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

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

IT(TP)A No.171/Bang/2022
Assessment year : 2017-18

Cerner Healthcare Solutions India Pvt. Ltd. [**erstwhile** Cerner Healthcare Solutions Pvt. Ltd.], 10th Floor, Wing B, Block H2, Mountain Ash, Manyata Embassy Park, Nagawara, Bangalore – 560 045. **PAN: AAFCC 8750R**	Vs.	The Deputy Commissioner of Income Tax, Circle 2(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Sumit Khurana, CA
Respondent by	:	Shri Srinivas T. Bidari, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	13.07.2022
Date of Pronouncement	:	27.07.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal is against the final assessment order passed by the National Faceless Assessment Centre (NFAC), Delhi u/s. 143(3) r.w.s. 144(C13) of the Income Tax Act, 1961 (the Act) dated 13.01.2022 for the assessment year 2017-18.

2. The assessee has raised 8 grounds and several sub-grounds. During the course of hearing the learned AR submitted that Ground No. 4 pertaining to transfer pricing is withdrawn since the assessee has entered into an Advance Pricing Agreement (APA). Ground Nos. 1 to 3 are general in nature and does not warrant separate adjudication. Therefore ground 1 to 4 are dismissed.

3. The issues contended by the assessee through Ground Nos. 5 to 8 are as follows: -

i) Disallowance of ESOP expenditure u/s. 37 – Rs.4,88,99,898/- (Ground No. 5)
ii) Disallowance of salary cost paid to Cerner Corporation u/s. 40(a)(ia) – Rs.94,37,712/- (Ground No. 6)
iii) Disallowance of communication expenses paid to Cerner Corporation – Rs.3,47,06,876/- (Ground No. 7)
iv) Initiation of penalty proceedings u/s. 270A r.w.s. 274 (Ground No. 8)

4. The assessee is a company engaged in the business of rendering Software Development and providing information technology enabled services and business process outsourcing services to its group companies, viz. Cerner Innovation Inc. and Cerner International Inc USA. The assessee filed the return of income for AY 2017-18 on 24.11.2017 and revised return on 02.12.2017 declaring a total income of Rs.20,04,70,980/- under normal provisions and Rs.52,90,67,234/- u/s. 115JB of the Act. The book profit was computed u/s. 154 of the Act and rectified as Rs.57,18,72,341/- and total income as Rs.20,72,19,760/-. The case was selected for scrutiny and the reference

was made to Transfer Pricing Officer. The AO passed the draft assessment order by making aforesaid disputed disallowances besides the TP adjustment. The DRP, against the objections raised by the assessee confirmed the disallowances and the TP adjustment. The assessee is in appeal before the Tribunal against the final order of assessment passed by the AO pursuant to the directions of the DRP. The learned AR submitted before us that all the issues contended in this appeal are covered by the decision of the coordinate bench of the Tribunal in assessee's own case for AY 2016-17 in IT(TP)A No. 254/Bang/2021 dated 18.05.2022. The relevant findings of the Hon'ble Tribunal are reproduced below –

Disallowance of ESOP Expenditure

"9. After hearing both the parties we notice that the coordinate bench of the Tribunal in assessee's own case (supra) has dealt with the same issue and held as under:-

"4. After hearing both the parties we find that similar issue came for consideration of the Tribunal in the case of Novo Nordisk India (P) Ltd. (2014) 63 SOT 242 Bang – Trib.) wherein it was held as under:-

In the present case, there is no dispute that the liability has accrued to the assessee during the previous year. The only question to be decided is as to whether it is the expenditure of the assessee or that of the parent company.

The foreign parent company has a policy of offering ESOP to its employees to attract the best talent as its work force. In pursuance of this policy of the foreign parent company, allowed its subsidiaries/affiliates across the world to issue its shares to the employees.

As far as the assessee in the present case which is an affiliate of the foreign parent company is concerned, the shares were in fact acquired by the assessee from the parent company and there was an actual outflow of cash from the assessee to the foreign parent company.

The price at which shares were issued to the employees was paid by the employee to the Assessee who in turn paid it to the parent company. The difference between the fair market value of the shares of the price at which shares were issued to the employees was met by the Assessee.

This factual position is not disputed at any stage by the revenue. In such circumstances, we do not see any basis on which it could be said that the expenditure in question was a capital expenditure of the foreign parent company.

As far as the assessee is concerned, the difference between the fair market value of the shares of the parent company and the price at which those shares were issued to its employees in India was paid to the employee and was an employee cost which is a revenue expenditure incurred for the purpose of the business of the company and had to be allowed as deduction.

There is no reason why this expenditure should not be considered as expenditure wholly and exclusively incurred for the purpose of business of the assessee.

23. With regard to the observations of the CIT(Appeals) that the ESOP actually benefits only the parent company, we are of the view that the expenditure in question is wholly and exclusively for the purpose of the business of the assessee and the fact that the parent company is also benefited by reason of a motivated work force would be no ground to deny the claim of the assessee for deduction, which otherwise satisfies all the conditions referred to in section 37(1).

The facts and circumstances of the present case, the expenditure in question was wholly and exclusively for the

purpose of the business of the assessee and had to be allowed as deduction as a revenue expenditure.

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

5. In view of the binding decision of the Coordinate Bench we allow the grounds taken by the assessee."

10. Respectfully following the above decision of the coordinate bench, we allow the ground in favour of the assessee

Disallowance of salary cost paid to Cerner Corporation

13. We heard the rival submissions and perused the materials on record. We notice that the coordinate bench of the Tribunal in the case of Goldman Sachs services Private Limited, [2022] in IT(IT)A Nos.362 to 369 & 338 to 345/Bang/2020 dated 29.4.2022 has dealt with the same issue and held as under:-

"37. Respectfully following the above views expressed by Hon'ble High Court in DIT vs. Abbey Business Services India (supra), Hon'ble AAR in Cholamandalam MS General Co. Ltd. (supra), Hon'ble Bombay High Court in case of iris & Spencer Reliance India Pvt.Ltd. vs. DIT (supra), Hon'ble Delhi Sit Court in the case of DIT Vs. HCL Infosystems Ltd. (supra), Coordinate bench of this Tribunal in case of IDS Software Solutions ITO (supra), Hon'ble Pune Tribunal in case of M/s. Faurecia Automative Holding(supra), Hon'ble Ahmedabad Tribunal in the case Burt Hill Designs (P) Ltd. vs. DDIT(IT) (supra), we are of the view that the reimbursement made by the assessee in India to overseas entity. towards the seconded employees cannot be regarded as "Fee For technical Services".

Once there is no violation of provision of section 195, assessee cannot be held to be an assessee in default under section 201(1) of the Act for all the years under consideration. We therefore direct the ld. AO to delete interest levied under section 201(1A) of the Act for all the years under consideration."

14. Following the binding decision of the coordinate bench of the Tribunal we hold that the reimbursement made by the assessee in India to the overseas entity towards the salary cost of seconded

employees cannot be regarded FTS and hence not liable to deduct tax at source u/s. 195 of the Act. Therefore the disallowance made by the AO in this regard on the ground that tax was deducted at source is hereby deleted."

Disallowance of communication expenses paid to Cerner Corporation

"18. We have heard the rival submissions and perused the materials on record. Cerner Corporation has entered into a global agreement with Sprint communication systems under which service provider provides bandwidth services to Cerner group companies including the assessee. The service provider raises invoice on Cerner Corporation for the services rendered to various companies including the assessee. During the assessment year 2016-17 Cerner Corporation has paid a sum of Rs. 2,42,95,765 towards communication expenses to the service provider on behalf of the assessee and in turn cross charged these expenses to the assessee on cost to cost basis without any profit/element. The assessee had submitted copies of invoices to support this claim before the lower authorities. The important element that needs to be considered here is the amount reimbursed by the assessee to Cerner Corporation is on cost or cost basis and does not contain any element of profit. We notice that a similar issue has been considered by the Pune bench of the Tribunal in the case of T-3 Energy Services India Pvt. Ltd vs JCIT (ITA No.826/Pun/2015) where the Hon'ble Tribunal has held that -

"25. Now, coming to the next aspect of the issue that reimbursement of charges is not subject to tax in India. The basic principle underlying the same is that where reimbursement of expenses do not include any income element, then the same is not subject to tax in India. The assessee before us has filed extensive evidence in this regard i.e. Qwest Communications Inc had raised charges upon T-3, USA and the portion allocable to the assessee was charged on cost to cost basis. Hence, it cannot be said that there was any income element which has arisen in the case and consequently, we hold that where the assessee had reimbursed the expenses having no income element, there is no requirement to withhold tax out of such payments. The case of Revenue in this regard is that it is

not case of reimbursement but is a case of payment to third party through its associated enterprise and hence, the need for withholding tax. We have already decided this issue in the paras hereinabove that under the provisions of DTAA, the term 'royalty' is defined and it does not cover any such services availed and payment made and hence, there is no merit in the stand of Revenue in this regard and the same is dismissed. In any case, the privity of contract is between Qwest Communications Inc, the service provider and T-3, USA, who in turn had received bandwidth and passed on the services to various entities of group on cost to cast basis. The assessee as recipient of services had reimbursed the same and in the absence of profit / income element, there is no liability to deduct tax at source. Hence, the assessee cannot be held to be in default.

26. The Assessing Officer had also raised the issue of payment being in the nature of fees for technical services. However, in the final analysis disallowance has been made in the hands of assessee for non deduction of tax at source on the payments being made in the nature of royalty i.e. amended provisions of the Income-tax Act. We have already decided the said issue in the paras hereinabove and accordingly, we hold that there is no merit in invoking the provisions of section 40(a)(i) of the Act for non withholding of tax on the amount of charges paid for reimbursing associated enterprise for lease line charges."

19. The determinant factor of reimbursement is, whether there exist an obligation on the part of the person bearing the expenditure to incur such expenditure. Where the ultimate obligation/liability to bear the expenses rests on another person and the payment for the same was made on his behalf the repayment of such expenses could partake the nature of reimbursement. The judicial precedents have upheld the principle that the reimbursements do not constitute income.

20. In view of the above discussion and respectfully following the decision of the Pune bench of the Tribunal, we hold that the bandwidth charges reimbursed by the assessee to Cerner Corporation on the cost or cost basis without any element of profit cannot be treated as Royalty liable to be taxed in India and hence there is no liability to deduct tax at source on such reimbursements. When there is no liability to deduct tax at source the question of disallowance

u/s.40(a)(i) does not arise. This ground of the appeal is allowed in favour of the assessee."

5. The facts being identical for the year under consideration the learned AR prayed for a similar adjudication for the year under consideration also. The learned DR did not have any counter submissions and relied on the order of DRP in this regard.

6. We heard the rival submissions and perused the material on record. We notice that there is no change to facts of in assessee's case for the year under consideration as compared to assessment year 201-17. In view of the same the decision of the coordinate bench of Tribunal in assessee's own case (supra) for assessment year 2016-17 will be squarely applicable for the year under consideration also. We therefore respectfully follow the decision of the Hon'ble Tribunal and relying on the relevant paragraphs extracted above hold that –

(i) The ESOP expenditure in question was wholly and exclusively for the purpose of the business of the assessee and had to be allowed as deduction as a revenue expenditure. Ground no.5 is allowed in favour of the assessee.

(ii) The reimbursement made by the assessee in India to the overseas entity towards the salary cost of seconded employees cannot be regarded FTS and hence not liable to deduct tax at source u/s. 195 of the Act and therefore the disallowance made on

the ground that tax is not deducted at source is deleted. Ground no.6 is allowed in favour of the assessee.

(iii) The bandwidth charges reimbursed by the assessee to Cerner Corporation on the cost or cost basis without any element of profit cannot be treated as Royalty liable to be taxed in India and hence there is no liability to deduct tax at source on such reimbursements. When there is no liability to deduct tax at source the question of disallowance u/s.40(a)(i) does not arise. Ground no.7 is allowed in favour of the assessee.

7. Ground No. 8 raised by the assessee with respect to penalty is consequential. Since Ground Nos. 5 to 7 are allowed in favour of the assessee, Ground No. 8 does not warrant a separate adjudication and hence dismissed.

8. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open court on this 27th day of July, 2022..

Sd/-	Sd/-
(GEORGE GEORGE K.)	(PADMAVATHY S.)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 27th July, 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.