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

BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.83/Bang/2018
Assessment year : 2009-10

M/s Hindustan Aeronautics Ltd., No.15/1, Cubbon Road, Bengaluru-560 001. PAN – AAACH 3641 R	Vs.	The Asst. Commissioner of Income-tax, Circle-3(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ajit Kumar Jain & Siddhesh Chaugule, ARs
Revenue by	:	Smt. S Praveena, CIT(DRP-2)

Date of hearing	:	03.03.2022
Date of Pronouncement	:	10.03.2022

O R D E R

Per Padmavathy S, Accountant Member

This appeal is directed against the order of the CIT(A) - 3, Bengaluru dated 09/11/2017 for the asst. year 2009-10.

2. The assessee raised the following grounds:-

"1. That the order passed by the learned Commissioner of Income-Tax (Appeals) 'CIT(A)' under section 250 of the Income-tax Act, 1961 ('Act'), to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.

2. That on the facts and in the circumstances of the case, the Learned CIT(A) has erred in upholding the reopening of assessment proceedings u/s. 147 of the Act.

3. That on the facts and in the circumstances of the case and in law, Ld.CIT(A) has erred in upholding disallowance amounting to Rs. 13,80,672 u/s 40(a)(i) of the Act.

4. That the learned CIT(A) erred in not granting TDS credit available to the company.

5. That the learned CIT(A) erred in law and facts in upholding the order of the learned Assessing Officer in levying interest under Section 234B of the Act.

6. That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal."

3. The brief facts of the case are that the assessee is a public sector undertaking of the Govt. of India. The assessee is engaged in the business of design, development, manufacture and maintenance of advanced fighters, piston and jet engine trainers, commercial aircraft, helicopters and associated aero engines, aircraft systems, equipment and avionics catering mainly to India's defence needs. The assessee filed its return of income for the asst. year 2009-10 on 26/9/2010 declaring an income of Rs.12,21,84,77,030/-. The case was selected for scrutiny and, therefore, order was passed by the AO determining the income of the assessee at 18,09,38,31,456/-. Subsequently, another order was passed u/s 143(3) r.w.s 147 of the Act and the income was

assessed at Rs.22,36,13,32,340/- which was later rectified to Rs.19,43,28,93,840/-. The proceedings were reopened once again vide issue of notice dated 30/3/2016 u/s 148 of the Act and the income the assessee was determined at Rs.19,43,42,74,512/- wherein the AO has made an addition of Rs.13,80,672/- u/s 40a(ia) for non deduction of tax on payments made to CGTM France towards flight testing services.

4. The ALH Shakti Engine was co-developed by Turbomeca (a company based at France) and the assessee . The assessee through its Rotary Wing R&D Centre (RWRDC) division has engaged M/s. CGTM France for conducting flight testing services in respect of these ALH Shakti Engines where the services provided by CGTM France included the following

(i) Air intake Survey
(ii) Engince bay, FACEC bay and oil cooling systems
(iii) Engine Accessories and FADEC vibrations
(iv) Measurement of gas concentration of fire extinguishing systems
(v) Hot Fule tests

During the year under consideration the assessee paid a sum of 477223 EUROs to CGTM for the above said technical assistance for Shakti Engince installation flight testing carried out in India and claimed he same as an expenditure. The Technical personnel of CGTM France came with their equipment/tools/testing kits to India and carried out

various tests in the premises of the assessee. Relying on the provisions of the protocol governing the India France Treaty read with India Portugal Treaty, the assessee did not deduct any tax at source on the payments made to CGTM France. The AO made the disallowance of the payment made u/s.40(a)(i), on the ground that the payments were covered by the definition of FTS as defined u/s.9(1)(vii) of the Act and hence tax ought to have been deducted at source.

5. Aggrieved by the order of the AO, the assessee preferred an appeal before the CIT(A). The assessee submitted before the CIT(A) that the services provided by CGTM France did not satisfy the condition of 'make available' on technical knowledge and skill to the assessee in view of India-France treaty r.w India-Portugal treaty. In view of this contention, the assessee submitted that tax was not required to be deducted at source and in this connection, the assessee relied on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. ISRO Satellite Center, 35 taxmann.com.

6. The CIT(A) after considering the submissions of the assessee and the decision of the jurisdictional High Court in the case of ISRO Satellite Center (Supra) admitted the argument of the assessee to be correct to the extent that 'make available' condition needs to be satisfied in relation to technical services provided by CGTM France to invoke the provisions of sec. 195 of the Act. However, the CIT(A) upheld the disallowance made by the AO on the ground that the nature

of services rendered by CGTM France satisfies the condition "making available" and hence the assessee ought to have deducted tax at source on payments made to CGTM France.

7. Aggrieved by the order of the CIT(A), the assessee is in appeal before the Tribunal.

8. The ld.AR submitted that there was no technology that was made available by CGTM France to the assessee. The ld.AR drawn our attention to para 5.6 of the CIT(A)'s order where the CIT(A) himself has mentioned that this services to be provided by CGTM France were '**Strictly Limited'** to the following resources:-

i) 1 operating engineer over 2 consecutive months in Bangalore
ii) 1 flight engineer over 1.5 months in Bangalore
iii) 1 measure dedicated technician, for 2 consecutive weeks in Bangalore
iv) 1 operating engineer in our facilities Pau-France

9. The ld.AR also submitted that based on the receipt of the testing services, the assessee would neither be able to conduct this test on their own without involvement of CGTM France nor would be able to undertake the installation of equipment. The assessee would require the assistance of CGTM France in each of the above services if required at later stages. Hence, the ld.AR submitted that the services

required by CGTM did not result in 'make available' of technical knowledge and skill to the assessee thereby the requirement to deduct tax at source u/s 195 of the Act does not arise.

10. The ld.DR submitted that the services rendered by CGTM France in the form of test carried out results in 'make available' technical knowledge to the assessee towards manufacturing of air worthy Shakti Engine. The ld.DR hence prayed that the disallowance made u/s 40a(ia) should be upheld.

11. We have heard both the parties and perused the materials on record. The nature of service rendered by CGTM France to the assessee needs to be examined. The ALH Shakti Engine was co-developed by Turbomeca (a company based at France) and the assessee and the assistance for conducting flight tests were provided by CGTM France a subsidiary of Turbomeca. The perusal of the details of technical services provided by CGTM France to the assessee shows that the technicians/engineers of CGTM carried out Air intake Survey relating to Air inlet distortion and installation losses. On the basis of test results, the assessee would look into various issues involving in the Shakti Engine and would carry out the requisite test for improving its engine. The fees paid towards the services in question here is purely towards the testing of Shakti Engines in order to identify the issues of Air inlet distortion and installation losses. The subsequent action of the assessee to carry out the improvement

based on the test results given by CGTM France cannot be considered as a basis for 'make available' services rendered by CGTM France to the assessee. Conducting the test and subsequent improvement to the engines based on test results are independent activities and cannot be considered together. As contended by the assessee, the test conducted by CGTM France cannot be independently carried out by the assessee without the support of engineers from CGTM France and hence does not satisfy the conditions of 'make available' that the services rendered by CGTM France to the assessee. It is settled law that mere rendering of services would not be taxable unless the person receiving the services is enabled to utilize such services on its own in the future without having recourse to the person providing the service. The Hon'ble Karnataka High Court in the case of CIT vs. De Beers India Minerals Pvt. Limited (2012): 346 ITR 467 (Kar) while considering a similar issue has held that

> *"To be said to "make available", 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 terminology "making available", the technical knowledge, skills" etc must remain with the person receiving the service 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 has 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. On facts, while the Dutch company performed the surveys using substantial technical skills, it has not made available the technical expertise in respect of such collection or processing of data to the assessees, which the assessee can apply independently and without assistance and undertake such survey independently. Consequently, the consideration is not assessable as "fees for technical services"

In view of the above, we are of the considered opinion that fees paid by the assessee to CGTM France is not in the nature of fees for technical services and hence does not attract the provisions of sec. 195 with regard to requirement for deduction of tax at source on payment of fees for technical services of an resident outside India. As a result, no disallowance is warranted u/s 40(a)(ia) of the expenses claimed by the assessee towards payment of service charges to CGTM France. Accordingly, we allow the appeal in favour of the assessee.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in court on 10th March **,** 2022

Sd/- Sd/-

(GEORGE GEORGE K) **(PADMAVATHY S)**
Judicial Member Accountant Member

Bangalore,
Dated, 10th March**,** 2022
/ vms /

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.

1. Date of Dictation
   ……
2. Date on which the typed draft is placed
   before the dictating Member …….
3. Date on which the approved draft comes to Sr.P.S
   …….
4. Date on which the fair order is placed
   before the dictating Member ……..
5. Date on which the fair order comes back to the Sr.
   P.S. ……..
6. Date of uploading the order on
   website……..
7. If not uploaded, furnish the reason for doing so
   ……..
8. Date on which the file goes to the Bench Clerk
   ……..
9. Date on which order goes for Xerox &
   endorsement……
10. Date on which the file goes to the Head Clerk
    …….
11. The date on which the file goes to the Assistant
    Registrar for signature on the order
    …….
12. The date on which the file goes to dispatch section
    for dispatch of the Tribunal Order
    …….
13. Date of Despatch of Order.
    ……..