

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 4407/Mum/2019 (A.Y. 2013-14)

M/s ITP Publishing India Pvt. Ltd.

Norton Plaza, 3rd Floor,
898, Turner Road, Bandra (W),
Mumbai-400050.

PAN: AABC18454Q

..... Appellant

Vs.

ACIT-12(2)(2),
Room No. 109, Aayakar Bhavan,
M.K. Road, Churchgate,
Mumbai-400020.

..... Respondent

Appellant by	:	Sh. Dharan Gandhi, Adv.
Respondent by	:	Sh. Soumendu Kumar Dash, Sr. DR
Date of hearing	:	30/11/2022
Date of pronouncement	:	13/01/2023

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of Commissioner of Income Tax (Appeals)-20, Mumbai (for short 'CIT(A)') dated 27.03.2021 under section 143(3) of the Income Tax Act, 1961 (for short 'the Act') for A.Y. 2013-14. The assessee has raised the following grounds of appeal:

“Being aggrieved by the order of the Learned Commissioner of Income-tax Appeals 20, Mumbai, (‘Ld. CIT(A)’) this appeal petition is being submitted - on the following grounds, which it is prayed may be considered independently without prejudice to one another.

1. In the facts and the circumstances of the case and in law, the Ld. CTT(A) erred in upholding the action of the Ld. AO in treating the payment of Rs. 1, 65, 31,810/- made to parent company as fees for technical services and thereby disallowing such expenses u/s. 40(a)(1) of the Act for non- deduction of tax at source.

2. In the facts and the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Ld. AO in not allowing benefit of Indo- UAE DTAA.

3. The Ld. CIT(A) erred in upholding the levy of interest u/s. 234B and 234C of the Act.

4. The Ld. CIT(A) erred in not setting aside the action of the Ld. AO in initiating penalty proceedings u/s. 271(1)(c) of the Act.”

2. Brief facts of the case are that the assessee is a company in the business of magazine publishing and event management. The return of income was filed on 29-11-2013 declaring NIL income under the normal provisions of the act and Rs. 61, 91,743/- as book profit u/s.. 115JB of the act. Case was selected under CASS and was assessed u/s. 143(3) during the assessment proceedings AO made disallowance u/s. 40(a)(ib) of the act amounting to Rs. 1,65,31,810/- and disallowed Rs. 20,63,697/- as disallowance of provisions under the normal provisions of the act. Whereas added back disallowance of provisions amounting to Rs 20,63,697 to the book-profit also under section 115JB of the act.

3. Vide para-14 of the assessment order it is observed that assessee itself accepted the disallowance of provision amounting to Rs. 20,63,697/- and for disallowance u/s. 40(a)(ib) he preferred an appeal before the Ld. CIT(A)-20 Mumbai. In his order u/s. 250 dated 27-03-2019 Ld. CIT (A) also sustained the

order passed by the AO u/s. 143(3). Being aggrieved with this order assessee preferred the present appeal before the ITAT.

4. We have gone through the order of AO, order of Ld. CIT(A) and submissions of the assessee along with case laws relied upon. We have gone through the general and administrative service agreement vide page no. 1-11 of the paper-book, page no. 38 of the paper-book (part of form no.3CEB) i.e. part of report from chartered accountant to be furnished u/s. 92E relating to international transactions wherein it has been confirmed that payment under consideration is reimbursement of actual expenses and allocated expenses to parent company. We further rely on para 5.3.6 vides page no. 7 of the Ld. CIT (A) order reproduced herein below:

“5.3.6 In the assessment order, the AO has observed from the invoices raised by ITP Holdings Inc., Dubai that the services were provided by ITP BVI to the appellant can be broadly divided into (a) Accounts, (b) Management accounting, (c) Human resource services, (d) information technology services (e) Production services (design) & (f) Production services (co-ordination). The AO held that those services provided by ITP BVI were in the nature of managerial, technical and consultancy services. The contention of the AO in this regard for each of the above categories of services, are tabulated below:

Category of service	Contention of the AO
These services include (i) preparation of pay roll, bonus statements, paperwork relating to Freelancers and temporary staff etc. entering invoices, petty cash items, preparation of cheques for vendors (iii) pursuing debtors for collection, checking of booked orders	These are services rendered for enabling the appellant to run and manage its business.
Management accounting: These services include creating budgets, cost allocation, managing internal control, sales	The monthly report made by ITP BVI for Board of Directors of the appellant company is

