

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

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

ITA No.3393/Bang/2018
Assessment Year: 2014-15

Ideaobject Software Pvt.Ltd. PrabhakarAnnaswamy, 7154 13 th Floor, Tower 4B, Prestige Bella Vista Iyyappanathanagar Mount Poonamali Road Chennai 600 056 PAN NO :AACCI0346N	Vs.	ACIT Circle-3(1)(1) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri Chaitanya Mudrabetu, A.R.
Respondent by	:	Shri Kannan Narayanan, D.R.

Date of Hearing	:	02.08.2021
Date of Pronouncement	:	03.08.2021

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order dated 25.10.2018 passed by Ld. CIT(A)-3, Bengaluru and it relates to the assessment year 2014-15. All the grounds urged by the assessee are directed against the disallowance made u/s 40(a)(i) of the Income-tax Act,1961 [‘the Act’ for short].

2. The facts relating to the issue are stated in brief. The assessee is engaged in the business of providing software related

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services for medical industry. The A.O. noticed that the assessee has claimed an expenditure of Rs.1,44,92,747/- as payment towards export commission. It was submitted that the commission was paid to M/s. Infor Medix FZ LLC, a company registered in UAE. The A.O. took the view that the commission payment has been made by the assessee to the above said company for providing services which are in the nature of “technical services” mentioned in section 9 of the Act. Accordingly, he took the view that the assessee should have deducted tax at source from the export commission payment. Before A.O., the assessee submitted that the foreign agent did not have any business connection in India nor do they have any place of business in India. Accordingly, it was submitted that the commission earned by the foreign agent is not deemed to accrue or arise in India and hence, there is no liability to deduct tax at source u/s 195 of the Act. The A.O. did not agree with the submissions made by the assessee. The AO referred to the Explanation inserted by Finance Act 2010 with retrospective effect from 1.6.1976, which stated that even if non-resident has no place of business in India and whether or not that non-resident has rendered services in India, the fee for technical services are deemed to accrue or arise in India. The assessee also placed reliance on certain case laws to support its contention. However, the A.O. held that the case laws relied on by the assessee have been rendered prior to amendment made to explanation to section 9(ii) of the Act by Finance Act, 2010 with retrospective effect from 1.6.1976. Accordingly, the A.O. held that the assessee is liable to deduct tax at source from the export commission payment. The AO also placed his reliance on the decision rendered by Cochin bench of ITAT in the case of Device Driven (India) P Ltd (29 ITR 263). Since the assessee has failed to deduct tax at source, the A.O. disallowed the export commission expenditure of Rs.1,44,92,747/- u/s 40(a)(i) of the Act.

3. The Ld. CIT(A) called for agreement entered between the assessee and the foreign agent. The Ld. CIT(A) also extracted the relevant clauses of the agreement in his order and finally held that the services provided by foreign agent would fall within the purview of fee for technical services and thus covered by section 9(i)(vii) of the Act. For the sake of convenience, we extract below the relevant observations made by Ld. CIT(A) in this regard.

“ *(Business Development and Commission Agreement)* ”

ARTICLE 1 - Scope

Where the Provider will act on behalf of the company in International business development, Marketing activities, representations and provide Sales Opportunities leads to in managing the process for providing the company with Market Penetration In the International market (outside India and United states), introducing the Idea Object Products and solutions, and build distribution and partnership agreement (hereinafter referred to as "Business").

ARTICLE 2 — Operations

Provide International Market penetrations, Business Development Sales Leads and customer, Opportunities introduction and coordination for new business territories internationally focusing in South East Asia, Africa, Australia and Europe (being "Territory")

2.1 Where the Company wishes to:

*2.1.1 Establish a commercial distribution relationship with new software agents across the Territory for **IdeaObject** product line.*

2.1.2 Purchase a Marketing Services from Provider himself or and Infor Medix (Legal Entity) to deliver a frame of work defined.

2.1.3 Setting Up and deliver market requirements for each market territory to the company addressing local Health IT market requirement, ensuring the technical support will be provided by the company (IdeaObject) staff which allow them to be able to address both markets commercially.

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2.1.4 Commercial management all IdeaObject business aspect for the agreed Territory.

2.1.5 Develop and create commercial opportunities and gain leads with the assistance from the Provider in the Territory and also win the Business in the Territory.

2.1.6 The Company will utilize the Provider's contacts and efforts to arrange Consortiums, Joint Ventures and other arrangements that could be established with different companies within the territory or and the region, if so required by the Company for any potential business.

2.2 Where the Provider accepts to:

2.2.1 Act on behalf of the company (IdeaObject) in the agreed and designated territories as a Provider within the agreed framework between both parties as defined below.

2.2.2 The framework being focusing on Business developments, new market entries, Product Registrations for each new territory, introduction to customer leads directly with IdeaObject or through their existing Partners. 2.2.3 Provide all the required efforts to set up IdeaObject and their potential consortium for all business activities and tender participation within the IT System Integrator providers in the specified Territory.

2.2.4 Act as a Provider for the Business, where he and business entities related to him (clearly predefined) can act on behalf of the Company within the Framework for Operations, as detailed below. 2.2.5 Create New Sales Leads and new business opportunities for IdeaObject Products.

2.2.6 Provide all the needed efforts to secure and A in the projects related to the IdeaObject products.

2.2.7 Achieve the Target Business revenue agreed within this agreement.

ARTICLE 4- Framework for Operations

4.1 The Provider will provide the company (IdeaObject) with Business plan model based on international Market strategy and procedures.

4.2 The Provider will lead and act as an IdeaObject Partner in building the relation with supply chain distribution agency model on the agreed Territories.

4.3 Supervision and assisting IdeaObject sales team even to acts in some sales opportunities and act on when needed to perform the required tasks related to the company business ensuring deal closure to the benefit of IdeaObject.

4.5 The Provider will Work with company and their management team ensuring that the company will deliver the targeted annual sales revenue

4.6 The Provider will be provide the Company with Market report for the prospect Business potential sales analysis and market activities_

4.7 The Provider shall work with potential Project, for Bid preparation until submittal.

4.6 A perusal of the above clauses of the agreement shows that it is not an agreement for commission simpliciter. The same are not normal activities which a sales commission agent would be performing, but much more than that. The payments made by the appellant include payments for activities other than mere commission for procuring orders or identifying the customers. From above details it becomes very clear that the services to be provided through the sales commission agreement are not purely sales commission agent services but include managerial, technical and consultancy services, although separate charges for the same are not indicated. These services would fall within the purview of 'Fee for Technical Services' and thus covered by Section 9(1)(vii) of the Act.

4. Before Ld. CIT(A), the assessee placed reliance on certain case laws. However, the Ld. CIT(A) held that the said decisions have been rendered on entirely different facts i.e. they were considering the case of “pure commission” payment. The Ld. CIT(A) observed that the services rendered by the foreign agent are not purely sales commission agent services but include managerial, technical and consultancy services, although separate charges for the same are not indicated. Accordingly, the Ld. CIT(A) confirmed the disallowance made by the A.O. u/s 40(a)(i) of the Act.

5. The Ld. A.R. contended that the export commission has been paid for procuring orders for the assessee and apart from the same, the foreign agent has not provided any other services. The Ld. A.R. invited our attention to the copy of Master invoice raised by the foreign agent upon the assessee, which is placed at page 23 of the paper book and submitted that during the year under consideration, the foreign agent has procured aggregate sales of USD 1462620 and the sales commission has been calculated on the above said gross sales procured by the foreign agent. The assessee has paid a commission of USD 242523.96, which worked out to Rs.1,44,92,747/-. The Ld. A.R. also placed reliance on the decision

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rendered by Lucknow bench of Tribunal in the case of ACIT Vs. Northern Tannery (ITA No.636/LKW/2013 dated 18.6.2015) and also the decision rendered by the Bengaluru bench of Tribunal in the case of Exotic Fruits Pvt. Ltd. Vs. ITO (2013) 40 Taxmann.com 348 and contended that the Tribunal has held that there is no liability to deduct tax at source when the services of non-resident agents were rendered outside India and the commission was also paid outside India and hence, no income accrue or arise in India.

6. On the contrary, the Ld. D.R. supported the order passed by Ld. CIT(A). Inviting our attention to clauses 2.1.2, 2.1.4, 2.2.2, 4.1 & 4.6 of the agreement entered between the assessee and foreign agent, the Ld. D.R. submitted that these clauses clearly shows that the foreign agents are providing services much more than ordinary selling agent. Accordingly, he submitted that the Ld. CIT(A) has held that the foreign agent has provided services which are in the nature of fee for technical services.

7. We heard the parties and perused the record. It is the case of the assessee that it has only paid "pure sale commission" and in support of the same, the assessee has placed its reliance on the Master Invoice raised by the foreign agent upon the assessee. As pointed out by Ld A.R, the commission amount has been computed on the value of exports made through the foreign agent. On the contrary, it is the submission of Ld D.R that the foreign agent has provided services more than that will be provided by an ordinary sales agent. In this regard, the Ld D.R invited our attention to certain clauses of the agreement. However, Article 1 of the agreement, which reads as under, provides for the scope of services:-

ARTICLE 1- Scope

Where the Provider will act on behalf of the company in International business development, Marketing activities, representations and provide Sales Opportunities leads to in managing the process for providing the company with Market Penetration In the International market (outside India and United states), introducing the Idea Object Products and solutions, and build distribution and partnership agreement (hereinafter referred to as "Business").

All other Articles mentioned in the agreement, in our view, are enabling articles for complying with the scope mentioned in Article 1. A perusal of Article 1 would show that the foreign agent is providing pure marketing services only. We notice that though the Ld CIT(A) has observed that the foreign agent is providing services more than an ordinary sales agent, yet it was only a general observation only, since he has not pointed out the actual services, if any, provided by the agent other than the pure marketing services. As observed earlier, various clauses of the agreement pointed out by Ld D.R, in our view, only mention the agreement between the parties about the ways and means for carrying out effective marketing services. Accordingly we are of the view that payments have been made by the assessee as export commission to the foreign agent for marketing its products/services only. Hence, it cannot be termed as "fee for technical services" within the meaning of Income tax Act. The payment has been made outside India for services rendered outside India and hence the income of foreign agent cannot be held to accrue or arise in India as held by the Tribunal in the case of Exotic Fruits Pvt. Ltd. (supra). Since no income is chargeable in the hands of foreign agent, there is no liability to deduct tax at source u/s 195 of the Act. Accordingly, the AO was not justified in disallowing the export commission payment u/s 40(a)(i) of the Act.

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8. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the disallowance made u/s 40(a)(i) of the Act.

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

Order pronounced in the open court on 3rd Aug, 2021.

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

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

Bangalore,
Dated 3rd Aug, 2021.
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.