आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'B' BENCH, CHENNAI
श्री वी दुर्गा राव न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
Before Shri V. Durga Rao, Judicial Member &
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./**I.T.A. Nos. 1248 & 1249/Chny/2018**
निर्धारण वर्ष/**Assessment Years: 2011-12 & 2012-13**

BASF Catalysts India Private Limited, Plot No. 8/1, Veerapuram Village, Mahindra World City, Chengalpattu, Kancheepuram District 603 002.	Vs.	The Deputy Commissioner of Income Tax, Corporate Circle I(2), Chennai.

[PAN:AAACE2545B]

(अपीलार्थी/Appellant) (प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by	:	Ms. N.V. Lakshmi, Advocate
प्रत्यर्थी की ओर से/Respondent by	:	Shri D. Hema Bhupal, JCIT
सुनवाई की तारीख/ Date of hearing	:	09.03.2023
घोषणा की तारीख /Date of Pronouncement	:	15.03.2023

आदेश /O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

Both the appeals filed by the assessee are directed against the common order of the ld. Commissioner of Income Tax (Appeals) 1, Chennai dated 31.01.2018 relevant to the assessment years 2011-12 and 2012-13. Since, common issues have been raised in an identical fact, for the sake of convenience; both appeals were heard together and are being disposed of by this consolidated order. The grounds raised in the assessment year 2011-12 are extracted as under:

1) *The orders of the Assessing Officer ('AO') and that of the Commissioner of Income Tax (Appeals) ['CIT (A)'] are against the law, the facts and circumstances of the case and the principles of equity and natural justice.*

2) *The CIT (A) erred in holding that the payments made by the appellant to BASF SE Germany, BASF Japan and BASF USA under the cost sharing agreement falls within the scope of fee for technical services as defined in section 9(1)(vii) of the Income Tax Act and the DTAA.*

3) *The CIT (A) erred in concluding that the appellant did not receive any service in respect of payments made by it under the cost sharing agreement and therefore the same is not an allowable deduction.*

4) *The CIT(A) failed to appreciate that the payments made are not income in the hands of the non residents hence the provisions of section 195 to deduct TDS and consequentially the disallowance under section 40(a) is not attracted.*

5) *The CIT (A) failed to appreciate that in the common interest and benefit of pool members of the appellant's group companies across the world, the pool members through cooperation amongst themselves are providing/ using common services and that it was agreed that the costs in connection with the same will be shared jointly by the pool members as beneficiaries.*

6) *The CIT (A) failed to appreciate that in respect of payments made in respect of the Cost sharing agreement cannot be treated as Fees for technical services, in view of the Double Taxation Avoidance Agreements.*

7) *The CIT(A) erred in concluding that the nature of services mentioned in the cost sharing agreement are predominantly in nature of Managerial services and that the services fall within the definition of managerial, consulting and technical services.*

8) *The CIT (A) failed to appreciate that the activities listed in the agreement are enjoyed by all the pool members. The appellant only reimburses its share of the cost. The CIT (A) ought to have noted that in the absence of any income to the recipient and only cost being shared, there is no liability on the appellant to deduct tax at source.*

9) *The CIT (A) erred in holding that knowhow or other valuable information is made available in respect of payments made to BASF USA and therefore the same is covered as fee for technical services even as per the DTAA with USA. The CIT (A) failed to appreciate that*

the no skill, knowhow or knowledge was made available to the appellant and hence the same does not fall within the ambit of "fees for included services" under the DTAA with USA

10) The CIT (A) erred in concluding that the payments are in nature of fee for technical services merely because the cost is allocated or apportioned and not on actual basis. The CIT (A) failed to appreciate that common costs are usually allocated and the same will not convert the same being not on cost. The CIT (A) ought to have appreciated that there is no income for the recipient and therefore there is no liability on the appellant to deduct tax at source.

11) The CIT (A) erred in holding that income is taxable in the hands of recipient even in the absence of mark up.

12) Your appellant prefers this appeal on these grounds and such other grounds that may be adduced before or at the time of hearing of this appeal."

2. Facts are, in brief, that the assessee is engaged in the business of manufacture and sale of catalysts and catalytic convertors for automobile manufacturers in India. The assessment under section 143(3) of the Income Tax Act, 1961 ["Act" in short] has been completed for the assessment year 2011-12 after disallowing payments made to BASF Malaysia to the extent of ₹.1,08,78,548/- towards shared legal/ administrative services under section 40(a)(i) of the Act for failure to deduct tax at source under section 195 of the Act. Further a sum of ₹.4,28,18,719/- paid by the assessee to BASF SE, Germany under a cost sharing agreement has also been disallowed for failure to deduct tax at source. In the assessment year 2012-13 payment to BASF Malaysia on account of legal/administrative services to the extent of ₹.1,60,39,669/-

has been disallowed for failure to deduct tax at source. Further, the assessee has paid a sum of ₹.3,20,69,778/- under cost sharing agreement to BASF SE Germany and BASF Japan, which has also been disallowed for failure to deduct tax at source. The Assessing Officer has also disallowed payment on account of testing charges amounting to ₹.67,32,748/- paid to BASF Germany under section 40(a)(i) of the Act and product development expenses of ₹.2.01 crores treated as capital expenditure. On appeal, the ld. CIT(A) partly allowed the appeal filed by the assessee.

4. On being aggrieved, the assessee is in appeal before the Tribunal. The ld. Counsel for the assessee has submitted that under similar facts and circumstances in assessee's own case for the assessment years 2015-16 to 2017-18, the Tribunal has considered and the issue has been remitted back to the file of the Assessing Officer to consider afresh in accordance with law and prayed that the same may be followed.

5. On the other hand, the ld. DR has not raised any objection.

6. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, the issue in respect of applicability of TDS as per section 195 of the Act in

respect of payments made to non-resident Indian, similar issue on an identical fact was subject matter in appeal in assessee's own case for the assessment years 2015-16, 2017-18 & 2016-17 in I.T.A. Nos. 1187 & 3122/Chny/2016 & 1690 & 1691/Chny/2017 and vide order dated 21.10.2022, the Coordinate Benches of the Tribunal has already considered the issue and remitted the matter back to the file of the Assessing Officer to consider afresh in accordance with law. For the sake of convenience, the relevant portion of the order is extracted as under:

> *"8. We have heard both the parties, perused the materials available on record and gone through the orders of authorities below. The assessee is a member of BASF group and had entered into Cost Sharing Agreement with effect from 1st January, 2010 with its parent company. As per the agreement between the assessee and its parent company, BASF SE, Germany procures and provides certain common services to pool members on cost sharing basis. The agreement further specifies the nature of services to be provided and the manner in which cost should be shared by pool members. The assessee claims that the payment made to its parent company, a non-resident entity is reimbursement of expenses without any mark-up and to this effect, the assessee has filed an audit report of Deloitte GmbH, where, they certified that the services provided by BASF SE, Germany in terms of cost sharing agreement with pool members is on cost to cost basis without any mark-up. The assessee, on the basis of cost sharing agreement and also in light auditor certificate claimed that payment made to non-resident entity is not liable to be taxed in India and consequently, the assessee need not to deduct TDS in India. We find that although the assessee claims to have reimbursed cost incurred by parent company to provide certain common services without any mark-up, the said claim of the assessee was not substantiated. Further, if we go through the cost sharing agreement between the assessee and its parent company, the services to be rendered are in the nature of composite services and from the said agreement, it is difficult to ascertain whether they are in the nature of 'fee for technical services' or only reimbursement of cost. Although, the assessee strongly relied upon the certificate issued by the Deloitte GmbH and contended that the payment made to the non-resident is only cost incurred by the parent company without any mark-up, which was not supported by any evidence. Therefore, we are of the considered opinion that the issue needs to be re-examined in light of various averments including*

cost sharing agreement, certificate issued by the Deloitte GmbH and the provisions of section 9(1)(vii) of the Act read with DTAA between India and Germany. Further, similar issue was considered by the Mumbai Benches of the ITAT in assessee's group company in the case of BASF India Ltd. v. DCIT(IT) [2019] 102 taxmann.com 133 (Mumbai – Trib.), in an identical set of facts, set aside the issue to the file of the Assessing Officer to re-examine various evidences filed by the assessee and relevant findings are reproduced as under:

> *8. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. The dispute in the present appeal arise out of rejection of assessee's application made under section 195(2) of the Act requesting for no deduction of tax at source on remittances to be made. The Assessing Officer has rejected the aforesaid applications filed by the assessee on the ground that services rendered by BASF SE to whom remittances were to be made are in the nature of fees for technical services. However, the aforesaid order passed by the Assessing Officer is cryptic and bereft of reasoning. The Assessing Officer has not stated on what basis he considers the nature of payment to be made is fees for technical services. It is also not known whether before treating the nature of payment as fees for technical services the Assessing Officer has properly examined the cost sharing agreement, the nature of services provided and other relevant factors including the relevant provisions under the India Germany DTAA. While deciding the appeals of the assessee, the learned Commissioner (Appeals) has upheld the orders passed by the Assessing Officer for the following reasons:-*
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> *i) Invoice dated 17.12.2012, raised by BASF SE on the assessee does not refer to cost sharing agreement dated 25.05.2000.*
> *ii) Services to be rendered under the cost sharing agreement are in the nature of fees for technical services.*
> *iii) Cost sharing agreement was executed in the year 2000,*
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> *whereas, the assessee became party to the agreement in the year 2010. Thus, when the assessee prior to 2010 did not making any remittances for availing such services there is no need to do so now unless the assessee avails services in the nature of fees for technical services.*
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> *9. As regards the allegation of the learned Commissioner (Appeals) that the invoice raised by the BASF SE dated 17th December 2012, does not refer to the cost sharing agreement, we find*

such allegation to be factually incorrect. Perusal of the said invoice, a copy of which is placed at Page-46 of the paper book, clearly reveals that it refers to the cost sharing agreement dated 25th May 2000. As regards the observations of the learned Commissioner (Appeals) that nature of services rendered is managerial and technical, there is absolutely no reasoning on what basis the learned Commissioner (Appeals) has come to such conclusion. Though, he has stated that such conclusion is arrived at after going through the cost sharing agreement, however, the order passed by the learned Commissioner (Appeals) does not reveal whether he has examined and analyzed the nature of services rendered by the pool members to term the payment made as fees for technical services. Further, only because the assessee became party to the agreement in December 2010, it cannot be said that the payment made by the assessee for services are in the nature of fees for technical services. It is necessary to observe, the assessee has furnished before us a number of documentary evidences, some of which for the first time by way of additional evidences, to demonstrate that the payment made to BASF SE is actually relating to services rendered by different pool members on cost to cost basis without any mark-up. Learned Sr. Counsel for the assessee with the aid of the aforesaid documentary evidences had attempted to demonstrate that services were not rendered by BASF SE but by pool members, hence, remittances to BASF SE does not require deduction of tax at source under section 195(1) of the Act. In our view, before concluding that the remittances are in the nature of fees for technical services and chargeable to tax at the hands of the recipient in India, all necessary and relevant documents including the cost sharing agreement, the auditor's report as well as other additional evidences filed by the assessee before us needs to be properly analysed and examined. Further, contention of learned Sr. Counsel that BASF SE having not rendered any services to the assessee, payment made cannot be treated as fees for technical services as per Explanation-2 to section 9(1)(vii) has not been considered by the Departmental Authorities both factually and legally. Further, the contention of the assessee that when another Indian company of BASF group, a party to the same cost sharing agreement has been issued a no deduction certificate under section 195(2) of the Act, why a differential treatment should be meted out to the assessee also needs to be considered with proper reasoning. Since, the aforesaid aspects have not been considered by the Departmental Authorities and many of the documentary evidences were furnished for the first time before us by way of additional evidences and were not before the Departmental Authorities, though we are of the opinion that the additional evidences furnished by the assessee require to be admitted as they will have a crucial bearing for deciding the issue, however, to afford a fair opportunity to the Department to examine such documents, we are

inclined to restore the issues raised in the aforesaid grounds to the Assessing Officer for de novo adjudication after due opportunity of being heard to the assessee. While doing so, the Assessing Officer must consider the ratio laid down in the decisions to be cited before him.

10. The issue raised in ground no.4, which is common in both the appeals, being consequential to grounds no.1 to 3, we accordingly restore the issue to the Assessing Officer for fresh adjudication depending upon the decision to be taken in respect of issues raised in grounds no.1 to 3."

9. In view of this matter and also considering the facts and circumstances of the case and in consistent with the view taken by the Coordinate Benches of the Tribunal, we are of the considered opinion that the issue needs to go back to the Assessing Officer for further verification and accordingly, we direct the Assessing Officer to re-examine the issue of applicability of TDS as per section 195 of the Act on payment made to non-resident and decide the issue in accordance with law.

10. In the result, all the appeals filed by the assessee are allowed for statistical purposes."

6.1 In view of the above decision of the Coordinate Benches of the Tribunal in assessee's own case, the grounds raised by the assessee for the assessment year under consideration are remitted back to the file of the Assessing Officer to consider afresh in accordance with law. Similarly, for the assessment year 2012-13 also, the matter is remitted back to the file of the Assessing Officer for fresh consideration.

6.2 The assessee has also raised one more additional ground in respect of disallowance of ₹.67,32,748/-. It was submitted that when this appeal was filed, the assessee has failed to take up this ground inadvertently and the same may be admitted and remitted the matter back

to the file of the Assessing Officer for consideration afresh.

6.3 We have heard the rival contentions. Considering the plea of the assessee, we are of the opinion that the additional ground has to be admitted. Accordingly, in the interest of natural justice, the additional ground raised by the assessee is admitted and remitted the matter back to the file of the Assessing Officer to consider and decide the issue afresh in accordance with law by affording an opportunity of being heard to the assessee.

7. In the result, both the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced on the 15th March, 2023 in Chennai.

Sd/-	Sd/-
(G. MANJUNATHA)	(V. DURGA RAO)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, 15.03.2023

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy 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.