INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI

BEFORE DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 397/Del/2019
Asstt. Year: 2014-15

ACIT, Circle-10(2) Room No. 238A, 2nd Floor, C.R. Building, I.P. Estate, ITO, New Delhi – 110 001	Vs.	Graziano Transmission India Pvt. Ltd. 510-511. 5th Floor, DLF Tower-B, Jasola, New Delhi – 110 025 PAN AAACG4258M
(Appellant)		**(Respondent)**

Department by:	Shri Mrinal Kumar Das, Sr. DR
Assessee by :	Shri Rishabh Malhotra, AR
Date of Hearing	03/03/2022
Date of pronouncement	11 /04/2022

O R D E R

PER ASTHA CHANDRA, JM

This appeal is filed by the Revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-4, New Delhi ("**CIT(A)**") dated 10.10.2018 pertaining to the assessment year 2014-15.

2. The solitary ground raised by the Revenue is as under:-

"1. Whether on the facts and circumstances of the case and in law, the Ld. CIT is correct in deleting the disallowance of Rs. 3,07,65,783/-

made on account of non-deduction of TDS on the payment made to M/s. Oerlikon Graziano SPA Italy, holding the same as commission payments and not fee for technical services u/s 9(1)(vii) of the Income Tax Act, 1961 ('the Act').

1.a) Whether the Ld. CIT(A) has erred in ignoring the fact that the scope of services rendered by M/s Oerlikon Graziano SPA, Italy was not confined to mere procuring export orders as the services rendered by the said foreign entity included, inter alia, assisting the assessee in protecting patent & other intellectual property rights of the assessee, assisting the assessee's service personnel, informing the assessee about its competitors' activities etc. and therefore, the services rendered were in the nature of managerial, technical and consultancy/advisory services within the meaning of section 9(1)(vii) of the Act read with the relevant DTAAs."

3. Briefly stated, the assessee is engaged in the manufacturing of customized gears, synchronizers, transmission components and transaxles for automotive industry. The assessee filed its return of income on 29.11.2014 declaring total income of Rs. 134,25,86,070/-. The assessee's case was selected for scrutiny. The Ld. Assessing Officer ("**AO**") completed the assessment under section 143(3) of the Income Tax Act ("**Act**") vide assessment order dated 13.12.2017 on total income of Rs. 137,33,51,853/- including therein addition of Rs. 3,07,65,783/- on account of non-deduction

of tax deducted at source (“**TDS**”) on payment of export commission to Oerlilkon Graziano SPA, Italy (“**SPA**”).

3. During the previous year relevant to assessment year 2014-15 the assessee continued to engage SPA under the agreement dated 20.3.2012 (“**Agreement**”) as export commission agent for sale of all its products to its various customers, including Turk Tractors, Club Car and Iveco. SPA is a tax resident of Italy and a non-resident in India. As per the terms of the Agreement, SPA was under an obligation to provide marketing and sales services to the assessee which included promotion of all the products of the assessee, collection of payments, submit all enquiries and orders of the assessee, visit customers within the territory at a regular intervals and report to the assessee and assist the customers at all times including the warranty period. In consideration, the assessee was under the obligation to pay commission to SPA @ 2% of the gross sales made to its customers which amounted to Rs. 3,07,65,783/- for the assessment year 2014-15.

4. During the assessment proceedings, the assessee was asked to furnish details of the expenses incurred in foreign currency on payments made to parties outside India and TDS, if any deducted thereon. From the reply filed by the assessee, the Ld. AO observed that the assessee has made payments to SPA without any TDS. The Ld. AO also mentioned that the payments made to SPA was treated as royalty/FTS by his predecessor and since the assessee has not deducted TDS on such payments, the assessee

was asked to explain as to why the disallowance under section 40(a)(i) be not made for the reasons given in detail in the assessment order of the preceding year. In response, the assessee filed detailed submissions before the Ld. AO explaining that the assessee has made payment merely towards marketing and sales support provided by SPA to the assessee. However, the explanation of the assessee was not acceptable to the Ld. AO. The Ld. AO after analysing the provisions of section 9(1)(vii) of the Act, arrived at the conclusion that commission paid to SPA is taxable in India as fees for technical services ("**FTS**") by presuming that there is an element of consultancy, technical and managerial services for which said commission was paid and hence the assesee was liable to deduct TDS under section 195 of the Act. As the assessee failed to deduct TDS, the Ld. AO disallowed the total amount of expenditure of Rs. 3,07,65,783/- on export commission invoking section 40(a)(i) of the Act.

5. On appeal, the Ld. CIT(A) after considering the facts of the case in the light of the submissions made by the assessee deleted the addition made by the Ld. AO by recording the following findings :-

> *"6.2.1 It is noted that the commission has been paid for procuring export orders for which the services were provided outside India. In order to examine whether appellant was required to deduct tax in term of provisions of section 195 of the Act, while making payments for commission, it is required to examine if the amount paid was*

chargeable to tax in India in the hands of the commission agent. Scope of total income of non residents is defined u/s 5(2) of the Act. The income of non residents is taxable in India if it is received or deemed to be received in India or if it accrues or is deemed to accrue or arise in India. It is not the case of the AO that the income was received or deemed to be received in India by the foreign agent. As foreign agent operates outside India for booking export orders and goods in pursuant to such orders are also sold outside India, no part of the income can be said to accrue or arise in India. As held by Hon'ble jurisdictional High Court in the case of PAN Alpha Auto Electric Ltd. 272 CTR 117 (Delhi) that payment of commission for exports cannot be considered as fee for technical services. It was has held that:-

> *"25. Thus, the technical services consist of services of technical nature, when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allow him to do so. In the present case, the aforesaid requisites and required necessities are not satisfied. Indeed, technical, managerial and consultancy services may overlap and in would not be proper to view them in watertight compartments, but in the present case this issue or differentiation is again not relevant."*

6.2.2 In my opinion similar to the above case, the role of the commission agent is limited. The aforesaid is substantiated by the fact that commission is payable by the Appellant only upon realisation of the invoice by the appellant and hence, the nature of activities by no stretch of imagination can be construed to be technical in nature nor the payment made by the appellant can be described as dividend, interest, royalty or salary. Accordingly, commission paid to non-resident agent cannot be deemed to accrue or arise in India u/s 9(1)(vii) of the Act, as sales support services being provided are not in nature of managerial, technical or consultancy services as it is also evident from agreement between the appellant and agent.

6.2.3 Furthermore, AO has not brought out any facts on record to show that the commission agents had any business connection in India or any operations were carried out by them in India. In the absence of any such finding given by the AO, it cannot be held in respect of foreign commission agent that the income deemed to accrue or arise to in India. In view of the above, I am of the opinion that the commission paid to SPA was not chargeable to tax in India. AO has mentioned about the applicability of section 195 of the Act. The said Section as interpreted in various judicial pronouncements, however, cannot be stretched to mean that all payments are subject to T'DS which are otherwise not chargeable to tax in India.

6.2.4 Hon'ble ITAT, Delhi in the case of Welspring Universal vs. JCIIT in ITA No. 4761/Del/2014 given on 12.01.2015, after going through various aspects regarding the chargeability of commission income paid to non residents for procuring export orders held that the income of foreign agent of Indian exporter for procuring export order where no part of services was rendered in India and the goods were sold outside India, no part of the income can be said to accrue or arise in India, in the absence of any business connection in India.

6.3 I also find that similar issues have been decided in the case of CIT vs. Farida Leather Company [2016] 238 taxman 0473 & CIT, Coimbatore vs. Kikani Exports (P) Ltd. [2014] 49 taxman.com 601 (Madras) by the Hon'ble High Court of Madras in which it has been held that commission paid to a non-resident for completion of exports commitment would not fall within the definition of fees for technical services and explanation 2 to s. 195(1) and explanation below S. 9(2) makes no difference to the law.

6.4 It was also brought to my notice that CIT(A) in the appellate orders for A.Ys. 2010-11, 2011-12 and 2013-14 in the case of the appellant itself on the same issue have held that the services provided by the commission agent are not technical in nature. The facts and circumstances continue to remain the same this year as well."

6. Aggrieved, the Revenue is before us.

6.1 At the very outset, the Ld. AR submitted that the issue under consideration is squarely covered by the coordinate bench of ITAT for earlier years in ITA No. 2575/Del/2016 dated 9.1.2019 for assessment year 2010-11 and ITA Nos. 1820 and 1821/Del/2018 dated 6.3.2019 for assessment year 2012-13 and 2013-14 in assessee's own case. He submitted that the Department has not challenged the orders of the ITAT (supra) before the Hon'ble High Court and that in subsequent years too no addition has been made by the Ld. AO on the issue under challenge by the Department.

6.2 The Ld. DR, however, controverted the submission of the Ld. AR. The Ld. DR strongly relied on the order of the Ld. AO and agrued that the principal of res-judicata does not apply to tax proceedings. The Ld. DR submitted that in the assessment year 2014-15 the facts are different than the earlier assessment years which have already been decided by the coordinate bench of the ITAT (supra). He submitted that SPA's profile shows that it is engaged in a highly technical business. SPA is conducting two fold activities for the assessee i.e. acting as sales commission agent for its products and also rendering technical services to the assessee. This is evident from the findings of the Ld. AO in para 6.11 of his order and submitted that the Ld. CIT(A) erred in not considering the same. The said para 6.11 is reproduced below:-

"6.11 In respect of the contention of the assesee that the CIT(A)-16, New Delhi has in his order for A.Y. 2010-11 deleted the disallowance it is stated that the department has not accepted the order of Ld. CIT(A). Further while deleting the disallowance Ld. CIT(A) stated in his order that "From the perusal of the duties and responsibilities of agent. I am convinced that the agent is not providing any technical services to the appellant. The agent is acting only as commission agent and procuring the order for the appellant and to inform the appellant for any infringement of rights."

The assessee filed a copy of agency contract vide its letter dated 11.12.201 7 and as per this contract besides other obligation casts upon SPA it was also bound to do the following:-

(i) Clause 2.12 of the agreement: The agent shall especially inform, to the best of its knowledge. Graziano India about current and newly introduced - legal regulations in the Territory which may have an impact on the sale of Graziano India's products. These may include, without limitation, the provision of the reservation of title, on custom duties, taxes, fees and charges. The agent however does not take responsibilities for decisions or unawareness of Graztano India.

(ii) Clause 2.16 of the agreement:- The agent shall assist Graziano India in protecting patent and other intellectual property rights of Graziano India with respect to the products as well as in defending against unfair completion by third parties, and shall immediately inform Granziano India upon becoming aware of occurrences of infringement or unfair competition.

These clearly shows that the agent i.e. SPA was not merely acting as sales/commission agent and the services that it was rendering qualifies to be called as technical services and thus liable for deduction of TDS as per the provision of the I.T. Act."

The Ld. DR further submitted that the Ld. CIT(A) has arrived at erroneously recorded that the AO has not examined the presence of business connection of SPA in India which according to him was duly considered by the Ld. AO. According to him SPA has a business connection in India in support of which he relied on the judgement of the Hon'ble Supreme Court in CIT vs. R.D. Aggarwal and Co. (1965) 56 ITR 20 and CIT vs. Fried Krupp Industries (1981) 128 ITR 27 (Mad) and also on Circular 23 of 1969 regarding taxability of income accruing or arising through, or from, business connection in India to non resident under section 9 of the Act.

6.3 In rebuttal, Ld. AR reiterated that the facts in the assessment year 2014-15 under consideration are exactly the same as those assessment years which have already been decided by the coordinate bench of the ITAT (supra). There is no change in the Agreement, the parties involved, the terms of payment etc. in the relevant assessment year. He submitted that the Hon'ble coordinate bench has decided the same issue in the earlier years (i.e. assessment year 2010-11, 2012-13 and 2013-14) in favour of the assessee considering all the relevant facts and legal propositions. The Ld. AR submitted that the SPA is not rendering any technical services to the

assessee as alleged by the Ld. DR. SPA is only procuring orders for the assessee outside India. He further submitted that SPA by performing the activities for the assessee as stipulated under the Agreement, is not trading in India but is only trading with India and hence there is no business connection of SPA in India. By placing reliance on the judgment of the Hon'ble Supreme Court in the case of GE Technology CE (P) Ltd. vs. CIT 327 ITR 456, the Ld. AR submitted that there is no obligation on the assessee to withhold tax under section 195 as payment to SPA which is in the nature of export commission, is not chargeable to tax in India.

7. We have considered the submissions of the Ld. representatives of the parties and perused the material on record. The coordinate bench in para 3 of its order for assessment year 2012-2013 and 2013-14 stated that the Ld. DR during the course of hearing though relied on the orders of the Assessing Officer but he did not object to the contention of the Ld. AR that the issue involved in both these assessment years are squarely covered by the decision of coordinate bench in assessee's own case for assessment year 2010-11 whereby in the identical facts of the case, the payments made to the same agents have been treated as commission and not as fee for technical services. However in assessment year 2014-15 under consideration the Ld. AR has raised an objection to this contention of the Ld. AR. We have perused the order passed by the Hon'ble coordinate bench of the ITAT for earlier assessment years. The relevant extract of the Hon'ble ITAT's order is reproduced below:-

ITA No. 2575/Del/2016

Assessment Year 2010-11

"5.2 As regards ground no. 2 relating to disallowance of Rs. 88,91,816/- is concerned, after perusing the duties and obligations as mentioned at page no. 44 to 46 of the impugned order, we find that the agent is not providing any technical services to the assessee. The agent is acting only commission agent and procuring the orders for the assessee and to inform the assessee for any infringement of rights. Even if the same is considered as business income of the commission agent same is not taxable in India as the foreign entity does not have any PE or BC in India. The commission is being entertained in the foreign company in the foreign country. No part of its income accrue or arise in India. Nor it is making available any technical knowledge, experience, skill, knowhow etc. to the assessee. Hence, Ld. CIT (A) has rightly held that the case of the assessee is identical to the decision of the Hon'ble Delhi High Court in the case of DIT vs. Guy Carpenter and Company Ltd. (ITA No. 202/2012)- Hon'ble Delhi High Court and the ITAT, Hyderabad and deleted the addition of Rs. 88,91,816/-. In view of above, we are of the considered view that Ld. CIT(A) has passed a well reasoned order which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground No. 2 raised by the Revenue."

ITA Nos. 1820 & 1821/Del/2018

AY 2012-13 and 2013-14

"3. During the course of hearing, the Id. DR, though relied on the orders of the Assessing Officer, but did not object to the contention of the learned AR that the issue involved in both these appeals are squarely covered by the decision of Co-ordinate Bench in assessee's own case for A.Y. 2010-11 [ITA No. 2575/Del/2016), whereby in the identical facts of the case, the payments made to the same agents have been treated as commission and not as fee for technical services. Relevant facts and findings of the ITAT, Delhi Bench in the aforesaid case read as under:

Facts:

"Further, AO observed that the assessee company had paid an amount of Rs. 88,91,816/- to M/s Graziano Transmission North America USA and the assessee was asked to explain as to why the payment made to M/s Graziano Transmission North America USA be not treated as royalty /fees for technical services in light of the services offered by the said company. The assessee company was further asked to explain as to why no TDS was deducted on the payment made to the said company. In compliance thereto the assessee company did not file any reply. Therefore, as per the provisions of the Act and in accordance with judicial pronouncement on the issue in dispute, the AO observed that assessee was liable to deduct TDS on export commission of Rs. 89,91,816 paid to non-resident / outsiders. Since assessee did not deduct the TDS as per provision of the section 195 of the Act, therefore, total deduction of expenditure of Rs. 88,91,816/- on export commission, as claimed by assessee, was disallowed and added back to the taxable income of the assessee for the AY 2010-11. Accordingly, the AO assessed the income of the

assessee at Rs. 22,10,20,170/- u/s.l43(3) of the Act dated 28.2.2014. Against the assessment order, assessee appealed before the Ld. CIT[A), who vide his impugned order dated 04.2.2016 has allowed the appeal of the assessee. Aggrieved with the impugned order, Revenue is in appeal before the Tribunal."

Findings:

"5.2 As regards ground no. 2 relating to disallowance of Rs. 88,91,816/- is concerned, after perusing the duties and obligations as mentioned at page no. 44 to 46 of the impugned order, we find that the agent is not providing any technical services to the assessee. The agent is acting only commission agent and procuring the orders for the assessee and to inform the assessee for any infringement of rights. Even if the same is considered as business income of the commission agent same is not taxable in India as the foreign entity does not have any PE or BC in India. The commission is being entertained in the foreign company in the foreign country. No part of its income accrue or arise in India. Nor it is making available any technical knowledge, experience, skill, knowhow etc. to the assessee. Hence, Ld. CIT(A) has rightly held that the case of the assessee is identical to the decision of the Hon'ble Delhi High Court in the case of DIT vs. Guy Carpenter and Company Ltd. (ITA No. 202/2012)- Hon'ble Delhi High Court and the ITAT, Hyderabad and deleted the addition of Rs. 88,91,816/- . In view of above, we are of the considered view that Ld. CIT(A) has passed a well reasoned order which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground no. 2 raised by the Revenue."

4. Having considered the rival submissions and gone through the material available on record and respectfully following the decision of co-ordinate Bench of Tribunal, we find no justification to interest with the orders of the Ld. CIT(A) on the issue under consideration. Accordingly, the grounds raised by the Revenue in both the appeals deserve to be rejected."

7.1 We have carefully considered the arguments of the Ld. DR. We notice that there is no change in the facts and legal position in the assessment year 2014-15 under consideration. Hence, we are unable to subscribe to his view. The contention of the Ld. DR that the Ld. CIT(A) has erroneously passed the orders for the earlier assessment years is not acceptable in view of the detailed findings recorded by the Ld. CIT(A) which is extracted in para 5. above. Further, we do not find any mention regarding the presence of business connection of SPA in the order of the Ld. AO as claimed by the Ld. DR. In any event, in our view, this aspect has also been considered by the coordinate bench by categorically recording that the foreign entity (SPA) does not have a permanent establishment (PE) or business connection (BC) in India. Reliance placed by the Revenue on the judgment of the Hon'ble Supreme Court in R.D. Aggarwal & Co. and judgment of the Hon'ble Madras High Court in Fried Krupp Industries (supra) and also on CBDT Circular 23/1969 (which stands withdrawn w.e.f. 22.10.2009) is misplaced. In both these cases the Honb'le Courts observed that whether there is a business connection or not, must be determined based on facts and circumstances of the particular case. In our opinion there is nothing on record which

indicates that SPA is carrying out its business in India owing to which any portion of its income can be attributed to its Indian operations. We firmly hold that there is no change in the facts and circumstances of the assessee's case in the assessment year 2014-15. The facts and circumstances remain the same as in the preceding years.

7.2 Accordingly, there is no justification to interfere with the order of the Ld. CIT(A). We note that the Revenue is not in appeal against the orders of the coordinate bench (supra) in earlier years. Decided cases must be put to rest. In the absence of any change in the factual matrix and the legal position in the assessment year 2014-15, respectfully following the decisions of the coordinate bench in assessee's own case in earlier years, we reject the appeal of the Revenue. It fails.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 11th April, 2022.

sd/-	sd/-
(DR. B.R.R. KUMAR) **ACCOUNTANT MEMBER**	**(ASTHA CHANDRA)** **JUDICIAL MEMEBR**

Dated: 11 /04/2022

Veena

Copy forwarded to-

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
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