आयकर अपीलीय अधिकरण,'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL , 'C' BENCH, CHENNAI

श्री वी.दुर्गा राव, न्यायिक सदस्य एवं डॉ मनीष बोरड़, लेखा सदस्य के समक्ष

BEFORE SHRI V.DURGA RAO, HON'BLE JUDICIAL MEMBER AND DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

आयकर अपीलसं./ I.T.A. No.473/Chny/2019

(निर्धारण वर्ष /Assessment Year: 2012-13)

The Deputy Commissioner of Income Tax, Corporate Circle-3(1), Chennai.	Vs	M/s.Trusted Aerospace Engineering Pvt.Ltd. 18A, 3rd floor, BBC Manor 10 &11, Duraisamy Road, T.Nagar, Chennai-600 017.
		PAN: AACCT 4202A
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	Mr. P.Sajit Kumar, JCIT
प्रत्यर्थी की ओरसे /Respondent by	:	Mr. S.Sridhar, Advocate

सुनवाई की तारीख/Date of hearing	:	26.04.2023
घोषणा कीतारीख /Date of Pronouncement	:	14.06.2023

आदेश /**O R D E R**

PER Dr. MANISH BORAD, AM:

This appeal at the instance of Revenue is directed against the order of the ld. Commissioner of Income Tax (Appeals), Chennai dated 02.11.2018, which is arising out of the order u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") dated 30.03.2015 framed by ld. ACIT, Corporate Circle-3(1), Chennai.

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

1. The order of the CIT(A) is contrary to law and facts and circumstances of the case.

2. The CIT(A) has erred in deleting the disallowance made by the AO u/s. 40(a)(ia).

2.1 The CIT(A) has erred in deleting the disallowance made by the AO u/s 40(a)(ia) by overlooking the fact that the remittance was made towards fee for technical services chargeable to tax u/s 9(1)(vii)".

3. The sole grievance of the Revenue in this appeal is against order of the Ld.CIT(A) in deleting disallowance made by the ld. Assessing Officer amounting to Rs.4,95,20,000/- u/s.40(a)(ia) of the Act, by overlooking the fact that remittance was made towards fee for technical services chargeable to tax u/s.9((1)(vii) of the Act.

4. The facts in brief are that the assessee company filed its return of income for the assessment year 2012-13 on 01.10.2012 declaring loss of Rs.10,02,80,149/-. The case was selected for scrutiny under CASS followed by issuing notices u/s.143(2) & 142(1) dated 14,08.2023 & 11.12.2014 required the assessee to submit various details. The then Assessing Officer has observed in the assessment order that the assesse has debited an expenditure of Rs.4,95,20,000- under the head "HS Pure Power Programme" on which tax was not deducted at source. He also observed that the payment was made to the non-resident involved in engineering design costs, product development costs and engineering support. The payments made to non-residents attract the provisions of Section 195 of

the I.T. Act and the same has to be read with section 9 and the DTAA entered into by the Government of India. It was contended by the assessee that payments made are not for technical services, but towards cost of products manufactured by its sister concern. However, the Ld. Assessing Officer was not satisfied and he invoked provisions of section 195 of the Act holding that alleged payment is liable for deduction of tax at source and thus, disallowed expenditure u/s.40(a)(i) of the Act. Aggrieved, the assessee preferred appeal before the Ld.CIT(A) contending that that the services were not rendered in India and there is no Permanent Establishment in India. In support of the claim, the assessee has submitted copy of contract containing terms and conditions, copy of invoice, copy of DTAA and nature of services rendered. The ld. CIT(A) has called for remand report from the Assessing Officer. The contents of the same are extracted below:-

> *The appellant company (henceforth called as Supplier) entered into a product support agreement dated 24-6-2009 with Mis.Hamilton Sundstrand Corporation, No.1, Hamilton Road, Windsor Locks, CT, USA (henceforth called as Buyer). As per this agreement, the Buyer is responsible for design and sole customer*

interface for Product support and the Supplier is responsible for manufacturing and to provide buyer with after-sales support services as defined in the said agreement. Copies of all agreements were produced by the appellant company before the then Assessing Officer during the course of assessment proceedings.

Since the assessee has paid to the non-resident company which has no permanent establishment in India and since the expenses were incurred outside India for manufacture of design etc. for sale outside India it was submitted that no TDS is required to be deducted. It is submitted that the design that was being developed at USA was supposed to be used in India, and products were to be manufacture in India and then exported. Therefore, as the "Design" was to be used in India, income earned by the relevant non-resident in developing the "Design" is taxable in India. Hence, provisions of TDS are attracted."

5. The Ld. CIT(A), after considering remand report and also examined facts of the case in light of provisions of section 9(1)(vii) of the Act, and also drawing support from the judicial pronouncements held that alleged payment is not liable to tax in India, therefore, disalllowed u/s.40(a)(ia) of the Act is

uncalled for. Aggrieved, the Revenue is now in appeal before the Tribunal.

6. The Ld. DR vehemently supporting order of the Assessing Officer and further submitted that agreement referred in the paper book filed by the assessee is between Hamilton Sundstrand Corporation and the assessee i.e., (TASE) dated 24.06.2009, whereas payment has been made to assessee's sister concern TASI USA. However, there is no mention of the sister concern in the said agreement dated 24.06.2009 and there are some other agreements on the basis of which alleged payments have been made and in absence thereof, it has to be presumed that alleged payment is towards technical services and designing work, which calls for deduction tax at source u/s.195 of the Act and since the assessee has failed to deduct TDS, expenditure is disallowable u/s.40(a)(ia) of the Act.

7. On the other hand, the learned counsel for the assessee took us through product support agreement dated 24.06.2009 and also referred to the remand report extracted (supra) contending that designing and technical services were to be provided by the buyer i.e., Hamilton Sundstrand Corporation

and the assessee was only required to manufacture products and since, the facilities were not ready in India, the assessee carried out manufacturing process through its sister concern in USA and alleged payment was made towards the same. The learned counsel for the assessee further reiterated submissions filed before the Ld. CIT(A), which reads as follows:-

> *"After perusing all the documents submitted, the learned AO has wrongly concluded that the design was to be used in India and hence income earned by the relevant nonresident in developing the "design" is taxable in India. Hence TDS provisions are attracted. This observation is entirely against facts. In the previous paragraph under the heading, "present Assessing Officer's report on the above issue", the AO has observed as below:*
>
> > *The appellant company (henceforth called as Supplier) entered into an product support agreement dated 24-6-2009 with Mis. Hamilton Sundstrand Corporation, No.1, Hamilton Road, Windsor Locks, CT, USA (henceforth called as Buyer). As per this agreement, the Buyer is responsible for design and sole customer interface for Product support and the Supplier is responsible for manufacturing and to provide buyer with after sales support services as defined*

in the said agreement. Copies of all agreements were produced by the appellant company before the then Assessing Officer during the course of assessment proceedings.

Having correctly observed as above, the AO went on to wrongly conclude on a wrong application of mind that the design was to be used in India and hence income earned by the relevant non-resident in developing the "design" in taxable in India and hence TDS provisions are attracted.

The learned AO may be asked to clarify on this.

8. We have heard rival contentions and perused records placed before us. The Revenue's sole grievance is that the Ld. CIT(A) has erred in deleting disallowance made u/s.40(a)(ia) of the Act for non-deducting tax at source u/s.195 of the Act on the payment of Rs.4,95,20,000/- to its sister concern, TASI USA, booked under the head "HS Pure Power Programme". We observe that the assessee entered into an agreement with Hamilton Sundstrand Corporation dated 24.06.2009, as per which the buyer, i.e., Hamilton Sundstrand Corporation, was responsile for design and sole customer interface for product support and supplier, i.e., the assessee, was responsible only

for manufacturing. We note that when the Ld. CIT(A) deleted said disallowance u/s.40(a)(ia) of the Act observing as follows:-

> "*In the return of income filed, the appellant claimed an expenditure of Rs. 4,95,20,000/- on the stated fact that the appellant has paid the same for engineering design costs, product development costs and engineering support. According to the Assessing Officer, as per Sec 195 of the Act, the payee being a non resident, the appellant ought to have deducted tax at source at the prescribed rates when the payment was made. Hence the disallowance u/s 40a(ia) of the I.T Act.*
> *For easy understanding of facts, Sec 195 is reproduced herein below.*
>
> *195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such, income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :*
>
> *From the above, it could be seen that Sec 195 applies only when the payment made to the non resident has an element of income embedded in it which is chargeable to tax in India. If the sum paid or credited by the payer is not chargeable to tax, then obligation to deduct tax does not arise. In other words, if the sum is assessable in India, the payer has a duty to deduct tax at source u/s 195.*

TDS is a vicarious liability on behalf of the recipient and if the recipient does not have primary liability to be taxable in respect of income embedded in the payment, the vicarious liability also cannot be invoked. So tax cannot be deducted unless the non-resident is liable to tax in India in respect of the receipt. Reliance is placed on the decision of the Supreme Court in the case of GE India Technology Center Pvt. Ltd. where the Supreme Court held that TDS obligations under Sec 195 arises only when the payment is chargeable to tax in the hands of non-resident in this regard.

Further, the charge of income-tax under sub-section (1) of section 4 is on the total income of every person for a previous year at the rates enacted in the Central Act.

In the case of a non-resident, sub-section (2) of section 5 enunciates that the total income of any previous year would include all income from whatever source derived, which (i) is received or is deemed to be received in India by or on behalf of such person; or (ii) accrues or arises or is deemed to accrue or arise to him in India during such year. Breaking down sub-section (2) into components, it covers income of a non-resident, which (i) is received in India, (ii) accrues in India, (iii) arises in India, (iv) is deemed to be received in India, (v) is deemed to accrue in India, or (vi) is deemed to arise in India.

Hence, in the case of a non-resident the nexus for the purpose of chargeability to income-tax is provided by the receipt or accrual of the income in India.

Section 9(1) defines the circumstances in which income is deemed to accrue or arise in India. Sub-section (1) of section 9 defines in clause (i) income which shall be deemed to accrue or arise in India. Sub-clause (i) is, in turn, distributed into four categories. These categories cover income accruing or arising, whether directly or indirectly:

(i) through or from any business connection in India;

(ii) through or from any property in India;

(iii) through or from any asset or source of income in India; or (iv) through the transfer of a capital asset situated in India.

In each of these four categories, the law has postulated the existence of a nexus with India, which invokes taxing jurisdiction.

Another point to be considered here is whether non-residents with no "tax presence" in India are liable u/s 195? A literal construction of the words "any person responsible for paying" as including non residents would lead to absurd consequences. A plain reading of Sec.191A, 194B, 194C, 194D,194E, 194l, and 194J read with Sec. 115BBA, 1941, 194J would show that the intention of the Parliament was first to apply Sec. 195 only to the residents who have a tax presence in India. It is all the more so, since the person responsible has to comply with various statutory requirements such as compliance of s. 200(3), 203 and 203A. Th% expression "any person" in Sec. 195 should mean any person who is a "resident" in India. Sec. 195 applies only if payments are made by a resident to another non-resident. The transaction had no nexus with the underlying assets in India. In order to establish a nexus, the legal nature of the transaction has to be examined.

The Hon'ble Supreme Court also vide its judgment dated 9.9.2010 in the case of GE India Technologies Pvt. Ltd. Vs. CIT (327 ITR 456) explained that expression 'chargeable under the provisions of the Act' in S.195 (1) shows that the remittances have got to be trading receipt whole or part of which is liable to tax in India. If the tax is not so assessable, there is no question of tax at source being deducted. In other words, it was held that the moment a remittance is made to a non resident; obligation to deduct tax at source under section 195 of the Act does not arise. It arises only when such remittance is a sum chargeable to tax under the Income Tax Act under sections 4, 5 and 9 of the Act. The ratio laid down by the Karnataka High Court judgment in the cited case (320 ITR 209) has been set aside in that case.

From the above, it could be seen that what is relevant is whether the payment includes any income component and if so whether the same is chargeable to tax. In the appellant's case from the facts and from the legal position discussed as above, it appears that the payment made is not liable to tax in India. Hence the payment made is treated as being not liable for TDS. No disallowance u/s 40(a)(ia) is therefore called for. This ground is therefore allowed."

9. On going through the findings of the ld. CIT(A), we notice that the ld. CIT(A) referring the judgment of the Hon'ble Supreme Court in the case of *GE India Technologies Pvt. Ltd. (supra)* has come to a finding that since the alleged payment made by the assessee to its sister concern in US does not

include any income component, therefore, the assessee cannot be held to be in default for not deduction tax at source u/s 195 of the Act. It is an admitted fact as discernible from the copies of invoices raised by TASE USA to the assessee TASE India available at page nos. 3 to 6 of the paper book that they are towards reimbursement of Pure Power Project first phase expenses. We note that TASE India entered into an agreement with Hamilton Sundstrand Corporation USA vide the project agreement dt. 24/06/2009 for manufacturing new products for their new engine program called Pure Power Program. So, the consideration flowing from Hamilton Sundstrand Corporation to the assessee, is on account of the agreement dt. 24/06/2009 and the same includes the element of income, if any, which is earned by the assessee for carrying out this project. However, the Indian facility of the assessee company was not established in its full strength during the period and it was necessary to get the hardware parts as specified in the agreement. In order to get this work done, the assessee company approached its sister concern TASE India, which was well equipped with the necessary facilities for carrying out the manufacturing work.

Therefore, the invoices were raised by the TASE USA and then re-imbursement of first phase expense of Pure Power Project was made. Thereafter, certain costs were incurred by TASE USA on the said project but subsequently, when the contract got terminated by Hamilton Sundstrand Corporation in the year 2011, the balance amount lying with TASE USA was refunded to the assessee. Looking into these transactions with the angle of the application of Section 195 of the Act, we notice that in the alleged payments made by the assessee to its sister concern TASE USA, there is no element of income and it is purely re-imbursement of expenses and as held by the Hon'ble Supreme Court in the case of *GE India Technologies Pvt. Ltd. Vs. CIT (supra),* obligation to deduct tax at source u/s 195 of the Act does not arise at the moment the payment is made to a non-resident but arises only when such remittances is a sum chargeable to Income Tax u/s 4, 5 and 9 of the Act, the same ratio applies on the facts of the instant case and, therefore, no tax was deductible by the assessee company on the alleged payments.

10. We are thus inclined to hold that the ld. CIT(A) was justified in deleting the addition/disallowance made by the Assessing Officer u/s 40(a)(ia) of the Act on considering the facts of the case as well as the settled judicial precedent. We, therefore, fail to find any infirmity in the order of the ld. CIT(A) and uphold the same. Accordingly, the effective Ground No. 2 raised by the revenue is dismissed. Other Grounds are general in nature.

11. In the result appeal of the revenue is dismissed.

Order pronounced in the open court on 14th June, 2023

Sd/-	Sd/-
(वी.दुर्गा राव)	**(डॉ. मनीष बोरड़)**
(V.Durga Rao)	(Dr. Manish Borad)
न्यायिक सदस्य /Judicial Member	**लेखा सदस्य** / Accountant Member

चेन्नई/*Chennai,*
दिनांक/Dated 14th June, 2023
DS

आदेश की प्रतिलिपिअग्रेषित/Copy to:
1.Appellant
2. Respondent
3.*आयकरआयुक्त*/CIT
4.*विभागीयप्रतिनिधि*/DR
5. *गार्डफाईल*/GF.