

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "C", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.715/Bang/2014 : Asst.Year 2008-2009

M/s.Subex Technologies Limited #999/1, 9 th Main, HSR Layout Sector -7 Bangalore - 560 102. PAN : AAICS9433Q.	v.	The Joint Commissioner of Income-tax, Circle 12(3) Bangalore.
(Appellant)		(Respondent)

IT(TP)A No.2638/Bang/2019 : Asst.Year 2008-2009

M/s.Subex Limited RMZ Ecoworld, Outer Ring Road Devarabisanahalli Bangalore - 560 037. PAN : AABCS9255R.	v.	The Joint Commissioner of Income-tax (OSD), Circle 12(3) Bangalore.
(Appellant)		(Respondent)

Appellants by : Sri.Tata Krishna, Advocate
Respondent by : Smt.Vandana Sagar, CIT-DR

Date of Hearing : 01.09.2022	Date of Pronouncement : 06.09.2022
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ORDER

Per George George K, JM :

These appeals are at the instance of two assesseees. The relevant assessment year is 2008-2009. Common issues are raised in these appeals, hence, they were heard together and are being disposed of by this consolidated order.

2. The solitary issue raised in both the appeals is with regard to disallowance u/s 40(a)(i) of the I.T.Act (disallowance of Rs.62,49,85,438 in case of M/s.Subex Technologies Limited and Rs.42,76,35,600 in case of M/s.Subex Limited). As regards the ITA No.715/Bang/2014 is concerned, the

same is a High Court directive case. We shall first adjudicate the High Court directive case.

ITA No.715/Bang/2014 (M/s.Subex Technologies Limited)

3. The Tribunal had disposed of the above case vide its order dated 29.07.2016. The Tribunal decided the issue in favour of the assessee. The Tribunal held that the payment made to the Associate Enterprise (AE) in USA amounting to Rs.62,49,83,348 was merely a journal entry, hence, need for tax deduction at source u/s 195 of the I.T.Act does not arise and the lower authorities erred in disallowing the impugned expenditure u/s 40(a)(i) of the I.T.Act. The Revenue being aggrieved by the order of the ITAT, filed an appeal before the Hon'ble High Court u/s 260A of the I.T.Act. The Hon'ble High Court vide judgment dated 21.12.2020 in ITA No.180/2017, restored the matter to the ITAT. The Hon'ble High Court directed the Tribunal to consider afresh, the claim of the assessee u/s 40(a)(i) of the I.T.Act. The relevant finding of the Hon'ble High Court reads as follow:-

“10. Thus, from perusal of the aforesaid paragraph, it is evident that the tribunal has merely recorded its conclusion and has not assigned any reasons in support of the conclusion. Thus, for the aforementioned reasons, the impugned order dated passed by the tribunal is hereby quashed. The substantial question of law is answered accordingly. The tribunal is directed to decide the claim of the assessee under Section 40(a)(ia) of the Act afresh on the basis of the material available on record and on the basis of the reasoning assigned by the Assessing Officer as well as Commissioner of Income Tax (Appeals) and shall also advert to the issue whether the condition precedent for invocation of Section 40(a)(ia) of the Act have been fulfilled in the fact situation of the case.”

4. The brief facts of the case are as follows:

During the impugned assessment year, under the scheme of arrangement approved by the Hon'ble Karnataka High Court, certain business's of Subex Limited (the parent company of the assessee) were transferred to the assessee. All the contracts / agreements entered by the parent company of the assessee with its AE, i.e., Subex Tehcnologies INC, USA (hereinafter referred to as "STI") were also transferred to the assessee. Accordingly, STI became direct overseas wholly owned subsidiary of the assessee. For the assessment year 2008-2009, the return of income was filed by the assessee on 06.09.2008 declaring total income of Rs.1,70,10,894. The assessment was selected for scrutiny and notice u/s 143(2) of the I.T.Act was issued. During the course of assessment proceedings, the matter was referred to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price (ALP) of the international transaction undertaken by the assessee its AE (STI). The TPO passed order u/s 92CA of the I.T.Act on 31.10.2011 concluding that no adjustment was required to be made to the ALP. Later on, the A.O. passed an order u/s 143(3) of the I.T.Act on 29.12.2011 by disallowing the payment made by the assessee to its overseas subsidiary, namely, STI by invoking the provisions of section 40(a)(i) of the I.T.Act. The A.O. made the disallowance of Rs.62,49,85,438 holding that the payments made to STI requires tax deduction at source u/s 195 of the I.T.Act and

since the assessee has not deducted tax at source, the same is liable to be disallowed u/s 40(a)(i) of the I.T.Act.

5. Aggrieved by the order of the A.O., the assessee has preferred an appeal before the first appellate authority. The assessee filed additional grounds and elaborate written submissions. The CIT(A), during the course of appellate proceedings, called for a remand report from the A.O. The A.O. on 31.12.2013 submitted the remand report to the written submissions filed by the assessee. In response to the same, the assessee filed a rejoinder. All the contentions raised before the first appellate authority was rejected and the appeal of the assessee was dismissed. The CIT(A) held that 87% of the gross receipts of the assessee was passed on to the STI and it is only reasonable to conclude that the services rendered by STI were vital and crucial to the business of the assessee and not merely a support service. Therefore, it was concluded by the CIT(A) that all evidence on record points to the fact that the payments are in the nature of FTS and tax was required to be deducted at source.

6. Aggrieved by the order of the CIT(A), the assessee preferred appeal before the Tribunal. As mentioned earlier, the Tribunal disposed of the matter in favour of the assessee by holding that the payment was merely a journal entry, hence, there was no necessity of tax deduction at source u/s 195 of the I.T.Act. On further appeal, the Hon'ble High Court had restored the matter to the Tribunal. Pursuant of the

Hon'ble High Court's remand to ITAT, the case was heard on 01.09.2022.

7. The learned AR had made various submissions stating that the assessee is not liable for deduction of tax at source u/s 195 of the I.T.Act. Further, the learned AR contended that the assessee cannot be held liable for default in not deducting tax at source when there is no such liability as per the law in force at that point of time of payment to STI. In this context, the learned AR referred to grounds II(5) and (6). The learned AR also relied on various judicial pronouncements and especially the judgment of the Hon'ble Bombay High Court in the case of CIT v. KPMG reported in TS 602 HC 2019 (Bom.).

8. The learned DR, on the other hand, submitted that the entire issue has to be examined afresh and the question of genuineness of the said payment also needs to be examined by the Tribunal u/s 37 of the I.T.Act. It was submitted that the assessee has not provided necessary evidence to prove that services were rendered by STI for such payment. The learned DR has filed a written submission and case law compilation in support for her contentions, namely, (i) no fetter on the power the Tribunal to examine the subject matter before it from different angle, (ii) Revenue may be allowed to raise the contention of allowability u/s 37 of the I.T.Act for the first time before the Tribunal.

9. In the rejoinder, the learned AR submitted that Tribunal is not empowered to improve the case of the Assessing Officer and embark upon on the allowability of the expenditure u/s 37 of the I.T.Act. In this context, the learned AR relied on various judicial pronouncements.

10. We have heard rival submissions and perused the material on record. The primary contention of the assessee is that it cannot be made liable for default for non-deduction of tax at source when there is no such liability as per the law in force at the time of payment of the same to the foreign AE, namely, STI. This plea of the assessee was also raised before the first appellate authority. The CIT(A) by referring to the substituted explanation by Finance Act, 2010 with effect from 01.06.1976, decided the issue against the assessee. The relevant observation of the CIT(A) reads as follows:-

“Considering this amendment which has retrospective effect w.e.f. 1.10.1976, it is clear that the territory of rendering of services by STI is not material and not germane to deciding the taxability of income u/s 9(1)(vii) of the Act.”

11. We shall first adjudicate the contention of the learned AR that the assessee cannot be held liable for default in not deducting tax at source, when there was no such liability as per the law in force at the that time. As per the law prevalent during the assessment year 2008-2009, the income is deemed to accrue or arise in India only when the services are rendered in India and as well as utilized in India. The Hon'ble Apex Court in the case of Ishikawajima – Harima Heavy Industries

Ltd. v. DIT [2007] 288 ITR 408 (SC) has held that for Section 9(1)(vii) of the I.T.Act to be applicable, it is necessary that services provided by a non-resident assessee under a contract should not only be utilized within India, but should also be rendered in India or should have such a live link with India that entire income from fees as envisaged in Article 12 of DTAA becomes taxable in India. The Hon'ble Apex Court also held that whatever is payable by a resident to a non-resident by way of fees for technical services would not always come within purview of section 9(1)(vii) of the I.T.Act but it must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax. In order to overcome the decision of the Hon'ble Supreme Court an Explanation was inserted by the Finance Act, 2007 to Section 9(2) of the Act w.r.e.f 01.06.1976, which read as follows:-

"Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub-section (1), such income shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India."

12. As per the aforesaid Explanation, income is deemed to accrue or arise in India whether or not the non-resident has a residence or place of business or business connection in India. However, the amended Explanation does not seek to explain anything about the rendering of service in India and utilization of such service in India. The Hon'ble jurisdictional High Court in the case of Jindal Thermal Power Company Ltd v. DCIT [2010] 321 ITR 31 (Kar.) held that aforesaid amended

Explanation had no effect on the ratio laid down by the Hon'ble Supreme Court in Ishikawajma Harima Heavy Industries Ltd.'s case (supra). The relevant extract of the Hon'ble jurisdictional High Court, reads as follow:-

“The Explanation incorporated in section 9(2) declares that ‘where the income is deemed to accrue or arise in India under clauses (v), (vi), (vii) of sub-section (1), such income shall be included in the total income of the non-resident; whether or not the resident has a residence or place of business or business connection in India.’ The plain reading of the said provision suggests that criterion of residence, place of business or business connection of a non-resident in India has been done away with for fastening the tax liability. However, the criteria of rendering service in India and the utilisation of the service in India laid down by the Supreme Court in Ishikawajma Harima Heavy Industries Ltd.’s case (supra) to attract tax liability under section 9(1)(vii) remains untouched and unaffected by the Explanation to section 9(2).

When the purport of the Explanation to section 9(2) is plain in its meaning, it is unnecessary and impermissible to refer to the Memorandum explaining the Finance Bill, 2007. Therefore, it is explicit from the reading of section 9(1)(vii)(c) and Explanation to section 9(2) that the ration laid down by the Supreme Court in Ishikawajma Harima Heavy Industries Ltd.’s case (supra) still holds the field.”

13. In the instant case, the impugned assessment year is A.Y. 2008-2009. The law that was applicable is the law which existed during the impugned assessment year i.e., the aforesaid Explanation inserted by the Finance Act, 2007 and the laid down by the Supreme Court in the case of Ishikawajima – Harima Heavy Industries Ltd. v. DIT [2007] 288 ITR 408 (SC). In other words, the income is deemed to accrue or arise in India in the hands of the recipient when the services are rendered in India as well as utilized in India. In

the instant case, admittedly, services by STI to the assessee are not rendered in India. The aforesaid Explanation was thereafter substituted by the Finance Act, 2010, w.r.e.f 01.06.1976. The newly substituted Explanation reads as follows:

“Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India.”

14. The newly substituted Explanation provides that income is deemed to accrue or arise in India whether or not the non-resident has a residence or place of business or business connection in India; or whether or not the non-resident has rendered services in India. In other words, the even if the services are not rendered in India, the income of the non-resident is deemed to accrue or arise in India. The said Explanation was made retrospective with effect from 01.06.1976.

15. The Hon'ble Apex Court in the case of In Engineering Analysis Centre of Excellence Private Limited v. CIT [2021] 432 ITR 471 (SC), had held as follows:-

“80. The learned Additional Solicitor General then argued that being covered by explanation 4 of section 9(1)(vi) of the Income Tax Act, the persons liable to deduct TDS under section 195 of the Income Tax Act ought to have deducted tax at source on the footing that explanation 4 existed on the

statute book with effect from 1976. We have, therefore, to examine as to whether persons liable to deduct TDS under section 195 of the Income Tax Act can be held liable to deduct such sums at a time when explanation 4 was factually not on the statute book, all deductions liable to be made and the assessment years in question being prior to the year 2012.

.....

85. It is thus clear that the “person” mentioned in section 195 of the Income Tax Act cannot be expected to do the impossible, namely, to apply the expanded definition of “royalty” inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute.”

16. In case of ACIT vs. NGC Networks (I) Pvt. Ltd., [TS-415-ITAT-2014(Mum)], the ITAT, Mumbai Bench has held that the Assessee was not supposed to foresee the subsequent retrospective amendment in the statute to be held liable to tax deduction at source. The said order of the ITAT was upheld by the Honourable Bombay High Court in CIT v. NGC Networks (India) Pvt. Ltd. [TS-41-HC-2018(BOM)]/(2021) 432 ITR 326 (Bom). The same is approved in Engineering Analysis Centre of Excellence Private Limited Engineering [supra].

17. The Hon'ble High Court of Bombay in the case of CIT v. KPMG TS-602-HC-2019(Bom), had held as under:-

“7. In any view of the matter, the impugned order further holds that at the relevant time there was no obligation to deduct tax at source in respect of fees paid to service providers, on the basis of its deemed income under Section 9(1)(vii) of the Act. It was only by the amendment made by the Finance Act, 2010 with retrospective effect by adding an Explanation to Section 9(1)(vii) of the Act, that the requirement

of the service providers providing the same in India was done away with, for its application. Thus, making it deemed income subject to tax in India and require tax deduction at source by the respondent. However, the Tribunal held that yet the obligation to deduct tax cannot be created with the aid of an amendment made with retrospective effect, when such obligation was absent at the time of making payment to the service providers.

...

11. So also, question (ii) as proposed is academic as no occasion to deduct tax at source would arise in the absence of any income in the hands of the service providers outside India in view of Section 195 of the Act. Even otherwise a retrospective amendment cannot cast an obligation to deduct tax when not in force at the relevant time i.e. when payment was made. In fact, this Court in Commissioner of Income Tax V/s. M/s. NGC Networks (India) Pvt. Ltd. (Income Tax Appeal No.397 of 2005, decided on 29th January, 2018) has held that a party cannot be called upon to perform an impossible act i.e. to comply with the provision which was not in force at the relevant time. Admittedly, the Explanation if applicable is introduced later by a retrospective amendment. Thus, there could be no obligation to deduct tax at source when the payments have been made to the service providers abroad in the absence of a specific provision at the time when the payments were made.”

18. In the case of CIT v. Virola International [2014] 147 ITD 519 (Agra - Trib.), the Agra Bench of the Tribunal has held as under:

“7. The law laid down by Hon'ble Supreme Court, in the case of Ishikawajma-Harima Heavy Industries Ltd. (supra), binds everyone under Article 141 of the Constitution of India. The legal position thus was that unless the services are rendered in India, the same cannot be brought to tax as 'fees for technical services' under Section 9. However, this legal position did undergo a change when Finance Act 2010 received assent of the President of India on 8th May 2010.

...

8. It is thus clear that till 8th May 2010, the prevailing legal position was that unless the technical services were rendered in India, the fees for such services could not be brought to tax

under Section 9(1)(vii). The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax-deductor cannot be expected to have clairvoyance of knowing how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in Section 195, require that the person making the payment "at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force". When these obligations are to be discharged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands that point of time. Section 40(a)(i) provides that, inter alia, notwithstanding anything to the contrary in sections 30 to 38, any amount payable outside India, or payable in India to a non-resident, shall not be deducted in computing the income chargeable under the head 'profits and gains of business or profession' "on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted". The disallowance under section 40(a)(i) is not for the payments made to non-residents, which are taxable in India, but for the payments on which tax was deductible at source but tax has not been deducted, and such deductibility of tax at source, as we have discussed above, has to be in the light of the legal position as it stood at the point of time when payment was made or credited- whichever is earlier. Clearly, therefore, the disallowance under section 40(a)(i) can come into play only when the assessee had an obligation to deduct tax at source from payments to non-residents, and the assessee fails to comply with such an obligation. In view of these discussions, so far as payments made before 8th May 2010 are concerned, the assessee did not have any tax withholding liabilities from foreign remittances for fees for technical services unless such services were rendered in India, and a fortiori no disallowance can be made under section 40(a)(i) for assessee's failure to deduct tax at source from such payments."

19. In the following judicial pronouncements, the Courts have held that the liability to deduct tax at source arises in

accordance with the provisions of law prevailing during the relevant assessment year:

- KPTCL vs. DCIT [2016] 383 ITR 59 (Karnataka HC) (para 28);
- Shubhankar Estates Pvt. Ltd. vs. The Senior Sub-Registrar & Others [WP No. 57385/ 2013, dated 03.06.2015], Karnataka HC (paras 3 & 5);
- CIT vs. Municipal Corporation (2014) 365 ITR 254 (AP-HC) (para 7);
- State Bank of India v. DCIT [2010] 40 SOT 160 (Hyd.)/ 2010-TIOL-231-ITAT-HYD

20. In the following judicial pronouncements, it has been held that merely because the law has been amended with retrospective effect, the assessee cannot be held to be assessee-in-default retrospectively:

- KPTCL vs. DCIT [2016] 383 ITR 59 (Karnataka HC) (para 28);
- CIT v. Creative Infocity Ltd. [2017] 397 ITR 165 (Guj)(para 8.5);
- CIT v. Western Coalfields Ltd., ITA No. 93/2008, Bom -HC (para 11);
- Canara Bank v. ITO [2009] 121 ITD 1 (Nagpur) (para 67);

21. Therefore, retrospective amendment may provide for levy tax on STI retrospectively but cannot make the assessee

retrospectively in default applying the maxim “Lex Non Cogid ad Impossibilia”. In this context, we rely on the following judicial pronouncements:

- *Krishnaswamy S. Pd v. UOI* [2006] 151 Taxman 286 (SC)/[2006] 281 ITR 305 (SC);
- *Engineering Analysis Centre of Excellence Private Limited v. CIT* [2021] 432 ITR 471 (SC) (paras 81-85);
- *Dalmia Power Ltd. v. ACIT* [2020] 420 ITR 339 (SC) (para 8);
- *Industrial Finance Corporation of India Ltd. v. Cannanore Spinning & Weaving Mills Ltd.* [2002] 110 Comp Cas 685 (SC); AIR 2002 SC 1841;
- *CIT vs. Sarkar Builders* (2015) 375 ITR 392 (SC) (para 12);
- *Life Insurance Corporation of India v. CIT* [1996] 85 Taxman 313 (SC)/[1996] 219 ITR 410 (SC);
- *Gujarat State Plastic Manufacturers Association v. DDIT(E)* [2013] 359 ITR 516 (Gujarat) (para 6.3); SLP dismissed in *Gujarat State Plastic Manuf. Association v. DDIT* [2014] 227 Taxman 380 (SC);
- *V.L.S. Finance Ltd. v. CIT* [2007] 289 ITR 286 (Delhi);
- *City Union Bank Ltd. v. ACIT* [2020] 425 ITR 475 (Madras) (para 14);
- *Swami Premananda v. CIT* [2009] 180 Taxman 368 (Mad. - HC);

22. In view of the aforesaid reasoning and judicial pronouncements, cited supra, we hold that the Explanation

substituted by the Finance Act, 2010 w.r.e.f 01.06.1976 does not apply to the case of assessee (person responsible for deducting tax at source). Hence, the assessee is not liable to deduct tax at source for the reason that consideration received by the STI from the assessee could not have been regarded as income deemed to accrue or arise in India as per the law then existing. Since, we hold that the assessee is not liable to deduct tax at source at the relevant point of time, the other contentions raised by the assessee, whether payment made to STI is income deemed to accrue or arise in India is not adjudicated and is left open

23. During the course of the hearing, the Learned DR argued that as per the observation of the Hon'ble Karnataka High Court (judgment dated 21.12.2021)i.e., "*7. the assessee has only relied on several decisions without establishing its claim by producing the documents called for, which would support its claim.*", the allowability of the expenditure has to be examined under section 37 of the IT Act. We are of the view that the judgment of the Hon'ble Karnataka High Court has to be read along with paragraph 10. The Hon'ble Karnataka High Court has not directed the Tribunal to examine the allowability of claim of expenditure under section 37(1) of the IT Act. The phrase "*support its claim*" used in the judgment of the Hon. High Court dated 21.12.2021 has to be understood as supporting the argument that the sums received by STI do not require tax deduction at source and no disallowance is to be made under section 40(a)(i) of the IT Act.

The said phrase cannot be understood as embarking on allowability of the expenditure under section 37 of the IT Act.

24. Moreover, it was never the case of the A.O. nor the CIT(A) that the aforesaid expenditure is not allowable under section 37(1) of the IT Act. Rather, it is the case of the lower authorities that expenditure is disallowed under section 40(a)(i) of the I.T.Act for the reason that assessee has not deducted tax at source. The very fact that revenue invoked section 40(a)(i) of the I.T.Act implies that revenue is otherwise satisfied about the allowability of impugned expenditure under section 37(1) of the I.T.Act. Such being the case, revenue is not permitted to make out altogether new case before the Tribunal . In this regard, we rely on the following judicial pronouncements :-

- ∞ DIT vs. A.P. Moller Maersk AS [2017] 392 ITR 186 (SC);
- ∞ Oil & Natural Gas Corpn. Ltd. vs. CIT [2010] 322 ITR 180 (SC);
- ∞ CIT vs. Shree Public Charitable Trust (2018) 388 ITR 222 (Kar. HC);
- ∞ PCIT vs. HCL Comnet Systems & Services Ltd., (2021) 433 ITR 251 (Delhi);
- ∞ CIT vs. Magenta Raghava Reddy Charitable Trust (2017) 398 ITR 663 (Mad. HC);
- ∞ JCIT vs. Flipkart India Pvt Ltd 2019-TIOL-1237-ITAT-BANG;

25. It is to be mentioned that a similar expenditure was allowed as expenditure upto AY 2007-08. For the AY 2007-08, during the assessment proceedings the AO had raised the objection with regard to the non-deduction of tax for the payment made by Subex Ltd (parent company) to STI. The parent company filed its submissions. The A.O. passed assessment order dated 30.12.2010 without making any disallowance under section 40(a)(i) of the I.T.Act. Such being the case, there cannot be any question about the allowability of deduction under section 37(1) of the IT Act. It is also to be mentioned that the aforesaid transaction being international transaction, the matter was referred to the TPO and the TPO had accepted the price of the international transaction to be arm's length price.

26. Before concluding, it is to be mentioned that the learned DR had relied on various judicial pronouncements in support of her contentions that Tribunal ought to consider the allowability of expenditure u/s 37 of the I.T.Act. We shall deal with each of these judgments / orders relied on by the learned DR as under:-

(i) Sogefi MNR Filtration India (P) Ltd., vs. DCIT [2022] 140 taxmann.com 335 (Bangalore - Trib.):

In the above case, none appeared for the assessee. The Tribunal decided to remand the matter to the AO to examine the issue of allowability of depreciation afresh in the light of the decision of Hon'ble Karnataka High Court in Padmini

Products P Ltd., vs. Dy. CIT [2021] 277 Taxman 22 (Kar.). This case does not apply to in the present case, where the Hon. Karnataka High Court remanded the Hon. Tribunal to examine the issue afresh under section 40(a)(i) of the I.T.Act. In the instant case, the lower authorities had all the details and were convinced of the correctness of claim under section 37(1) of the I.T.Act proceeded to disallow under section 40(a)(i) of the I.T.Act. The very fact that section 40(a)(i) of the I.T.Act was invoked by the lower authorities also establishes that the claim under section 37(1) of the I.T.Act was found admissible. If the claim under section 37(1) of the I.T.Act is not found admissible, there is no case for department to proceed to invoke section 40(a)(i) of the I.T.Act. In fact, while holding that TDS is required to be made, the lower authorities held that not only services were rendered by Subex Technologies Inc, even the technology was made available to the assessee. This itself proves that lower authorities were satisfied the expenditure was laid out or expended for the purpose of business of the assessee. Hence, the facts in the above case are distinguishable to the facts of the present case. Therefore, the above case is not applicable in the present case.

(ii) Linklaters LLP vs. ITO [2010] 40 SOT 51 (Mum.):

In the above case, the observations in paragraphs 31 & 32 of the Hon'ble Mumbai Tribunal are in fact in favour of the assessee i.e., *“Undoubtedly, in a situation when assessee is in appeal, Tribunal cannot give a finding adverse to the appellant so as to place him*

in a position worse than what it was before the appeal. However, in the case before us, both the parties are in appeal, and we are not venturing into an area where a finding, if adverse to the assessee, will make him worse off vis-a-vis the position in the assessment, because whether the assessee is entitled to the treaty benefits or not, his taxable income does not go beyond what was assessed by the Assessing Officer”and “While the Tribunal cannot enlarge the scope of 'subject-matter of appeal' inasmuch as a disallowance not made by any of the authorities below cannot be made by the Tribunal, or any addition of income not made by the authorities below cannot be made by the Tribunal, but, within the subject-matter of appeal, the Tribunal can examine any aspect of the matter - whether the same has been examined by the authorities below or not.....The only limitation to this power perhaps is that it should not expand the scope of the appeal in terms of the income sought to be taxed or disallowance sought to be made, and that both the parties should have adequate opportunity of being heard on this issue in terms of the provisions of rule 11 of the Appellate Tribunal Rules, 1963”. Both parties in the above case were in appeal whereas in the present case, the department is not in appeal before the Tribunal. Therefore, the finding of the Tribunal to the effect that “Undoubtedly, in a situation when assessee is in appeal, Tribunal cannot give a finding adverse to the appellant so as to place him in a position worse than what it was before the appeal” applies to the present case. Further, in the present case, upon examination of all records and information, lower authorities being satisfied with the claim of section 37(1) of the I.T.Act, proceeded to invoke section 40(a)(i) of the I.T.Act. Hence, the facts in the above case are distinguishable to the present facts of the case.

(iii) CIT vs. Kalpetta Estates Ltd., (1995) 211 ITR 635 (Kerala):

In the above case, the question before the Hon. High Court was the issue of res judicata. The Hon. High Court held that *"The Tribunal is entitled to take a different view of the matter, if new materials were placed or on a closer and more intelligent analysis. It is evident from the various decisions placed before us that a different aspect of the matter has been presented for consideration, as laid down in the decisions mentioned earlier. The Tribunal was, therefore, entitled to have a fresh look at the matter based on the line of thinking disclosed by these decisions. That was what was done by the Tribunal in the instant case. "* In the present case, upon examination of all records and information, lower authorities being satisfied with the claim of section 37(1) of the I.T.Act, proceeded to invoke section 40(a)(i) of the I.T.Act. The department has not brought any new material whatsoever to persuade us to take a fresh look at concluded matter. Hence, the facts in the said case are totally different and are distinguishable to the present facts of the case.

(iv) Hukumchand Mills Ltd., VS. CIT (1967) 63 ITR 232 (5C):

In the above case, the Hon'ble Apex Court observed that the subject matter of appeal before the Tribunal was the question as to what should be the proper written down value of the building or machinery. The Hon'ble Supreme Court was of the opinion that Tribunal has got sufficient power under section 33(4) of the I.T.Act to entertain the argument of the department with regard to the application of paragraph 2 of

the Taxation Laws Order and remand the case to the ITO. This was on the basis that the ITO had not examined paragraph 2 of the Taxation Laws Order. In the present case, upon examination of all records and information, lower authorities being satisfied with the claim of section 37(1) of the I.T.Act, proceeded to invoke section 40(a)(i) of the I.T.Act. Hence, the facts in the above case are distinguishable to the present facts of the case. Therefore, the above case is not applicable in the present case.

(v) Tata Communications Ltd., vs. JCIT [2009] 1211TD 384 (Mumbai) (58):

In the above case, the Special Bench of the Tribunal held that the entire claim of deduction under section 80-IA of the I.T.Act was the subject matter of appeal before it. It was held that for the purposes of allowability of deduction all conditions provided under section 80-IA of the I.T.Act has to be examined. The Hon'ble Special Bench has held that when the question of allowability of deduction under section 80-IA of the I.T.Act is pending before the Hon'ble Bombay High Court the Tribunal is now functus officio. Hence, the rectification application under section 254(2) of the I.T.Act filed by the Assessee was dismissed. Whereas in the present case, upon examination of all records and information, lower authorities being satisfied with the claim of section 37(1) of the I.T.Act, proceeded to invoke section 40(a)(i) of the I.T.Act. In the first round the Tribunal allowed the assessee's appeal under section 40(a)(i) of the I.T.Act on the basis that there was

not requirement for deduction of tax at source. This was taken in appeal by the department to High Court. Neither before the Hon. Tribunal in the first round nor before the Hon. High Court, it was the case of revenue that the assessee is not eligible for deduction under section 37(1) of the I.T.Act. The entire case of department from the beginning has been that assessee did not deduct tax at source. The High Court held that Tribunal has not passed a speaking order on the issue of section 40(a)(i) of the I.T.Act and hence, remanded the case to the Hon. Tribunal to re-examine the same. Hence, the facts in the above case are distinguishable to the present facts of the case.

(vi) Volkswagen Finance Pvt. Ltd., vs. ITO, ITA No. 2195/Mum/2017, dated 19.03.2020:

In paragraph 16 of the above order of the Tribunal, it was held as under:-

"Quite clearly, therefore, where Assessing Officer has held the taxability of an income, on ground 'A' at the assessment stage and the same taxability is sought to be justified on ground 'B' at the appellate stage, there is no infirmity in the stand so taken. In any case, once a specific ground of appeal is taken, and the assessee fails in that ground, the other issues are rendered academic inasmuch as whether these are decided against the assessee or not that would not make any difference to the ultimate outcome of the appeal. However, this aspect of the matter is not even relevant in the present context inasmuch as the assessee had raised a specific ground of appeal which was disposed of by us. Once the taxability is upheld on this ground, all other aspects of taxability under the domestic law are academic and need not be adjudicated upon" and in paragraph 15 that the assessee had raised specific ground before the Tribunal."

The above case is not applicable to the present case. In the present case, there is no question of alternating between section 37(1) of the I.T.Act and section 40(a)(i) of the I.T.Act for sustaining the disallowance. The question of going to section 40(a)(i) of the I.T.Act would arise only after the test of section 37(1) is passed by the assessee. In the present case, upon examination of all records and information, lower authorities being satisfied with the claim of section 37(1) of the I.T.Act, proceeded to invoke section 40(a)(i) of the I.T.Act. If section 40(a)(i) of the I.T.Act is held inapplicable, it is not open to the department to revisit the case under section 37(1) of the I.T.Act. This would amount to review of position already taken which is impermissible.

The Bangalore Bench of the Tribunal in the case of in Zynga Game Networks India P. Ltd., vs. ACIT (2018) 97 taxmann.com 44 (Bang. Trib.) has held that *"The first aspect which we notice is that the CIT(Appeals) having come to the conclusion that the payment in question was in the nature of FTS within the meaning of Explanation 2 to section 9(l)(vii) of the Act, cannot come to diagonally opposite conclusion that the payment in question is a 'royalty'"* Hence, the facts in the above case are distinguishable to the present facts of the case.

(vii) Kapurchand Shrimal vs. (IT (1981) 7 Taxman 6 (SC):

In the above case, the Hon'ble Apex Court held that the

action of the Tribunal in remanding the matter to the ITO was very much within the purview of the powers of the Tribunal. The Hon'ble Supreme Court held that *"It is well know that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeals and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the statue. The statue does not say that such a direction cannot be issued by the appellate authority in a case of this nature"*. However, in the present case, upon examination of all records and information, lower authorities being satisfied with the claim of section 37(1) of the I.T.Act, proceeded to invoke section 40(a)(i) of the I.T.Act. The Learned DR has not brought out any error on the part of lower authorities in their finding that the services were rendered by STI. The lower authorities in fact went a step ahead to conclude that Subex Technologies Inc made technology available to the assessee. Therefore, there is no occasion for the Tribunal to correct any error committed by the lower authorities in so far the claim u/s 37(1) of the I.T.Act is concerned. Thus, the facts in the above case are totally different and are distinguishable to the present facts of the case.

27. In view of the aforesaid reasoning, we partly allow the appeal of the assessee in ITA No.715/Bang/2014.

IT(TP)A No.2638/Bang/2019

28. The facts are identical to the facts considered by us in ITA No.715/Bang/2014 (except the same is not a High Court

directive case), for the reasoning mentioned in paragraphs 10 to 26 (supra), we partly allow the appeal of the assessee.

29. In the result, the appeals filed by the assessee are partly allowed.

Order pronounced on this 06th day of September, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 06th September, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-6/III, Bangalore
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore