आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता

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

श्री राजपाल यादव, उपाध्यक्ष(कोलकाता क्षेत्र) एवं श्री मनीष बोरड, लेखा सदस्य के समक्ष

[Before Shri Rajpal Yadav, Vice-President (KZ)& Shri Rajesh Kumar, Accountant Member]

I.T.A. Nos. 188 & 189/Kol/2018
Assessment Year : 2011-12 & 2012-13

M/s Forum Projects Pvt. Ltd. (PAN: AADCS 7575 E)	Vs.	DCIT(IT), Circle-1(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing	30.06.2022
Date of Pronouncement	05.09.2022
For the Appellant	Shri Saumitra Choudhury, Advocate
For the Respondent	Shri G.H. Sema, Addl. CIT

ORDER/ आदेश

Per Shri Rajesh Kumar, AM:

These two appeals preferred by the assessee against the separate orders of the Commissioner of Income Tax(Appeals)-6, Kolkata [hereinafter referred to as 'Ld. CIT(A)'] dated 12.10.2017 for the assessment year 2011-12 & 2012-13 respectively.

2. The assessee has raised the following grounds:

1. For that on the facts of the case, the order passed by the Ld. CIT(A)-22, Kolkata is completely arbitrary, unjustified and illegal.

2. For that on the facts of the case, the order passed by the Ld. CIT(A) was wrong and dittoing the order of the AO where he has calculated short deduction u/s 201(1) amounting to Rs. 16,95,150/- and interest u/s 201(1A) amounting to Rs. 8,98,430/- which is completely arbitrary, unjustified and illegal.

3.For that on the facts of the case, the Ld. CIT(A) was wrong and dittoing the order of the AO and confirming the disallowance amounting to Rs. 1,69,51,501/- as payment made to M/s Web Structure Pte. Ltd. in Singapore for Royalty and Fee for Technical Services which is completely arbitrary, unjustified and illegal.

4. For that on the facts of the case, the Ld. CIT(A) was wrong in not considering the fact that DTAA was entered into between India & Singapore u/s 90 of the I.T.Act, DTAA has to prevail, therefore, the assessee company was not liable to deduct TDS u/s 195 of the I.T..Act, therefore the demand raised by the AO u/s 201(1) and 201(1A) amounting to Rs. 25,93,580/- which are confirmed by the Ld. CIT(A) which is completely arbitrary, unjustified and illegal.

5. For that on the facts of the case, the Ld. CIT(A) was wrong, in not considering the fact that as per section 195(1) of the I.T.Act, the non-resident company i.e. M/s Web Structure Pte. Ltd., Singapore has to has residence and place of business in India but the said parties does not have P.E. in India, therefore, section 195 is not applicable, as such his finding is completely arbitrary, unjustified and illegal.

6.For that the appellant reserves the right to adduce any further ground or grounds, if necessary, on or before the hearing of the appeal.

3. Facts in brief are that the assessee is company registered and incorporated in India and engaged in the business of construction and development of projects during the year. The assessee was engaged in construction and development project called Atmosphere in Kolkata during the instant year. The assessee company entered into agreement with M/s Web Structures Pte. Ltd. having registered office at 146, Robinson Road, Singapore. M/s Web Structures Pte. Ltd. is a structural engineering consultancy firm and the service were to be provided to the assessee company were in the nature of concept and schematic design, design development, detailed design and contract documentation, tender & recommendation and construction etc. During the year, the assessee paid a sum of Rs. 1,52,56,351/- to the said consultancy company as consultancy fee for providing the above services. The said company is a non-resident company and incorporated in Singapore and was not having any permanent establishment in India according to assesse. Since the recipient is non-resident and is not having any permanent establishment in India, the provisions of Section 195(1) of the Act are not applicable. According to AO, the assessee is liable to deduct tax at source from the payment made to said company as the payment to the said foreign company M/s Web Structures Pte. Ltd. is covered under Article 12(3)(a) of the Treaty and constitute a payment towards royalty. According to AO, service rendered by M/s

Web Structures Pte. Ltd. to the assessee other than supply of design/drawings are ancillary and subsidiary to the application and enjoyment of right, property or information for which payment described in Article 12(3)(a) of the Treaty is made to the said foreign company and thus the part of the payment relating to supply of managerial consultancy and technical services under the Agreement between both the companies falls under the definition of FTS under Article 12(4)(a) of the Treaty. And therefore, the entire payment under the Treaty to M/s Web Structures Pte. Ltd. is in the nature of payment for royalty and fee for technical services. The AO observed that since there was no information available about M/s Web Structures Pte. Ltd. being beneficial owner of the payment and received by it under Article 12(2) and consequently domestic tax rates provided and the tax payable was computed as under:

$X - \frac{10\% X}{100} =$ Rs. 15,256,351/-	
X	= Rs. 16,951,501/-
Royalty & FTS @10%	= Rs. 1,695,150/-
Tax Payable	= Rs. 1,695,150/-
Interest u/s 201(1A)of the Income Tax Act, 1961 @53% [For 53 months]	= Rs. 898.430/-
Total Tax Payable	= Rs. 2,593,580/-

4. In the appellate proceedings, the Ld. CIT(A) confirmed the order of the AO by holding that the payment made to the foreign company by the assessee falls within the meaning of Article 12 of DTAA between the India and Singapore and therefore liable for deduction of tax u/s 195 of the Act.

5. The Ld. Counsel for the assessee submitted before us that since the assessee was not having any permanent establishment in India and was providing the service only from Singapore and therefore the provisions of Section 195 of the Act are not applicable. The Ld. A.R., at the outset, submitted that the issue is squarely covered in

favour of the assessee by the decision of the coordinate bench in the assessee's sister concern case wherein the similar issue has been decided in favour of the sister concern by the Co-ordinate Bench of ITAT, Mumbai Benches in the case of DCIT vs. M/s Forum Homes pvt. Ltd. in ITA No. 5804/Mum/2018 for AY 2015-16 dated 04.10.2021. The Ld. Counsel for the assessee submitted that in the assessee's case also while providing any managerial/technical or consultancy services, neither any technical knowledge, skill or knowhow into drawing have been provided to the assessee or processes are made available for utilization in future and whatever consultancy service was provided cannot be applied to the assessee independently and therefore the condition under Article 12(4) of the DTAA are not fulfilled. The Ld. Counsel for the assessee submitted that since the facts of the case are quite similar. The order of Ld. CIT(A) may set aside and the AO may be directed to delete the liability slapped on the assessee i.e liability for non-deduction of tax at source u/s 195 of the Act on payment made foreign recipient.

5. The Ld. D.R. on the other hand relied on the order of authorities below by submitting that the assessee has received services in lieu of royalty and fee for taxes paid to the foreign company which are covered under Article 12(4)(a) of Treaty and therefore the appeal of the assessee may be dismissed.

6. After hearing the rival parties and perusing the material on record and the decision of the Co-ordinate Bench we find that the issue in the instant appeal is similar to one as decided by the Co-ordinate Bench in the sister concern namely DCIT vs. M/s Forum Homes Pvt. Ltd. (supra) wherein the Co-ordinate Benches held that the conditions under Article 12(4)(a) of the Tax Treaty are not fulfilled and the services are not provided under technical knowledge, skill etc. by utilizing them for future independently nor any drawing, design have been provided to the assessee which can be applied by the assessee independently. The operative part is reproduced as under:

> *"8. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. Undisputedly, the assessee, at the relevant point of time,*

was developing a residential project at BKC. In connection with the development of such project, the assessee had availed certain technical/consultancy services from three non-resident entities located in Singapore. For availing such services, the assessee has paid certain amount to the non-resident entities. The short issue arising for consideration before us is, whether the payment made by the non-resident entities can be termed as FTS under Article 12(4) of India Singapore Tax Treaty. For better appreciation, Article 12(4) of the tax treaty is reproduced hereunder:-

> *"4. "The term fees for technical services as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:*
>
> *(a) are ancillary*
>
> *(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or*
>
> *(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."*

9. A reading of Article 12(4) of the tax treaty would make it clear that payment made to a resident of one of the contracting state can be regarded as FTS, if, in course of providing managerial/technical or consultancy services, technical knowledge, experience, skill, know-how or processes is made available which enables the person acquiring such services to apply the technology contained therein. It further provides, if the services consist of development and transfer of a technical plan or technical design, but excludes any services that does not enable the person acquiring the service to apply the technology contained therein would not qualify as FTS. In the facts of the present appeal, the payments made and the nature of services rendered are as under:

Sr.No.	Name of the party	Country	Amount (Rs.)	Nature of services
1	Arc Studio Architecture + Urbanism Pte Ltd	Singapore	2,85,35,269/-	Architectural drawing / design in relation to BKC project.
2	Web Structures Pte Ltd	Singapore	68,57,342/-	GFC drawing / design in relation to BKC project
3	RMR Engineers Pte Ltd	Singapore	12,24,464/-	MEP drawing / design in relation to BKC project
	Total		**3,66,17,075/-**	

10. Thus, as could be seen, the scope of work is limited to various types of drawings and designs for the residential project being developed at BKC. On further verification of facts on record, it is evident that insofar as Arc Studio Architecture + Urbanism Pte Ltd is

concerned, it will provide an illustrative site/roof plan showing all the components of the project, general landscape, recommendation and overall infrastructure elements, such as, entry driveways and service circulation, Diagram showing each of the major public at 1:200 scale, image board to describe the architectural character of the project etc. The scope of work also requires the entity to prepare schematic design drawings, approved by the client, in case of minor adjustment. The terms of the agreement make it clear that the design, drawing, rendering, model, specification, electronic files including database and spreadsheets and other derivation that are part of theproject will remain the intellectual property of the service provider and are intended for use solely with respect to the project. It further restrains the assessee from utilizing such intellectual property for any other project or for addition to the subject project or for completion of the project by any other entity. Similar is the scope of work and terms and conditions in respect of Web Structures Pte Ltd, another non-resident entity.

11. Thus, from the nature of services provided by the non-resident entities and the terms and conditions under which it was provided, it is clear that whatever services were provided are project specific and cannot be used for any other project by the assessee. Further, while providing such services neither any technical knowledge, skill, etc is made available to the assessee for utilizing them in future, independently nor any developed drawing or design have been provided to the assessee which can be applied by the assessee independently. Thus, it is very much clear, the conditions of Article 12(4) of the tax treaty are not fulfilled.

12. Though, the assessing officer has generally observed that in course of providing services to the assessee, the non-resident entities have made available technical knowledge, know-how, processes to the assessee. However, no substantive material has been brought on record by him to back such conclusion. Even, before us, learned departmental representative has not brought any material to demonstrate that conditions of Article 12(4) have been fulfilled in the facts of the present case. In view of the aforesaid we do not find any valid reasons to interfere with the decision of learned Commissioner (Appeals). Accordingly, we uphold the order of learned Commissioner (Appeals) on the issue by dismissing ground raised.

13. In view of our decision in Ground No. 1, Ground No. 2 has become academic, insofar as, the present appeal is concerned. Hence, we refrain from adjudicating the ground.

14. In the result, appeal is allowed to the extent indicated above."

Since the facts before us in the instant appeal are similar to one as decided by the Co-ordinate Bench, we therefore respectfully following the same, set aside the order of ld. CIT(A) by holding that the payment made to non- resident recipient not having any permanent establishment in India and also that the services provided are not in the nature of royalty and fee for technical services. Accordingly we direct the AO to delete the demand. The appeal of the assesse is allowed.

7.The issue raised in ITA No. 189/Kol/2018 AY 2012-13 is similar to one as decided by us in ITA No. 188/Kol/2018 AY 2011-12 and therefore our decision (supra) would , mutatis ,mutandis, apply to this appeal as well. Consequently the appeal is allowed.

8. In the result, both the appeals of the assessee are allowed.

Order is pronounced in the open court on 5th September, 2022

Sd/- Sd/-

(Rajpal Yadav / राजपाल यादव) (Rajesh Kumar/ राजेश कुमार)
Vice-President/ उपाध्यक्ष Accountant Member/ लेखा सदस्य

Dated: 5th September, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s Forum Projects Pvt. Ltd., 4/1, Red Cross Place, Kolkata-700001.
2. Respondent – DCIT(IT), Circle-1(1), Kolkata
3. The CIT(A)- 22, Kolkata (Sent Through E-mail)
4. Pr. CIT- Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata