

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No. 165/Bang/2020
Assessment Year : 2009-10

M/s. DMG Mori India Pvt. Ltd. (formerly DMG Mori Seiki India Machines and Services Pvt. Ltd.), No. 3/1, 3 rd Main Road, KIADB, Peenya, 1 st Stage, Ward No. 1, HMT, Bangalore – 560 058. PAN: AABCD0003E	Vs.	The Deputy Commissioner of Income Tax, Circle – 11(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Vikram, Advocate
Revenue by	:	Shri Priyadarshi Mishra, Addl. CIT (DR)

Date of Hearing	:	22-03-2022
Date of Pronouncement	:	29-04-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by the assessee against order dated 29/11/2019 passed by the Ld.CIT(A)-2, Bangalore for assessment year 2009-10 on following consolidated grounds of appeal:

- “1. The order of the CIT(Appeals) is contrary to law, facts, and circumstances of the case.*
- 2. Disallowance under section 40(a)(i) of the Act (Rs.2,76,24,000/-)*
 - 2.1. Disallowance u/S.40(a)(i) unwarranted: The CIT(Appeals) erred in confirming the disallowance of payments made to M/s R.S Mail Limited , United kingdom*

for under taking market survey under Section 40(a)(i) of the Act amounting to Rs.2,76,24,000 for non deduction of taxes

2.2 Services rendered outside India: The CIT(Appeals) erred in confirming that the services have been rendered in India where as the entire services have been provide by M/s RS Mail Limited from outside India and is not taxable in India and therefore no TDS is required as held in GE.

2.3 No technical service or knowledge "made available" under DTAA: The CIT(Appeals) ought to have appreciated that the payments made to M/s.R.S Mail Limited, UK for the services do not make available any technical knowledge, skill, know how to the appelland under Article 12 of India - UK tax treaty and hence is not in the nature of fees for technical services as per aforesaid Article.

2.4 Service not taxable under Act in AY 09-10 as it is not both rendered & utilized in India: Without prejudice to the above, the CIT(Appeals) ought to have appreciated that in the impugned Assessment Year the law of the land was Ishikawajima-Harima Heavy Industries vs. DIT (288 ITR 408 SC) which required both rendering and utilization of services in India for S.9(1)(vii) to apply which is not satisfied in the instant case as rendering is outside India and hence impugned payment for market survey by the Appellant is not taxable in India.

2.5 Impossibility of performance: Without prejudice to the above, the CIT(Appeals) ought to have appreciated that disallowance u/s.40(a)(i) cannot be made on the basis of retrospective amendments made by Finance Act 2010 as held in Channel Guide India Ltd. vs. ACIT (139 ITD 49 Mum) & Sterling Abrasives Ltd. vs. ITO (140 TTJ 68 Ahd.)

2.6 Exclusion clause of S.9(1)(vii)(b) applies: The CIT(Appeals) ought to have appreciated that even assuming but not conceding that the agent has carried out market survey / research for improving export of products in the Territory, such services are for the purpose of earning income from outside India and hence payment for the same does not accrue in India by the virtue of exclusion clause in S.9(1)(vii)(b). Reliance is placed on Titan Industries Vs ITO 11 SOT 206 (Bang) and CIT Vs Aktiengesellschaft Kuhnle Kopp and Kausch (262 ITR 513 (Mad))

3. S.234B & 234C excess interest charged

3.1 The CIT(A) ought to have specifically adjudicated the grounds related to S.234B & S.234C and the excess interest u/S.234B & S.234C charged by the AO ought to be deleted.

4. Short credit of TDS

4.1. The CIT(A) ought to have directed the AO to give correct TDS credit of Rs. 30,47,006/- as against the Rs.

17,51,164/- given by the AO, amounting to a short credit of Rs. 12,95,842/-

5. Penalty proceedings u/s.271(1)(c)

5.1 The CIT(A) ought to have directed the AO to drop the penalty proceedings initiated u/s.271(1)(c) r.w.s 274 of the Act.

6. Erroneous & unwarranted TP Adjustment on "Marketing Support Services"

6.1 The Commissioner of Incometax (Appeals) ("CIT(A)") ought to have quashed on merits the ALP adjustment on Marketing Support Services erroneously levied by the TPO to the tune of Rs.1,39,43,507/-.

6.2. The CIT(Appeals) erred in holding that ground taken by the Assessee on this adjustment was infructuous and thereby CIT(Appeals) failed to decide on merits this ground.

6.3. The CIT(A) ought to have held that the adjustment under "Marketing Support Services" was erroneous and against the Transfer Pricing provisions of the Incometax Act r.w. Rules and that the TPO has incorrectly rejected the Transfer Pricing study of the Assessee.

6.4. The CIT(A) ought to have struck down the incorrect TP methodology, FAR analysis & erroneous comparables chosen by the TPO to arrive at the adjustment of Marketing Support Services.

6.5 Without prejudice to the above, the CIT(A) ought to have appreciated that when the "Management Service Fee" of Rs.1,70,91,217 has already been benchmarked separately by the TPO and held to be ALP, in para Para 6.2(a)(2) of CIT(A) Order, then consequently such Management Service Fee ought not to be considered while computing the PLI for Marketing Support Services segment.

7.The Appellant carves leave to file additional grounds at the time of hearing."

2. Brief facts of the case are as under:

2.1 The assessee is a subsidiary of DMG Vertruibs Und Service GMBH, Germany. It is engaged in trading, servicing, installation and commissioning of computer numerically controlled machining (CNC) centres, CNC tuning centres, conventional machines and leads manufactured by various companies under that the Glidemeister Group. It is said that the company also provides manpower support services to its group companies.

2.2 For the year under consideration assessee filed return of income on 27/04/2010 declaring total income of ₹ 3,63,56,540/- under the normal provisions of the act. The case was selected for scrutiny and notice under section 143(1) of the Act, was issued to assessee. From the details filed, the Ld.AO observed that, the assessee had international transaction exceeding ₹ 15 crores and accordingly, reference was made to the transfer pricing officer, to determine arms length price of the international transactions.

2.3 Upon receipt of the reference, the Ld.TPO called upon assessee to furnish the economic details of the international transaction between assessee and its AE. The Ld.TPO observed that, the assessee was engaged in rendering of marketing support services and manpower support services to its group companies the details of which are as under:

International transaction	Payment (Rs.)
Import of spares and tools and CNC machines	91,85,419/-
Purchase of capital goods	16,83,767/-
Commission and warranty income received	14,85,56,079/-
Income from manpower support services	1,89,04,270/-
Payment of management fees	1,70,91,217/-
Recovery of exhibition expenses	3,73,88,473/-

2.4 The Ld.TPO re-characterised assessee's transaction by aggregating importers parent tools and CNC machines, purchase of capital goods, commission and warranty income received as linked transaction under the head marketing support service segment, manpower support service segment and payment of

management fee separately. The Ld.TPO also noted that assessee had computed its margin as under:

Particulars	Marketing support services	Manpower consultancy services
Total Income	18,09,00,940/-	1,89,04,270/-
Expenditure	15,25,10,061/-	1,64,38,496/-
Operating Profit	2,83,90,879/-	24,65,774/-
OP/Cost	18.62%	15%

2.5 The Ld.TPO re-casted the financials of assessee for marketing support service segment and manpower support service segment as under:

Sl.	Particulars	Marketing support services segment (91%)	Manpower support services – segment (9%)
1	Revenue (excluding other income)	18,71,71,821/-	1,89,04,270/-
2	Expenditure (Provn for doubtful debts, deposits excluded. Cost of raw material, management fees included in marketing support service segment – rest of the expenditure distributed proportionate to revenue)	18,28,32,116/-	1,80,82,297/-
3	Operating profit / loss	43,39,705/-	8,21,973/-
4	OP/ Cost	2.31%	5%

2.6 For marketing support service segment the Ld.TPO selected 7 comparable is having a margin of 10% by using OP/total cost as PLI. As the margin computed by the Ld.TPO under the segment was 2.31% necessary adjustments were proposed.

2.7 In respect of management fees segment, the Ld.TPO was of the opinion that, the assessee has not proved with sufficient evidence and services have been actually rendered by the AE, for which, the said payment of management has been made. The Ld.TPO thus treated the management fee paid to be a nil, and disallowed the entire payment of ₹ 1,70,91,217 in the hands of assessee.

The total adjustment proposed by the Ld.TPO are as under:

International Transaction	Amount (Rs.)
Commission Income, Warranty Income, Purchase of capital goods, Purchase of CNC Machine, Import of spares and tools	1,39,43,507/-
Management Fees	1,70,91,217/-
Total	3,10,34,724/-

2.8 The Ld.AO, on receipt of the order under section 92 CA passed the draft assessment order on 11/03/2013. As the assessee did not file any objections before the DRP within the stipulated period, final assessment order was passed on 30/04/2013 wherein the Ld.AO, further made disallowance of Rs.2,76,24,000/-, made to non-resident for non-reduction of TDS.

2.9 Against the disallowance is made by the Ld.AO, assessee preferred appeal before the Ld.CIT(A).

3. The Ld.CIT(A), deleted the addition made towards management fee by holding it to be at arms length. The relevant observation of the Ld.CIT(A) are as under:

“2. The TPO in his orders u/s 92CA for AY 2007-08 and 2008-09, treated the 'Management fee' transaction as a separate segment from 'Marketing support services' and accordingly treated the payment of 'Management fees' as not at arm's length and made an ALP adjustment by analyzing it under CUP method. The taxpayer using the TNMM method had aggregated the transaction of 'Management fee' with 'Marketing support services' segment for analysing the international transactions in its TP study. On further appeals by the appellant, the ITAT set aside the issue to the TPO for fresh consideration of the issue taking into account all the evidences filed by the appellant in relation to rendering of management services by its AE and the various judicial pronouncements on the issue. The TPO while giving enect to the ITAT order held that the price paid

as 'Management fees' was at arm's length and accordingly deleted the ALP adjustment made in his original order. The same issue is being agitated during the present appeal for AY 2009-10 also. I have perused the submissions/evidences filed by the appellant during the appeal proceedings and found that the appellant has actually received certain management services relating to IT services, finance and marketing services from its AE. Therefore, in view of the appellant's submissions and the legal position on this issue, I hold that the 'Management fees' paid by the appellant to its AE was at arm's length and accordingly delete the ALP adjustment of Rs.1,70,91,217/- made by the TPO. The ground is therefore allowed."

4. In respect of the disallowance made under section 40(a)(i) of the Act, the Ld. CIT(A) upheld the addition by observing as under:

"A perusal of the above provision makes it clear that the 'Market survey expenses' are in the nature of technical/consultancy services and clearly falls within the scope of section 9(1)(vii) of the Income tax act and therefore is liable for withholding of taxes. The contention of the appellant that the TDS was not made since the non-resident beneficiary had no Permanent Establishment (PE) in India is not tenable. Explanation 2 to section 195 of the Income tax Act clearly says that the obligation to make TDS u/s 195(1) shall be applicable whether or not the non-resident person has- (i) a residence or place of business or business connection in India, or (ii) any other presence in any manner whatsoever in India. In view of the above, I uphold the disallowance made by the AO u/s 40(a)(i) of the Income tax Act and dismiss the ground raised by the appellant."

Aggrieved by the order of the Ld.CIT(A) the assessee is an appeal before this *Tribunal*.

5. **Ground No.2** raised by assessee is in respect of the disallowance made under section 40(a)(i) of the Act, amounting to ₹ 2,76,24,000. The Ld.AR submitted that, the assessee made payment to non-resident parties namely R.S.Mail Ltd UK, under the head market survey expenses. The Ld.AO disallowed the expenditure on the ground that tax was not been deducted, towards the payment, as it was free for technical services. The Ld.AO also held that the services were provided in India.

5.1 On appeal before the Ld.CIT(A), the disallowance made by the Ld.AO was upheld. Relevant observation upholding the deisallowance is reproduced in para 4 herein above.

5.2 Before this *Tribunal*, the Ld.AR submitted that, services were rendered outside India and the service provider, being R.S Mail Ltd., which is a UK-based company, does not have a permanent establishment in India. It was submitted that, the assessee engaged R.S.Mail Ltd., to conduct all related activities of market survey of machine tools industries for DMG India. It is also submitted that, no technical services was provided by this UK-based entity, and this company has only provided the results of the market survey conducted by it, which was used by assessee for its business purposes.

5.3 The Ld.AR referring to Article 13(4)(c) of the India UK DTAA submitted that, the payment made by the assessee towards market survey conducted in UK, becomes business income of the non-resident and the same is liable to be taxed in UK in the hands of the non-resident company. It also submitted that, there is no “make available”, of technical knowledge, experience, know-how or processes or consistent of the development and transfer of a technical plan or technical design. He placed reliance on the following decision in support of its contention that there is no fulfilment of “make available” to the assessee in India.

- *CIT v De beers Mineral India P Ltd* 346 1TR 467 Kar.
- *DIT v Guy Carpenter Ltd* 346 1TR 504 DEL
- *ACIT v M/s Textech International P ltd* 2012-TII-184-ITAT-MAD-INTL
- *Gama Industries Coimbatore Ltd v CIT* 2012-TII-120-1TAT-MAD-INTL
- *Mahindra & Mahindra Ltd Vs DCIT* 121 TTJ 577 (Mum-SB)
- *Inveys Systems In.re* 3171TR 438 (AIR)
- *Grasim Industries Ltd. v. CIT* 332 ITR 276 Bom
- *Intertek Testing Services India (P) Ltd. in re* 307 ITR 418

- *Bharath Petroleum Corporation Ltd v JCIT 111 TTJ 375 Mum.*
- *ICICI Bank v DCIT ss20 SOT 453 Mum.*
- *Anapharm Inc In Re. 305 ITR 394 AAR*
- *Worley Parsons Services Pty Ltd 313 ITR 74 AAR*

5.4 On the contrary, the Ld.CIT.DR relied on orders passed by authorities below.

5.5 We have perused the submissions advanced by both sides in light of records placed before us.

5.6 We note that the Ld.CIT(A) upheld the disallowance by the Ld.AO, for non-deduction of tax at source by the assessee, holding that, the same was in the nature of fee for consultancy services chargeable to tax in India, on which, TDS was liable to be deducted. The Ld.CIT(A) upheld the action of Ld.AO, by relying on *Explanation 2* to section 9(1)(vii) of the Act. In our opinion, *Explanation 2*, to section 9(1)(vii) cannot be applied, as the assessee cannot be held liable to deduct tax at source relying on a subsequent amendment made in the act with retrospective effect. The retrospective amendment was brought in by Finance Act, 2010, which was nowhere in sight at during the relevant assessment year.

5.7 We draw a support from the decision of *Hon'ble Ahmadabad Tribunal* in case of *Sterling Abrasive Ltd.*, by order dated 23/12/2010 the said proposition was also followed by *Hon'ble Mumbai bench* of this *Tribunal* in case of *Channel Guide India Ltd vs ACIT*, reported in 139 ITD 49, wherein it is held that, law cannot cast the burden of performing the impossible task of performing tax withholding obligations with retrospective effect, and, accordingly, the disallowance under section 40(a)(i) cannot be

made in a situation, in which, taxability is confirmed only as a result of retrospective amendment of law.

5.8 Tax treaties are primarily, an instrument, allocating between contracting states, with or without conditions, rights to tax income, which have allegiance in more than one tax jurisdiction. A tax treaty does, therefore, only enable a contracting state to levy tax. Once it does so, the domestic law of the tax jurisdiction which has been granted the right to tax comes into play and it comes into play subject to such restrictions as may have been placed thereon, A tax treaty cannot force a contracting state to levy a tax.

5.9 In this light let us also examine the Article 13 of India UK DTAA. Clause (4) of Article 13 construe “fee for technical services” under the India UK DTAA:

“4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5 of this Article, the term fees for technical services means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.”

5.10 The Ld.AR submitted that, if market research fee was treated as fee for technical services, then vide Article 13.4 of DTAA such technical services, unless it was made available to the assessee, could not be taxed in India. There was nothing that was made available to the assessee. On the other hand, R.S.Mail Ltd., UK was doing market survey for the assessee outside India. Learned A.R. also pointed out that payments made by assessee squarely

fell within the exclusion mentioned in clause (b) of Section 9(1)(vii). Said clause clearly excluded from purview of fee for technical services, fees paid in respect of services as well as business promotion carried on by a non-resident outside India.

5.11 *Hon'ble Bombay High Court* in case of *Clifford Chance v. Deputy CIT* reported in (2009) 318 ITR 237, wherein *Hon'ble Court*, was considering taxability of income of a nonresident falling under section 9(1)(vii)(b) of the Act, *having regards to the decision of Hon'ble Supreme Court* in case of *Ishikwajima* reported in (2007) 208 ITR 408, held as under,:

“Reading the provision in its plain sense, as per the Apex Court it requires two conditions to be met—the services which are the source of the income that is sought to be taxed, has to be rendered in India, as well as utilised in India, to be taxable in India. Both the above conditions have to be satisfied simultaneously. Thus, for a non-resident to be taxed on income for services, such a service needs to be rendered within India, and has to be part of a business or profession carried on by such person in India.”

5.12 Further, even if we consider, the marketing services rendered outside India, as technical services, nothing was made available to the assessee in the nature of any technical knowledge, experience, skill know-how or processes. There was no development or transfer of any technical plan or technical design. We are therefore of the opinion that, the revenue is incorrect in view of Section 9(1)(vii) (b) of the Act and also in view of DTAA between India and UK. We, therefore, hold that, the disallowance under Section 40(a)(i) cannot be invoked on the facts of this case.

Accordingly Ground no.2 raised by the assessee stands allowed.

6. Ground No.3-4 is raised in respect of interest levied under section 234 B&C as well as non granting of full credit to the TDS.

The assessee is directed to file all relevant details and the Ld.AO is directed to verify. The Ld.AO is directed to consider the claim of the assessee in accordance with law.

Accordingly these grounds raised by the assessee stands allowed for statistical purposes.

7. Ground No.6 is raised by the assessee in respect of the transfer pricing adjustment made under marketing support service segment. The assessee has also raised petition for admission of additional grounds on this issue.

7.1 The grievance of the assessee is that there is a double addition under this segment in respect of the management fees by the Ld.TPO.

7.2 This issue is decided by the Ld.CIT(A) by deleting the transfer pricing adjustment made under Management services segment. Relevant observation by the Ld.CIT(A) is reproduced herein above.

7.3 As this issue has been settled by the Ld.CIT(A) by deleting the transfer pricing adjustment made under Management service segment, we do not find any grievance on behalf of the assessee.

Therefore these grounds are held to be infructuous.

In the result the appeal filed by the assessee stands partly allowed.

Order pronounced in open court on 29th April, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 29th April, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore