. We have noticed that the Ld CIT(A) has raised very valid points on the claim of the assessee, which is also required to be addressed by the assessee.

13. We notice that an identical issue relating to the disallowance of payments made to M/s Gartner Group u/s 40(a)(ia) of the Act was examined by the co-ordinate bench in the case of M/s Wipro Ltd (IT(TP)A No.99/Bang/2014 & others dated 05-10-2020). The issue as to “source of income” was also examined in the above said case. For the sake of convenience, we extract below the relevant observations made by the co-ordinate bench in the above said case:-

“32. ISSUE NO.30 relates to disallowance of payment made to M/s. Gartner Group u/s 40(a)(ia) of the Act for non-deduction of tax at source. This issue arises in assessment years 2010-11 to 2014-15 in the appeal filed by the assessee.

32.1 The facts relating to this issue are that M/s. Gartner Group maintains a data base and the same is allowed to be used by others on payment of license fee. The assessee has obtained license from M/s. Gartner Group for using the data base. The assessee did not deduct tax at source from the licence fee paid to the above said group. The AO, however, took the view that the payment so made is in the nature of royalty and hence the provisions of sec.9(1)(vi) are attracted. Hence the AO took the view that the assessee should have deducted tax at source

from the above said payment and accordingly proposed to disallow the payment by invoking provisions of sec.40(a)(i) of the Act. Before the A.O., the assessee submitted that the license was used for the business carried on by the assessee outside India or for the purpose of earning income from any source outside India. Accordingly, it was contended that the payment made for the use of licence would be covered by the exception given u/s 9(1)(vi) of the Act. However, the A.O. noticed that an identical issue has been examined by the jurisdictional Karnataka High Court in the assessee's own case reported in 355 ITR 284 and the issue has been decided against the assessee. Accordingly, the A.O. held that the payment made to M/s. Gartner Group is in the nature of royalty and assessee is liable to deduct TDS from the said payment u/s 195 of the Act. Since the assessee did not deduct TDS, the A.O. disallowed the payments made to Gartner Group in the years relevant to the assessment years 2010-11 to 2014-15 by invoking provisions of section 40(a)(i) of the Act.

32.2 *The Ld. A.R. admitted that an identical issue has been decided against the assessee by Hon'ble Karnataka High Court in its own case referred above. He submitted that the Hon'ble Karnataka High Court, however, did not have occasion to examine the applicability of exceptions provided u/s 9(1)(vi)(b) of the Act to the facts of the assessee's case. He submitted that the provisions of sec.9(1)(vi)(b) states that if any royalty is paid for the purposes of business carried on outside India or for the purposes of making or earning any income from any source outside India, then the royalty income shall not be deemed to accrue or arise in India. He submitted that the SEZ/STPI units have an obligation to make exports and accordingly earned income outside*

India. Hence, the export profits received by the assessee from outside India constitute a “source outside India” and accordingly, the exception provided u/s 9(1)(vi) of the Act is applicable to the assessee. Accordingly, the Ld A.R submitted that the royalty given to M/s. Gartner Group shall not be deemed to accrue or arise in India in the hands of M/s Gartner Group. In the absence of any income in the hands of above said person, there is no obligation is placed on the shoulders of the assessee to deduct tax at source u/s 195 of the Act from the payment so made. In support of his contentions, the assessee relied on the decision rendered by Hon’ble Madras High Court in the case of AktiengesellschaftKuhnle Koop and Kausch (262 ITR 513). In the above said case, the assessee before the Madras High Court paid royalty outside India out of its export sales. The Hon’ble High Court held that the source for royalty is from the source generated outside India and hence the same is not taxable within the meaning of section 9(1)(vi) of the Act.

32.3 The Ld. A.R., however, fairly conceded that the Hon’ble Delhi High Court has examined the issue of “source of income” in the case of CIT Vs. Havells India Ltd. (ITA No.55/2012 & ITA No.57/2012 dated 21.5.2012) and the decision rendered by Hon’ble Madras High Court in the case of AktiengesellschaftKuhnle Koop and Kausch (supra) was also cited before Hon’ble Delhi High Court. However the Hon’ble Delhi High Court noticed that the Hon’ble Madras High Court, in the above said case, did not consider another decision rendered by it earlier in the case of Anglo-French Textile Ltd. 199 ITR 785, wherein it was held that the source of income is the place where the right to receive the income by the assessee arose. Accordingly, the Delhi High Court held

that if the export contracts are concluded in India and the assessee's products are exported outside India under such contracts, then the source of income would arise in India. The Ld. A.R., however, submitted that there is conflict of view between Madras High Court and Delhi High Court and hence the view in favour of the assessee should be adopted.

32.4 We heard Ld. D.R. on this issue and perused the record. There is no dispute with regard to the fact that identical payments made to M/s Gartner Group has been held to be royalty in the years relevant to assessment years 2001-02 to 2003-04 within the meaning of section 9(1)(vi) of the Act by Hon'ble jurisdictional Karnataka High Court in the assessee's own case reported in 355 ITR 284. It is the case of the Ld A.R that the Hon'ble Karnataka High Court did not have occasion to examine the applicability of exceptions provided in sec.9(1)(vi) of the Act. Hence, the Ld. A.R. has taken an alternative contention that the royalty was paid for the purpose of earning income from a source outside India. Accordingly, it was contended that the said payment would be covered by exception provided in sec.9(1)(vi). Accordingly, it was contended that the amount so paid to Gartner Group, shall not be deemed to accrue or arise in India within the meaning of section 9(1)(vi) of the Act. Accordingly, it was contended that there is no liability for the assessee to deduct tax from the said payment and hence the A.O. was not justified in disallowing the payment by invoking the section 40(a)(ia) of the Act.

32.5 In effect, the alternative contention of the assessee is that the export proceeds received by it should be considered as an income earned from a source located outside India. There is no dispute with

regard to the fact the export of services/products have been done from the SEZ/STPI units located in India. The question as to whether the export proceeds can be treated as a source located outside India was examined by Hon'ble Delhi High Court in the case of Havells India Ltd. (supra) and the same was decided against the assessee with the following observations:-

“13. [Section 9\(i\)\(vii\)\(b\)](#) contemplates a source located outside India. It is difficult to conceptualise the place/ situs of the person who make payment for the export sales as the source located outside India from which assessee earned profits. The export contracts obviously are concluded in India and the assessee's products are sent outside India under such contracts. The manufacturing activity is located in India. The source of income is created at the moment when the export contracts are concluded in India. Thereafter the goods are exported in pursuance of the contract and the export proceeds are sent by the importer and are received in India. The importer of the assessee's products is no doubt situated outside India, but he cannot be regarded as a source of income. The receipt of the sale proceeds emanate from him from outside India. He is, therefore, only the source of the monies received. The income component of the monies or the export receipts is located or situated only in India. We are making a distinction between the source of the income and the source of the receipt of the monies. In order to fall within the second exception provided in [Section 9\(1\)\(vii\)\(b\)](#) of the Act, the source of the income, and not the receipt, should be situated outside India. That condition is not satisfied in the present case. The Tribunal, with respect, does not appear to have examined the case from this aspect. Its conclusion that the technical services were not utilised for the assessee's business

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activity of production in India does not bring the assessee's case within the second exception in [Section 9\(1\)\(vii\)\(b\)](#) of the Act. It does not bring the case under the first exception either, because in order to get the benefit of the first exception it is not sufficient for the assessee to prove that the technical services were not utilised for its business activities of production in India, but it is further necessary for the assessee to show that the technical services were utilised in a business carried on outside India. Therefore, we cannot also approve of the Tribunal's conclusion in para 29 of its order to the extent it seems to suggest that the assessee satisfies the condition necessary for bringing its case under the first exception. Be that as it may, as we have already pointed out, since the source of income from the export sales cannot be said to be located or situated outside India, the case of the assessee cannot be brought under the second exception provided in the Section."

32.6 It can be noticed that the Hon'ble Delhi High Court has made distinction between "source of income" and "source of receipt of monies". So long as the export contracts are concluded in India, the source of income is treated as located or situated only in India. The Ld. A.R. placed his reliance on the decision rendered by Hon'ble Madras High Court in the case of AktiengesellschaftKuhnle Koop and Kausch(supra). However, the Hon'ble Delhi High Court has observed that the decision rendered by Hon'ble Madras High Court in the case of Anglo French Textiles Ltd. (supra) earlier to the above said decision was not brought to the notice of Hon'ble Madras High Court. Accordingly, the Delhi High Court refused to follow the decision rendered in the case of AktiengesellschaftKuhnle Koop and

Kausch(supra) by Hon'ble Madras High Court. We also notice that the Hon'ble Delhi High Court has also referred to various decisions to understand the meaning of the word "source". For the sake of convenience, we extract below the observations made by Hon'ble Delhi High Court in this regard.

"12. The question as to what is a source of income has been dealt with in some authoritative pronouncements. The Judicial Committee in [Rhodesia Metals Ltd. v. Commissioner of Income Tax](#), (1941) 9 ITR (Suppl.) 45 observed that a "source" means not a legal concept but one which a practical man would regard as a real source of income. This observation was adopted by Malik, J. in his separate but concurring judgment in the case of [Rani Amrit Kaur v. CIT](#), (1946) 14 ITR 561, a decision of the Full Bench of the Allahabad High Court. A source of income was described by R. S. Pathak, J. (as he then was) in the following words in [Seth Shiv Prasad v. CIT](#), (1972) 84 ITR 15 (All.) at page 18: -

"A source of income, therefore, may be described as the spring or fount from which a clearly defined channel of income flows. It is that which by its nature and incidents constitutes a distinct and separate origin of income, capable of consideration as such in isolation from other sources of income, and which by the manner of dealing adopted by the assessee can be treated so."

The observations of the Judicial Committee (supra) as to what is a source of income have been approved by the Supreme Court in [CIT v. Lady Kanchanbai](#), (1970) 77 ITR 123. The location or situs of a source of income is another aspect. The third aspect is the accrual of the income. Though it is true, as held by Kania,

C.J., speaking for a Constitution Bench of the Supreme Court in [CIT v. AhmedbhaiUmarbhai](#), (1950) 18 ITR 472 (SC) at page 479, that the place where the source of income is located may not necessarily be the place where the income also accrues, that question is not material in the present case because herein we are concerned only with the question as to the location of the source. The real question is whether the export sales proceeds received from goods manufactured and exported from India constitute a source inside or outside India. To decide the same we have to take a pragmatic and a practical view and not approach the question from a theoretical perspective.”

Accordingly, following the decision rendered by jurisdictional Hon’ble Karnataka High Court in the assessee’s own case reported in 355 ITR 284 and also the decision rendered by Hon’ble Delhi High Court in the case of Havells India Ltd. (supra) we hold that the A.O. was justified in holding that the payment made to M/s. Gartner Group is in the nature of royalty within the meaning of section 9(1)(vi) of the Act and hence the assessee is liable to deduct tax at source from the said payment u/s 195 of the Act. In view of the default on the part of the assessee in not deducting the tax at source, the A.O. was justified in making the disallowance of payment made to M/s. Gartner Group by invoking provisions of section 40(a)(i) of the Act.”

14. Accordingly, we restore this issue also to the file of the AO for examining it afresh in the light of discussions made supra. After affording adequate opportunity of being heard, the AO may take appropriate decision in accordance with law.

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15. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 2nd Dec, 2020.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 2nd Dec, 2020.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.