<p>forecasting and profit planning. A report is made on the 10th of every month and submitted to the Board of Directors</p>	<p>clearly in the nature of advice or consultation given to the appellant for the purpose of appellant's business</p>
<p><u>Human resource services</u> These services provided by the HR team provides vacancy form approval for new replacement roles, occasional recruitment advertising, screening of applications, provision of contract of employment and associated a paperwork, occasional flight booking for new starters, provision of contractual information for new starters to finance, and annual/other leave record keeping on CRM, leaving entry onto CRM Visa provision for visitors to Dubai from Mumbai office, HR advice regarding employment relations issues</p>	<p>HR services provided by the ITP BVI for effectively managing the leaves, employees, contracts, it visas and other human resource aspects of the business of the appellant. These are managerial services for running and managing the business of the appellant</p>
<p><u>Information Technology services;</u> These services include IT infrastructure provisioning and support services, CRM and a Navigation software supporting their business processes, custom application development, provision of digital production services e.g. email blasts, banner management and provision of web server infrastructure for running their websites.</p>	<p>The information technology services provided to the appellant require expertise in technology and providing the client such technical expertise. They are provided by experts in software and information technology, e.g., engineers. IT infrastructure provisioning is an extremely technical service to be carried out by Network engineers. Similarly CRM and Navigation Services require technical domain expertise. Other services are also in the nature of technical services since specialized technical skills and knowledge are</p>

	required to provide them
<p><u>Production services (design).</u> These services include creating page layout for ITP India Magazine supplements and for events related designs.</p>	Creating the page layout for the magazine require knowledge of specialised software on which such designs are made at therefore they are technical service.
<p><u>Production services (coordination)</u> these services include all tasks right from sourcing bookings from clients to ensuring that the magazine is delivered on time</p>	These service amount to management of the business of the appellant and therefore they are managerial in nature”

5.3.7 The AO has also observed in 11.3 of the ass 15CA dated 20.12.2012, the services were classified para 11.4 of the assessment order, without prejudice to her findings above, the AO has also noted that appellant had itself submitted such services through experts (employees/freelancers for technical services as per section 9 also includes technical and other personnel. Therefore, the appellant's contention, the payments to ITP BVI par fees.”

5. In addition to above we have gone through articles - 5,6 and 7 of general and administrative service agreement between assessee and its parent company and the same is reproduced herein below:

“Article 5-REMUNERATION AND INVOICING PROGRESS

5.3 TTP GROUP's remuneration

The nature, diversity, frequency and volume of the services provided under this agreement, the number of personnel involved in the provision thereof, and the Intangible nature of many of the services provisioned hereunder make It Impossible to contemplate invoicing for the services rendered on a time spent or case-by-case basis. The Parties in seeking a practical basis on which to charge have concluded that the RECIPIEN T's budgeted full time headcount is the most sound Indicator of volume of services consumed under this agreement from time to time bearing a solid correlation to the size and growth of the business and therefore the resource demanded.

5.2 Invoicing process

With the objective to simplify as much as possible the invoicing process as well as to reduce administrative costs, the Parties hereto have agreed the following:

5.2.1 ITP GROUP shall invoice for its services on a monthly basis or on another agreed upon basis. ITP GROUP's invoices shall be sent to the RECIPIENT monthly.

5.2.2 Invoicing by ITP GROUP to RECIPIENT shall be made in US Dollars on the basis of the actual Chargeable Costs for the Fiscal Year for the first ten months and on estimated cost method for the next two months if needed.

Article 6-METHOD OF ALLOCATION

RECIPIENT considers that ITP GROUPS services are essential and beneficial to their activities.

6.2 The ITP GROUP will be allocating the expenses on the basis of budgeted headcount in all the services with a cost of \$ 600 per budgeted head. In the case of legal as per actual and in the case of remuneration of the director on the basis of time spent by the director for RECIPIENT services,

6.3 The Parties intend that the Costs Share of each RECIPIENT shall be computed based upon the reasonably anticipated benefits to be derived by each RECIPIENT as a result of the performance of the services contemplated under this Agreement.

6.4 The Parties believe that reasonably anticipated benefits are best measured by a proportionate allocation of the Costs of each ITP GROUP amongst RECIPIENT based on objective allocation keys per type of services rendered by ITP GROUPS that are further detailed in Appendix 1.

6.4 The Estimated Cost Shares shall be determined at the beginning of each Fiscal Year and the Final Costs Shares no later than mid-November of each Fiscal nag-mm. otherwise agreed upon.

Article 7-DETERMINATION OF ESTIMATED CHARGEABLE COSTS

7.1 At the beginning of each Fiscal Year, a budget consolidating all Estimated Chargeable Costs as well as the Estimated Costs Shares shall be elaborated.

7.2 Each Party hereto undertakes to provide in a timely manner all the Information and any supporting documentation required to enable the determination of total

amount for the Estimated Chargeable Costs as well as its allocation among RECIPIENT.

7.3 Unless otherwise agreed upon, in determining the Estimated Costs and Estimated Costs Shares, any expenses or revenues Incurred In currencies other than US Dollar shall be translated into US Dollars at the exchange rate provided for in the budget set forth under article 7.1 above.”

6. The summary of recitals of agreement between assessee and its parent company as tabulated by the AO and Ld. CIT (A) confirms that these are the only services provided by their parent company. This fact is not under challenge. The document can't be relied upon partially, revenue is accepting the types of services rendered by the parent company then they can't read the same in isolation. The same agreement over which revenue is relying also confirms that all these services are in the nature of support category and that is to without any cost-plus markup. We have gone through the provisions of sec. 5 and 9 of the act.

7. Revenue is failed to establish clearly that under which category of income as defined in sec 5 and 9, transaction falls. It is further observed that being an international transaction no reference to TPO (transfer pricing officer) was made this fact further strengthens the contention of the assessee that transaction under consideration did not have any element of mark-up/profits. Sec. 195 relating to TDS for the payments outside India applicable only in the cases where an element of income is involved. This essential element of income to the parent company is not establish by the AO while applying sec. 195 and sec 40(a)(ib). It is further observed that revenue is not able to establish any element of income involved in this transaction of reimbursement by assessee to the parent company. We have gone through the case laws relied upon by the revenue and assessee

both and we found that the judicial pronouncement relied upon by the assessee are relevant and applicable to the facts of the case and we concur with those judicial pronouncement of honourable apex court ,high court and benches of ITAT as under:

- CIT Vs Kotak Securities Ltd (2016) 239 taxman 139 (S.C)
- CIT Vs Bharti Cellular Ltd (2011) 330 ITR 239 (S.C)
- UPS-SCS (Asia) Ltd Vs Addl. Director of Income Tax (2012) 31 CCH 132 (Mum. –Trib.)
- PCIT, (TDS-2), Mum. Vs national Health and Education Society (2019) 103 Taxman .com 286(Bomb).
- Ashapura Minichem Ltd Vs ADIT (Int. Tax) (2010) 131 TTJ (Mum) 291

8. There is nothing special, exclusive or customised service that is rendered by the parent company. 'Technical services' like 'Managerial and Consultancy service' would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would, therefore, stand out in distinction to the former.

9. Thus, it can be noticed that the payment made to the assessee in question is not a consideration for managerial or technical or consultancy services and that being the position, it cannot fall within the ambit of section 9(1)(vii). Section 4 provides that the income tax shall be charged on the total income of any assessee of the previous year for any assessment year at the rates in accordance with and

subject to the provisions of this Act. Scope of total income of any person has been enshrined in section 5. The assessee in question is a non-resident company. Section 5(2) mandates that the total income of a non-resident includes the income from whatever source derived which is received or is deemed to be received in India; or accrues or arises or is deemed to accrue or arise in India. The only possibility of the receipt by the assessee in the present facts and circumstances qualifying for inclusion in the total income, can be under section 9. It has been observed that section 9(1)(vii) is not applicable. Now it is necessary to examine the prescription of section 9(1)(i) which deals with the income accruing or arising from any business connection in India. It provides that where an income accrues or arises whether directly or indirectly through or from any business connection in India etc., it shall be deemed to accrue or arise in India. Explanation 1(a) states that in the case of a business of which all operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. This Explanation makes it prominent that only that part of the income from business operations can be said to be accruing or arising in India, as is relatable to the carrying on of operations in India. In other words, if a non-resident earns any income from India by means of operations carried on outside India, that will not fall within the scope of section 9(1)(i). Even Explanation below section 9(2), as relied on by the revenue, requiring inclusion of income 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 or the non-resident has rendered services in India, is applicable only in respect of clauses (v) to (vii). Clause (i) of section 9 has not been included by the legislature

within the ambit of this Explanation. It shows that unless a non-resident earns income from business operations carried out in India, such income cannot be deemed as accruing or arising in India. Reverting to the facts of the instant case, it is crystal clear that the assessee rendered "International services" outside India which required the payment in question. If this is the position, which has not even been disputed by the revenue, then there can be no question of roping such income within the ken of section 9(1)(i). It is, therefore, patent that the payment remitted by the assessee neither falls under section 9(1)(i) nor under section 9(1)(vii). Since the income cannot be described as deemed to accrue or arise in India and there is no doubt about such income having not been received or deemed to be received or accruing or arising in India, the taxability of such income fails. Therefore, the impugned order has to be set aside and it has to be held that the amount in question cannot be charged to tax.

10. In the light of above facts, it can be reasonably concluded that payments remitted by the assessee to its parent company do not attract the provisions of sec 5 and sec 9. Even if it is assumed for the time being that assessee's remittances falls in sec. 9 still revenue is not able to establish the basic condition of sec 195 i.e. income element. In view of this payments made by assessee without TDS will not attract disallowance u/s. 40(a) (ib) r.w.s.195 and 9. Consequent to this Ground no. 1 raised by the assessee is allowed.

11. As substantive ground no.1 had already been decided in favour of assessee, Ground No. 2 now became academic and ground no. 3 and 4 are consequential in nature hence, no adjudication is required.

12. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 13th day of January, 2023.

Sd/-

(AMIT SHUKLA)

JUDICIAL MEMBER

Mumbai, दिनांक / Dated: 13/01/2023

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai