आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'A' BENCH, CHENNAI
श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./**I.T.A.No.1528/Chny/2019**

(निर्धारणवर्ष / Assessment Year: 2012-13)

M/s.Ceequence Technologies P.Ltd. 131, GN Chetty Road, T.Nagar, Chennai-600 017.	Vs	Deputy Commissioner of Income Tax, Corporate Circle-1(2) Chennai.
PAN: AABCC 7920M		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr. Arjunraj, C.A for S.Sridhar, Advocate
प्रत्यर्थीकीओरसे/Respondent by	:	Mr. Sajit Kumar, JCIT

सुनवाईकीतारीख/Date of hearing	:	02.03.2022
घोषणाकीतारीख /Date of Pronouncement	:	09.03.2022

आदेश / O R D E R

PER G.MANJUNATHA, AM:

This appeal filed by the assessee is directed against order passed by the learned Commissioner of Income Tax (Appeals)-1, Chennai, dated 19.03.2019 and pertains to assessment year 2012-13.

2. The assessee has raised following grounds of appeal:-

"1. The order of the Commissioner of Income Tax (Appeals) —1, Chennai dated 19.03.2019 in ITA 20/CIT (A)-1/2018-19 for the above mentioned Assessment Year in so far as the issues raised in this appeal is contrary to law, facts, and in the circumstances of the case.

2. The CIT (Appeals)-1 erred in sustaining the disallowance of Rs. 5,77,575/- paid towards Internet Private Line Charges (IPLC) to M/s. Tata Communications (America) Inc for non-deduction of tax at source u/s 195 of the Act without assigning proper reasons and justification.

3. The CIT (Appeals)-1 ought to have appreciated that the payment towards Internet Private Line Charges (IPLC) would not fall within the ambit of the term 'Royalty' and went wrong in placing reliance on the judgment in the case of Verizon Communications Singapore Pvt Ltd. Vs. ITO in TCA Nos 147 to 149 of 2011 and TCA 230 of 2012 without assigning proper reasons and justification.

4. The CIT (Appeals)-1 failed to appreciate that the Income Tax Appellate Tribunal, Chennai remitted the issue with a limited purpose of consideration of the Double Taxation Avoidance Agreement to the facts of the case and ought to have appreciated that the proper understanding of the term royalty as per DTAA would vitiate the findings recorded at Page Nos.10 & 11 of the impugned order.

5. The CIT (Appeals) -1 failed to appreciate the impossibility of deducting TDS by forecasting a retrospective amendment brought in Finance Act 2012 and ought to have appreciated that the judicial trend in this regard would vitiate the disallowance made.

6. The CIT (Appeals) failed to appreciate that there was no proper opportunity given before passing of the impugned order and any order passed in violation of the principles natural justice would be nullity in law."

3. Brief facts of the case are that the assessee company filed its return of income for the assessment year 2012-13 on 29.09.2012 declaring total income of Rs.87,02,260/-. The

assessment has been completed u/s.143(3) of the Income Tax Act, 1961, on 13.03.2015 and determined total income at Rs.1,34,76,758/- by making additions of Rs.46,99,302/- u/s.40(a)(ia) of the Act for non-deduction of TDS u/s.195 of the Income Tax Act, 1961. The assessee carried the matter in appeal before the first appellate authority, but could not succeed. The learned CIT(A) sustained additions made by the Assessing Officer towards disallowance of expenses u/s.40(a)(ia) of the Act. The assessee carried the matter in further appeal before the Tribunal and the Tribunal vide its order in ITA No.138/Mds/2017 dated 28.12.2017 set aside the issue to the file of the Assessing Officer and directed the Assessing Officer to reexamine claim of the assessee in light of material that may be filed by the assessee and also Double Taxation Avoidance Agreement between India & USA. Accordingly, the Assessing Officer has taken up case for fresh examination on applicability of TDS and consequent disallowances of payment made to certain non-residents u/s.40(a)(ia) of the Income Tax Act, 1961. The Assessing Officer after considering relevant facts and also amendment to provisions of section 9(1)(vi) / 9(1)(vii) by the Finance Act,

2012, with retrospective effect from 01.06.1976, held that payment made by the assessee to non-resident is in the nature of royalty within the meaning of section 9(1)(vi) read with Article 12 of the DTAA between India and USA and thus, made addition of Rs.46,99,302/- u/s.40(a)(ia) of the Act, for non-deduction of TDS u/s.195 of the Income Tax Act, 1961.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the learned CIT(A). Before the learned CIT(A), the assessee has challenged additions made by the Assessing Officer towards disallowance of certain payments made to non-residents without deduction of TDS and argued that payments made by the assessee to non-residents is not in the nature of royalty or fees for technical services, because services were rendered by non-residents outside India and in absence of any business connection in India, same cannot be brought to tax under Indian Income Tax Act. Therefore, the assessee is not required to withhold tax on payment u/s.195 of the Income Tax Act, 1961, and consequently, payment made by the assessee to non-residents cannot be disallowed u/s.40(a)(ia) of the Act. The learned

CIT(A), after considering relevant submissions of the assessee and also taken note of various facts allowed partial relief to the assessee, where he had deleted additions made by the Assessing Officer towards payment made to M/s. Cinenet Communications and M/s. Novatel Ltd. by holding that services rendered by two non-residents does not fall within the definition of royalty as per Article 12 of the DTAA between India and USA and also under section 9(1)(vi) / 9(1)(vii) of the Act. However, in respect of payment made to M/s.Tata communications (America) Inc. payments were made for internet private line charges and such services has been rendered by the non-resident service provider through equipment in USA and such service is coming within the definition of royalty and thus, sustained additions made by the Assessing Officer towards disallowance of payment made for internet private line charges. Aggrieved by the learned CIT(A) order, the assessee is in appeal before us.

5. The learned A.R for the assessee submitted that the assessee could not deduct TDS u/s.195 of the Act, on payment made to non-residents service provider, because there was

ambiguity in the definition of royalty, as defined under section 9(1)(vi) / 9(1)(vii) before insertion of Explanation 4 to section 9(1)(vi) expanding definition of royalty and thus, in absence of clarity on the issue, the assessee was unable to deduct TDS . He further submitted that the assessee cannot be asked to perform impossibility of performing contract, because the assessee cannot foreseen amendment to the definition of royalty and withheld taxes. Therefore, he submitted that since there was an ambiguity in the definition of royalty and such ambiguity has been clarified by the Finance Act, 2012, by insertion of Explanation 4 with retrospective effect from 01.04.1976, the assessee cannot foresee said amendment and deduct TDS. Hence, for non-deduction of TDS, disallowances cannot be made u/s.40(a)(ia) of the Act. In this regard, the learned AR relied upon the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt.Ltd Vs. CIT in Civil Appeal No.8733 & 8734 of 2018.

6. The learned DR, on the other hand, submitted that there is no merit in the arguments of the assessee that definition of royalty was not clear before insertion of Explanation 4,

because services rendered by the assessee are held to be coming within the ambit of definition of royalty and thus, even before amendment, the assessee was required to deduct TDS on payment made to non-residents. Since, the assessee failed to deduct TDS, the Assessing Officer has rightly disallowed payment made to non-residents u/s.40(a)(ia) of the Income Tax Act, 1961, and the learned CIT(A), after considering relevant facts has rightly held that same is liable for TDS u/s.195 of the Act, and for non-deduction of TDS, the Assessing Officer has rightly disallowed payment made to non-residents u/s.40(a)(ia) of the Act.

7. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The assessee has made certain payments to M/s. Tata communications (America) Inc. for rendering internet private line services and such services were rendered by the recipient through an equipment in USA and the India via internet. The Assessing Officer has considered payments made to non-residents as royalty u/s.9(1)(vi) / 9(1)(vii) read with Article 12 of the DTAA between India and USA and disallowed said

payment for non-deduction of TDS u/s.195 of the Income Tax Act, 1961.

8. We have given our thoughtful consideration to the reasons given by the Assessing Officer in light of arguments of the assessee and we ourselves do not subscribe to the reasons given by the Assessing Officer for simple reason that the issue before the Assessing Officer is not taxability of payment made by the assessee to non-resident, but it was on the issue of applicability of provisions of section 195, and consequent disallowance of payment u/s.40(a)(ia) of the Income Tax Act, 1961. The definition of royalty, before insertion of Explanation 4 by the Finance Act, 2012 with retrospective effect from 01.04.1976 does not cover payment made to non-resident for rendering services outside India and also receipt of services outside India. However, definition has been expanded by insertion of Explanation 4 by the Finance Act, 2012, with retrospective effect from 01.06.1976 and as per amended definition, even if services rendered outside India, but if such services are received in India, then payment made to non-residents partakes nature of royalty and consequently,

withholding tax is applicable as per provisions of section 195 of the Act. In the present case, payment made by the assessee to non-residents was prior to amended definition of royalty by the Finance Act, 2012. Further, at the time of payment made by the assessee to non-residents, there was an ambiguity in the definition of royalty and because of this the assessee could not deduct TDS as per provisions of section 195 of the Act. Although, the definition has been amended by the Finance Act, 2012, with retrospective effect, but because there was an ambiguity in the definition, the assessee cannot do impossible things by foreseeing an amendment to the definition of royalty and deduct TDS on payment made to non-residents. This principle is supported by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd Vs. CIT in Civil Appeal No.8733 & 8734 of 2018, where it was held that “person” mentioned in section 195 of the Income Tax Act cannot be expected to do the impossible, namely, to apply the expanded definition of “royalty” inserted by Explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute. Therefore, we are

of the considered view that the Assessing Officer was erred in making addition towards payment made to non-residents u/s.40(a)(ia) of the Act, for non-deduction of TDS u/s.195 of the Income Tax Act, 1961. The learned CIT(A), without appreciating facts has simply confirmed additions made by the Assessing Officer. Hence, we reverse findings of the learned CIT(A) and direct the Assessing Officer to delete additions made towards payments made to non-residents u/s.40(a)(ia) of the Act, for non-deduction of TDS u/s.195 of the Income Tax Act, 1961.

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

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

Sd/-	Sd/-
(वी. दुर्गा राव)	(**जी. मंजुनाथ)**
(V.Durga Rao)	(G. Manjunatha)
न्यायिक सदस्य /Judicial Member	लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 9th March, 2022
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant 2. Respondent 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.