

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

BEFORE

**SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 8061/Del/2019

Asstt. Year: 2013-14

ACIT, Room No. 202, 2 nd Floor, C.R. Building, I.P. Estate, New Delhi. (Appellant)	Vs.	Red Ice Production Pvt. Ltd., D-46, Naraina Vihar, New Delhi. PAN AADCR8533M (Respondent)
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Assessee by:	Shri Sanjay Gupta, CA
Department by:	Shri Sanjay Kumar, Sr. DR
Date of Hearing	25.04.2023
Date of pronouncement	08.05.2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the Revenue is directed against the order dated 10.07.2019 of the Ld. Commissioner of Income Tax (Appeals) - 7, New Delhi (**"CIT(A)"**) pertaining to the Assessment Year (**"AY"**) 2013-14.

2. The Revenue has raised the following grounds of appeal:-

- “1. Whether, in facts and circumstances of the case the Ld.CIT(A) has erred in observing that there is no business connection in India despite the fact that the assessee entered into specific service agreement with the non-residents.”
2. “Whether, in facts of circumstances of case, the Ld.CIT(A) has erred in holding that the provisions of section 9(l)(vii) does not apply to ad film production services despite the fact that such

services rendered by technical people who are handling and working with technical equipment.”

3. *“Whether, in facts of circumstances of case, the Ld.CIT(A) has erred in holding that the director fees paid to Mr. Jean Carlier is not technical nature despite the fact that the payment is covered under professional services which include technical, management and consultancy service.”*
4. *“Whether, in facts of circumstances of case, the Ld.CIT(A) has erred in deletion the addition made by AO despite the fact that the said payments are covered u/s 9(l)(vii) and hence ought to have been disallowed u/s 40(a)(i).”*

3. Briefly stated the facts are that the assessee is a company engaged in the business of making ad films (TVC). For AY 2013-14, the assessee e-filed its return on 29.09.2013 declaring income of Rs. 85,09,790/-. The case was selected for scrutiny and statutory notices were issued and duly served upon the assessee. In response thereto, the assessee produced complete books of account and also filed all the necessary details as called for by the Ld. Assessing Officer (“AO”) from time to time. The reply filed by the assessee was not found tenable by the Ld. AO who proceeded to make disallowance of Rs. 1,69,275/- under section 40(a)(ia) of the Income Tax Act, 1961 (the “Act”) on account of interest paid to NBFC without TDS; disallowance of Rs. 1,58,85,633/- on account of expenses paid/remitted abroad without TDS; disallowance of Rs. 96,330/- on account of website development charges being 3/4th of Rs.1,28,440/- and disallowance of Rs. 41,65,707/- on account of apportionment of indirect expenses towards work in progress (WIP). Accordingly, the Ld. AO assessed the total income of assessee for AY 2013-14 at Rs. 2,88,26,740/- vide assessment order dated 29.02.2016 passed under section 143(3) of the Act.

4. Dissatisfied, the assessee carried the matter before the Ld. CIT(A). The Ld. CIT(A) deleted all the additions made by the Ld. AO on account of disallowance of interest paid to NBFC, disallowance of expenses paid/remitted abroad; disallowance of 3/4th of website development charges and disallowance on account of apportionment of indirect expenses towards WIP.

5. The Revenue is aggrieved by the deletion by the Ld. CIT(A) of the disallowance of Rs. 1,58,85,633/- on account of expenses paid/remitted abroad without withholding of tax on such payments and all the grounds raised by the Revenue before the Tribunal relate thereto.

6. During the appellate proceedings, before the Ld. CIT(A) the assessee filed detailed submissions against the finding of the Ld. AO who treated the payment of Rs. 1,58,85,633/- made outside India as Fee for Technical Services (FTS) as defined under section 9(1)(vii)(b) of the Act. The submissions of the assessee are incorporated in para 4.1 of the appellate order of the Ld. CIT(A). The Ld. CIT(A) observed and recorded his findings in para 4.3 to para 4.15 of his appellate order which is reproduced below:-

“4.3 It was submitted that the assessee had paid Rs. 1,58,85,633/- on account of expenses to the persons who are resident outside India and they do not have any PE in India. A detailed reply to the show cause notice as to why TDS has not been deducted u/s 195 was given to the AO vide letter dated 22/12/2015 along with a Chart showing the detail of all such payments and also provided copies of all the invoices against which such payment was made by the assessee. Extracts of the reply given by the assessee is reproduced below:

1. *During the year the company has made the various payments in foreign exchange to non-resident for which form 15CB/15CA has been issued and submitted with the bank. All these payments are being made to non-resident having no PE in India A detailed chart of all such payments is enclosed for your kind perusal. We are also enclosing copies of invoices received against the payment made to non-resident.*
2. *Regarding the non deduction of TDS on Payment to Non Resident. The person to whom the payment is made they have no permanent establishment in India It is to be submitted that we have made major payments to non-resident for ad film production services like :-*
 - a. *Arranging for shooting locations,*
 - b. *Obtaining necessary permits for the appellant.*
 - c. *Arranging shipping & custom clearances*
 - d. *Arranging for extras, shooting equipment, meals, transport etc. if required*
 - e. *Rendering help in obtaining visas*
 - f. *Arranging for makeup of casts, if required*
 - g. *Coordinating necessary licenses.*

3. *The said Services rendered outside India by the overseas service providers in connection with making logistic arrangement are in the nature of commercial Services and the amount received by them from the assessee for such Services constitutes their business profit which is not chargeable to tax in India in the absence of any PE in India of the said service providers. The assessee, therefore was not liable to deduct tax at source from the said payments.*
4. *The said Services were purely of commercial nature and could not be termed as Technical Services. The foreign Services providers in the case of the assessee thus were remunerated for their efforts and time spent in making logistic arrangement for the assessee. The entire payments made by the assessee to the foreign service providers thus were not in the nature of fees for Technical Services within the meaning of Explanation 2 to section 9(1)(vii) and the same were not chargeable to tax in India. The assessee, therefore, was not required to deduct tax at source from the payments made to the overseas service providers.*
5. *As submitted above, the assessee is engaged in the business of production of ad films for telecasting. In this connection, it is relevant to refer to definition of “work” as given in section 194C which is reproduced here :-*
- “(iv) Work shall include –*
- (a)*
- (b) Broadcasting and telecasting including production of programme for such broadcasting or telecasting”*
6. *Where the payment was made for production of telecasting of programme, it was covered by provisions of section 194C. The assessee was the exclusive owner of the programme to be produced. Therefore the payment for carrying out the work of producing programme on behalf of assessee was in the nature of ‘work’ as defined in section 194C of the Act and the same could not be treated as fees for technical services’ or ‘royalty’ under section 194J of the Act. We relied upon the judgement of the Hon’ble Delhi High Court in the case of ‘CIT vs. Prasar Bharti Broadcasting Corpn Of India’ [292 ITR 580]. In the said case, the assessee was a government corporation engaged in controlling various TV channels of Doordarshan. It was held that the payments made by it to various producers of programme were covered under Explanation III(b) to section 194C of the Act [now explanation iv(b)] as a contract for production of programme for broadcasting or telecasting and not as a fee for professional services or royalty; hence the tax deduction at source was required to be made @2% under section 194C of the Act and section 194J of the Act was not applicable.*

Production of film for telecasting is covered under the definition of work. Hence the same cannot be termed as Technical or Professional Services.

7. Out of the total amount remitted out of India, an amount of Rs. 572850/- has been paid for services of ad film director Mr. Jean Carlier. All other payments are on account of production services. This payment is made for the direction of the ad film "Dalda". This payment is covered under article 15 of the DTAA with country Malasiya. This payment is made to a non-resident individual having no PE in India and payment for ad film director is covered under "Professional Services. Film direction services cannot be termed as technical services as defined under explanation 2 to section 9(1)(vii) of the Act."

4.4 It was submitted that the AO had wrongly presumed all these payments are covered under "Fee for technical services" as defined u/s 9(1)(vii)(b) of the Act whereas these payments were made to all these persons on account of ad film production line services like

- a. Arranging for shooting locations,
- b. Obtaining necessary permits for the appellant.
- c. Arranging shipping & custom clearances
- d. Arranging for extras, shooting equipment, meals, transport etc. if required
- e. Rendering help in obtaining visas
- f. Arranging for makeup of casts, if required
- g. Coordinating necessary licenses

4.5 It was submitted that the services are characterized as 'contact work' under section 194C o. the Act. The income received should be necessarily treated as business income. The non-resident company does not have PE in India. The services are rendered and utilized outside India and the payments for the services rendered are also received outside India. There is no business connection in India. In such circumstances the income of the non-resident company is not taxable in India.

4.6 Regarding the applicability of Explanation 2 to section 9(1)(vii, relied upon by the AO giving the definition of the term "fees for technical services" it was submitted that the services rendered by the overseas providers in connection with logistic arrangements were not in the nature of managerial, technical or consultancy services. The said service partook the character of commercial services and could not be termed as technical, managerial or consultancy services.

4.7 It was further submitted that the said Services rendered outside India by the overseas service providers in connection with making logistic arrangement are in the nature of commercial Services and the amount received by them from the assessed or such Services constitutes their business profit which is not chargeable to tax in India in the absence of any PE in India of the said service providers. The assessee, therefore, was liable to deduct tax at source from the said

payments. India has DTAA with all these countries and the payments made to them are covered under Article 7 of the relevant DTAA.

4.8 It was also submitted that out of the total amount remitted out of India, an amount of Rs. 5,72,850/- had been paid for services of ad film director Mr. Jean Carlier. All other payments are on account of production services. This payment was made for the direction of the ad film 'Dalda'. This payment was covered under article 15 of the DTAA with Malasiya. This payment was made to a non-resident individual having no PE in India and payment for ad film director is covered under "Professional Services". Film direction services cannot be termed as technical services as defined under explanation 2 to section 9(1)(vii) of the Act.

4.9 It was vehemently submitted that the said Services were purely of commercial nature and could not be termed as Technical Services. The foreign Services providers in the case of the assessee thus were remunerated for their efforts and time spent in making logistic arrangement for the assessee. The entire payments made by the assessee to the foreign service providers thus were not in the nature of fees for Technical Services within the meaning of Explanation 2 to section 9(1)(vii) and the same were not chargeable to tax in India. The assessee, therefore, was not required to deduct tax at source from payments made to the overseas service providers.

4 10 The appellant also relied on a similar view taken in the case of *Yash Raj Films P. Ltd v ITO (IT) (2013) 140 ITD 625 / 23 ITR 125 (Mum.)(Trlb.)*

Assessee Company was engaged in business of production of films, shooting of which was often done outside India. For shooting films outside India, its production unit used to go abroad and services required in connection with work of shooting abroad were availed from various overseas providers. The assessee made payment to five such overseas service providers for services availed in connection with shooting of different films. It was held that the services rendered by overseas service providers would not fall within ambit of technical services as given in Explanation 2 to section 9(1),vii) instead they were in nature of commercial services and amount received for such services constituted business profit. (AY. 2005-06 & 2006-07) .

4.11 It was held in this case

"19. Keeping in view the ratio of the various decisions of the coordinate benches of this Tribunal discussed above and having regard to the nature of the services rendered by the overseas service providers to the assessee as spelt out in the relevant agreements, we are of the view that the said services cannot be treated as technical services within the meaning given in Explanation 2 to section 9(1)(vii). We are in agreement

with the learned CIT(Appeals) that the said services rendered outside India by the overseas service providers in connection with making logistic arrangement are in the nature of commercial services and the amount received by them from the assessee for such services constitutes their business profit which is not chargeable to tax in India in the absence of any PE in India of the said service providers. The assessee, therefore was not liable to deduct tax at source from the said payments and the AO was not justified in treating the assessee as in default u/s.”

4.12 Further in the case of Endemol India (P) Ltd. In re(2013) 40 taxmann.com 340/(2014) 97 DTR 51/361 ITR 361(AAR), it is held that

In view of CBDT's Circular No. 715, dated 8-8-1995, services rendered by Non-resident for production of programmes for purpose of broadcasting and telecasting shall be specifically characterized as 'work' for the purpose of section 194C, the income there from would be treated as 'business income'. Therefore, payment to a non-resident for production of programmes for the purpose of broadcasting and telecasting cannot be treated as 'Fees for Technical Service'. Payment made to non-resident company is also not chargeable to tax as per the provision of section 9(1)(i) as the services are rendered and utilised outside India and the said company has no PE in India (AY 2012-13)(A.A.R. No. 1083 of 2011 dt 13.12.2013).

4.13 It is held in this case.

“12.The questions raised by the applicant are answered as follows:-

(1) The payments made by the applicant towards line production services provided by Endemol ARG in accordance with the agreement entered into by the applicant with Endemol ARG is not 'fees for technical services' as the services falls under 13 'work contract' as defined in Explanation to Section 194C of the IT Act.

(2) The question is not dealt with because of our answer to question No. 1

(3) The payments made by the applicant to Endemol ARG for availing the line production services under the agreement is not chargeable to tax as per the provision of section 9(1)(i) of the IT Act.

(4) The receipts by Endemol ARG from the applicant will not suffer withholding of tax under section 195 of the Act as the income earned is not taxable in India.”

4.14 It was further submitted that the assessee is procuring similar service4s from same countries during the preceding and succeeding assessment years but no such addition has ever been made. The

assessments for the AY 2009-10, AY 2011-12, AY 2012-13 and 2015-16 have been completed u/s 143(3).

4.15 In view of above facts the addition on this account is deleted and the grounds of appeal are allowed.”

7. The Ld. DR relied upon the order of the Ld. AO. Per contra, the Ld. AR relied upon the order of the Ld. CIT(A) and reiterated the submissions made before him.

8. We have heard the Ld. Representatives of the parties and perused the material on record. Facts on record reveal that during AY 2013-14 the assessee made payments aggregating to Rs. 1,58,85,633/- (the details of which is tabulated below as reflected in Form 15CA/CB) to certain persons resident outside India in consideration for the ad-film production line services rendered by these non-residents except two payments amounting to Rs. 5,72,850/- made to Mr. Jean Carlier for rendering ad film director services.

S. No.	Date of Payment	Name of Remittee	Amount Paid in INR	Nature of services	Country
1	12/04/2012	Prisana Trachai	1534566.00	Ad Film Production Services	THAILAND
2	21/04/2012	Jean Carlier	318150.00	Director Fees	MALAYSIA
3	28/05/2012	Jean Carlier	254700.00	Director Fees	MALAYSIA
4	29/05/2012	Pumpkin Pictures Sdn Bhd	823888.00	Ad Film Production Services	MALAYSIA
5	22/05/2012	Pumpkin Pictures Sdn Bhd	1388750.00	Ad Film Production Services	MALAYSIA
6	21/09/2012	Venus Productions	1643350.00	Ad Film Production Services	FRANCE
7	21/08/2012	Venus Productions	726270.00	Ad Film Production Services	FRANCE
8	01/10/2012	Didier Canaux	240275.00	Ad Film Production Services	FRANCE
9	22/10/2012	Didier Canaux	248500.00	Ad Film Production Services	FRANCE
10	04/10/2012	Nolabel Sp.z.o.o	272000.00	Ad Film Production Services	POLAND
11	05/10/2012	French Directors	68100.00	Ad Film Production Services	FRANCE
12	15/10/2012	Pumpkin Pictures Sdn Bhd	1183600.00	Ad Film Production Services	MALAYSIA
13	23/10/2012	Pumpkin Pictures Sdn Bhd	1163090.00	Ad Film Production Services	MALAYSIA
14	20/11/2012	Maria Moumoussi	286103.00	Ad Film Production Services	UNITED KINGDOM
15	04/12/2012	Nolabel Sp.z.o.o	290000.00	Ad Film Production Services	POLAND
16	11/12/2012	Maria Moumoussi	212658.00	Ad Film Production Services	UNITED KINGDOM

17	20/12/2012	Nolabel Sp.z.o.o	329850.00	Ad Film Production Services	POLAND
18	29/01/2013	Nolabel Sp.z.o.o	329400.00	Ad Film Production Services	POLAND
19	05/02/2013	Nolabel Sp.z.o.o	272813.00	Ad Film Production Services	POLAND
20	01/03/2013	Nolabel Sp.z.o.o	296020.00	Ad Film Production Services	POLAND
21	14/03/2013	Marco Pinesii Production Service	860250.00	Ad Film Production Services	MALAYSIA
22	25/03/2013	Marco Pinesi Production Service	862500.00	Ad Film Production Services	MALAYSIA
23	18/03/2013	Prisana Trachai	1925000.00	Ad Film Production Services	THAILAND
24	22/03/2013	Nolabel Sp.z.o.o	142200.00	Ad Film Production Services	POLAND
25	07/12/2012	Nolabel Sp.z.o.o	213600.00	Ad Film Production Services	POLAND
		TOTAL	15885633.00		

9. It is also an undisputed fact that the services received by the assessee by these non-resident service providers are on account of ad film production line services like arranging for shooting locations; obtaining necessary permits for the appellant; arranging shipping & custom clearances; arranging for extras, shooting equipment, meals, transport etc.; rendering help in obtaining visas; arranging for makeup of casts; coordinating necessary licenses which are required to shooting of ad films in their respective countries and that none of the non-residents have a PE in India. These services thus essentially involve making logistic arrangement for the assessee outside India. The services are rendered and utilised outside India and the payments for these services are also received outside India. The assessee has submitted copies of invoices of payment made to non resident service providers which is placed at pages 12-32 of the Paper Book to substantiate its claim that the payments have been made on account of ad film production services. The payments made by the assessee to the foreign service providers are thus not in the nature of FTS within the meaning of explanation 2 to section 9(1)(i) of the Act and not chargeable to tax in India. The assessee characterised these services as 'contract work' under section 194C of the Act and therefore it is to be treated as business income of the non-resident which is not taxable in India in the absence of a Permanent Establishment (PE) in India of the said service providers in terms of Article 7 of the relevant Double Taxation Avoidance Agreement (DTAA) between India and the respective countries of the non-resident service providers. The

assessee therefore is not required to withhold tax from the payments made to the non-resident service providers.

10. Before the Ld. CIT(A), in support of its contentions above, the assessee has relied on the case of Yashraj Films P. Ltd. vs. ITO (IT) (2013) 23 ITR 125 (Mum.) (Trib) wherein in the similar fact pattern, the Tribunal decided the impugned issue in favour of the assessee. In this case, the assessee company was engaged in business of production of films, shooting of which was often done outside India. For shooting films outside India, its production unit used to go abroad and services required in connection with work of shooting abroad were availed from various overseas service providers. The assessee made payment to five such overseas service providers for services availed in connection with shooting of different films. The Tribunal having regard to the nature of the services rendered by the overseas service providers held that such services cannot be treated as technical services within the meaning given in explanation 2 to section 9(1)(vii) of the Act and that the said services rendered outside India by the overseas service providers in connection with making logistic arrangements are in the nature of commercial services and the amount received for such services constitutes business profit which is not chargeable to tax in India in the absence of any PE of the said service providers. As regards payments made to Mr. Jean Carlier for the direction of the ad film, the contention of the assessee is that these payments are covered by Article 15 of the India-Malaysia DTAA and cannot be termed as technical services as defined under explanation 2 to section 9(1)(vii) of the Act and hence are not chargeable to tax in India.

11. We agree with the finding of the Ld. CIT(A) that services provided by the non-resident service providers are not in the nature of managerial technical or consultancy services within the meaning of explanation 2 to section 9(1)(vii) of the Act. These are to be characterised as contract work under section 194C of the Act and thus partakes the nature of business income which is not taxable in India in the absence of a business connection or PE of the non-resident service provider in India. The Ld. CIT(A) has

recorded a finding that the assessee procured similar services from same countries during the AY 2009-10, AY 2011-12, 2012-13 and AY 2015-16 the assessments for which have been completed under section 143(3) of the Act without any addition on account of the same.

12. In view of the above, we endorse the findings of the Ld. CIT(A) that the payments made to the non-resident service providers by the assessee are not chargeable to tax in India and thus no disallowance under section 40(a)(ia) of the Act is called for on account of non-deduction of tax at source thereof. Nothing has been brought on record by the Revenue to dismantle the findings of the Ld. CIT(A). We therefore decline to interfere and uphold the order of the Ld. CIT(A) on the issue and reject all the grounds raised by the Revenue.

13. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 8th May, 2023.

sd/-

**(G.S. PANNU)
PRESIDENT**

sd/-

**(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 08/05/2023

Veena

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	

Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	