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

BEFORE SHRI G.S. PANNU, PRESIDENT AND SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No. 274/Del/2019
Assessment Year: 2013-14

Grant Thornton India LLP, L-41, Connaught Circus, New Delhi	**Vs.**	JCIT, Range-52, New Delhi
PAN :AACFG9740K		
(Appellant)		**(Respondent)**

Assessee by	Shri Vinod Kumar Bindal, CA & Ms. Rinky Sharma, ITP
Department by	Smt. Sanjay Kumar, Sr. DR

Date of hearing	04.01.2023
Date of pronouncement	31.03.2023

ORDER

PER SAKTIJIT DEY**: JUDICIAL MEMBER:**

Present appeal by the assessee arises out of order dated 15.11.2018 of learned Commissioner of Income-Tax (Appeals), New Delhi pertaining to assessment year 2013-14.

2. The dispute in the present appeal is confined to disallowance of Rs.7,57,940 made under Section 40(a)(i) of the Income-Tax Act,1961.

3. Briefly, the facts relating to this issue are, the assessee is a limited liability partnership firm and is a resident of India. As stated by the Assessing Officer, the assessee provides international accounting and advisory services to various clients within India and abroad. For the assessment year under dispute, the assessee filed its return of income on 27.09.2013 declaring income of Rs.20,05,79,536.

4. In course of assessment proceedings, the Assessing Officer noticed that in the year under consideration, the assessee had paid professional fee amounting to Rs.33,06,542 to various overseas entities without withholding tax at source.

5. Noticing this, the Assessing Officer called upon the assessee to explain why the payments made 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 payments made are taxable at the hands of the overseas entities as profit of business and profession. It was submitted, since, as per the relevant Double Taxation Avoidance Agreements (DTAAs) business

profit of the non-residents are not taxable in India in absence of Permanent Establishment (PE), there was no obligation on the part of the assessee to withhold tax at source. The assessee further submitted, the payment made cannot be treated as either royalty or Fee for Technical Services (FTS}. The assessee submitted, at best, the payment made can be considered to be for 'Independent Personal Services' which is taxable in the country of residence of the recipient. In support of such contention, assessee relied upon various judicial precedents. The Assessing Officer, however, did not accept assessee's contention. He was of the view that the payment made is in the nature of FTS, hence, taxable in India. Since, the assessee had not deducted tax at source, he disallowed the amount of Rs.33,06,542 under Section 40(a)(i) of the Act. Assessee contested the aforesaid disallowance before learned Commissioner (Appeals).

5. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) held that, though, the payment made to entities based in UK, USA and Singapore, are in the nature of managerial, technical and consultancy services, however, since, the make available condition enshrined in

the treaties is not fulfilled, they will not qualify as FTS. Accordingly, he deleted the disallowance made under Section 40(a)(i) of the Act in respect of such payments. Further, he deleted the disallowance made under Section 40(a)(i) in respect of payments made to entities in Cyprus and Indonesia on different reasonings.

5. Admittedly, the Revenue is not in appeal against such decision of learned Commissioner (Appeals). The only disallowance sustained by learned Commissioner (Appeals) was in respect of payment made of Rs.7,57,940 to Warth&Klein Grant Thornton AG of Germany.

6. Learned Commissioner (Appeals) observed that the payment made is consultancy services, hence, has to be treated as FTS under Article 12(4) of India-Germany DTAA. Further, he observed that the definition of FTS under Article 12(4) of the India-Germany Treaty does not speak of make available condition. Accordingly, he upheld the disallowance to that extent.

7. Before us, learned counsel appearing for the assessee submitted that the entity to whom the assessee has made the payment is a firm of Chartered Accountants (CA) and the payment made is in the nature of professional fee for due diligence of a client and for valuation of

shares of another client. Thus, he submitted, the payment made cannot be treated to be for managerial, technical or consultancy services. Thus, he submitted, it cannot be treated as FTS under Article 12(4) of the Treaty.

8. On the contrary, he submitted, the payment made falls within the definition of "Independent Personal Services" under Article 14 of the Tax-Treaty, hence, taxable in the country of residence of the recipient. He submitted, this is the ratio laid down by the Tribunal while deciding identical issue in assessee's own case in assessment years 2010-11 to 2012-13.

9. Learned Departmental Representative strongly relied upon the observations of learned Commissioner (Appeals).

10. We have considered rival submissions and perused material on record.

11. Undisputedly, the assessee has paid the amount to an entity in Germany towards certain professional services rendered to assessee's clients in Germany. The issue which falls for consideration is the nature of payment made and its taxability in India at the hands of the recipient. While, learned Commissioner (Appeals) has treated it as

FTS under Article 12(4) of India-Germany Treaty, the assessee claimed it as payment for Independent Personal Services falling under Article 14 of the treaty. On careful reading of Article 14 of treaty as a whole and specifically Article 14(1), it is observed that it is only applicable to income derived by an individual towards certain professional services. The term "Professional Services" has been defined under Article 14(2) to mean independent scientific, literary, artistic, educational or teaching activities, as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants. No doubt, while, considering identical nature of payments made in assessee's own case in assessment years 2010-11 to 2012-13, the Tribunal has held that payments made were in the nature of Independent Personal Services falling under Article 15 of India-UK, India-US, India-France and India Netherlands DTAA. However, on careful reading of the provisions relating to Independent Personal Services in aforesaid treaties considered by the Tribunal in the preceding assessment years in contrast to Article 14 of India-Germany Treaty, we find a marked difference. While, in all other treaties considered by the Tribunal in the preceding assessment years,

Articles governing Independent Personal Services refer to both individual and partnership firm, however, Article 14 of India-Germany Treaty is quite restricted in its scope as paragraph 1 of Article 14 refers only to income earned by an individual. Therefore, in our view, the decisions of the Tribunal in preceding assessment years would not apply, qua, the payment made to a German entity, which no doubt, is a partnership firm. Therefore, the assessee cannot take the benefit o Article 14 of India-Germany Treaty.

12. Having held so, the next issue arising for consideration is whether the payment made can be treated as FTS under Article 12(4) of the India-Germany Treaty. From the nature of services for which payment was made, it can very well be said that neither it is managerial, nor technical nor consultancy services. Even, the Assessing Officer has admitted that it is in the nature of professional fee. Thus, undoubtedly, payment made by the assessee to CA firm is for professional services rendered. The fact that payment made for professional services will not fall within the definition of FTS under Article 12(4) of the treaty is evident from putting it under Article 14 of the treaty, though, it applies to Individuals only. Thus, in absence of a

specific provision under the treaty, the payments have to be treated as business profit at the hand of the recipient. Thus, once the payment does not fall either under Article 12 or Article 14, in absence of any other provision in the treaty specifically dealing with such payment, it has to be treated as business profit at the hands of the recipient. Thus in absence of a PE or fixed base, the payment is not taxable at the hands of the recipient. That being the case, there was no obligation on the assessee to withhold tax at source on such payment. Therefore, we delete the disallowance made under Section 40(a)(i) of the Act.

13. In the result, the appeal is allowed.

Order pronounced in the open court on 31st March, 2023.

Sd/-	**Sd/-**
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 31st March, 2023.
Mohan Lal

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

Asst. Registrar, ITAT, New Delhi