

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI**

**BEFORE,
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.8766/Del/2019
(ASSESSMENT YEAR 2013-14)**

Asst. CIT, Circle-18(1), New Delhi	Vs.	M/s. NCM (India) Limited A-253/2, Road No.5, Mahipalpur Extension, New Delhi- 110 001 PAN-AAACN 0675K
(Appellant)		(Respondent)

Appellant by	Mr. Arvind Kumar Bansal, Sr.DR
Respondent by	Mr. Shivam Agarwal, CA

Date of Hearing	08/06/2023
Date of Pronouncement	21/06/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal by Revenue is filed against the order of Learned Commissioner of Income Tax (Appeals)-6, Delhi ["Ld. CIT(A)", for short], dated 30/09/2019 for Assessment Year 2013-14. The sole ground taken in this appeal which read as under:

"In the fact and circumstances of the case Ld. CIT(A) erred in deleting the addition of Rs.3,49,74,918/- on account of non-deduction of TDS u/s 195 of the Income-tax Act, 1961 on the payments amounting to Rs.3,49,74,918/-."

2. The brief facts of the case are that assessee company filed its return declaring total income of Rs.33,67,720/-, the Assessment Order came to be passed u/s 143(3) of the Act by making addition of Rs.3,49,74,918/- wherein the Ld. Assessing Officer (“Ld. A.O.”, for short) observed that the assessee failed to deduct TDS u/s 195 of the Act on payments amounting to Rs.3,49,74,918/- in the nature of Fees for Technical Services (“FTS”, for short) made by it to non-resident during the year under consideration, therefore, the same are not deductible in view of section 40(a)(i) of the Act.

3. Aggrieved by the assessment order dated 30/03/2016, the assessee preferred an appeal before the Ld. CIT(A). The Ld. CIT(A) allowed the appeal on 30/09/2019 and deleted the addition of Rs.3,49,74,918/- made on account of non-deduction of TDS u/s 195 of the Act. As against the deletion of the addition, the Department filed the present appeal on the grounds mentioned above.

4. The Ld. Departmental Representative (“Ld. DR”, for short) vehemently contended that the Ld. CIT(A) erred in deleting the

addition of Rs.3,49,74,918/- on account of non-deduction of TDS and by relying on the order of the A.O. submitted that the order of the Ld. CIT(A) is liable to quashed.

5. Per contra, the Ld. Counsel for the assessee has taken us through the Paper Book and submitted that the order of the Ld. CIT(A) is well reasoned and requires no interference at the hands of the Tribunal.

6. We have heard both the parties and perused the materials available on record. During the assessment proceedings, the AO was of the opinion that the assessee failed to deduct TDS u/s 195 of the Act on the payments made to non-residents in the nature of “FTS” to the tune of Rs.3,49,74,918/-. During the appellate proceedings, the Ld. CIT(A) while deleting the addition held as under:

“6.2.2 The appellant has submitted that payments amounting to Rs. 3,49,44,923/- had been made by the appellant company to three non-resident entities located outside India towards double appoint of moulds. It has also been submitted that the appellant is engaged in the business of supply of various hospitality items to corporate clients mainly from the aviation industry and during the year under consideration on receipt of orders for supply of items like customised sandwich makers, customise highball glasses and wineglasses etc., these items with required specifications had been procured from the foreign entities. It has further been submitted that for the purposes of manufacturing the customised

sandwich makers and glasses it was necessary to develop moulds of the required designs which could be used to manufacture the customised products with the desired specification and such moulds were developed by foreign entities outside India and subsequently these moulds were used by such foreign entities to manufacture the customised products which were supplied to the appellant company for effecting sales in India. It has also been submitted that the payment of Rs. 3,49,44.923/- made to the foreign entities towards cost of moulds is not in the nature of fees for technical services in terms of Explanation 2 to section 9(1)(vii) which restricts the meaning of fees for technical services to the consideration received for rendering of any managerial, technical or consultancy services. It has also been submitted that the payment has been made by the appellant towards cost of development/procurement of moulds and thus the impugned payment has not been made to the foreign entities for rendering of any managerial, technical or consultancy services. It has also been submitted that even if it is presumed that the foreign entities have designed the moulds by use of technology, still the impugned technology used by the foreign entities to design the mould was never made available by the foreign entities to the appellant company and the moulds were designed and developed by the foreign entities at their end outside India and they were also used by them outside India for manufacture of products ordered by the appellant. It is further been submitted that what was supplied to the appellant was only the final manufactured product and neither the moulds nor the technology used by the foreign entities for designing the moulds were ever supplied to the appellant in India.

6.2.3 I have considered the assessment order and the submissions of the appellant. During the year under consideration the appellant was in the business of supply of customized items to various customers, mainly in the aviation sector, like Air India, Sahara, Kingfisher Airlines, etc. To procure the same, manufacturing of the said ms was outsourced to various manufacturers situated outside India. Further, since the items had to be customised, for developing the nems moulds had to be developed for which also various vendors were engaged to whom specifications were provided and in most cases the said moulds which were developed were handed over to the manufactures of the hems. In some cases, the vendors who developed the moulds also manufactured the customized items.

6.2.4 For instance, from copies of the purchase orders from Sahara India Commercial Corporation Ltd (pages 52 to 54 of the paper book), Sahara India Feal Estate Corporation Lad pages 15 to 57 of the paper book), Kanglaher Airlines Lad (pages 56 to 55 of the paper book) and Air India (pages 109 to 140 at the paper book), it is seen that the hems for supply were specific with detailed specifications. In fact in the case of Aur la detailed drawings of the he ball glass and wineglasses was given. From

the orders which were placed by the appellant with East Asia Trading Company it is seen that detailed specifications as per the purchase order received by the appellant were given with a specific instruction that the mould parts were to be used were those as were to be supplied by Hong Kong Polychem Company. Hong Kong for production of sandwich makers. A specific instruction was also given that East Asia Trading Company was to scrap the mould parts after completion of the order and the moulds were not be used for any other customers. From the purchase order placed by the appellant with Hong Kong Polychem Company, Hong Kong for making mould parts for sandwich maker, it is clearly mentioned that the mould parts were to be prepared as per the specifications/drawings provided by the appellant and the mould parts were to be delivered to East Asia Trading Company. The invoice from Hong Kong Polychem Company also mentions that the charges towards customisation of moulds and boxes/cartons as per specifications/drawings provided by the appellant. It is apparent that the moulds were developed by the foreign entities at their end outside India and subsequently these moulds were used by the foreign entities to manufacture the customised products which were supplied to the appellant company for effecting sales in India. It is also apparent that the cost paid to the foreign entities for supply of customised products also includes the cost towards development of the moulds which were developed and used by the foreign entities at their end outside India for manufacturing the products supplied to the appellant company. It is apparent that the moulds which were developed were never supplied by the foreign entity to the appellant and the moulds were developed by the foreign entities at their end and were also used by them outside India for manufacture of products ordered by the appellant. What was supplied to the appellant was the final product and there is nothing on record to suggest that either the technology or the moulds used by the foreign entities for designing the moulds was ever supplied to the appellant in India.

6.2.5 The case of the appellant appears to be one where technology or technical knowledge of the person is not made available to the assessee but only by using such technical knowledge, services have been rendered to the assessee. In such a case it cannot be said that the amount is paid as "fees for technical services. As has been held by the Hon'ble ITAT Delhi in the case of DCIT vs. Parasrampuriah Synthetics Ltd (supra), rendering services by using technical knowledge or skill is different than charging fees for technical services and in the latter case, the technical services are made available due to which the assessee acquired certain right which can be further used.

6.2.6 Section 9(1)(vii) which deals with fee for technical services, as considered by the AO, deals with rendering of any managerial, technical or

consultancy services (including the provision of services of technical or other personnel). Explanation 2 to section 9(1)(vii) which defines "fees for technical services for the purpose of the said clause is reproduced below.

Explanation 2.-For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum considerations for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

6.2.7 From the facts and circumstances of the case it is apparent that the services have neither been utilized in India nor have been rendered in India. Further, the entire arrangement of the appellant for development of moulds and manufacture of items is a contract for supply of goods Hence, in view of the facts of the case it has to be held that the impugned payment of Rs 3,4941.923/- were not in the nature of fees for technical services and, therefore, tax was not required to be deducted at source under section 195. Therefore, the disallowance made under section 40(a)(1) is deleted. Grounds of appeal Nos. 2 and 3 are allowed."

7. Thus, it is any specific finding of the Ld. CIT(A) that, the services have neither been utilized in India nor have been rendered in India. Further, the entire arrangement of the assessee for development of moulds and manufacture of items is a contract for supply of goods, therefore, the impugned payment of Rs.3,49,44,923/- were not in the nature of "FTS" and, therefore, tax was not required to be deducted at source under section 195. The said finding and conclusion of the Ld. CIT(A) neither erroneous nor suffers from any infirmity. Thus, we find no merit in the ground of appeal of the

Revenue. Accordingly, ground of the appeal of the Revenue is dismissed.

8. In the result, the appeal filed by the Revenue is dismissed.

Sd/-

(DR. B.R.R.KUMAR)
ACCOUNTANT MEMBER

Dated: 21/06/2023

Pk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI