

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH, CHENNAI**

श्री जी. मंजुनाथ, लेखा सदस्य एवं श्री संजय शर्मा, न्यायिक सदस्य के समक्ष  
**BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER  
AND SHRI SONJOY SARMA, JUDICIAL MEMBER**

आयकर अपील सं./ITA Nos.: **2158, 2159 & 2160/Chny/2018**  
निर्धारण वर्ष / Assessment Years: 2011-12, 2012-13 & 2013-14

Toshiba JSW Power Systems Private Limited  
S. No. 74-95, Vaikkadu Village, Andarkuppam Check Post, Manali New Town, Chennai – 600 103.

v. Deputy Commissioner of Income Tax, International Taxation -2(2), Chennai.

**[PAN: AADCT-0151-D]**

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri. Siddesh Chaugule, Advocate &

Shri. Shreyansh Kocar, CA

प्रत्यर्थी की ओर से/Respondent by : Shri. A.S. Sumanth, JCIT

सुनवाई की तारीख/Date of Hearing : 18.08.2022

घोषणा की तारीख/Date of Pronouncement : 24.08.2022

**आदेश / O R D E R**

**PER BENCH :**

These three appeals filed by the assessee are directed against separate, but identical orders of the Commissioner of Income Tax (Appeals)-16, Chennai all dated 16.05.2018 and pertains to assessment years 2011-12, 2012-13 & 2013-14. Since, facts and

issues are common, for the sake of convenience, these appeals were heard together and are being disposed off by this consolidated order.

2. At the outset, Id. AR for the assessee submitted that all the three appeals filed by the assessee are time barred by one day for which necessary petition for condonation of delay along with affidavit explaining the reasons for the delay has been filed. The AR further submitted that the assessee could not file appeal within the time allowed under the Act, due to the technical reasons as mentioned in petition. The delay in filing appeals is neither intentional nor willful, but for the unavoidable reasons, therefore, delay may be condoned in the interest of advancement of substantial justice. The Ld. DR, on the other hand, has no objection to condone the delay.

3. Having heard both sides and considered the petition filed by the assessee for condonation of one day delay which is meager, we are of the considered view that reasons given by the assessee for not filing the appeals with the time allowed under the Act comes under reasonable case as provided under the Act for condonation of

delay and hence, delay in filing of appeals is condoned and appeals filed by the assessee are admitted for adjudication.

4. Brief facts of the case are that the assessee M/s. Toshiba JSW Power Systems Pvt Ltd applied for a Nil withholding Tax Certificate u/s. 195(2) of the Income Tax Act, 1961, for the financial years 2010-11 to 2012-13 on the proposed remittances to the Non-resident company M/s. Toshiba Corporation, Japan. The Assessing Officer has passed order u/s. 195 of the Act and held that payments made by the assessee to non-resident being reimbursement of salary costs of the seconded employees of Toshiba Corporation Japan constitute income chargeable to tax in India as fees for technical services as per section 9(1)(vii) of the Act and also as per Article 12(4) of India and Japan DTAA and held to be liable to tax @ 10% of the gross amount on fee for technical services.

5. The assessee preferred appeal before the CIT(A) as required u/s. 248 of the Act on the ground that the assessee has not required to deduct TDS on payments made to non-resident towards cost of salary of seconded employees of Toshiba Corporation Japan. The assessee has also agitated the issue on the ground that it has already deducted TDS on behalf of non-resident and remitted the

TDS to Government account and thus, the same may be refunded as required u/s. 248 of the Act. The CIT(A) disposed off the appeals filed by the assessee for all the three assessment years on technical ground without discussing the issue on merit whether the assessee is required to deduct TDS or not on payments made to non-resident only on the ground that the assessee could not furnish necessary evidence to prove that there is an arrangement between the parties whether to deduct the tax deductible on said income is payable by the assessee. Being aggrieved by the CIT(A) order, the assessee is in appeal before us.

6. The Ld. Counsel for the assessee submitted that the Ld. CIT(A) has disposed off appeals filed by the assessee on technical ground without discussing the issue on merit to observe whether the assessee is liable to deduct TDS on impugned payments made to non-resident. The Ld. Counsel further submitted that the CIT(A) has dismissed the appeals without observing principles of natural justice which is evident from the fact that even though, the assessee has sought adjournment by way of letter dated 19.04.2018 and the CIT(A) has adjourned the appeals hearing to 16.05.2018, but the appellate order has been passed on 16.05.2018, without providing reasonable opportunity of hearing to

assessee and thus submitted that the appeals may be set aside to the file of the CIT(A) to give one more opportunity of hearing the assessee to explain its case.

7. The Ld. DR, on the other hand, supporting the order of the CIT(A) submitted that the CIT(A) had disposed off the appeals filed by the assessee on technical ground, however on perusal of reasons given by the CIT(A), it is very clear that the assessee could not file any details to prove its case that appeal can be filed u/s. 248 of the Act, and therefore there is no error in the reasons given by the CIT(A) to dismiss appeals filed by the assessee and thus, their order should be upheld.

8. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. The AO had held that payment made by the assessee to non-resident towards cost of salary of seconded employees is fees for technical services as per section 9(1)(vii) of the Act and also as per Article 12(4) of India & Japan DTAA and held to be liable to tax @ 10% of gross amount on fee for technical services. It was the contention of the assessee before CIT(A) that reimbursement of cost of salary to seconded employees is not fees for technical services and thus,

assessee is not liable to deduct TDS as required u/s. 195 of the Act. It was further contended that the assessee had also deducted TDS on such payments and has filed appeals in terms of section 248 of the Act before the CIT(A) to declare that the assessee is not liable to deduct TDS on such payments. However, the CIT(A) has dismissed appeals filed by the assessee on technical grounds, without discussing issue on merits. We find that the sole issue needs to be resolved in the given facts and circumstances of the case is to whether payment made by the assessee to non-resident will come under provisions of section 195 of the Act and the assessee is required to deduct TDS or not. Although, the assessee has filed appeals in terms of provisions of section 248 of the Act, the CIT(A) has dismissed appeals filed by the assessee on technical grounds, without discussing the issue on merit whether the assessee is liable to deduct TDS or not on payments made to non-resident only on the ground that the assessee could not file necessary evidence to prove that there is no such arrangements whereby the tax deductible on said income is payable by the appellate assessee. It was contention of the assessee that in Form No. 35 Column 10, the assessee has specified the details of TDS deducted and reimbursed to Government account. The assessee further contended that it has necessary arrangements with the non-

resident as per which the cost of salary of seconded employees should be reimbursed without any mark up or profit. For this, evidences were furnished before the CIT(A). However, the CIT(A) has ignored all the evidences filed by the assessee and dismissed appeals on technical grounds. We find that the appeals of the assessee has been posted for hearing on 15.03.2018. On request of the assessee, the hearing has been adjourned to 24.04.2018. The assessee vide its letter dated 19.04.2018 requested for grant of adjournment for which the CIT(A) has adjourned the case to 16.05.2018, which is evident as per copy of adjournment letter filed by the assessee, where there are acknowledgment from the office of the CIT(A) for adjourning the case to 16.05.2018. However, the CIT(A) has passed an appellate order on 16.05.2018 and has sent orders through e-mail to the assessee, without hearing the assessee on 16.05.2018. From the above, it is abundantly clear that the CIT(A) has disposed off appeals filed by the assessee on technical grounds without observing principle of natural justice by providing reasonable opportunity of hearing to the assessee to justify its case. Therefore, we are of the considered view that the appeals filed by the assessee need to go back to the file of the Ld. CIT(A) to decide the issues involved in these appeals on merits. Hence, we set aside the appeals filed by the assessee for assessment year 2011-12 to

2013-14 to the file of CIT(A), with a direction to decide the issues involved in these appeals on merits after providing reasonable opportunity of being heard to the assessee.

9. In the result, the appeals filed by the assessee for assessment years 2011-12, 2012-13 & 2013-14 are treated as allowed for statistical purposes.

Order pronounced in the court on 24<sup>th</sup> August, 2022 at Chennai.

**Sd/-**

(संजय शर्मा)

**(SONJOY SARMA)**

**न्यायिकसदस्य/Judicial Member**

**Sd/-**

(जी. मंजुनाथ)

**(G. MANJUNATHA)**

**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,

दिनांक/Dated, the 24<sup>th</sup> August, 2022

**JPV**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्था/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT     | 5. विभागीय प्रतिनिधि/DR  | 6. गार्ड फाईल/GF             |