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

BEFORE SHRI N V VASUDEVAN, VICE PRESIDENT
AND
SHRI PADMAVATHY S, ACCOUNTANT MEMBER

IT(**IT**)A No.987/Bang/2017
Assessment year : 2016-17

M/s. Infosys BPO Ltd., Electronics City, Hosur Road, Bangalore – 560 100. **PAN: AACCP 4478N**	Vs.	The Deputy Commissioner of Income Tax, International Taxation, Circle 1(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Padamchand Khincha, CA
Respondent by	:	Shri Priyadarshi Mishra , Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	28.04.2022
Date of Pronouncement	:	17.05.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal is at the instance of assessee directed against the order of the CIT(Appeals)-12, Bengaluru dated 28.02.2017 for the assessment year 2016-17 on the following grounds:-

"1.0 Exception to section 9(l)(vi)(b) / 9(l)(vii)(b) not examined by CIT(A)

The learned CIT(A) 12, Bangalore has erred in not appreciating that the payments to non residents were in respect of right, property or information used or services utilized in a business or profession carried on by the appellant outside India or for the purposes of making or earning any income from any source outside India.

The learned CIT(A) 12, Bangalore has erred in not appreciating that the payments to non residents were not deemed to accrue to arise in India u/s 9(1)(vi)/(vii) in view of the above exception and consequently not liable for TDS u/s 195.

2.0 Payments to non residents were not chargeable to tax under the DTAA

2.1 The learned CIT(A) 12, Bangalore has erred in not appreciating that the payments to non residents were not chargeable to tax under the DTAA and consequently not liable for TDS u/s 195.

3.0 Rate of20% u/s 206AA is not applicable for grossing up u/s. 195A

3.1 The learned CIT(A) 12, Bangalore has erred in not appreciating that the rate of20% as per section 206AA is not applicable for the purposes of grossing up of income and payment of TDS under section 195A.

3.2 The learned CIT(A) 12, Bangalore has erred in not appreciating that the grossing up under section 195A is required to be made at 'rates in force' and not at the rate of 20% as per section 206AA.

3.3 The learned CIT(A) 12, Bangalore has erred in not appreciating that section 206AA is not applicable in the context of section 195A as grossing up u/s 195A does not involve deduction of tax at source from the amount payable to the payer.

4.0 Grant of interest on refund

4.1 The learned CIT(A) 12, Bangalore has erred in not allowing interest on refund of TDS paid by the appellant out of its own funds.

4.2 The learned CIT(A) 12, Bangalore has erred in not appreciating that interest on refund of TDS is to be allowed as per CBDT Circular No. II of 2016 dated 26.4.2016 read with the decision of the Supreme Court in the case of UOI v TATA Chemicals Ltd (2014)43 taxmann.com 240 (SC)."

2. The brief facts of the case are that the assessee is an Indian company engaged in the business of providing business process outsourcing services. The following payments were made by the assessee to non-residents after grossing up the invoice amount and TDS thereon in accordance with the provisions of section 195A of the Income-tax Act, 1961 [the Act]:

Vendor Name	Country	Vendor PAN	Tax Residency	Grossed-up Invoice	TDS	Rate	Challan date	Nature of expenses
GRAPA	USA	Not available	Yes	278,435	28679	10.30	4.9.2015	Training fees

3. According to the assessee, the payment of TDS after grossing up had been made out of the assessee's own funds and under protest and TDS Certificates will not be issued to the non-residents.

4. The assessee filed an application before the CIT(Appeals) u/s. 248 of the Act for a declaration that payments made to non-residents were not chargeable to tax under the provisions of the Act and Double

Taxation Avoidance Agreements (DTAA) and consequently no tax was deductible on the said payments u/s. 195 of the Act.

5. The CIT(Appeals) observed that as per the provisions of section 248 of the Act, a person who makes a payment of any income other than interest and pays tax deductible u/s. 195 to the credit of the Central Government and claims that tax was not required to be deduction on such income, appeal may be filed before the Commissioner (Appeals) for a declaration that no tax was deductible on such income. In such cases, any order is not required to be passed by the Assessing Officer for filing the appeal before the CIT(Appeals) as held in *Jindal Thermal Power Co. Ltd. v. DCIT [2009] 182 Taxman 282 (Kar), DIT v. CGI Information Systems and Management (ITA No.531 of 2008, High Court of Karnataka)* and *Kotak Mahindra Ltd. v. ACIT [2010-TII-ITAT-Mum-INTL.)*. With these observations, the CIT(Appeals) admitted the appeal for adjudication.

6. The assessee sought a declaration from the CIT(Appeals) stating that the payment made to GRAPA is training fees and hence no TDS was liable to be deducted at source by the assessee. However, the CIT(Appeals) held that income arising due to payments for the services mentioned in section 5(2) of the Act would come under the ambit of "fees for technical services" as described in section 9(1)(vii) of the Act. Therefore, the payments made to non-residents in this case is chargeable to tax in India as per the provisions of the Act.

7. Another plea of the assessee before the CIT(Appeals) was that the payments made to non-residents were not chargeable to tax in India under the DTAA. The CIT(Appeals) rejected this plea of the assessee observing that the services provided by GRAPA of USA was for training for certification course in 4G/LTE business operations. The training charges came within the ambit of payments for 'fees for included services' as defined in para 4 of Article 12 of DTAA between India and USA. In the present case the technical knowledge provided by the payee was made available to the assessee and hence the payments thereof made to non-residents were covered under Article 12 of the DTAA between India and USA, thus chargeable to tax in India.

8. Next issue on which the assessee sought declaration from the CIT(A) that tax deducted at higher rate under section 206AA was not applicable when the payments were made to non-residents in the absence of Permanent Account Number. On this, the CIT(A) relied on the decision of the coordinate bench of the Tribunal in the case of Bosch Ltd v ITO (ITA No.552 to 558/Bang/2011 dated 10.11.2012) and held that section 206AA for charging tax at higher rate under section 206AA was not permissible when the benefit of DTAA was available to the non-resident payee.

9. The assessee also sought declaration that assessee was entitled to refund of TDS under section 195A along with interest under section 244A of the Act. The CIT(A) rejected this stating that though the assessee is entitled to refund where it has paid more taxes than the due

amount required under section 195A, there is no provision under section 214 and 244A of the Act for interest in an appeal made under section 248 of the Act.

10. Aggrieved, the assessee is in appeal before the Tribunal. The assessee had raised grounds (Ground No.3) with regard to tax deducted at higher rate under section 206AA was not applicable. Since the CIT(A) has already allowed this issue in favour of the assessee this ground is infructuous and hence dismissed. The rest of the grounds are adjudicated in the ensuing paragraphs.

11. The ld. AR submitted that the fees paid by the assessee towards training does not fall under the purview of 'fees for technical services' under Article 12 of the DTAA between India and USA as there is no technical knowledge made available by the payee to the assessee. In this regard, he relied on the decisions of the ITAT Mumbai in the case of *Lloyds Register Industrial Services (India) (P.) Ltd. v. ACIT [2010] 36 SOT 293 (Mum)* and *United Helicharters (P) Ltd. v. ACIT [2013] 37 taxmann.com 343 (Mum Trib.).* He also relied on the decision of Pune Bench of the Tribunal in the case of *Sandvik AB v. ACIT [2021] 129 taxmann.com 69 (Pune Trib.).* The ld.AR also submitted that the tax residency certificate GRAPA stating that GRAPA is a resident of United States (US) for the purpose of US Taxation was already submitted before the CIT(A).

12. On the other hand, the ld. DR submitted that the training fees paid by the assessee to GRAPA, USA are for training in certification course which are sponsored by the assessee and hence clearly fall within the ambit of taxability u/s. 9(1)(vii) as well as Article 12 of the DTAA between India and USA. The assessee being the ultimate beneficiary of the training, the technical knowledge obtained by the employees of the assessee is clearly made available for the benefit of the assessee and hence taxable in India.

13. We have heard the rival submissions and perused the material on record. Before we go into whether the fees paid by the assessee towards training is tax deductible, we will look at the relevant provisions of section 9(1)(vii) and also relevant Article of DTAA.

Definition of Fees for Technical Services as per section 9(1)(vii)

(vii) income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person97 outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided *****

Explanation [2].—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction99, assembly, mining or like project undertaken by the recipient99 or consideration which would be income of the recipient chargeable under the head "Salaries".]

"Article 12(4) of DTAA between India and USA reads as under –

For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of 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, or consist of the development and transfer of a technical plan or technical design.*

14. The main arguments of revenue was that the services provided were in the nature of 'fees for technical services' as defined in Explanation 2 to section 9(1)(vii), and therefore, the payment was covered by the definition of 'fees for technical services' as per article 12 of tax treaty between India and USA. These submissions overlook the fundamental position that the provisions of the Income-tax Act apply in a treaty situation only to the extent they are more favourable

vis-à-vis the provisions of tax treaties, to the assessee. Accordingly, when case of the revenue authorities fails on the tests of the treaty provisions, there is no occasion at all for their leaning upon the provisions of the Income-tax Act. Hence it is important to establish that the training fees paid in the assessee's case, fall within the purview of 'fees for technical services' under Article 12(4). The Ld AR submitted that this training fees is paid for certification course on revenue assurance in telecom i.e. migrating from 3G to 4G and for access to better infrastructure which is substantiated by the copy of invoice submitted as part of paper book **(Page 3 of paper book)**. The law is settled so far as the connotations of 'make available' clause in the definition of fees for technical services in the contemporary tax treaties are concerned. It is held to be a condition precedent for invoking this clause that the services should enable the person acquiring the services to apply technology contained therein. This proposition is supported by the decision of the Hon'ble Karnataka High Court in the case of CIT v. De Beers India (P.) Ltd. [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214. Unless there is a transfer of technology involved in training services extended by the GRAPA, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under article 12(4) of the India USA Treaty. The decisive factor is not the fact of training services per se, but the training services being of such a nature that it results in transfer of technology. GRAPA is providing training on revenue assurance in telecom (4G LTE) which in our considered view is not a technical

service rendered by GRAPA. We notice that the Hon'ble Mumbai Bench of the Tribunal in the case of Lloyds Register Industrial Services (India) (P.) Ltd.(supra) has considered a similar issue and held that

(14) After careful perusal of various authorities relied on either side would show that they are quite distinguishable because none of the case law deals with the training expenses. In these cases some principles have been laid down. We further find that the decision relied on by the learned counsel for the assessee in the case of Ishikawajma-Harima Heavy Industries Ltd. (supra) is not applicable because that decision has been rendered in respect of section 9(1)(vii)(c) which is applicable in the case of non-residents whereas clause (b) deals with residents. However, at the same time, common sense would tell us that training expenses cannot be called as "fee for technical services". For example a student passes his examination of LLB, it does not mean he becomes fully equipped to deal with the cases in various fields. He needs further training under a Senior Lawyer in the chosen field say for example - taxation, service matters, civil matters or criminal matters, etc. In the modern days even these categories can be further sub-divided, for example - in the case of taxation, it can be direct taxes and indirect taxes and with further specialization, for example - say International taxation etc. Similarly, civil matters can be divided into various fields say property matters, family matters etc. What we mean to say is that a person is highly qualified by his law degree but still requires training for rendering practical aspects. Similarly, in the case before us surveyors were highly technically qualified but such persons, may need to learn practical aspects of examining various electrical and other equipments. Such training in our view is a continuous process because technology is changing very fast and one needs to keep touch with such technology and therefore,

expenses incurred towards training cannot be termed as "fee for technical services". In any case, the case before us major amount has been paid by way of reimbursement for boarding and lodging arrangements also for which no separate claims have been made. Therefore, according to us, the training fee cannot be termed as "fee for technical services".

15. We also notice that the similar view is held by the Hon'ble Tribunal in the case of United Helicharters (P) Ltd (supra) where it was held that –

(9) Therefore, in view of the legal proposition discussed by the Ahmedabad Bench (supra) we agree with the contention of the assessee that the assessee has acted under bonafide belief that no tax was to be deducted at source on these payments. Apart from the bonafide belief we further noted that as per para 4(b) of Article 12 of Indo-US DTAA fees for included services means if such services made available technical knowledge, experience, skill, know-how, or processes, or consists of the development and transfer of a technical plan or technical design. The training in the case in hand was given to the pilots and other staff as per the requirement of the DGCA Rules therefore, it was only a part of the eligibility of the pilots and other staff for working in the industry of aviation and such training would not fall under the term "service make available". The decisions relied upon by the Ld. DR are on the taxability of the income in the hand of the non-resident in view of the retrospective amendment therefore the said principle cannot be applied while deciding the issue of disallowance u/s 40(a)(i). In view of the above discussion and the facts and circumstances of the case we are of the considered opinion that the disallowance of u/s 40(a)(i) is not justified and accordingly the same is deleted.

16. In view of the decisions of the Hon'ble Tribunal and given the facts as discussed above, we are of the considered view that the fees paid by the assessee to GRAPA towards training services does not seem to involve any transfer of technology and thus cannot be brought to tax under article 12(4) of the India USA Treaty hence the assessee is not liable to deduct tax at source under section 195 of the Act.

17. On the issue of interest on refund of tax deposited under section 195 of the Act. it is submitted that the coordinate bench of the Tribunal in assessee's own case **(IT(IT)A Nos.986 & 990/Bang/2017)** has held that the assessee is entitled for interest on refund of tax deposited under section 195 of the Act. The Hon'ble Tribunal has held that –

> *It is submitted that Hon'ble Supreme Court in case of UOI vs Tata Chemicals Ltd., reported in (2014) 43 taxman.com 240 held that, deductee is entitled for interest on refund tax deposited under section 195. The Ld.AR placed reliance on CBDT Circular No.11/2016 allowing interest on refund under section 244A on excess TDS deposited under section 195 of the Act.*
>
> *Nothing contrary has been brought on record by the Ld.CIT DR.*
>
> *Respectfully following the decision of Hon'ble Supreme Court, we hold that the deductee is entitled to interest on refund of tax deposited under section 195 of the Act*

18. Respectfully following the decision of the coordinate bench of the Tribunal in assessee's own case, we hold that the assessee is entitled to interest on the refund of tax deposited under section 195.

19. In the result, the appeal is allowed in favour of the assessee

Pronounced in the open court on this 17th day of May, 2022..

Sd/-	Sd/-
(N V VASUDEVAN)	**(PADMAVATHY S.)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Bangalore,
Dated, the 17th May, 2022.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.