IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH :: PANAJI

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER &
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER
(Through virtual hearing)

ITA No.401 /PAN/2018
(A.Y. 2011-12)

M/s. Tumkur Minerals Pvt. Ltd., Salgaocar House, Vasco-Da-Gama, Goa. PAN: AACCT 2057 P	vs	JCIT, Margao Range, Goa.
Appellant		Respondent

Assessee by	:	Shri P.J. Pardiwalla, Adv.
Revenue by	:	Smt. Ashwini Hosmani, Sr.DR
Date of hearing	:	04/09/2023
Date of pronouncement	:	20/09/2023

O R D E R

Per PARTHA SARATHI CHAUDHURY, JM:

This appeal preferred by the assessee emanates from the order of Commissioner of Income Tax (Appeals)-1, Panaji (for short, 'CIT(A)') dated 11.07.2018 for A.Y.2011-12 as per the grounds of appeal on record.

2. The issue for adjudication is whether the ld. CIT(A) was correct in confirming the disallowance u/sec. 40(a)(i) of the Income Tax Act, 1961 (for short, 'the Act') on foreign remittance made to non-residents towards destination sampling charges/ore analysis charges of Rs.10,21,904/- for services rendered outside India for non-deduction of tax at source u/sec. 195 of the Act and also whether the ld. CIT(A)

was correct in holding that the criterion of the second limb of the exception clause in sec.9(1)(vii)(b) of the Act was not satisfied in the case of the assessee.

3. The relevant facts are that as per the details furnished by the assessee, it was observed by the Assessing Officer (AO) that the assessee-company had paid an amount of Rs.10,21,904/- towards Ore analysis charges (consultation/technical charges) to Italab (China) Pty Ltd. which is a registered company in Hongkong. The assessee had not deducted TDS on this amount. The assessee was requested to explain why this amount should not be disallowed u/sec. 40(a). The assessee company submitted that the payments were made for the services rendered outside India. The above income is neither received nor deemed to have been received in India nor accrues or arises in India. Hence, it falls outside the purview of sec.5 of the Act. The assessee also stated that its case is covered within the purview of sec. 9(1)(vii)(b) and hence the deduction of TDS does not arise. The assessee had made payment of destination sampling charges to non-resident service providers for the services rendered by them outside India, which were utilized by the assessee-company for the purpose of earning income from the source outside India. Therefore, the assessee had submitted that services were rendered outside India and in fact the services from which the income was earned, that is also outside India and hence, the case of the assessee is squarely covered

by the exception provided in sec. 9(1)(vii)(b) of the Act and hence, not taxable in India. These submissions of the assessee did not find favour either with the AO or with the ld. CIT(A) and both the authorities have sustained addition in the hands of the assessee.

4. At the time of hearing, ld. Sr. counsel appearing for the assessee demonstrated that the services were rendered outside India, the source of payment to the assessee was also outside India. The provisions of sec. 9(1)(vii)(b) reads as under:-

> *"9(1) The following incomes shall be deemed to accrue or arise in India :—*
> *(i) to (vi) x x x x x x*
> *(vii) income by way of fees for technical services payable by—*
> *(a) the Government ; or*
> *(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or*
> *(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India."*

Ld.Sr. counsel further submitted that in clause (b), the word *'or'* is there and thereafter, it is stated '*for the purposes of making or earning any income from any source outside India*….'. The assessee has also furnished evidence as evident at para 6 of the ld. CIT(A)'s order regarding the fact that payer was situated outside India and, therefore, the source of payment is located outside India. The ld. Sr. Counsel also relied on the decision of Hon'ble Delhi High Court in the

case of *DIT v. Lufthansa Cargo India* [2015] 375 ITR 85 (Del.), wherein it has been held as under:-

> *"The assessee acquired four old aircrafts from a non-resident company outside India and wet-leased them to a foreign company. "Wet-leasing" means the leasing of an aircraft along with the crew in flying condition to a charterer for a specified period. As the assessee was obliged to keep the aircraft in flying condition, it had to maintain them in accordance with the DGCA guidelines to possess a valid airworthiness certificate as a pre-condition for its business. The assessee entered into an agreement with the overhaul service provider, T.T carried out maintenance repairs without providing technical assistance by way of advisory or managerial services. The Assessing Officer noticed that no tax was deducted at source on payments to T and no application under section 195(2) was filed. He held that payments were in the nature of "fees for technical services" defined in Explanation 2 to section 9(1)(vii)(b) and were, therefore, chargeable to tax and tax should have been deducted at source under section 195(1) . He rejected the assessee's plea that the payments for repairs were incurred for earning income from sources outside India and fell within the exclusionary clause of section 9(1)(vii)(b) . He also rejected the assessee's plea that the business of aircraft leasing was carried on outside India. The assessee's alternate plea that in any case the payments made to the residents ofthe USA, the UK, Israel, the Netherlands, Singapore and Thailand could be taxed as business profits only and not as fees for technical services keeping in view the relevant provisions of the DTAAs with those countries too was rejected. He passed orders under section 201 deeming the assessee to be an assessee in default for the financial years 1997-98 to 1999-2000, and levied tax as well as interest under section 201(1A). The Commissioner (Appeals) rejected the assessee's contention that the payments made to the various non-residents for carrying out overhaul repairs were not chargeable to tax. The payments made to T were treated as the model for considering the question of taxability of payments made to all other foreign companies. He held that such repairs required knowledge of sophisticated technology and trained engineers were employed by the non-residents for carrying out the overhaul repairs. According to him, the repairs constituted fees for technical services and, therefore, were subject to tax deduction at source. With reference to the payments made to the residents of the UK and the USA, he held that they were not in the nature of fees for technical or included services under article 12 of the Double Taxation Avoidance Agreements read with the memorandum of understanding. Payments made to the residents of the USA and the UK were held to be "business profits" and since those companies did not have a permanent establishment in India, their income was not chargeable to tax. The Tribunal held that the payments made to T and other foreign companies for maintenance repairs were not in the nature of fees for technical services as defined in Explanation 2 to section 9(1)(vii)(b) and that in any event these payments were not taxable for the reason*

that they had been made for earning income from sources outside India and, therefore, fall within the exclusionary clause of section 9(1)(vii)(b). On appeal :

Held, dismissing the appeal, that besides international convention and domestic law that mandated aircraft component overhaul, the manufacturer itself, as a condition for the continued application of its warranty and in order to escape any liability for lack of safety, required periodic overhaul and maintenance repairs. Unlike normal machinery repair, aircraft maintenance and repairs inherently are such as at no given point of time can be compared with contracts such as cleaning, etc. Component overhaul and maintenance by its very nature cannot be undertaken by all and sundry entities. The level of technical expertise and ability required in such cases is not only exacting but specific, in that, the aircraft supplied by the manufacturer has to be serviced and its components maintained serviced or overhauled by the designated centres. International and national domestic regulatory authorities mandate that certification of such component safety is a condition precedent for their airworthiness. The exclusive nature of these services could not but lead to the inference that they were technical services within the meaning of section 9(1)(vii). However, the overwhelming or predominant nature of the assessee's activity was to wet lease the aircraft to a foreign company. The operations were abroad and the expenses towards maintenance and repairs payments were for the purpose of earning abroad. Therefore, the payments made by the assessee fell within the purview of exclusionary clause of section 9(1)(vii)(b) and were not chargeable to tax at source."

5. Further, in an earlier decision, the Hon'ble Madras High Court in the case of *CIT v. Aktiengesellschaft Kuhnle Kopp and Kausch* [2003] 262 ITR 513 (Mad) has held that royalty on export sales is concerned, the amount is exempt u/sec. 9(1)(vi) of the Act. Though, royalty was paid by a resident in India, it could not be deemed to have accrued or arisen in India as the royalty was paid out of the export sales and, hence, the source for royalty was the sales outside India. Since the royalty was from the source situate outside India, the royalty paid on export sales was not taxable. The Hon'ble High Court held that the tribunal was, therefore, correct in holding that the royalty on export sales was not taxable within the meaning of sec.9(1)(vii) of the Act.

The question of law was answered in favour of the assessee. The relevant extracts of this decision are as follows:-

> *"The assessee, a West German company, had entered into a collaboration agreement dated November 26, 1973, with an Indian company. Three kinds of payments were received by the assessee, namely, royalty, fees for sending technicians to India and special engineering fees for a particular item of work done. The assessee claimed exemption that the receipts were not liable to tax, but the Assessing Officer did not accept the claim and completed the assessment. The Tribunal held that the fees for the visiting technicians were exempt under the Double Taxation Avoidance Agreement and that the amounts were exempt as they were received under a pre-1976 agreement and were not exigible to tax under section 9(1)(vi) of the Income-tax Act, 1961. As far as the special engineering fees received for the year 1980-81 were concerned, the Appellate Tribunal upheld the claim of the assessee for exemption on the grounds: (i) that the income did not accrue in India as the entire work was done in Germany, (ii) the income arose under a pre-1976 agreement, and (iii) it was also exempt under the Double Taxation Avoidance Agreement. As far as royalty payable on export sales was concerned, the Appellate Tribunal held that it could not be regarded as deemed to have accrued in India within the meaning of section 9(1)(vi) of the Income-tax Act. The Appellate Tribunal therefore held that the royalty on export sales was not taxable. On a reference :*
>
> *Held, (i) that the Tribunal was correct in holding that the receipts for visit of experts were not taxable within the meaning of section 9(1)(vi)*
>
> *(ii) that as far as the receipts for special engineering services were concerned, the issue arose only in the assessment for 1980-81 and there was no doubt that the amount was paid under a pre-1976 agreement. Since the receipt was a lump sum payment, the amount received was exempt under the proviso to section 9(1)(vi).*
>
> *(iii) That though the royalty was paid by a resident in India, it could not be deemed to have accrued or arisen in India as the royalty was paid out of the export sale and, hence, the source for royalty was the sales outside India. Since the royalty was from the source situate outside India, the royalty paid on export sales was not taxable."*

6. Considering the aforesaid judicial pronouncements and applying the same to the facts of the assessee's case, we do not find any merit with the order of ld. CIT(A) and, therefore, the same is set aside and the grounds of appeal of the assessee stands allowed.

7. In the result, appeal of the assessee is allowed.

Order pronounced in open Court on 20th September, 2023.

Sd/-	Sd/-
(INTURI RAMA RAO)	(PARTHA SARATHI CHAUDHURY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated : 20th September, 2023

vr/-

Copy to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The DR, ITAT, Panaji Bench, Panaji.
5. Guard File.

By Order

// TRUE COPY //

Senior Private Secretary
ITAT, Pune.