IN THE INCOME TAX APPELLATE TRIBUNAL
"C"BENCH: BANGALORE

BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.2681/Bang/2018
Assessment Year: 2006-07

M/s. Wipro Limited (Being Successor of M/s. 3D Networks Pte Ltd.) Doddakannelli, Sarjapur Road Bangalore 560 035. **PAN NO :AAACW0387R**	**Vs.**	Deputy Commissioner of Income-tax Circle-7(1)(2) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Sandeep Huilgul, A.R.
Respondent by	:	Smt. Priyadarshini Basaganni, D.R.

Date of Hearing	:	30.12.2021
Date of Pronouncement	:	09.02.2022

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order dated 6.8.2018 passed by Ld. CIT(A)-7, Bengaluru and it relates to assessment year 2006-07.

2. The grounds urged by the assessee give rise to the following two issues:-

a) Validity of re-opening of assessment u/s 147 of the Income-tax Act,1961 ['the Act' for short].
b) Addition of Rs.25,06,859/- made u/s 40(a)(i) of the Act.

3. At the time of hearing, the Ld. A.R. advanced his arguments only with regard to the disallowance made u/s 40(a)(i) of the Act. Accordingly, the grounds relating to the validity of reopening of assessment are dismissed as not argued.

4. The assessee company was earlier known as M/s. 3D Networks Pte. Ltd., Singapore. The same merged with M/s. Wipro Ltd. w.e.f. 1.4.2009. During the year under consideration, the assessee company was engaged in the business of providing system integration, support and maintenance services and also selling products of its head office. The return of income filed by the assessee for the year under consideration was initially accepted u/s 143(1) of the Act. Subsequently, the AO reopened the assessment by issuing notice u/s 148 of the Act. In the reopened assessment, the A.O. disallowed a sum of Rs.25,06,859/- for non-deduction of tax at source u/s 40(a)(i) of the Act. The Ld. CIT(A) also confirmed the same and hence the assessee has filed this appeal before the Tribunal.

5. The facts relating to the above said issue are stated in brief. During the year under consideration, the assessee paid following charges to non-resident parties and claimed the same as deduction:-

M/s. Planet PSG Pte Ltd.	-	Rs.15,68,411/-
Nortel Network, Singapore Pte. Ltd.	-	Rs. 7,33,201/-
Paid for Tool kit inspection charges etc.		Rs. 2,05,246/-

The AO took the view that these payments fall under the category of Fee for technical services and accordingly took the view that the assessee should have deducted at source from these payments.

6. Before the A.O. the assessee contended that the above said demands are not liable for deduction of tax at source u/s 195 of the Act for the following reasons:-

a) The payment of Rs.15,68,411/- made to M/s. Planet PSG Pte. Ltd., Singapore was towards charges for installation of Nortel IVRS equipments. It was submitted that the above said company has only installed the equipments and has ensured that are functioning. It was submitted that it is business income in the hands of M/s. Planet PSG Pte. Ltd. and it does not have any permanent establishment in India. Accordingly, it was submitted that the above said payment is not liable for deduction of tax at source u/s 195 of the Act.

b) With regard to payment of Rs.7,33,201/- paid to M/s. Nortel Network Singapore Pte Ltd., the Ld. A.R. submitted that it is paid for AMC contract with its customers. It was submitted that the same shall also constitute business income in the hands of the above said company and it does not have PE in India. Hence, the same is not liable for deduction of tax at source u/s 195 of the Act.

c) With regard to remaining amount of Rs.2,05,246/-, it was submitted that same was paid for purchase of tool kit inspection charges, etc.

The assessee further explained that, as per DTAA entered between India and Singapore, the above said payment shall not constitute fee for technical services. The definition of fee for technical services is given as under, under India - Singapore DTAA:-

> *"The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial technical or consultancy nature*

(including the provision of such services through technical or other personnel) if such services:
a) Are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

b) ***Make available technical knowledge, experience, skill, know-how*** *or processes, which enables the person acquiring the services to apply the technology contained therein; or*

c) Consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person."

Accordingly, it was submitted that no technical knowledge, experience, skill, etc. was made available to the assessee by making the above said payments and hence the above said payment cannot be considered as fee for technical services. The A.O. did not accept the contentions of the assessee and accordingly held that these payments are in the nature of fee of technical services. Accordingly he disallowed the above said payments u/s 40(a)(i) for non deduction of tax at source.

7. The Ld CIT(A) noticed that the assessee has furnished any evidence or agreement entered with the above said parties in order to support its contentions. Accordingly he held that the c;ao, pf the assessee remains unverified and unsubstantiated. Accordingly, he confirmed the disallowance made by the AO.

8. The Ld A.R reiterated the contentions made before the AO and further submitted that one of the main conditions for treating a payment as "Fee for technical services" as per the definition given under DTAA entered between India and Singapore is that the technology should be made available to the assessee. He submitted that, in the instant case, the above said companies have only provided certain services to the assessee and the technology is not made available to the assessee. Accordingly, he submitted that these payments cannot fall under the category of "Fee for technical services" as per DTAA entered between India and Singapore. Further, these companies do not have Permanent Establishment in India and hence this income is not taxable in India, in which case, there is no requirement of deducting tax at source u/s 195 of the Act from these payments.

9. The Ld DR, on the contrary, supported the order passed by Ld CIT(A).

10. We heard rival contentions and perused the record. There is no dispute that these expenses have been incurred by the assessee in Singapore, meaning thereby, these payments have been made to non-residents. Hence the liability to deduct TDS u/s 195 of the Act should be examined in terms of DTAA entered between India and Singapore. We noticed earlier that the tax authorities have considered these payments as "Fee for technical services". The expression "Fee for technical services" is defined in DTAA and the same has been extracted in an earlier paragraph. As per the said definition, the above said concerns should have made available to the assessee technical knowledge, experience, skill, know-how etc.

The law on this point has been explained by Hon'ble jurisdictional Karnataka High Court in the case of CIT vs. De Beers India Minerals P Ltd (2012) 346 ITR 467 as under:-

> *"What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not* per se *be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."*

11. In the instant cases, it is the submission of the assessee that these payments were made for installation of Norton IVRS equipments, AMC charges, purchase of kits etc. These expenses are apparently in the nature of payments made for providing certain services. Hence, the question of making available technical knowledge etc does not arise in these set of facts. Further these payments constitute business income in the hands of the recipients. It is the submission of the assessee that the said recipients do not have permanent establishment in India and hence these payments are not taxable in India. When the income is not chargeable to tax India in the hands of these non-residents, the question of deducting tax at source u/s 195 of the Act does not arise. Accordingly, we hold that the assessee is not liable to deduct tax at source from these payments u/s 195 of the Act and hence no disallowance u/s 40(a)(i) is called for. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this disallowance.

12. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 9th Feb, 2022

Sd/-	**Sd/-**
(Beena Pillai)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 9th Feb, 2022.
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.