

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.582/Del/2020
Assessment Year: 2015-16

Yamazen Machinery and Tools India Pvt. Ltd., 212, DLF Galleria, Mayur Vihar, Phase-I, New Delhi	Vs.	ACIT, Circle-27(2), New Delhi
PAN :AAACY2683E		
(Appellant)		(Respondent)

Appellant by	Sh. K.M. Gupta, Advocate Sh. Anubhav Rastogi, Advocate
Respondent by	Sh. Sanjay Kumar, Sr. DR

Date of hearing	12.10.2022
Date of pronouncement	10.01.2023

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal by the assessee arises out of order dated 27.11.2019 of learned Commissioner of Income Tax (Appeals)-9, New Delhi, pertaining to assessment years 2015-16.

2. In ground no. 1, the assessee has challenged the addition of Rs.1,85,20,176/-.

3. Briefly the facts relating to this issue are, the assessee, a resident corporate entity, is stated to be engaged in the business of marketing and supplying of factory equipments, such as, machine tools, tool holders, industrial equipment etc. The assessee is a wholly owned subsidiary of Yamazen Corporation, Japan. For the assessment year under dispute, the assessee filed its return of income on 13.11.2015 declaring income of Rs.1,97,56,210/-. In course of scrutiny assessment, the Assessing Officer, after calling for and examining the necessary details, found that in the year under consideration the assessee has debited an amount of Rs.1,85,20,176/-, being reimbursement of expenses to the parent company in Japan. On verifying the details, he found that a part of the payment made was classified as salary for providing services in India through certain employees of the parent company. In this regard, the Assessing Officer noticed that an amount of Rs.1,85,20,176/- was paid to four expatriate employees working in managerial position with the assessee. Being of the view that the employees of the parent company were seconded to the assessee and were rendering managerial services, the Assessing Officer called upon the assessee to explain, as to why the remuneration paid to them

should not be treated as fee for technical services (FTS) under section 9(i)(vii) of the Act read with Article 12 of India – Japan Double Taxation Avoidance Agreement (DTAA), and since, the assessee has failed to withhold tax under section 195 of the Act in respect of such payment, why the payment should not be disallowed under section 40(a)(i) of the Act. In response to the show-cause notice issued by the Assessing Officer, the assessee submitted that the concerned employees were not seconded to the assessee. Rather, they were assigned to the assessee and were under employment of the assessee. It was submitted, the assessee was exercising full supervision and control over those employees and the payments made to them are in the nature of salary. Accordingly, assessee has deducted tax at source under section 192 of the Act. It was submitted that for administrative convenience, salary of the concerned employees were paid by the parent company and the assessee reimbursed the actual salary cost to the parent company without any mark up. In sum and substance, the assessee claimed that it is the real and economic employer of the concerned employees in respect of whom the salary expenditure was claimed. The Assessing Officer, however, was not convinced with the submission of the assessee. He

observed, the payment towards salary was not remitted to the overseas bank accounts of the concerned employees. Rather, it was paid to the parent company, in turn, it was paying salary to the employees. He observed, the assessee is providing specialized services to Indian customers, for which, competence and supervision is being provided by the parent company through specialized managerial personnel who have experience in this field. Thus, he ultimately, concluded that the parent company has seconded its employees for rendering managerial services to the assessee. Therefore, the fee paid to them is in the nature of FTS, requiring withholding of tax under section 195 of the Act. Since, the assessee had not deducted tax at source on such payment, the Assessing Officer disallowed the amount of Rs.1,85,20,176/- under section 40(a)(i) of the Act. The disallowance so made was upheld by learned Commissioner (Appeals).

4. Before us, learned counsel appearing for the assessee reiterated the stand taken before the departmental authorities. Further, he submitted, the decision of the Hon'ble Delhi High Court in case of *Centrica India Offshore (P.) Ltd. Vs. CIT*, [2014] 364 ITR 336 will not apply to assessee's case due to factual

differences. In support of his contention, learned counsel relied upon the following decisions:

1. *DIT(IT) Vs. Abbey Business Services India (P.) Ltd., [2020] 122 taxmann.com 174 (Karnataka)*
2. *Boeing India Pvt. Ltd. Vs. ACIT (ITA No.9765/Del/2019)*
3. *DDIT Vs. Yum! Restaurants (Asia) Pte. Ltd. (ITA No.6018/Del/2012)*
4. *M/s. Faurecia Automotive Holding Vs. DCIT (ITA No.784/PUN/2015)*
5. *M/s. Toyota Boshoku Automotive India Pvt. Ltd. Vs. DCIT [IT(TP)A No.1646/Bang/2017]*

5. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

6. We have considered rival submissions and perused the materials on record. We have also applied our mind to the decisions cited before us. The short issue arising for consideration is, whether the payment made by the assessee to certain persons is in the nature of salary as claimed by the assessee or FTS as held by the Assessing Officer. It is the case of the Revenue that certain employees of the parent company were seconded to the assessee for rendering managerial services, hence, the payment made is in the nature of FTS. As could be seen from the materials placed before us, an assignment agreement was executed between

the assessee and its parent company on 1st April, 2014, in terms of which, four employees of the parent company were assigned to the assessee for periods ranging between three to five years. On perusal of the assignment agreements, copies of which are placed in the paper-book, it is observed that as per the terms of the agreement, three of the employees were holding the position of Sales Managers in the assessee company for period of three years and one of the persons was holding the position of Managing Director for a period of five years.

17. The terms of the agreement provided that the concerned persons shall, at all times, during the tenure of the agreement be employee of the assessee and the assessee would exercise full rights of an employer over the assigned employees and the parent company would surrender all its rights as an employer over the assigned employees during the tenure of the agreement. The agreement also provides that the assigned persons from time to time would require to perform the duties as per the requirements of the assessee and such persons should be under obligation to report to the management of the assessee. The agreement further provided that during the tenure of the agreement the assigned employees would not be subjected to any sort of control, direction

and supervision of the parent company. It also provided that no offer of employment shall be made to the assigned employees by the parent company during the tenure of the agreement without prior consent of the assessee. The agreement also provide that upon expiry or earlier termination of the agreement, it would be open for the assigned employees to rejoin the services of the parent company at a position and subject to terms and conditions agreed between the concerned employees and the parent company. The terms of the agreement further provided that the assigned employees shall be paid in India by the assessee a monthly payment as stipulated in the agreement for meeting the living expenses and they shall be entitled to further monthly payment in Japanese Yen, as per the insistence of the assigned employees, to be paid in Japan by the parent company on behalf of the assessee and shall be cross-charged to assessee by issue of monthly debit notes.

8. Thus, various terms of the assignment agreement make it clear that the assigned employees, in respect of whom, the disputed payments have been made by the assessee are under complete control and supervision of the assessee during the tenure of the assignment agreement. In other words, there was

employer-employee relationship between the assessee and the assigned employees.

9. In fact, the payments made to the assigned employees, either directly or through the parent company, have been treated as salary and tax at the appropriate rate has been duly deducted under section 192 of the Act by the assessee, which is evident from the TDS certificates issued in Form No. 16. Even, the assigned employees have filed their Income Tax Returns in India offering the salary received from the assessee. Thus, facts and materials placed on record, including the terms of the assignment agreement clearly establish that for all practical purposes the concerned persons assigned by the parent company to the assessee were working as employees of the assessee and receiving salary income. The primary factor which influenced the departmental authorities in treating the payment made as FTS for secondment of employees by the parent company to the assessee is the fact that the parent company made the payments to the concerned employees and the assessee reimbursed the cost against debit-notes issued by the parent company. In our view, nothing much can be read into this arrangement as such

payments made by the parent company on behalf of the assessee is as per the contractual terms of the assignment agreement.

10. Insofar as applicability of the decision of the Hon'ble Jurisdictional High Court in case of Centrica India Offshore (P.) Ltd. Vs. CIT (supra) relied upon by the departmental authorities, in our view, the said decision would not apply due to following factual differences:

S. No.	Centrica Facts	Yamazen India Facts
1.	<i>The seconded employees were not specifically taken into employment by the Indian Company.</i>	<i>Seconded employees taken into employment by Appellant.</i>
2.	<i>The obligation to pay the salary was of Foreign Company. Indian Company was merely reimbursing the salary paid by Foreign Company. Seconded employees had no right against Indian Company in case of failure of payment of salary.</i>	<i>Obligation to pay all the costs and benefits is the sole responsibility of Appellant and is clearly spelt out in the assignment agreement.</i>
3.	<i>The employment contracts issued by Indian Company to seconded employees were silent on salary details.</i>	<i>All compensation and benefits accruing to employees are in accordance with applicable rules of Appellant.</i>
4.	<i>The seconded employees were not specifically released by Foreign Company during the period of secondment.</i>	<i>Assignment agreement clearly demonstrates that the seconded employees shall work "exclusively" for Appellant in the conduct of its business operations.</i>
5.	<i>The supervision and control over the employees was not clearly spelt out</i>	<i>Assignment agreement clearly states that the seconded employees shall work under the direct supervision and</i>

		<i>control of the Appellant during the entire period of employment with them.</i>
		6
6.	<i>No powers vested with Indian Company to terminate the employment of the seconded employees.</i>	<i>Appellant has a right to terminate the employment contract.</i>
7.	<i>Employees were seconded for initial period to operationalise the Indian Company.</i>	<i>Employees were seconded to the Appellant to carry on routine business activities as employee of Yamazen India and which continue even after initial period to operationalise Yamazen India.</i>

11. Thus, on the contrary, we find, the decision cited by learned counsel for the assessee are more applicable to the facts of the present appeal. In this context, we deem it appropriate to reproduce the following observations of the Coordinate Bench in case of Boeing India Pvt. Ltd. (supra):

“30. We have given thoughtful consideration to the orders of the authorities below. We have also carefully perused the salary reimbursement agreement, which is placed at pages 296 onwards of the paper book, and as per clause 1.1, it is provided that the secondees have expressed their willingness to be deputed to BIPICL [the 20 appellant] and TBC [AE] have agreed to release these employees to BIPICL. It is provided that TBC will facilitate payment of salaries in secondees home country on behalf of BICIPL. Under the head employment status, it is provided that the secondees shall be working for BICIPL and will be under supervision, control and management of BICIPL as an employee of BICIPL.

31. It is clear from the afore-stated relevant clauses that the secondees were, in fact, in employment of the appellant and as per the terms, the ‘A’ was paying salaries at the home country of the secondees and, therefore, there was reimbursement by the appellant. These facts clearly show that the assessee has been

paying to its own employees and this fact alone clearly distinguishes the facts of the decision in the case of Centrica India Offshore Ltd [supra].

32. The co-ordinate bench in the case of AT & T Communication Services India Pvt Ltd. [supra], distinguishing the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore Pvt Ltd [supra], has held as under:

“30. The DRP has affirmed the decision of the Ld. AO by holding that the assessee has deducted withholding tax on 21 substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.

31. The DRP has affirmed the decision of the AO by holding that the assessee has deducted withholding tax on substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.

32. The Special Auditors in their Audit Report have worked out particulars of payments in respect of which no TDS was deducted u/s 40(a)(ia) of the Act. Consequently, an amount of Rs. 54,06,328/- was not to be allowed as expenditure.”

33. We have also perused the TDS certificates, Forms 15CA and 15CB, tax deducted by the assessee and all these documents are part of the paper book. There is no dispute that the assessee has deducted tax at source u/s 192 of the Act. On the given facts of the case, we are of the considered opinion that the provisions of Section 195 of the Act do not apply. Considering the facts of the case in totality, in light of judicial decisions referred to hereinabove, we do not find any merit in 22 the disallowance made by the Assessing Officer/DRP. We, accordingly, direct for deletion of addition of Rs. 56.58 crores.”

12. Thus, keeping in view the discussions made above, in final analysis, we hold that the payment of Rs.1,85,20,176/- made by the assessee towards reimbursement of expenses is in the nature of salary cost of the assigned employees subject to TDS under section 192 of the Act, hence, cannot be treated as FTS under

section 9(1)(vii) of the Act and Article 12 of the tax treaty. Accordingly, there was no obligation on the part of the assessee to withhold tax at source under section 195 of the Act. Resultantly, we delete the addition made by the Assessing Officer. This ground is allowed.

13. In ground no. 2, the assessee has challenged the disallowance of Rs.2,11,199/- representing delayed payment of employees contribution to Provident Fund (PF) within the due date prescribed under the PF Act held that the assessee has violated the provisions of section 36(1)(va) and Accordingly, disallowed the expenditure. Learned Commissioner (Appeals) upheld the disallowance made by the Assessing Officer.

14. We have considered rival submissions and perused the materials on record. There is no dispute that the assessee has not paid employees' contribution to PF within the time limit prescribed under the PF Act. It is the case of the assessee that the deduction should be allowed as the payment has been made before the due date of filing of return under section 139(1) of the Act. In our view, the aforesaid claim of the assessee is not acceptable, as now the issue stands decided against the assessee by the Hon'ble Supreme Court in case of Checkmate Services Pvt.

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15. In this view of the matter, we do not find any merit in the ground raised. Accordingly, ground raised is dismissed.

16. In the result, the appeal is partly allowed.

Order pronounced in the open court on 10th January, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 10th January, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi