

FIT FOR PUBLICATION

Sd/- Sd/-
(AS) (ANM)
J.M. A.M

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No. 4801/Del/2016
Assessment Year : 2010-11
ITA No. 5964/Del/2016
Assessment Year : 2011-12
ITA No. 5410/Del/2018
Assessment Year : 2012-13**

Energy Infratech Pvt. Ltd. 14, Factory Road, Block No. A, Ground Floor, Adj. Vardhman Mahavir Medical College, Safdarjung, New Delhi- 110029 PAN : AAICS4105R	Vs.	DCIT Circle 8(1) New Delhi
Appellant		Respondent

Assessee by : Sh. Puneet Thukral, CA
Revenue by : Sh. Avikal Manu, Sr. DR

ORDER

PER ANADEE NATH MISSHRA, A.M.:

(A) The aforementioned appeals in the case of the Assessee are taken up together for the sake of convenience and brevity; and are hereby disposed off through this Consolidated Order. Grounds taken in these appeals of Assessee are as under:

ITA No. 4801/Del/2016, A. Y. : 2010-11

- 1) *That the Id. CIT(A) has erred in law and on facts in confirming the disallowance of expense made by Assessing officer amounting to Rs. 86,41,053/-.*
- 2) *That the Id. CIT(A) has erred on the facts and in law by not disposing off the Grounds of appeal raised by the assessee which primarily related to addition made by assessing officer for claiming double deduction of expenses as well as non deduction of tax at source on payment made to non residents and further the CIT(A) erred in confirming the same disallowance on an altogether new basis .*
- 3) *That the Id. CIT(A) has erred in law as well as facts of the case by confirming the disallowance of Rs. 86,41,053/- being reimbursement of expenses by the appellant to its wholly owned subsidiary in United states for development of its business in United States of America :-*
 - i) *on the basis that the said expenses have not been incurred wholly and exclusively for the purpose of the business.*
 - ii) *on the basis that these expenses have been made by its Subsidiary company which is a separate legal entity for tax purposes in the United States.*
 - iii) *without properly considering the evidence produced and material placed and made available on record in respect of expenses incurred and claimed by the appellant.*
- 4) *The Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing.*

ITA No. 5964/Del/2016, A.Y. 2011-12

- 1) *That the Id. CIT(A) has erred in law and on facts in confirming the disallowance of expense made by Assessing officer amounting to Rs. 44,57,472/-.*
- 2) *That the Id. CIT(A) has erred on the facts and in law by not disposing off the Grounds of appeal raised by the assessee which primarily related to addition made by*

assessing officer for claiming double deduction of expenses as well as non deduction of tax at source on payment made to non residents and further the CIT(A) erred in confirming the same disallowance on the basis of previous year appeal order in a mechanical manner.

3) *That the Id. CIT(A) has erred in law as well as facts of the case by confirming the disallowance of Rs.44,57,472/- being reimbursement of expenses by the appellant to its wholly owned subsidiary in United states for development of its business in United States of America :-*

i) *on the basis that the said expenses have not been incurred wholly and exclusively for the purpose of the business.*

ii) *on the basis that these expenses have been made by its Subsidiary company which is a separate legal entity for tax purposes in the United States.*

4) *The Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing.*

ITA No. 5410/Del/2018, A.Y. 2012-13

1) *That the Id. CIT(A) has erred in law and on facts in confirming the disallowance of expense made by Assessing officer amounting to Rs. 15,68,254/-.*

2) *That the Id. CIT(A) has erred on the facts and in law by not disposing off the Grounds of appeal raised by the assessee which primarily related to addition made by assessing officer for claiming double deduction of expenses as well as non deduction of tax at source on payment made to non residents.*

3) *That the Id. CIT(A) erred in confirming the disallowance on the basis of previous year appeal order in a mechanical manner and without providing any opportunity to file detail of expenses and further erred in stating in the appeal order that the assessee did not submit any details of the expenses.*

4) *That the Id. CIT(A) has erred in law as well as facts of the case by confirming the disallowance of Rs. 15,68,254/- being reimbursement of expenses by the appellant to its wholly owned subsidiary in United states for development of its business in United States of America :-*

- i) *On the basis that the said expenses have not been incurred wholly and exclusively for the purpose of the business.*
- ii) *on the basis that these expenses have been made by its Subsidiary company which is a separate legal entity for tax purposes in the United States.*
- 5) *The Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing."*

(A.1) In the course of appellate proceedings in Income Tax Appellate Tribunal three paper books were filed by the assessee, containing the following particulars :

S. No.	Particulars
1.	Submissions before the Hon'ble ITAT
2.	Assessment order u/s 143(3) of the I. Tax Act.
3.	Form No. 35 along with Grounds and Statement of facts
4.	Revised Grounds of Appeal vide letter dated 17.02.2015
5.	First submission before CIT(A)
6.	Additional Submission before CIT(A)
7.	Letter to AO dated 20.07.2012 along with Balance Sheet & ITR of Energy Infratech Inc.
8.	Note on business Development activities filed with AO
9.	Complete set of Balance Sheet of Energy Infratech Pvt. Ltd.
10.	Reply to CIT(A) vide letter dated 12.03.2014
11.	Reply to CIT(A) vide letter dated 20.03.2014
12.	Reply to CIT(A) vide letter dated 20.06.2014
13.	Reply to CIT(A) vide letter dated 10.05.2016
14.	Order passed by CIT(A) dated 08.06.2016
15.	Assessment order u/s 143(3) of the I. Tax Act
16.	Form No. 35 along with Grounds and Statement of facts
17.	First submission before CIT(A)
18.	Complete set of Balance Sheet of Energy Infratech Inc.

19.	Complete set of Balance Sheet of Energy Infratech Pvt. Ltd.
20.	Order passed by CIT(A) dated 02.09.2016
21.	Assessment order u/s 143(3) of the I.Tax Act
22.	Form No. 35 along with Grounds and Statement of facts
23.	Revised Grounds of Appeal vide letter dated 06.04.2015
24.	First Submission before CIT(A)
25.	Complete Set of Balance Sheet of Energy Infratech Inc.
26.	Complete Set of Balance Sheet of Energy Infratech Pvt. Ltd.
27.	Order passed by CIT(A) dated 02.09.2016

(B) We take the appeal for A.Y. 2010-11 vide ITA No. 4801/Del/2016 first. The assessee company's business is rendering engineering consultancy services for the power projects. The company is also engaged in power generation through windmills farm. The assessee has a subsidiary company which registered in United State of America (USA). The name of the assessee's subsidiary company is Energy Infratech Inc. ('EII' for short). The assessee has claimed deduction amounting to Rs. 86,41,053/- on account of expenses which was incurred by EID, the Assessee's USA based subsidiary company. This amount was disallowed by the Assessing Officer. The relevant portion of the assessment order is reproduced as under :-

"3. During the course of assessment proceedings, the assessee was asked to provide details of expenses incurred in the foreign subsidiary namely Energy Infratech Inc. vide order sheet entry dated 02.07.2012. In response to this query, the assessee has replied vide letter dated 20.07.2012 that" the company is not consolidating the accounts of Energy Infratech Inc. and separate return of income is being

filed in USA." The assessee has also enclosed the copy of Income-tax return of Energy Infratech Inc. USA. However, from the perusal of the Notes to Account of Tax Audit Report of the assessee, it has been noted that the assessee has done expenditure in foreign currency towards Energy Infratech Inc. of an amount of Rs. 1,01,66,677/- and debited an amount of Rs.86,41,053/-. The assessee was asked to explain the said expenditure incurred on the foreign subsidiary despite the fact that the foreign subsidiary is filing its own Income-tax return in USA. The assessee has replied that "the company has been exploring various international markets specialized services. In the process, the company decided to explore the business opportunities in USA and other markets abroad. It is a trend in USA that they preferred USA based entities for availing servicing rather than the importing the services. Keeping these local requirements of USA clients, the assessee company has set up wholly owned subsidiary in USA instead of opening the branch of the company for marketing operations. The functional of the subsidiary companies is to procure consultancy assignment to the parent company for marketing commission or for reimbursement of actual expenses incurred by it. In case of failure to procure business for reasons beyond its control. In the process Energy Infratech Inc. incurred expenses under various heads such as rent, salaries, telephone, travel and conveyance etc. and claimed reimburse submitting all necessary bills and documentary proof and claimed reimbursement from the company which were paid on quarterly basis". The submission of the assessee on this point was considered but not acceptable because it is very clear that the foreign subsidiary in its return of income is already taking the allowances of expenses incurred by it in its return of income. So the reimbursement of expenses by the parent company i.e. Energy Infratech (P) Ltd. is a double deduction being claimed by the assessee.

