THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 3197/Ahd/2016 **Assessment Year 2012-13**

Lambda Therapeutic Research Ltd., Plot No. 38, Nr. Gujarat High Court, S.G. Highway, Gota, Ahmedabad PAN: AAACL4089R (Appellant)	Vs	ITO (International Taxation)-1, Ahmedabad (Respondent)

Assessee by: **Shri Tushar Hemani, Sr. A.R. &**
Shri Parimalsinh. B. Parmar. A.R.
Revenue by: **None**

Date of hearing : 23-06-2022
Date of pronouncement : 07-09-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the ld. Commissioner of Income Tax (Appeals)-13, Ahmedabad in Appeal no. CIT(A)-13/Ahd/45/2015-16 vide order dated 20/09/2016 passed for the assessment year 2012-13.

2. The assessee has taken the following grounds of appeal:-

"1. The learned CIT(A) has erred both in law and on the facts of the case in confirming AO's act of holding that the appellant is required to pay Rs.25,16,813/- being aggregate of sum deductible u/s 195 r.w.s. 201(1) alongwith interest u/s 201 (1 A) of the Act.

2. The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO in treating the amount of remittance to Lambda Therapeutic Research Inc., Canada as Fees for Technical Services u/s. 9(l)(vii) of the Act and Fees for Included Services under Art. 12 of the India-Canada DTAA.

3. Both the lower authorities have erred in applying s.9(l)(vii) of the Act for the definition of "fees for technical services.

4. The learned CIT(A) has consequently erred both in law and on the facts of the case in confirming AO's stand that the appellant was required to withhold tax while making the aforesaid remittance.

5. Both the lower authorities have failed to appreciate that the impugned amount of remittance is a business income in the hands of the recipient and in the absence of any business connection / Permanent Establishment in India, no business income can be taxed in India, and accordingly, the Appellant was not required to deduct tax at source u/s. 195 of the Act on such remittance.

6. The learned CIT(A) has accordingly erred both in law and on the facts of the case in confirming the action of AO in treating the Appellant as assessee-in-default u/s 201(1) of the Act for non-deduction of tax at source u/s 195 of the Act.

7. The learned CIT(A) has further erred in law and on the facts of the case in confirming the action of AO in grossing up the deductible amount u/s 195 A of the Act.

8. Both the lower authorities failed to appreciate that the said remittance is not at all chargeable to tax 'in India and therefore there

was no obligation to deduct tax at source. Accordingly, there was no question of invoking provisions of 8.201(1) and S. 201(1A) of the Act.

9. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal."

3. The brief facts of the case are that the assessee is a global clinical research organisation headquartered in Ahmedabad-India, with facilities and operations in Mumbai, Toronto (Canada), Warsaw (Poland), London (UK) and USA. The assessee offers clinical trial solutions to the biopharmaceutical and generic industry. The core competence of the assessee is to help clients develop their pharmaceutical products. Based on the trials conducted by the assessee, the customers get the permission to market/manufacture drugs. In this case, due to work pressure, a part of the trials related services were outsourced by the assessee to Lambda Canada. These services were utilised in India for provision of completed package services to its clients in India. During the process of proceedings under section 201 of the Act, the AO asked the assessee as to why taxes were not deducted on such payments made to Lambda Canada u/s 195 of the Act. The assessee's primary contention was that no taxes were required to be deducted on payments since the same did not qualify as "fee for technical

services" under Article 12 India Canada Tax Treaty since the condition of "make available" as contained in the India Canada Treaty were not satisfied in the instant facts. Accordingly, the transaction is not covered under Article 12 but forms part of Article 7 (business income) and in absence of any permanent establishment of the overseas entity in India to whom payment is made, there is no requirement to deduct tax at source u/s 195 of the Act. The AO however rejected the assessee's contention and held that the assessee is liable to deduction of taxes under section 195 of the Act. While passing the order, the AO made the following observations:

> *"The assessee at the outset admits that a part of the trials related services were outsourced to Lambda Canada who carried out these activities, It is also admitted that Lambda Canada employees acted in coordination with the assessee's employees to carry out the services assigned to them. Therefore the assessee's stand that no technical knowledge, experience, skill, know-how or processes has been made available is not supported by facts.*
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> *18. During the course of hearings sample of reports (in CD form) of Bio analysis made available by Lambda Canada to Lambda India were furnished by the assessee. It was explained that the tests/studies conducted by Lambda Canada formed just one part of the entire Study. On receipt of the report of bio analysis from Lambda Canada, depending on the results, further studies were conducted and only after all phases of bio analytical studies were completed could the assessee give its comprehensive report to the sponsor' who requisitioned the study. The following illustration will make matters more clear.*
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> *18.1 A sponsor ABCcommissions the assessee to conduct a bio analysis of its product named XYZ . Suppose this involves the study to be conducted in 5 phases. In turn, the assessee has outsourced the work of conducting phase 2 of this study to .Lambda Canada, who is fully equipped with the technical expertise and infrastructure to*

conduct such study. Lambda Canada performs this technical service and submits a report to the assessee, based on which phases 3,4 and 5 of the study are completed by the assessee and final report is given to the sponsor ABC By making available the report on phase 2, Lambda Canada has enabled Lambda India to utilise this information in further concluding its studies and then selling tine information (for a price of course) to its client who commissioned the study. Undoubted, Lambda Canada has utilised its skill, technical knowledge and experience in conducting these tests. Further, the study conducted by Lambda Canada is in coordination with the designated persons from Indian company as pre-phase 2 and post phase work needs to be continued, by them. Clearly, this results in making available technical skill or experience to the Indian company in respect of the work assigned to non-resident.

1.8.2 From the above illustration it is seen that, undoubtedly there is a transfer of technical knowledge as well as process, that this technical knowledge is being utilised by the assessee independently to complete the study and utilize the same for conducting its business in India. Hence every report that Lambda Canada has given to the assessee has made available technical knowledge to the assessee."

4. In appeal, Ld. CIT(Appeals) dismissed assessee's appeal with the following observations:

"5. I have gone through the order of the A.O., the written submissions made in this regard, the service agreement between the appellant and Lambda Therapeutic Research Inc.. Canada. 1 am of the view that the view taken by the A.O. is correct in treating the payment for services rendered as fees for technical services. The A.O. has highlighted the nature and services rendered in para-15 of the assessment order, wherein it is pointed out that the Lambda Therapeutic Research Inc., Canada has rendered services related to Bio-analyses, pharmacological, pharmacokinetic and bioequivalence. A mere perusal of these tests which were essentially a part of services

rendered indicate that they are highly technical in nature and after the information is generated, this technical information relating to drug being tested is given to the appellant company. Even the agreement between the appellant and Lambda Therapeutic Research Inc., Canada, indicates that such services rendered are of the nature of technical services, as is pointed out in para-17 of the assessment order. It is, thus, clear that the Lambda Therapeutic Research Inc., Canada, is providing bio availability and clinical trials and is required to have highly advanced technical skills for such trails. It is evident from the agreement that Lambda Therapeutic Research Inc.. Canada acknowledges that it has the necessary skills, experience, expertise and necessary infrastructure etc. to provide services contemplated in the agreement. In my view, such expertise, experience or technical knowledge is identical to experience etc. referred to in section 9(1)(vii) and also Article 12 of the India - Canada DTAA. The appellant has also pointed out that such services were obtained due to timeline constraints i.e. the appellant was not able to perform the specified test due to excessive work. It was also submitted that Lambda Therapeutic Research Inc., Canada is a subsidiary of the appellant company and all the expertise knowledge etc. were also not available with the appellant company. In my view, these two arguments are immaterial as the fundamental question which needs to be answered is that, whether the nature of services rendered by Lambda Therapeutic Research Inc., Canada, falls within the definition fees for technical services within Section 9(1)(vii) and Article 12 of the DTAA or not. In my view, the A.O. has correctly inferred that such payments are in the nature of fees for technical services. Considering the above, I am inclined to quote that the grounds raised by the appellant company are not sustainable and the same therefore, are dismissed.

6. As a result, the appeal of the appellant is dismissed."

5. Before us, the counsel for the assessee submitted that Article 12 of the India Canada DTAA stipulates the "make available" condition which is narrower in scope and section 9(1)(vii) of the Act. The assessee submitted

that this case is squarely covered by the decision the case of **ITO v. Cadila Healthcare Ltd. [2017] 77 taxmann.com 309 (Ahmedabad - Trib.)**, wherein it was held that where bio analytical services provided by non-residents did not involve any transfer of technology and recipient of services where not enabled to use these services in future without recourse to service provider, said services would not be regarded as FTS. He further placed reliance on the case of **ITO v. B.A. Research India (P.) Ltd. [2016] 70 taxmann.com 325 (Ahmedabad - Trib.)** which is to the effect that where non-resident companies located in USA rendered bio-analytical services on samples provided by assessee, since there was nothing on record suggesting that services rendered to assessee were made available to it and assessee was able to apply same on its own, said services would not fall within purview of 'included services' under article 12(4)(b). He further lead in the case of **ITO v. Veeda Clinical Research 144 ITD 297 (Ahmedabad Tribunal)**, wherein it was held that unless there is "transfer of technology" involved in the technical services rendered by foreign entity, the "make available" clause is not satisfied and hence, consideration for services cannot be taxed under article 13 of India-UK DTAA. The counsel for the assessee further submitted that the AO has grossly erred in holding that the "apply the technology independently in future" condition cannot be read into the Article 12 of India-Canada Tax Treaty. The counsel for the assessee submitted that the findings of the AO that merely by giving a technical report, Lambda Canada has "made available" cannot be accepted in light of the decisions cited above. Further, the "make available" clause is not satisfied in this case as Lambda Canada has merely shared "clinical test reports" which contain results of tests and trials carried out by Lambda

Canada. These reports are used by the assessee to finalise the study and hand over the final study report to its customers situated in India. Therefore there is no transfer of technology since the underlying "technology" used by Lambda Canada prepare such reports has not been shared with assessee so as to enable it to render similar services to other customers without being dependent upon Lambda Canada. In response, the Ld. DR relied upon the observations made by the AO and Ld. CIT(Appeals) in their respective orders.

6. We have heard the rival contentions and perused the material on record. In our view, the case of the assessee is directly covered by the case of **Anapharm Inc., In re [2008] 174 Taxman 124 (AAR)** where the applicant is a company incorporated in Canada. It provides clinical and bioanalytical services to assist pharmaceutical companies around world in development of new drugs or generic copies of drugs already being marketed. It entered into agreements with two Indian pharmaceutical companies for rendering said services. In terms of agreements, applicant provides to recipients only final results and conclusions of data of bioequivalence tests and not clinical procedure, analytical methods, etc., which are proprietary items of applicant. The clients pay fees to applicant in lieu of above services The AAR held that fees received by applicant for services provided to Indian companies cannot be considered to be 'fees for included services' within meaning of article 12(4) of the India Canada Treaty. The AAR further held that fee paid by Indian companies to applicant in respect of bioequivalence tests conducted by it is in nature of 'business profits' under article 7 of DTAA between India and Canada and same is not

taxable in India, as applicant does not have a permanent establishment in India. The AAR made the following observations while passing the order:

> ***"12.6** In the present case, the applicant renders bioanalytical services which, no doubt, are very sophisticated in nature, but the applicant does not reveal to Sandoz/Ranbaxy as to how it conducts those tests or the inputs that have gone into it, so as to enable them to carry out those tests themselves in future. **A broad description or indication of the type of test carried out to reach this conclusion does not enable the applicant's client to derive requisite knowledge to conduct the tests or to develop the technique by itself.** The mere fact that the tests in question are highly technical in nature will not make a difference. In its affidavit the applicant affirms that only final results, conclusion of data of bioequivalence tests are provided to the recipient. Clinical procedure, analytical methods, etc., which are proprietary items of the applicant, have neither been nor will they ever be transferred, assigned or handed over to Sandoz or any other Indian client**. From the perusal of the relevant agreements, we have not found any provision which would entitle Sandoz/Ranbaxy to know the details of the analytical methods and procedures employed by the applicant in carrying out the bioequivalence tests.** The only doubt cast by clause 15 of the agreement with Sandoz is cleared by Sandoz statement that the said clause which was part of standard format was never given effect to. It seems to be inapplicable also having regard to the actual modalities of the transaction as set out in the application. Then agreement with Ranbaxy says that Ranbaxy shall be the owner of the tested samples and test compounds. Further, the applicant will store tested samples and test compounds for three months and make these available to Ranbaxy at the expiry of that period. **Handing over tested samples and test compounds cannot be equated with making technology, know-how, etc., available to Ranbaxy.** The agreement also states that Ranbaxy shall be the owner of all intellectual property rights resulting from the services. This would mean that, if on the basis of these results, Ranbaxy is able to acquire patent or other intellectual property rights in respect new generic drugs developed by it, then the applicant shall not claim any interest whatsoever in such right. It is altogether a different aspect. By agreeing to this provision,*

> *the applicant has not made its technical expertise, know-how, etc., avail- able to Ranbaxy. It is only natural that Ranbaxy which has developed the generic drug should enjoy the intellectual property rights in relation thereto. The analytical test has not contributed to the development of new generic drug. The test has only shown whether that drug is as efficacious as the reference drug. We would also like to point out here that development of new drug and testing its efficacy are not one and the same thing. By merely acquiring knowledge of the testing methods one does not get any insight as to how a new drug could be developed."*

7. Now another aspect which is also important in determining the applicability of "make available" clause is that historically its applicability has to be seen from the perspective of the service provider i.e. whether the service provider intended that the technology/ knowledge be made available to the recipient of services in a manner that the service recipient is enabled to apply the technical knowledge in the future without recourse to the service provider. In the case of **Intertek Testing Services India (P.) Ltd., In re[2008] 175 Taxman 375 (AAR)**, the AAR held that the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in future **without depending on the provider.** The AAR cited an example that supposing, a prescription and advice is given by the doctor after examining the patient and going through the clinical reports. The service rendered by the doctor cannot be said to have "made available" to the patient, the knowledge and expertise possessed by the doctor. On the other hand, if the same doctor teaches or trains the students on the aspects of diagnosis or techniques of surgery, that will amount to "making available" the technical knowledge and experience of the doctor. Therefore, whether

"make available" clause is satisfied has to be seen from the perspective whether the service provided intended to transfer such knowledge to the service recipient during the course of rendering the services.

8. Now coming to the instant facts, from a perusal of the "Service Level Agreement" between the assessee and Lambda Canada (at pages 16-17 of the paper book), it is mentioned that the work has been assigned by the assessee to Lambda Canada for the reason that Lambda India has large order book position with periodic short-term mismatch between capacity and workload. Accordingly, in view of the additional workload, part of the work was assigned to Lambda Canada. From the terms of the Agreement, and copies of invoices produced before us, it does not seem that there is any intention on behalf of Lambda Canada to "make available" technical know-how/technical knowledge to the assessee so that the assessee can deploy similar technology or techniques in future without depending on the provider. In fact, it has been argued as is also evident from the terms of agreement that Lambda India also had similar technology available with it to conduct similar analysis/testing and preparation of feasibility report and the only purpose for entering the agreement was for the reason that the time being the assessee was loaded with excess work and accordingly part of the work was assigned to Lambda Canada. Therefore, evidently there was no intention between the parties that any technology be "made available" to the assessee. Accordingly, we are of the considered view that in the instant facts no technology was "made available" to the assessee in respect of the above payments and hence there was no requirement to deduct tax at source under Article 12 of the India Canada DTAA.

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

Order pronounced in the open court on 07-09-2022

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 07/09/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद