

आयकर अपीलीय अधिकरण 'सी' न्यायपीठ चेन्नई में।

IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं

माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND

HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA Nos. 2773 & 2774/Chny/2019**

(निर्धारण वर्ष / **Assessment Years: 2015-16 & 2016-17**)

M/s. Expleo Solutions Limited (previously known as SQS India BFSI Limited) Door No. 6A, 6 th Floor, Prince Infocity II, 283/3 & 283/4, Rajiv Gandhi Salai (OMR) Kandanchavadi, Chennai – 600 096.	बनाम/ Vs.	DCIT Corporate Circle -6(2), Chennai.
स्थायी लेखा सं./जीआइ आर सं./ PAN/GIR No. AABCT-0976-G		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	Shri Vikram Vijayaraghavan (Advocate) – Ld. AR
प्रत्यर्थी की ओरसे/ Respondent by	:	Shri P. Sajit Kumar (JCIT) – Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	08-09-2022
घोषणा की तारीख / Date of Pronouncement	:	08-09-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Years (AY) 2015-16 & 2016-17 arises out of the common order of learned Commissioner of Income Tax (Appeals)-15, Chennai [CIT(A)] dated 18.07.2019 in the matter of separate assessment framed by Ld. Assessing Officer [AO] u/s. 143(3). The sole issue in the appeal is disallowance of foreign

branch expenses (professional services) u/s 40(a)(i) for want of tax deduction at source.

2. The Ld. AR, at the outset, submitted that the issue is recurring in nature and therefore, the direction as given in earlier orders of the Tribunal may be given in these appeals. The Ld. Sr. DR could not controvert the fact that similar issue has been subject matter of adjudication by Tribunal in earlier years.

3. We find that the issue before us has been adjudicated by Tribunal in assessee's own case for AYs 2012-13 & 2013-14, ITA Nos. 223 & 224/Chny/2019 order dated 30.05.2021 as under: -

13. With regard to the common ground raised in the appeals for the assessment years 2012-13 and 2013-14 towards disallowance of payments for professional services rendered, during the course of assessment proceedings, the Assessing Officer observed that the assessee has paid professional fees without deducting TDS on the same. In the assessment year 2012-13, there are payments amounting to ₹.3,17,60,968/- as professional fees, out of which ₹.30,81,969/- has been paid to foreign entities which fall under the category of fees for technical services and professional services. After considering the submissions of the assessee, the Assessing Officer was of the opinion that the payment of ₹.30,81,969/- falls under the category of fees for technical services and professional services, which shall be disallowed under section 40(a) r.w. section 9(1)(vii)(b) and section 195 of the Act and accordingly disallowed the same and brought to tax. Similarly, for the assessment year 2013-14, the Assessing Officer disallowed the payment of ₹.37,55,687/- under section 40(a) r.w. section 9(1)(vii)(b) and section 195 of the Act and brought to tax.

14. On appeal, after considering the submissions of the assessee, the Id. CIT(A) has observed that the assessee has appointed foreign agents as consultants for the purpose of assisting foreign branches and rendered services in the area of accounting, legal, filing tax returns, secretarial assistance, etc., which are covered under DTAA. Accordingly, the Id. CIT(A) confirmed the disallowance for both the assessment years.

15. We have heard the rival contentions. Before us, the Id. Counsel for the assessee has submitted that the appellate authority has erroneously confirmed the disallowance by concluding that the professional services rendered by the foreign vendors to branches outside India would be taxable in India as 'fees for technical services'. It was further submission that the payments made to professionals outside India was taxable only in the foreign country as business profits and not in India in the absence of any PE in India as per section 9(1)(i) of the Act and Article 7 r.w. Article 5 of the DTAA. It was further submission that the payments made by foreign branches to foreign vendors via foreign branch bank account are not taxable in India. It was further submission that the payments made to 'firms' will not be taxable in India as per 'Independent Personal Services' clause in Article 14 of DTAA. It was also a submission that the payment was made by the assessee for the purpose or carrying on business outside India and hence, the same would be covered by exclusionary clause of section 9(1)(vii)(b) as held by the Hon'ble Madras High Court in the case of CIT v. KKK West Germany 262 ITR 513. We find force in the submissions of the Id. Counsel. The issue of interpretation of agreements for avoidance of double taxation has always been ongoing. More particularly when it involves importing the meaning of any expressions from the interpretation

adopted for any other tax treaty. India has signed tax treaties with various countries including Australia, with 'Make Available' clause which contains a restrictive definition of fees for technical services/fees for included services as against the wider definition of 'Fees for Technical Services' as provided under section 9(1)(vii) of the Act and certain DTAA's contains 'Most Favoured Nation' clause which requires a country to provide any concessions, privileges, or immunities granted to one nation of a particular body (say, OECD) to all other nations of that particular body (say, OECD). Article 7 of the DTAA reads as under:

1. The profits of an enterprise of one of the Contracting States shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to:

- a. that permanent establishment; or
- b. sales within that other Contracting State of goods or merchandise of the same or a similar kind as those sold, or other business activities of the same or a similar kind as those carried on, through that permanent establishment.

16. In this case, the authorities below have not given any findings of taxability in the absence of any PE in India as per section 9(1)(i) of the Act and Article 7 r.w. Article 5 of the DTAA, but also not appreciated the facts as argued by the Id. Counsel that the payment made to vendors in Australia and Belgium are not taxable in India due to presence of 'make available' clause and "Most Favoured Nation" clause in the DTAA's with Australia and Belgium respectively. Moreover, it was also not considered by the authorities below the provisions of Article 14 of DTAA, wherein, it was agreed upon that wherever applicable, that the payments made to 'Firms' will not be taxable in India as per 'Independent Personal Service' clause. More particularly, the Double Taxation Avoidance Agreement [DTAA] entered into with a foreign country is a statutory document recognized under the Income Tax Act, 1961 and by sub-section (2) of section 90 the provisions of the Act would apply only to the extent that they are more beneficial to the assessee. Over and above, when it was the submission of the assessee that the professional services were utilized by the assessee's branches located abroad and payments made abroad, it is not clear from the assessment/appellate order as to whether the deduction for the related expenditure was claimed by the assessee under sections 30 to 38 of the Act. In case, if the assessee has not claimed deduction, the Assessing Officer cannot invoke section 40(a)(i) of the Act for its disallowance in computation of business income. Accordingly, we set aside the order of the Id. CIT(A) on this issue and remit the matter back to the file of the Id. CIT(A) to consider the above observations and decide the issue afresh by passing speaking order in accordance with law after allowing an opportunity of being heard to the assessee.

The impugned order has followed the first appellate order for AYs 2012-13 to 2014-15. Since facts as well as issues are similar in both the years, the matter stand restored back to the file of Ld. CIT(A) on similar lines.

4. Both the appeals stands allowed for statistical purposes.

Order pronounced on 08th September, 2022.

Sd/-
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य / ACCOUNTANT MEMBER

चेन्नई / Chennai; दिनांक / Dated : 08-09-2022

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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