<u>आयकर अपीलीय अधिकरण "I" न्यायपीठ मुंबई में।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, VP AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 985/Mum/2015

(निर्धारण वर्ष / Assessment Year 2010-11)

आयकर अपील सं./ ITA No. 1918/Mum/2016

(निर्धारण वर्ष / Assessment Year 2011-12)

आयकर अपील सं./ ITA(TP) No. 1076/Mum/2017

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं./ ITA No. 7423/Mum/2017

(निर्धारण वर्ष / Assessment Year 2013-14)

आयकर अपील सं./ ITA No. 6310/Mum/2018

(निर्धारण वर्ष / Assessment Year 2014-15)

आयकर अपील सं./ ITA No. 7775/Mum/2019

(निर्धारण वर्ष / Assessment Year 2015-16)

Lloyd's Register Asia (India Branch Office) 63-64, Kalpatru Square, 6th Floor, Kondivita Lane, Off. Andheri Kurla Road, Andheri (E), Mumbai-400 059	बनाम/ Vs.	Dy. Commissioner of Income-tax (International Taxation)- 3(1)(2), Mumbai
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAACL9741J		

अपीलार्थी की ओर से/ Appellant by	:	Shri Nitesh Joshi, AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Sanjay Singh, CIT DR

सुनवाई की तारीख / Date of hearing:	02.07.2021
घोषणा की तारीख / Date of pronouncement:	30.09.2021

आदेश / O R D E R

महावीर सिंह, उपाध्यक्ष के द्वारा /

PER MAHAVIR SINGH, VP:

These appeals are arising out of the order of Dispute Resolution Panel-I, Mumbai [in short 'DRP'], in objection Nos. 154, 37, 61, 171, 53, 271 vide directions dated 27.09.2017, 03.11.2014, 18.07.2017, 29.11.2016, 20.08.2019, 22.12.2015. The Assessments were framed by the Dy. Commissioner of Income Tax, (IT), Circe 3(1)(2), Mumbai (in short 'DCIT/AO') for the assessment years 2013-14, 2010-11, 2014-15, 2012-13, 2015-16, 2011-12 vide order dated 04.10.2017, 26.11.2014, 06.09.2018, 29.03.2016, 25.10.2019, 21.01.2016 under section 143(3) read with section 144C (13) of the Income Tax Act, 1961 (hereinafter referred to as 'Act').

2. The first common issue in these appeals of the assessee for the above refer Assessment Years is as regards to disallowance made by AO in regard to management fee paid by assessee to Lloyds Register of Shipping, UK (in short 'LRS') by invoking the provisions of section 40(a)(i) of the Act. For this issue, the assessee has raised identically

worded grounds in all the years, hence, we will take the grounds from AY 2013-14 i.e. Ground No. 2, which read as follows:-

> *"2. Addition on account of disallowance under Sectionn 40(a)(ia) in respect of management fees.*
>
> *The AO/DRP erred in making a contingent disallowance under Section 40(a)(ia) of the Act which is bad in law, in respect of payment of management fees of INR 5,62,51,978/- paid by the assessee to its AE; when in fact the same bas been disallowed fully by the TPO u/s 92CA(3) and is accepted by the AO."*

3. The brief facts are that the assessee is engaged in the business of undertaking survey of ships for inspection, classification and certification etc. It also caters to the marine, energy, transportation and automotive industry for provision of survey and certification related services. Its residential status under the Act is that of a non-resident and as per the DTAA between India and U. K. is that of a resident of the U. K. and incorporated in U.K. Lloyds Register Shipping, U.K. (LRS) has been carrying on the business of survey, inspection, classification and certification of ships for more than 250 years in the past. Based on its experience, it has developed and has been regularly updating the exhaustive Rules for carrying out the survey and activity as well as

other intangibles. After the formation of the assessee and other similar entities which are operational in other parts of the world, LRS has entered into a License Agreement for grant of license to use its intellectual property. The copy of this license agreement is enclosed in assessee's paper book at pages 68 to 93. The Licenses are as per Schedule I, where the assessee appears as the last item on page 80 of assessee's paper book. The Licensed Trademarks are as per Schedule 2 at page 85 and the licensed products and other business intangibles are as per schedules 3 and 4.

4. The assessee also availed of management services from LRS for which Management Services Agreement was entered into which is enclosed at pages 94 to 126 of assessee's Paper book-I. In the list of Service Recipients as per Schedule 2, the assessee's name appears as second last item on page 107. As per Clause 2 of the said Agreement the services shall be as described in Schedule -3 thereof. The broad heads of services as per the said schedule included corporate communications, corporate finance and group reporting services, group quality assurance, human resources, information technology, integrated business system, internal audit services, legal services, operational management and reporting, risk management and secretarial services and taxation and treasury services. The payment made by the assessee to LRS in respect of the management services availed by it for the year under consideration was Rs. 2,18,73,892/-. With the approval of the Reserve Bank of India, the assessee has established a branch office in

India. The said branch has been providing the aforesaid services within the territory of India.

5. The assessee filed its return of income and claimed deduction inter alia of the license fees, management fees and IT recharge paid to LRS, U.K. as enclosed in assessee's paper book at pages 66 to 68. The AO passed the draft assessment order in the assessee's case inter alia making disallowance of Rs.2,18,73,892/- being the management fees as a transfer pricing adjustment. However, he also invoked the provision of section 40(a)(i) of the Act holding that TDS ought to have been deducted on the payment by way of management fees treating the same as fees for technical services as per article 13(4) of the DTAA between India and the U. K. For this purpose, he also referred to the assessment Order passed in the case of LRS where the said amount stands added as their income. Since the entire amount had been added as a transfer pricing adjustment, no separate addition was made while computing the business income. Aggrieved, assessee preferred objection before DRP.

6. The DRP passed its order under section 144C(5) of the Act. Insofar as the disallowance of management fees under section 40(a)(i) of the Act is concerned, it treated the management fees as fees for technical services being ancillary and subsidiary to the enjoyment of the rights under the license agreement. We may bring here one fact that final assessment order was passed in the case of LRS by the same AO assessing the assessee, inter alia assessing the management fees as received from the assessee and Lloyds Register Quality Assurance Ltd.

as fees for technical services. Aggrieved, assessee preferred appeal against directions given by DRP.

7. The learned counsel for the assessee Shri Nitesh Joshi first of all stated the fact that the Management fees of Rs. 2,18,73,892/- has been paid by the assessee to LRS as per the Management Services Agreement. No TDS has been deducted on the same, as according to it, the said amount is not chargeable to tax under the Act. The said amount has been assessed in the hands of LRS in an assessment Order passed under section 143(3) of the Act and their appeal is presently pending before the CIT(A) pursuant to set aside by the Tribunal. The issues which arise for consideration of the Tribunal in the said ground, which are in the alternative and without prejudice to any others and as argued by the learned counsel are as under:

> *"a. Whether second proviso as inserted below section 40(a)(i) of the Act by the Finance (No.2) Act, 2019 with effect from 01.04.2020 is to be given retrospective effect. Since LRS has been assessed on the said amount no disallowance of the management fees can be made in the present case.*
>
> *b. If a view is taken that retrospective effect cannot be given to the said amendment, whether existence of second proviso in section 40(a)(ia) of the Act, which was absent in section 40(a)(i) tantamounts to discrimination which is not permitted as per Article 26 of the Double Taxation Avoidance Agreement (the DTAA) between*

India and the United Kingdom of Great Britain and Northern Ireland (the U. K.).

c. Whether payment of management fees cannot be regarded as lees for technical services as per the DTAA between India and the U. K. as

(i) the said payment is in the nature of managerial services' which is not covered by the definition of fees for technical services as per Article 13(4) of the said DTAA.

(ii) the License Agreement and the Management Services Agreement are independent of each other and, hence, payment under the later agreement (for management services) cannot be regarded as ancillary and subsidiary to the enjoyment of the property as per the earlier agreement (for license)."

8. On the other hand, the Revenue has relied on the judgement of Hon'ble Supreme Court in the case of PILCOM Vs. CIT (425 ITR 312) for the proposition that provision of DTAA are not applicable when considering the obligation to deduct the tax at source.

9. We have heard the rival contentions and gone through the facts and circumstances of the case. On the aforesaid facts, the reasons why the provisions of section 40(a)(i) of the Act will not apply to payment by way of management fees made by the assessee to LRS, we will deal with the last argument taken by the assessee that whether payment of management fees cannot be regarded as lees for technical services as

per the DTAA between India and the U. K.. For this, the learned Counsel for the assessee stated that the said payment is in the nature of managerial services' which is not covered by the definition of fees for technical services as per Article 13(4) of the said DTAA. He further deliberated that the License Agreement and the Management Services Agreement are independent of each other and, hence, payment under the later agreement (for management services) cannot be regarded as ancillary and subsidiary to the enjoyment of the property as per the earlier agreement (for license).

10. We have heard learned CIT DR also, who mainly relied on the order of DRP as well as that of the AO.

11. We noted noted the facts and also gone through the DTAA between India and UK, which shows that the Article 13(4) deals with fees for technical services and it has been defined to mean consideration for rendering any technical and consultancy services. The expression 'managerial services' is not included in the said definition. The nature of services as covered by the Management Services agreement i.e. corporate communications, corporate finance and group reporting services, group quality assurance, human resources, information technology, integrated business system, internal audit services, legal services, operational management and reporting, risk management and secretarial services and taxation and treasury services would fall in the category of managerial services which does not form part of fees for technical services. In this regard, Tribunal's attention was drawn to judgment of the Hon'ble Delhi High Court in the case of

Steria (India) Ltd. V. CIT (2016) 386 ITR 390 (Delhi) wherein, the relevant services which are similar to the assessee's case, are referred to in paragraph 2 and 3 of the judgment and the Court's conclusion in paragraphs 19 to 24. Similar view has been taken by the Mumbai Bench of the Tribunal in DCIT Vs Hyva Holding B.V in ITA No. 3816/Mum/2017 vide order dated 30.04.2019, in that case, though the services were of a mixed nature, the Tribunal has characterised the services as managerial services based the predominant nature of the said services.

12. In the present case before us, the only reason given by the DRP to hold the payment under the Management Services agreement as fees for technical services is that the said services are ancillary and subsidiary to the enjoyment of the property for which the payment by way of royalty has been made. According to them, this test is fulfilled in the present ease because the objective of the License agreement and the Management service agreement is the same i.e. to promote safety on land and at sea and in the air. The assessee before us stated that if the services referred to in the Management Services Agreement is accepted as for managerial services, then, the said aspect would not arise in the absence of the services falling in the main part of the definition of fees for technical services as per article 13(4) of the DTAA between India and the U. K.

13. We noted that the test of the object being common is not decisive of the fact that the Management Services agreement is ancillary or subsidiary to the enjoyment of the rights under the License Agreement. The DTAA between India and USA is also similarly worded. As per the

Memorandum of Understanding which forms part of the said DTAA, the test of the services being ancillary and incidental to enjoyment of rights under the license agreement would be based on fulfilment of the following conditions:-

> *i. The extent to which the sen-ices in question facilitate the effective application or enjoyment of the right, property or information described in paragraph 3 (i.e., royalty);*
>
> *ii. The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties described in paragraph 3;*
>
> *iii. Whether the amount paid for the services is an insubstantial portion of the combined payments for the services and the right, property or information described in paragraph 3.*
>
> *iv. Whether the payment made for the services and the royalty described in paragraph 3 are made under a single contract (or a set of related contracts); and*
>
> *v. Whether the person performing the services is the same persons as, or a related person to, the person receiving the royalties described in paragraph 3 or if a person providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties.*

14. Since none of the aforesaid tests, have been fulfilled in the present case, agreement towards Management Services cannot be regarded as ancillary and subsidiary to enjoyment of the property under the License Agreement. Before us, in the course of hearing before the Tribunal, the Revenue had relied upon the judgment of the Hon'ble Apex Court in the case of PILCOM v. CIT 425 ITR 312 [2020] 116 taxmann.com 394 (SC) for the proposition that provisions of the DTAA are not applicable when considering the obligation to deduct tax at source. The assessee distinguished on fact that the observations to that effect have been made in the said judgment as it was concerned with deduction of tax at source under section 194E of the Act where liability to deduct tax was unconditional when the condition relating to nature of payment was fulfilled. In the present case before us, we are concerned with deduction of tax at source under section 195 of the Act where the obligation arises only when the sum is chargeable to tax under the Act. For ascertaining chargeability to tax reference to the relevant DTAA is essential. This point of distinction has been accepted by the Hon'ble Apex Court in Engineering Analysis Centre of Excellence Pvt. Ltd. [2021] 125 taxmann.com 42 (SC) thereof while dealing with the obligation to deduct tax at source on software related payments. Hence, in the given facts and circumstances we hold that the assessee's services were managerial in nature and not technical services. Hence, the assessee is not liable to deduct TDS on the same. The disallowance proposed by DRP and made by AO is deleted. This issue of assessee's appeal is allowed.

15. This issue is common in all the AYs i.e. AY 2010-11 to 2015-16 in ITA Nos. 985/Mum/2015, 1918/Mum/2016, 1076/Mum/2017, 7423/Mum/2017 (the decision is given above), 6310/Mum/2018 & 7775/Mum/2019 respectively. Hence, the decision above in ITA No. 7423/Mum/2017 for AY 2013-14 will apply to all the Assessment Year mutatis mutandis on this issue. Hence, this issue of assessee's appeal is allowed.

16. The second issue in ITA No. 7423/Mum/2017 for AY 2013-14 is as regards to addition on account of disallowance u/s 37(1) of the Act in respect of payment of management fees and information technology (IT) charges. For this, assessee has raised following ground No. 3:-

> *"3. Addition on account of disallowance under Section 37(1) of the Act in respect of payment of management fees and information technology (IT) charges.*
>
> *3.1. The AO/ DRP erred in making a contingent disallowance under section 37(1) of the Act for payment of management fee and IT charges amounting to INR 5,62,51,978 and INR 2,95,05,136 respectively which has been expended wholly and exclusively for the purpose of business of the assessee, on a dubious basis, when he himself disallows the same under section 40(a)(ia) and section 92CA(3) of the Act.*
>
> *3.2. The AO/ DRP erred in ignoring the detailed explanations as well as evidences furnished by the*

Appellant in respect of services/ benefits availed by Appellant from its AE and also failed to consider business exigencies while determining the allowability of such expenditure made for payment of management fee and IT charges.

3.3. The AO/ DRP erred in ignoring the principle of consistency, as the transaction of payment of management fee and IT charges has been allowed under section 37(1) in the earlier years and also there is no change either in the factual or the legal position in the year under consideration."

17. At the outset, learned counsel for the assessee as well as learned CIT DR agreed that the disallowance of management fee and IT charges u/s 37 of the Act has been accepted in other years and there is no dispute about it. Further, to the extent the position is accepted by the CBDT in the Unilateral Advance Pricing Agreement (UAPA) as payment on the Arm's Length Basis the deduction cannot be denied. Both learned Counsel as well as learned DR agreed that this matter can be referred to the file of the AO for verification whether this is accepted by UAPA as payment on Arm's Length basis. Hence, this issue is restored back to the file of the AO.

18. The other issue in ITA No.7775/Mum/2019 for AY 2015-16 is as regards to short grant of TDS credit. Both learned counsel for the assessee learned CIT DR agreed that this can be sent back to AO for

verification and assessee will produce the relevant certificates of TDS before AO and accordingly, the AO will allow the claim of assessee.

19. The common ground in all the years regarding charging of interest u/s 234B and 234D of the Act is consequential and hence, dismissed as academic.

20. In the result, appeals are allowed in term of the above.

Order pronounced in the open court on 30.09.2021.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(उपाध्यक्ष / VICE PRESIDENT)

मुंबई, दिनांक/ Mumbai, Dated: 30.09.2021

सुदीप सरकार, व. निजी सचिव/ *Sudip Sarkar, Sr.PS*

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति **//True Copy//**

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**