Further, the assessee was asked why the above said reimbursement should not be disallowed as no TDS has been deducted on these payments. In response to this, the assessee has submitted the judgment of ITAT in ITA No.3449 of 2002 in the case of M/s ACIT , Circle 23(2) Vs Modicon Network (P) Ltd. The assessee's submissions were considered but not found acceptable.

The provisions of section 9(1)(i) and 9(1)(vii) as applicable are reproduced as below:-

Section 9 - Income deemed to accrue or arise in India

1. The following incomes shall be deemed to accrue or arise in India:-

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explanation 1 - for the purpose of this clause:-

- (a) in the case of business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;*
- (b) in the case of a non resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;*
- (c) in the case of a non resident, being a persons engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India.*

- income by way of fees for technical services payable by -

- (a) the Government; or*
- (b) a persons who is a resident, except where the fees are payable in respect of services utilize in a business or profession carried on by such persons outside or for the purposes of making or earning any income from any source outside India; or*
- (c) a person who is a non resident, where the fees are payable in respect of services utilized in a business or profession carried on by such persons in India or for the purposes of making or earning any income from any source in India.*

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of april, 1976, and approved by the Central government.

Explanation 1- for the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976 shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

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".

In this case, the services provided by the non-resident company i.e. Energy Infratech Inc. are being utilized in India and clearly taxable u/s 9(1)(i) and 9(1)(vii)(b) of Income Tax Act, 1961. In the case of the assessee company, what remains to be considered is whether the "marketing commission or reimbursement of actual expenses incurred by energy Infratech Inc. in case of failure to procure business for reasons beyond its control" paid by Energy Infratech (P) Ltd falls within the ambit of (vii)(b) of Section 9(1). As per the said clause, income by way of technical services payable by a persons who is a resident are payable in respect of services utilized in a business or profession carried on by such persons outside India or for the purpose of making or earning any income from any source outside India shall be deemed to accrue or arise in India.

Explanation -2 defines the expression "fees for technical services" to mean any consideration (including any lump sum consideration) for the rendering of any 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".

Thus, from the combined reading of clause 9(1)(i) and (vi)(b) and Explantion-2 it becomes clear that any consideration whether lump sum otherwise paid by a person who is a resident in India to a non-resident for running any

managerial service would fall within the ambit of "income deemed to accrue or arise in India". Therefore, in view of the above said provisions the marketing commission / reimbursement of expenses which is paid by the assessee company to its subsidiary Energy Infratech Inc. would be chargeable to Income-tax.

Therefore, from the detailed discussion made above, it is clear that the payments made by the assessee company to Energy Infratech Inc. is covered both u/s 9(1)(i) and 9(1)(vii) of the I T Act. It is also fact that no TDS has been deducted u/s 194H on the same amount, therefore, an amount of Rs.86,41,053/- is required to be disallowed and added to the total income of the assessee in view of the provision of section 40(a) of the I T Act. Penalty proceedings u/s 271(1)(c) of the IT Act, 1961 is initiated separately for filing inaccurate particulars of income.

(Addition: 86,41,053/-)

(C) The assessee filed appeal before the Ld. CIT(A) who confirmed the aforesaid disallowance, holding as under :-

"2.1. Having gone through the submissions of the appellant, the order of assessment passed by the Assessing Officer and the material facts placed on the record, it emerges from the facts that a subsidiary by the name "Energy Infratech Inc." in USA who is a separate tax entity and assessed to tax in the United States of America expended the amount of Rs. 86,41,053/- which has been claimed as expenditure incurred by the assessee in connection with exploration of business in the United States of America. The Assessing Officer noted during the assessment proceedings that the assessee has debited expenditure of Rs. 86,41,053/- in its books of accounts which pertain to the subsidiary expended in the United States. It is claimed that the company was exploring the business avenues in the United States and the expenditure has been made wholly and exclusively for the business conducted by the company. It is a matter of record that the appellant was unable to bring on record any details of the business conducted in the United States. The counsel of the

appellant was directed by this office on numerous occasions as evident from the order sheet to adduce evidence regarding the expenditure made by the company in the United States of America. The counsel of the appellant vide letter dated 09.05.2016 filed the photocopy of the lease deed signed to take on lease the residential apartment. The copy of lease is appended at pages 54-59 of the Paper Books. The lease has been signed on 14.08.2008 effective from 1st of September, 2008 at the monthly rental of Rs. 6500 US\$ and the lessee has been shown to be Energy Infratech Incorporation registered in the United States. The clause 1 states very clearly that the apartment is to be used for the residential purposes only. The pages at SI.No. 60 to 62 of the P/B contain the appointment of Mr. Prasad Surapanem as Vice President (Business Development) at the monthly salary of US\$ 6500 and the appointment letter has been issued by the Director of M/s. Energy Infratech Incorporation. Various photocopies of the self made vouchers have been filed to make the claim for the various expenses. The cab charges @ 1000 US\$ per month have been claimed as the expenditure. Various copies of other bills of food, snacks,-stationery ,,gas, communication etc. have been produced. The counsel has however, been unable to produce any evidence to show that the expenditure has been incurred by the assessee wholly and exclusively for the purpose of the business. No evidence has been adduced during the appellant proceedings to show that the company made concerted effects to locate any business avenues in USA. The lease rental deed, the appointment letter and other copies of the bills produced for the verification clearly indicate that the expenditure has been made by M/s. Energy Infratech Inc. USA who is a separate legal entity for tax purposes in the United States of America. In view of the facts, the disallowance of the expenditure of Rs. 86,41,053/- made by the assessing officer is confirmed."

(D) The present appeal has been filed by the assessee against the aforesaid impugned appellate order of the Ld. CIT(A), dated 08.06.2016.

(E) At the time of hearing before us the Ld. Counsel for the assessee submitted that the aforesaid disallowance of Rs.86,41,053/- was confirmed by the Ld. CIT(A) on the ground that the assessee was unable to produce evidences to show that the expenditure has been incurred by the assessee wholly and exclusively for the purpose of business; and further that no evidence was adduced to show that the EII made concerted effects to locate any business arrangements in USA. The Ld. Counsel submitted that this reasoning for disallowance was not adopted by the Assessing Officer and the Ld. CIT(A) departed from the reasoning of the Assessing Officer for making the disallowance. He drew our attention to the assessment order to show that disallowance was made by the Assessing Officer on the ground that the amount claimed by the assessee was a double deduction; and further that claim was hit by Section 40(a) of Income Tax Act. He further drew our attention to the fact that the validity of these grounds for making the disallowance was not adjudicated by the Ld. CIT(A); and instead the Ld. CIT(A) followed a entirely different reasoning, as aforesaid, for confirming the disallowance. The Ld. Counsel submitted that the assessee had got no opportunity to make submissions before the Assessing Officer in respect of the reasoning adopted by the Ld. CIT(A). He submitted that the issue may be restored to the file of the Assessing Officer so that the assessee is able to produce the relevant details and to file necessary submissions before the Assessing Officer in respect of the reasoning adopted by the Ld. CIT(A). The Ld. Departmental Representative agreed that the

matter needs to go back to the Assessing Officer for necessary verification in this regard. At the time of hearing, both sides, through their representatives, submitted before us that dispute regarding disallowance of the aforesaid Rs. 86,41,053/- may be set aside to the file of the Assessing Officer for fresh order as per law.

(F) We have heard both sides. We are of the view that the **assessee has the right to explain his case first to the Assessing Officer; before he is forced to explain his case to appellate authorities. If an assessee explains his case at the first stage, i.e. at the stage of the Assessing Officer to the satisfaction of the Assessing Officer; the matter, in a way, attains 'Limited Finality' because Revenue has no right of appeal against the order of the Assessing Officer. Though the matter can be revisited by Revenue under exceptional circumstances, such as, for example, in the circumstances prescribed under sections 147, 263, 264, 154, 153A 153C, etc. of I.T.Act; the fact that Revenue has no right of appeal against the order of Assessing Officer implies that the matter attains 'Limited Finality', barring the exceptional circumstances as aforementioned, if the assessee is able to satisfactorily explain the matter to the Assessing Officer. That is why it is of utmost importance that the assessee gets proper and reasonable opportunity at the first stage (i.e. at the stage of Assessing Officer), so that the assessee has a chance to avail of 'Limited Finality' which is an assessee's**

statutory right. In the present case before us, the reasoning adopted by the Ld. CIT(A) for dismissing the assessee's appeal was not considered at the stage of assessment proceedings before the Assessing Officer; which has resulted in violation of the assessee's right of 'Limited Finality'. In view of the foregoing, and as both sides have agreed to this, we set aside the issue of disallowance of the aforesaid Rs. 86,41,053/- to the file of the Assessing Officer for fresh order as per law after providing reasonable opportunity to the assessee to produce relevant materials and to make necessary submissions. All the grounds in the present appeal are disposed of in accordance with aforesaid directions and are treated as partly allowed for statistical purposes. Appeal No. 4801/Del/2016, A.Y. 2010-11 is thus partly allowed for statistical purposes.

(G) In assessment year 2011-12 similar disallowance of Rs. 44,57,472/- was made by the Assessing Officer, which was likewise confirmed by Ld. CIT(A) in the impugned appellate order for assessment year 2011-12. Present appeal vide ITA No. 5964/Del.2016 has been filed by the assessee against the impugned order of Ld. CIT(A), for assessment year 2011-12. Also, for assessment year 2012-13, similar disallowance of Rs.15,68,254/- was made by the Assessing Officer, which was likewise confirmed by the Ld. CIT(A) in impugned appellate order for assessment year 2012-13. Present appeal vide ITA No. 5410/Del/2018 has been filed by the assessee against the impugned appellate order of the Ld. CIT(A) for A.Y. 2012-13. The reasoning followed by the assessing officer for making the aforesaid disallowances in assessment year 2011-12 and in

assessment year 2012-13 is the same as the reasoning followed by him in assessment year 2010-11. Moreover, the reasoning followed by the Ld. CIT(A) for confirming the aforesaid disallowances in assessment year 2011-12 and 2012-13 are also the same as the reasoning followed by him for assessment year 2010-11. Neither side has brought any facts and circumstances to our attention to draw any distinction from assessment year 2010-11 as compared with assessment year 2011-12 and 2012-13. No distinguishing facts and circumstances have been brought to our attention by either side to distinguish the appeals vide ITA No. 5964/Del/2016 for AY 2011-12 and ITA No. 5410/Del/2018 for AY 2012-13; from ITA No. 4801/Del/2016 for AY 2010-11. At the time of hearing before us, both sides submitted before us that the issues in dispute in appeals for 2011-12 and 2012-13 vide ITA no. 5964/Del/2016 and ITA No. 5410/Del/2018 may also be restored to the file of the Assessing Officer for fresh order as per law. In view of foregoing, and as both sides have agreed to this, the issues in dispute in appeals for assessment year 2011-12 vide 5964/Del/2016 and for AY 2012-13 vide ITA No. 5410/Del/2018 are also set aside to the file of the Assessing Officer for fresh order as per law after giving a reasonable opportunity to the assessee. For statistical purposes, the grounds of appeal in assessment year 2011-12 and 2012-13 by aforesaid ITA No. 5964/Del/2016 and ITA No. 5410/Del/2018 respectively are treated as partly allowed and consequently appeals vide ITA No.5964/Del/2016 and ITA No. 5410/Del/2018 for assessment years 2011-12 and 2012-13 respectively are treated as partly allowed.

(H) In the result, all the three appeals filed by the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on 23rd February, 2021.

Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 23.02.2021

Binita

Sd/-

(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR
ITAT NEW DELHI