

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA Nos. 550 to 552/Ind/2018
Assessment Years: 2014-15 to 2016-17

Permal Wallace Pvt.Ltd., Hoshangabad Road, Bhopal.	<u>बनाम/</u> Vs.	ITO, (IT & TP), Bhopal
(Assessee / Appellant)		(Revenue / Respondent)
PAN: AABCP7557R / TAN:BPLP01367C		
Assessee by	Shri Anil Chandra Shah, CA& Ld. AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	12.05.2023 / 18.08.2023	
Date of Pronouncement	09.11.2023	

आदेश/O R D E R

Per B.M. Biyani, A.M.:

These three (3) appeals are filed by assessee, against three separate appeal-orders, all dated 27.03.2018 and all passed by learned Commissioner of Income-Tax (Appeals)-13, Ahmedabad["CIT(A)"], which in turn arise out of a composite order dated 08.04.2016 for Financial Year ["FY"] 2013-14 & 2014-15 relevant to Assessment-Year ["AY"] 2014-15 & 2015-16 and a separate order dated 25.01.2017 for FY 2015-16 relevant to AY 2016-17 passed by learned ITO (IT&TP), Bhopal ["AO"] u/s 201(1)/(1A) read with section 195 of Income-tax Act, 1961 ["the Act"].

2. Since these appeals involve identical issues, we have heard them together at the request of parties and disposing of by this common order for the sake of convenience, clarity and brevity.

Brief facts:

3. The brief facts are such that the assessee is engaged in the business of manufacturing material for electrical insulation and engineering applications. During FY 2013-14, 2014-15 and 2015-16 (relevant to AY 2014-15, 2015-16 and 2016-17 respectively), the assessee made following payments to non-residents as noted by AO in respective orders:

Page 72 to 74 of order of FY 2013-14 & 2014-15 (AY 2014-15 & 2015-16):

Permali Wallace Pvt. Ltd. F.Y.-2013-14
& 2014-15

11- As discussed above the amount paid by the assessee to various non residents persons during FY 2013-14 and FY 2014-15 are in the nature of business income and technical services and the assessee failed to deduct TDS U/s 195 of the Act. The consolidated details of the payments and TDS liability of the assessee is calculated as under:-

(a) TDS Liability for F.Y.-2014-15 in the case of HSK Hauskeller & Siegmann, Germany for business income-

Sr. No.	Name of the supplier	Total Amount Remitted	Amount of Profit- 10% of amount remitted	Gross up amount as per 195A	Default of TDS @ 41.2% per Act (Incl. Cess)	Date of remittance	Interest thereon as per section 201(1A)
1	HSK Hauskeller & Siegmann, Germany	18,11,443/-	1,81,144	3,01,907	1,24,386	07.04.14	31,097
2.	HSK Hauskeller & Siegmann, Germany	10,25,380/-	1,02,538	1,70,897	70,410	01.06.14	16,194
3.	HSK Hauskeller & Siegmann, Germany	26,74,361/-	2,67,436	4,45,727	1,83,640	03.09.14	36,728
4.	HSK Hauskeller & Siegmann, Germany	3,05,611/-	30,561	50,935	20,985	23.02.15	3,148
Total			5,81,679/-	9,69,466/-	3,99,421/-		87,167/-

(b) TDS Liability in the case of Tethys Ventures Pte Ltd., Singapore for technical services -

Sr. No.	Name of the Service Provider	F.Y.	Amount remitted	Gross up amount as per 195A	Default of TDS @ 25.75% (Incl. Cess)	Date of remittance	Interest thereon as per section 201(1A)
1.	Tethys Ventures Pte Ltd., Singapore	2013-14	4,98,600	6,64,800	1,71,186	04.10.13	53,068
2	Tethys Ventures Pte Ltd., Singapore	2014-15	4,84,050	6,45,400	1,66,191	26.04.14	41,548
Total			9,82,650	13,10,200	3,37,377		94,616



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(a)(c) TDS Liability in the case of CTC Credit Management Co Ltd.
China for technical services -

Sr. No.	Name of the Service Provider	F.Y.	Amount remitted	Gross up amount as per 195A	Default of TDS @ 25.75% as per Act (Incl. Cess)	Date of remittance	Interest thereon per section 201(1A)
2.	CTC Credit Management Co Ltd. China	2014-15	19,247	25,663	6,608	13.05.14	1,586
3.	CTC Credit Management Co Ltd. China	2014-15	17,930	23,907	6,156	09.06.14	1,416
4.	CTC Credit Management Co Ltd. China	2014-15	19,071	25,428	6,548	11.06.14	1,506
5.	CTC Credit Management Co Ltd. China	2014-15	19,423	25,897	6,668	16.06.14	1,534
Total				1,00895/-	25,980/-		6,042/-

(a)(d) TDS Liability in the case of Fisher + Rucelle AG, Switzerland for technical services -

Sr. No.	Name of the Service Provider	F.Y.	Amount remitted	Gross up amount as per 195A	Default of TDS @ 25.75% as per Act (Incl. Cess)	Date of remittance	Interest thereon as per section 201(1A)
1.	Fisher + Rucelle AG, Switzerland	2013-14	10,47,750	13,97,000	3,59,728	28.02.14	97,127

Hence, the details of the payments and TDS liability of the assessee for F.Y.-2013-14 is calculated as under:-

TDS Default u/s 195 of the Act for FY 2013-14	Rs 5,30,914/-
Interest u/s 201(1A) @ 1% works out to	Rs 1,50,195/-
Total demand payable by the assessee	Rs 6,81,109/-



Permali Wallace Pvt. Ltd. F.Y.-2013-14
& 2014-15

Hence, the details of the payments and TDS liability of the assessee for F.Y.-2014-15 is calculated as under:-

TDS Default u/s 195 or FY 2014-15-	Rs 5,91,592 /-
Interest u/s 201(1A) @ 1% works out to	Rs 1,34,757/-
Total demand payable by the assessee	Rs 7,26,349 /-

As worked out above tax payable u/s 201(1), being equal to the amount of tax not deducted, along with statutory interest payable u/s 201(1A) on such non-deduction from the due date to this date amounts to **Rs. 6,81,109 /-** for the **FY 2013-14** and **Rs. 7,26,349/-** for the **FY 2014-15**. Total demand payable by the assessee u/s 201(1) /201(1A) for the years under consideration is, **Rs. 14,07,458/- (Rupees Fourteen Lakhs Seven Thousand Four Hundred Fifty Eight only)** in respect of which the assessee is treated as "assessee in default" and it is required to pay the same as per demand notice issued along with this order. Penalty u/s 271C will be proposed to the JCIT (Int. Taxn.), Ahmedabad, separately.

Place: Bhopal
Date: 08.04.16

Santosh
Santosh Kumar Nigam
Income Tax Officer
(International Taxation & Transfer Pricing) Bhopal

For PERMALI WALLACE PVT. LTD.

WHOLETIME DIRECTOR



Page 42 of order of FY 2015-16 (AY 2016-17):

Permal Wallace Pvt. Ltd. Bhopal | F.Y.-2015-16

9- As discussed above the amounts paid by the assessee to non-resident company during FY 2015-16 are in the nature of business income and the assessee failed to deduct TDS U/s 195 of the Act. The consolidated details of the payments and TDS liability of the assessee is calculated as under:-

Sr. N o.	Name of the supplier	Total Amount Remitted	Amount of Profit- 10% of amount remitted	Gross up amount as per 195A	Default of TDS 41.2% @ As per Act (Incl. Cess)	Date of remittance	Interest thereon as per section 201(1A)
1	HSK Hauskeller & Siegmann, Germany	20,81,336/-	2,08,134/-	3,46,890/-	1,42,919/-	07.04.2015	31,442/-
2	---Do---	27,79,889/-	2,77,989/-	4,63,315/-	1,90,886/-	13.04.2015	41,995/-
3	---Do---	10,25,380/-	1,02,538/-	1,70,897/-	70,410/-	01.06.2015	14,082/-
4	---Do---	29,05,332/-	2,90,533/-	4,84,222/-	1,99,499/-	15.12.2015	27,930/-
5	---Do---	24,55,233/-	2,45,523/-	4,09,205/-	1,68,592/-	22.12.2015	23,603/-
6	---Do---	58,54,048/-	5,85,405/-	9,75,675/-	4,01,978/-	01.03.2016	44,218/-
7	---Do---	15,28,854/-	1,52,885/-	2,54,808/-	1,04,981/-	14.03.2016	11,547/-
8	---Do---	19,91,647/-	1,99,165/-	3,31,942/-	1,36,760/-	28.03.2016	15,044/-
9	---Do---	27,20,363/-	2,72,036/-	4,53,393/-	1,86,798/-	28.03.2016	20,548/-
	Total--	2,33,42,082/-	23,34,208/-	38,90,347/-	16,02,823/-		2,30,409/-

Hence, the details of the payments and TDS liability of the assessee for F.Y.-2015-16 is calculated as under:-

TDS Default u/s 195 of FY 2015-16-	Rs 16,02,823/-
Interest u/s 201(1A) @ 1% works out to	Rs 2,30,409/-
Total demand payable by the assessee	Rs 18,33,232/-



4. Thus, in the above Tables, the AO noted that the assessee has made payments to four (4) non-resident parties, namely (i) HSK Hauskeller & Siegmann, Germany ["M/s HSK"], (ii) M/s Tethys Ventures Pte Ltd., Singapore ["M/s Tethys"], (iii) M/s CTC Credit Management Co. Ltd., China ["M/s CTC"], and (iv) M/s Fisher + Rucelle AG, Switzerland ["M/s Fisher"]. The AO further observed that the transactions with M/s HSK were in the nature of purchase of timber made through Mr. Deshal Merchant, an Indian agent of M/s HSK. Therefore, according to AO, M/s HSK was having a Business-Connection["BC"] in India in terms of section 9(1)(i) of the Income-tax Act, 1961 as well as a Permanent-Establishment["PE"] in terms of Double Taxation Avoidance Agreements ["DTAA"], which obligated the assessee to deduct TDS u/s 195 read with section 9(1)(i) but the assessee has failed to deduct. Then, the AO noted that the payments made by assessee to M/s Tethys, M/s CTC and M/s Fisher, were in the nature of Fee for Technical Services ["FTS"], which also obligated the assessee to deduct TDS u/s 195 read with section 9(1)(vii) but the assessee had failed to deduct. With such understanding, the AO show-caused assessee u/s 201(1)/(1A) of the Act for non-deduction of TDS. Thereafter, the AO also raised queries to assessee from time to time. In response, the assessee submitted replies which are narrated by AO in his orders. Finally the AO, upon considering replies of assessee and the facts of issues in the light of applicable provisions of Income-tax Act, 1961, DTAA and certain judicial rulings, held that the assessee was liable to deduct TDS and having not deducted, there was a failure on the part of assessee. Accordingly, the AO treated the assessee as defaulter in terms of section 201(1)/(1A) of the act; created demand of tax and interest and also proposed for initiation for penalty u/s 271C.

5. Aggrieved, the assessee carried matter in first-appeal but could not get desired relief. Now, the assessee has come in these appeals before us.

6. Although the assessee has raised several grounds in Appeal-Memos but during the course of hearing, Ld. AR for assessee pleaded following issues emanating from grounds; any other issue, whether on legality or on merit, was not pleaded. Therefore, in subsequent discussions, we shall confine our adjudication *qua* the issues pleaded/pressed before us.

ITA No. 550/Ind/2018 – FY 2013-14 (AY 2014-15):

- (i) *The lower-authorities have wrongly treated the assessee as defaulter for non-deduction of tax at source [“TDS”] u/s 195 out of payments made to:*
 - (a) *Tethys Ventures Pte Ltd., Singapore of Rs. 4,98,600/- which had been considered by the lower-authorities as Fee for Technical Service[“FTS”].*
 - (b) *Fisher + Rucelle AG, Switzerland of Rs. 10,47,750/- which had been considered by the lower-authorities as FTS.*
- (ii) *The lower authorities have wrongly held for grossing up of the amount of TDS u/s 195A.*

ITA No. 551/Ind/2018 – FY 2014-15 (AY 2015-16):

- (i) *The lower-authorities have wrongly treated the assessee as defaulter for non-deduction of tax at source (TDS) u/s 195 out of payments made to:*
 - (a) *Husk Hauskeller & Siegmann, Germany of Rs. 58,16,795/- for purchase of timberand also in estimating 10% of Rs. 58,16,795/- = Rs. 5,81,679/- as profit made by Husk Hauskeller & Siegmann, Germany.*
 - (b) *Tethys Ventures Pte Ltd., Singapore of Rs. 4,84,050/- which had been considered by the lower-authorities as FTS.*
 - (c) *CTC Credit Management Co. Ltd., China of Rs. 75,671/-which had been considered by the lower-authorities as FTS.*
- (ii) *The lower authorities have wrongly held for grossing up of the amount of TDS u/s 195A.*

ITA No. 552/Ind/2018 – FY 2015-16 (AY 2016-17):

- (i) *The lower-authorities have wrongly treated the assessee as defaulter for non-deduction of tax at source (TDS) u/s 195 out of payments made to Husk Hauskeller & Siegmann, Germany of Rs. 2,33,42,082/- for purchase of timberand also in estimating 10% of Rs. 2,33,42,082/- = Rs. 23,34,208/- as profit made by Husk Hauskeller & Siegmann, Germany.*
- (ii) *The lower authorities have wrongly held for grossing up of the amount of TDS u/s 195A.*

Additional Issues:

Vide application dated 26.11.2019, the assessee has also raised following issues in the “additional grounds” for FY 2014-15 & 2015-16 (AY 2015-16 & AY 2016-17):

- (i) *The lower authorities have wrongly considered the amount of Rs. 18,11,443/- as having been remitted by assessee on 07.04.2014 to HSK Hauskeller & Siegmann, Germany at S.No. 1 of Table in Para 11(a), Page No. 72 of the order of FY 2014-15 (AY 2015-16), which is in fact remitted on 07.04.2015 and the same has been again included in and mentioned as Rs. 20,81,336/- at S.No. 1 of Table in Para 9, Page 42 of the order of FY 2015-16 (AY 2016-17). This has resulted in double consideration of same transaction. Further, the correct amount of remittance is Rs. 18,11,443/- which ought to be considered.*
- (ii) *The lower authorities have wrongly considered the amount of Rs. 10,25,380/- as having been remitted by assessee on 01.06.2014 to HSK Hauskeller & Siegmann, Germany at S.No. 2 of Table in Para 11(a), Page No. 72 of the order of FY 2014-15 (AY 2015-16), which in fact remitted on 01.06.2015 and the same has been again included in and mentioned as Rs. 10,25,380/- at S.No. 3 of Table in Para 9, Page 42 of the order of FY 2015-16 (AY 2016-17). This has resulted in double consideration of same transaction. Further, the correct amount of remittance is Rs. 9,03,204/- which ought to be considered.*

7. Ld. AR for assessee submitted that the additional issues/grounds are in the nature of items which have been doubly considered by AO in FY 2014-15 (AY 2015-16) as well as FY 2015-16 (AY 2016-17) or there are mistakes in the amounts considered by AO; the assessee has discovered subsequently at the time of preparing arguments for appeal. It is further stated that the issues are apparent; already embedded in original grounds and can be contested even without raising additional grounds but the assessee has filed additional grounds as a matter of abundant caution and clarity. Therefore, the additional issues/grounds can be admitted without any difficulty. We confronted Ld. DR for the revenue who fairly agreed. Therefore, additional issues are allowed.

Issue No. (i)(a) of AY 2014-15 & (i)(b)/(c) of AY 2015-16- Payment of ‘FTS’ to M/s Tethys, Singapore and M/s CTC, China:

8. Ld. AR for the assessee drew our attention to the order of AO and submitted that the AO has observed that the assessee was required to deduct TDS out of payments made to M/s Tethys and M/s CTC u/s 195

read with section 9(1)(vii). Then, he carried us to provision of section 195 to show that the requirement of TDS under that section arises only if the assessee pays or credits “any sum chargeable under the provisions of this act”. Thereafter, he carried us to section 9(1)(vii) which prescribes following provisions for chargeability/taxability of FTS in India.

Section 9(1)(vii) prescribes thus:

“9. Income deemed to accrue or arise in India

- (1) *The following incomes shall be deemed to accrue or arise in India –*
- (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 utilized 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 in India or for the purposes of making or earning any income from any source in India.”*

[Emphasis supplied]

Explanation 2 to section 9(1)(vii) prescribes thus:

“For the purposes of this clause, “fee for technical services” means any consideration (including any lump sum consideration) 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”.”

Further, the Explanation below section 9 prescribes thus:

“Explanation – For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not, -

- (i) *the non-resident has a residence or place of business or business connection in India; or*
- (ii) *the non-resident has rendered services in India.*

9. The AO has dealt the payments made to M/s Tethys in Para 7 of his order. He examined documents submitted by assessee and observed that the payee is a consultant and the payment has been made for conducting market research study and to present a report thereon. The report has to include country-wise list of key manufacturers of generators, switchgears and transformers product segment with their locations. For key manufacturers, various micro information at a global level is also to be included in report. Then, the AO has dealt the payments made to M/s CTC

in Para 8 of his order. He examined documents and observed that the payee is a consultant and the payment has been made for the providing “Credential Report” of a party in China with whom the assessee was planning a business tie-up. Ultimately, the AO observed that for rendering those services, both of the payees used their technical knowledge, experience and skill in specialized field which is not in possession of an ordinary man; therefore the payment made by assessee to them were falling within the meaning of FTS as defined in Explanation 2 to section 9(1)(vii), hence those payments were chargeable to tax in India. When the AO show-caused assessee seeking explanation in the matter, the assessee submitted a reply claiming that M/s Tethys and M/s CTC are independent consultants; they operate in their own countries; they do not render any service in India; and they do not have any agent or PE in India; therefore payments made to them were not chargeable u/s 9(1)(vii). However, the AO was not satisfied with submission of assessee who held that by virtue of Explanation below Section 9, the income of the nature covered in section 9(1)(vii) i.e. “FTS” is deemed to accrue or arise in India irrespective of whether or not (i) the non-resident has a residence/place of business/ business connection in India; or (ii) the non-resident has rendered services in India. Accordingly, the AO rejected assessee’s reply and held liable for TDS. The assessee carried matter in first appeal but could not succeed.

10. Before us, Ld.AR for assessee neither claimed that the impugned payments do not fall in the definition of “FTS” prescribed in Explanation 2 to section 9(1)(vii) nor even claimed that the payees did not render service in India or the payees do not have any agent or PE in India. Ld. AR raised certain other contentions [which were also taken before CIT(A)] which Ld. DR opposed. After hearing both sides, we present our analysis as under:

- (i) Firstly, Ld. AR argued that assessee has made impugned payments to M/s Tethys and M/s CTC for the purpose of establishing a branch or establishment outside India and thereby create a source of income

outside India, hence the assessee's case is covered by the exception prescribed in **emphasized portion** of section 9(1)(vii)(b) re-produced earlier i.e. within the expression "except where the fees are payable for the purposes of making or earning any income from any source outside India" occurring in section 9(1)(vii)(b). To establish this, Ld. AR relied upon (a) Agreement with M/s Tethys/Report of M/s CTC, and (b) one Certificate dated 11.09.2017 placed in Paper-Book.

Referring to Agreement with M/s Tethys placed at Page 46-55 of Paper-Book, Ld. AR carried us to 'geographical clause' which states *"The geographical scope for the market research report will be world-wide though key focus will be on the European and Asian manufacturers"*. Then, Ld. AR carried us to a list of manufacturers of different countries in respect of which research is conducted by M/s Tethys. Referring to the Report of M/s CTC at Page 75-100 of Paper-Book, Ld. AR submitted that it is a report of prospective customers. Thus, Ld. AR submitted that the impugned Agreement/Report have been obtained to identify customers outside India, which is a clear pointer that the assessee intended to set up establishment outside India. We have carefully examined the impugned Agreement / Report but could not find any clause or mention therein which could suggest that the exercise was undertaken with an intent to set up any establishment outside India. The CIT(A) has also noted *"The appellant may make exports outside India, therefore the source of receipt of the appellant can be from outside India but the appellant has confused the same with the source of income."*

Next document relied upon by Ld. AR in support of his contention is a Certificate dated 11.09.2017 which, according to Ld. AR, proves that the assessee wanted to set up an establishment outside India. For the sake of immediate reference, we re-produce below this document:

PERMALI WALLACE PRIVATE LIMITED

REGISTERED OFFICE : OPPOSITE RBI, HOSHANGABAD ROAD, BHOPAL- 462011 INDIA

TEL: +91-755-2550085, 2555633, 4049100

EMAIL: info@permaliwallace.com, contact@permaliwallace.com Website: www.permaliwallace.com

CIN: U02001MP1961PTC000000



for FTS

To whom so it may concern

We state that, in 2013-14, our Company had a plan and was considering to enter globally to expand our business in overseas market (abroad outside India) either by establishing a branch or by a suitable tie up abroad from where we can expand our business globally and also can export the goods / various items from overseas branch or with the help of tie up with some body or associates and thereby also had a plan to establish a source outside India for earning income there from for which we availed services of CTC Credit Management Co. Ltd. of China and Tethys Ventures Pte Ltd. Singapore and obtained a report for the purpose.

Place : Bhopal
Date : 11/09/2017

For Permal Wallace Pvt. Ltd.

For PERMALI WALLACE PVT.LTD.

Signature

Authorized Signatory

Name & Designation of the person signing
the Certificate With Company/ entity's Seal
/ Stamp.



On perusal, we straightway find that it is not a Certificate at all; it is just a self-serving declaration made by assessee's director. Further, this so-called certificate dated 11.09.2017 has been prepared after passing of order dated 08.04.2016 by AO and it was submitted to CIT(A) during first appeal for the first time. Interestingly, in making this so-called certificate, which is actually a self-made declaration, the assessee's director has used phraseology to accommodate the **emphasized portion** of section 9(1)(vii)(b). Obviously, it is drafted just to take the benefit of exception provided in **emphasized portion** of section 9(1)(vii)(b). We are afraid that this self-serving declaration made by assessee himself can be taken as evidence to prove assessee's claim. We also find that no independent evidence whatsoever has been brought on record to show the assessee's intention to establish, or, to show the factum of actual establishment of any source of income outside India as being claimed. Ld. CIT(A) has also passed following order:

"The argument of the appellant has been duly considered but the same is rejected for the following reasons. The appellant has brought nothing on record to even vaguely suggest that it was contemplating to establish a branch. It is an after-thought and self-serving document. It is a failed attempt of the appellant to fall under the exception clause of Section 9 of the Act by having source outside India. The appellant itself had claimed that the payments were made towards market research report to target new overseas customers. However, when it was realized by the Appellant that this would not lead to source from outside India to be covered under exception clause of Section 9 of the Act, the appellant has changed its stand and is claiming that it wanted to set up a branch outside India. This is an effort to fall under the definition of source from outside India. The appellant has not submitted any cogent evidence as to its plan to set up a branch outside India. In the absence of any supporting documentary evidence, this argument is rejected.

There is no force in the argument of the appellant that its case is covered under exception provided in section 9(1)(vii)(b) of the Act. This ground is dismissed."

We are in full agreement with the order of Ld. CIT(A). Therefore, the assessee's contention is rejected.

- (ii) Secondly, Ld. AR argued that the C.A. has given certificate in Form No. 15CA, sample copies placed at Page No. 57 to 58 of Paper-Book, wherein it is certified that the payment made by assessee does not attract TDS. In our considered view, such certificate is neither binding nor conclusive for tax-authorities who are free to take their own decision on analysis of facts.
- (iii) Lastly, Ld. AR relied upon decision of ITAT, Ahmedabad Bench in **Marck Biosciences Ltd. Vs. ITO, ITA No. 203/Ahd/2014 order dated 28.03.2017** where it has been held that the taxability of “FTS” is attracted only when “make available” clause is satisfied. There is no quarrel with this settled proposition. But, when the Ld. AR raised this point, the Bench immediately hinted that the “make available” clause is available only in terms of Article 12 of Double Taxation Avoidance Agreement (DTAA). However, Ld. AR did not make any effort to prove that such clause was actually available in assessee’s case. We understand that if the benefit of “make available” clause is available to assessee, the assessee would not be liable to TDS. Since this point, which is quite substantial, needs a probe by AO, we think it appropriate to remit the issue of payments to M/s Tethys and M/s CTC to the file of AO for limited examination of availability of “make available” clause to assessee. The AO shall give opportunities to assessee to make necessary explanation in this regard and thereafter take a final call without being influenced by his previous decision.

Issue No. (i)(b) of AY 2014-15 - Payment of ‘FTS’ to M/s Fisher + Rucelle, Switzerland:

11. The AO has dealt these payments in Para 9 of order. He observed that the assessee made a total payment of Rs. 3,15,36,227/- for purchase of machinery which included charges of Rs. 10,47,750/- for installation of that machinery in India. The AO examined documents and observed that there was a separate mention of the amount of EUR 15,000 for “*installation 4*

travelling days and 15 working days” in purchase-order dated 14.02.2012. Similarly, in another purchase-order dated 28.08.2012, there was a remark mentioning *“installation and commissioning will be done by you”*. Further, in Performa Invoice dated 08.02.2012 and Commercial Invoice dated 14.09.2012, there was a separate mention of EUR 15,000 for *“installation 4 travelling days and 15 working days”*. The AO further observed that installation and commissioning service was rendered in India and it requires technical knowledge, experience and skill in specialized field which is not in possession of an ordinary man; therefore the payment of installation charges was in the nature of “fee for technical service (FTS)” as defined in Explanation 2 to Section 9(1)(vii). When the AO show-caused the assessee seeking explanation, the assessee submitted a reply claiming that it was a case of purchase of machinery on principal-to-principal basis; that the payee supplied machinery from outside India; and that the purchase price of machinery was ‘inclusive’ of installation charges; therefore section 9(1)(vii) had no application at all. The assessee also submitted that the foreign supplier had deputed his technical persons for installation and no money was separately paid on that account. However, the AO was not satisfied with submission of assessee who insisted that the amount of installation charges was separately mentioned in all documents. Ultimately, the AO rejected assessee’s reply and held liable for TDS. The assessee carried matter in first appeal but could not succeed.

12. Before us, Ld. AR for assessee submitted that the transaction of purchase of machine and installation thereof is a composite-transaction/package-deal and it was the responsibility of the non-resident payee to install machine, therefore we have to look at final price of Rs. 3,15,36,227/- and cannot segregate installation charges out of it. Alternatively, Ld. AR contended that the non-resident payee had borne 19,000 EUR equivalent to Rs. 13,90,015/- whereas the assessee has paid only 15,000 EUR equivalent to Rs. 10,47,750/-. Thus, the payee has incurred loss on installation activity. To establish the factum of loss, the

assessee filed documentary evidences in the form of (i) a Letter dated 25.05.2016 of payee confirming that they have incurred more expenses than collection from assessee, and (ii) air tickets of the personnel. These documents were filed to CIT(A) during first-appeal and also before us at Page No. 69-74 of Paper-Book. Ld. AR carried us to these documents and to show that there is no income element in the hands of payee and the EUR 15,000 paid by assessee was just a reimbursement of actual cost to the payee, in fact much lesser than actual cost incurred by payee. In this regard, Ld. AR also relied upon decision of **Hon'ble Supreme Court in Director of Income-tax (IT)-I Vs. A.P. Moller Maersk AS, Civil Appeal No. 8040 of 2015** to support the proposition that TDS is not applicable in case of mere reimbursement of expense, if there is no income. The relevant para of judgement is re-produced below:

"11. Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as fee for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is re-emphasised that neither the AO nor the CIT(A) has stated that there was any profit element embedded in the payments received."

13. Ld. DR for revenue strongly supported orders of lower-authorities. He carried us to the findings made by CIT(A) on Page No. 35 and 37 of order. He submitted that the AO has analysed documents of assessee and found that the installation charges are separately mentioned. He submitted that both of the lower-authorities have rejected the claim of composite-contract/ package-deal made by assessee. He submitted that the service has been rendered in India and therefore the transaction is directly taxable in India. Accordingly, he urged to uphold lower-authorities' action.

14. We have considered rival contentions raised by both sides and perused the orders of lower-authorities as also the documents filed in Paper-Book to which our attention has been drawn. At first, we find that it is an

admitted fact that the installation servicewas provided in India, therefore the income accrued in India. However, the assessee's claim that there is no income earned by payee and there is only actual reimbursement which does not require TDS, deserves attention in the light of decision of Hon'ble Supreme Court. In this regard, when we look into the orders of lower-authorities, we find that the assessee has raised this claim even before CIT(A). Therefore, on Page No. 32, the CIT(A) has noted *"In support of the claim, the AR submitted additional evidence in the form of the Statement and Copies of air tickets for travelling undertaken by the person of the Company NR Fisher + Rucle AG to establish that the non-resident entity has incurred loss on this count"*.That means, the evidences filed by assessee were to CIT(A) were newer evidences which had not been examined by AO. Then, the CIT(A) has also made following observation on this very claim raised by assessee before him:

"The contention of the appellant that the non-resident has incurred more expense towards installation than what was paid to them is immaterial in this case. In the instant appeal, the tax liability is restricted to TDS on the payment made towards fees for technical service. The non-resident company has not given complete details regarding the project undertaken and the work details of the employee while in India. In the absence of complete picture of work performed and project undertaken, any expenditure of the non-resident entity towards salary of its employee cannot be claimed against an isolated transaction in determining TDS liability. Therefore, this argument of the appellant that the non-resident entity has incurred more expenditure than the payment towards INSTALLATION SERVICE does not help the case of the appellant."

Therefore, following the decision of Hon'ble Supreme Court relied upon by Ld. AR, although we accept in principle that if there is mere reimbursement and no income element in the hands of payee, TDS is not required. But at the same time, the evidences supplied by assessee need an apt verification by AO. Hence, it is most appropriate in the situation to remit this issue also back to AO for limited verification of the factual aspect and thereafter take a final call. We order accordingly.

15. At this stage, we would like to make a mention that the CIT(A), while dealing this issue, has categorically mentioned on Page 34 and Page 37 of his order, that prior to 2001 'make available' clause was available in India-Switzerland DTAA but after amendment of DTAA in 2001 and subsequent revision in 2010, this clause is not available. Therefore, while deciding this issue, the AO is not required to go into the aspect of 'make available' clause.

Issue No. (i)(a) of AY 2015-16 & (i) of AY 2016-17- Payment for 'purchase of timber' to M/s Husk:

16. Ld. AR drew our attention to Para 5-6 of the order of AO and submitted that the AO has invoked section 195 read with section 9(1)(i). Then, he carried us to the provision of section 195 to show that the requirement of TDS under that section arises only if the assessee pays or credits "*any sum chargeable under the provisions of this act*". Thereafter, he carried us to section 9(1)(i) which prescribes the chargeability/taxability of 'business income' in India. He submitted that in the present case, section 9(1)(i) is not applicable for the certain reasons, namely (i) The AO has wrongly observed that the contracts relating to impugned purchase-transactions were concluded by Mr. Deshal Merchant, agent of M/s HSK; the fact is that Mr. Deshal Merchant had no such authority and the contracts were actually concluded by M/s HSK; (ii) Alternatively, Mr. Deshal Merchant was an agent of "independent status" and benefit of Proviso to Explanation 2 to section 9(1)(i) applies. Ld. AR submitted that the assessee made these claims before AO and also submitted a few documents in support but the AO did not consider those documents properly. Ld. AR further submitted that the AO is claiming to have issued notice dated 07.03.2016 u/s 133(6) to M/s Deshal Merchant and received reply from him and based upon those replies, the AO has drawn adverse conclusions but those replies were never brought to the notice of assessee and the assessee came to know only from AO's order. Relying upon the decision of Hon'ble Supreme Court in **Andman Timber Industries Vs. CCE (CA No. 4228 of**

2006), Ld. AR submitted that there had been a serious violation of the principle of natural justice. At that stage, the Bench posed a question to Ld. AR – Why not the replies of Mr. Deshal Merchant be excluded and still the case of assessee be decided on the basis of documents? Ld. AR instantly submitted that the assessee has moved a application dated 27.06.2019 supported by affidavit, under Rule 29 of ITAT Rules, 1963, for admission of additional evidences;those additional evidences have to be considered.

17. We firstly re-produce the application filed by assessee:

PERMALI WALLACE PRIVATE LIMITED

REGISTERED OFFICE : OPPOSITE RBI, HOSHANGABAD ROAD, BHOPAL- 462011 INDIA

TEL: +91-755-2550085, 2555633, 4049100

E-mail : info@permaliwallace.com, contact@permaliwallace.com Website: www.permaliwallace.com



CIN: U02001MP1961PTC0009

Before

The Hon'ble Income Tax Appellate Tribunal, Division Bench, Indore.

Appeal No. 550,551 and 552/INDORE of 2018

In the case of

PERMALI WALLACE PVT. LTD. Versus ITO (IT & TP), Bhopal

(APPELLANT)

(RESPONDENT)

Appeal against order passed U/s. 201(1)/201(1A) r.w.s.195 of the Act dtd.08.04.2016 passed by the ITO (IT & TP) BHOPAL for A.Y. 2013-14, 2014-15 and 2015-16.

An application U/r. 29 of the ITAT Rules, 1963 :-

In the matter of above appeal, WE most respectfully pray the Hon'ble ITAT to allow to furnish the additional evidences contained in Part II. of the paper book since,

- (a) Due to the circumstances beyond control of the appellant Company, it was prevented from producing the evidences as the same could not be furnished by it before the Id. ITO and CIT(A) since for the same it had to depend on the respective Non-resident entities/ Companies and others from whom the details were to be obtained,
- (b) The evidences sought to be produced are so much relevant to the grounds of appeal that without considering the same, the appeal cannot be decided judiciously and hence, the same are required to be admitted and considered in the interest of justice and for observance of natural rules of justice and we pray for the same.
- (c) The authorities below decided the case without giving sufficient opportunities to the assessee/appellant to adduce evidences on the points under appeal.
- (d) Affidavit in support of the above and confirming the above facts sworn in by Mr. Mahesh Vithaldas, for and on behalf of the appellant company PERMALI WALLACE PVT. LTD., as its director is being submitted herewith.

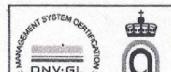
In view of the above, I humbly pray the Hon'ble Bench to kindly consider our prayer sympathetically and allow us to lead the additional evidences in the interest of justice and oblige. For and on behalf of, appellant company

PERMALI WALLACE PVT. LTD.

Signature

(Mahesh Vithaldas)
Director

Ahmedabad.
Dtd.27/06/2019



18. Now, we also re-produce the "Index" of 210 pages of additional evidences, serially numbered from 108 to 317, filed by Ld. AR:

Before
The Hon'ble Income Tax Appellate Tribunal, Bench "----", Indore.
Appeal No. 550 , 551,,552/INDORE of 2018
in the case of
PERMALI WALLACE PVT. LTD. Versus ITO ((IT & TP), Bhopal
(APPELLANT) (RESPONDENT)
Appeal against the order passed U/s. 201(1)/201(1A) r.w.s. 195 of the Act dtd.08.04.2016 passed by the ITO (IT & TP),
Bhopal for A.Y. 2014-15, A.Y. 2015-16 and order dtd.25/01/2017 for A.Y. 2016-17.
INDEX

Sr. No.	Particulars	A.Y. 2014-15	A.Y. 2015-16	A.Y. 2016-17	
		Page No.	Page No.	Page No.	
	ADDITIONAL EVIDENCES				
1	Copies of Annual returns of Saag Paryay Vitran under the GVAT Act,2003 for the years 2013-14 to 2016-17		108 127	108	127
2	VAT No. & CST TIN under GVAT Tax in respect of Saag Paryay Vitran and subsequent change in the name of Merchant Timber Link LLP under GST with its GSTIN /UIN		128 130	128	130
3	Constitution of Merchant Timber link LLP, details of designated partners, their profit sharing pattern		131 135	131	135
4	copy of audited Financial statements of Merchant Timber link LLP		136 148	136	148
5	Ack. of furnishing of returns of income and Computation of income in the case of Mr. Deshal Merchant for A.Y.2014-15, 2015-16 and 2016-17		149 161	149	161
6	Certificate for F.Y.2015-16 FROM Merchant Timber Ink LLP DTD.30/09/2019		162 162	162	162
7	Certificate for F.Y.2014-15 FROM SAAG PARYAY VITRAN DTD.30/09/2019		163 163	163	163
8	Copies of the relevant ledger account of HSK, Contract Notes, Purchase Order and the invoices along with extract of copy of bank statement with State Bank of India wherein payment appears:		165 317	165	317

19. On perusal of case records, we find that the AO has filed two separate remand-reports both dated 24.08.2020, one for AY 2014-15 & 2015-16 and other for AY 2016-17. These remand-reports are identical in content; therefore it would be sufficient to re-produce only one of them:

①

ITO(IT & TP), Bhopal |
Remand Report- M/s Permal Wallace Pvt. Ltd., Bhopal |



Government of India
Ministry of Finance (Department of Revenue)
Income Tax Department
Office of the Income Tax Officer (IT & TP)

48-Arcera Hills, Aayakar Bhawan, Hoshangabad Road, Bhopal - 462011

F.No. ITO(IT & TP)/BPL/Remand Report/PWPLL/2020-21/3706 Dated: 24/08/2020

To,
The Addl. Commissioner of Income Tax (Sr. AR),
Income Tax Appellate Tribunal,
C.G.O. Building, 2nd Floor,
A-Wing, White Church Road,
Indore (MP).

Sir,

Sub: Remand Report in the case of M/s Permal Wallace Private Limited,
Bhopal for A.Yrs 2014-15 and 2015-16-regarding.

Kindly refer to your letter's F. No. Sr. (Dr)/ITAT/Ind/2020-21/74, dated
30/07/2020 received to this office on 04/08/2020 for the above.

2. In this connection, it is submitted that the assessee-deductor is engaged in manufacturing of wood veneer based composite material for electrical insulation and engineering applications. The person is responsible for deducting tax at source under Chapter XVII of the Income-tax Act, 1961 and it is an assessee-deductor for the purpose of tax deductible at source (TDS) and payable to Central Government account under the Act. As per the available of the records, this office was issued various letters to the assessee i.e. on 26.10.2015, 17.11.2015, 01.01.2016 for verification of payments made to non-residents during the F.Y. 2013-14 and 2014-15 without deduction of TDS u/s 195 of the Act and also, show cause notices were issued to the assessee on 10.02.2016 and 07.03.2016 for treating it as assessee in default u/s 201(1)/201(1A) for not deducting TDS u/s 195 of the Act, 1961 on various payments made to different non-residents for technical services and business income during F.Y. 2013-14 and 2014-15. Apart from this, it is also pertinent to mention here that as per

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ITO(IT & TP), Bhopal
Remand Report- M/s Permal Wallace Pvt., Ltd., Bhopal

the order sheet dated 02/12/2015, 16/12/2015, 15.01.2016, there were several details/information/documents called for from the assessee during the hearing relating to payments for foreign remittance during the F.Y. 2013-14 & 2014-15. Thus, due and adequate opportunity was provided to the assessee before passing the order u/s 201(1)/201(1A) of the Act and finally order was passed u/s 201(1)/201(1A) of the Act on 08/04/2016 according to the merit of case for F.Y. 2013-14 & 2014-15.

Further, on perusal of application under rule 29 of the ITAT Rules, 1963 has been submitted by the assessee before your honour, the following facts have been observed and discussed here in under, point wise-

(a). Due to the circumstances beyond control of the appellant company, it was prevented from producing the evidences as the same could not be furnished it before the Ld. ITO and CIT(A) since for the same it had to depend on the respective Non-resident entities/Companies and others from whom the details were to be obtained.

Comment of AO: It is submitted that TRC and from IOF should be obtained by deductor before making payment to the foreign company/non-resident and deductor assessee company failed to do so. In this case, proceedings was started on 26.10.2015 and order u/s 201(1)/201(1A) was passed on 08.04.2016. Before passing the order, the adequate opportunities were provided to the assessee as mentioned in para no. 2 above.

(b). The evidences sought to be produced are so much relevant to the grounds of appeal that without considering the same, the appeal cannot be decided judiciously and hence, the same are required to be admitted and considered in the interest of justice and for observation of natural rules of justice and we pray for the same.

Comment of AO:- Nothing to say on this point.

(c). The authorities below decided the case without giving sufficient opportunities to the assessee/appellant to adduce evidences on the point under appeal.

Comment of AO:- According to the Para No. 02 as mentioned above, the adequate opportunities were provided to the assessee before passing the order and also submitted that in this case, show cause notices u/s 201(1)/201(1A) of the Act were issued on 10.02.2016 & 07.03.2016 and order passed u/s 201(1)/201(1A) on

Page 2 of 3

3

ITO(IT & TP), Bhopal
Remand Report- M/s Permali Wallace Pvt., Ltd., Bhopal

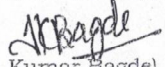
08.04.2016. Vide show cause notice dated 10.02.2016, the assessee was required to submit the copy of TRC & 10F. In compliance to the same, the counsel of the assessee himself requested vide letter dated 18.02.2016 to adjourn the hearing till the first week of March, 2016 which was duly considered and granted by the then AO. However, the assessee failed to produce the same before passing the order u/s 201(1)/201(1A) of the Act on 08.04.2016.

In view of the above, it is therefore requested that additional evidences submitted during the Appellate proceeding may not be admitted in terms of Rule 46A as adequate time and opportunities were provided to the assessee and despite providing several opportunities, the assessee failed to submit the copy of TRC and 10F in respect of recipient company during the proceedings u/s 201(1)/201(1A) of the Act.

Submitted for your kind perusal and consideration.

Encl: Copy of all notices and order sheet.

Yours faithfully,


(Jitendra Kumar Bagde)
Income Tax Officer(IT & TP),
Bhopal

Copy for kind information to-

- 1, The Jt. Commissioner of Income-tax (IT), Ahmedabad.


Income Tax Officer(IT & TP),
Bhopal

20. It can be seen that the AO has requested not to admit additional evidences on the ground that adequate time and opportunities were provided to the assessee and despite several opportunities, the assessee failed to submit these evidences during proceeding before him. However, Ld. AR drew us to the submission made by assessee in Point No. (a) of application under Rule 29, re-produced above, that the assessee could not file these evidences before AO because of the reason that the assessee was dependent upon non-residents and others for collection of evidences. Referring to Point No. (b) of application, Ld. AR urged that the evidences are much relevant and without considering them, the issues cannot be decided judiciously. Ld. AR carried us to these evidences briefly so as to apprise the nature of evidences. Ld. AR also relied upon decision of Hon'ble Jurisdictional High Court of M.P. in **CIT Vs. Shiya Dawoodi Bohara Jamat** where it has been held that additional evidences can be filed at appellate stage.

21. On perusal of remand-report filed by revenue, we find that the AO has not submitted any comment on merits of the additional evidences filed by assessee, instead the AO has raised objection again admission of evidences. But, however, we find that the reasoning given by assessee in the application which has led to non-production of evidences at earlier stage, are convincing. Further, we also find that the evidences go the root and as claimed by assessee, are quite substantial for proper adjudication of assessee's grievances. Therefore, we admit these evidences and we also find it most appropriate to remand this issue back to the file of AO for adjudication afresh. The AO shall consider these additional evidences and also any other evidence as the assessee may choose to file before him. Further, the AO shall also give an opportunity to assessee to make his submissions in respect of the replies made by M/s Deshal Merchant to the notice u/s 133(6). Ordered accordingly.

Issue No. (ii) of all years - Grossing up u/s 195A:

22. In this issue, the assessee claims that the AO has wrongly invoked section 195A and grossed up all of the aforesaid payments as dealt in foregoing issues. Ld. AR submitted that the grossing-up u/s 195 is applicable only if and where, under an agreement or arrangement, the tax chargeable on the payments made by assessee is to be borne by the payer (i.e. assessee). He submitted that in the present case, the assessee does not have any agreement or arrangement for bearing the burden of tax and the AO has merely presumed the same just because the assessee has failed to deduct TDS. He submitted that failure to deduct TDS is at the best a default of assessee and for that reason the department is attempting to recover the amount of TDS with interest in terms of section 201 from assessee but it is not at all a case where the assessee has agreed under any agreement or arrangement to bear the tax liability of non-resident. Ld. AR submitted that the non-residents are liable to their own tax liabilities on impugned payments, if any, in India. Therefore, in such a case, the AO has wrongly invoked section 195A which is not applicable at all. To support his contention, Ld. AR relied upon decision of **Hon'ble Kerala High Court in Asian Development Service Vs. CIT (1999) 239 ITR 713 (Ker)**.

23. However, in view of the fact that we have remanded the original issues to AO for consideration afresh in foregoing paragraphs and the AO's adjudication will have a bearing on the issue of grossing-up also, we are not answering this question at present. The AO will take a call in accordance with above decision cited by Ld. AR, in case of necessity.

Additional Issues:

24. Now we take up the additional issues raised by assessee for AY 2015-16 and 2016-17. A perusal of the issues clearly demonstrate that they are related to the payments made to M/s HSK. Since we have already remanded the issue of payments to M/s HSK to AO for consideration afresh, the

additional issues are also remitted to AO. The AO shall look into those issues and make necessary adjudication.

25. Resultantly, these appeals of assessee are allowed for statistical purposes.

Order pronounced in the open court on 09.11.2023.

sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक/Dated : 09.11.2023.

CPU/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

*Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore*