IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &F
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.6997/Mum/2019

(A.Y. 2016-17)

Dy. Commissioner of Income Tax-11(3)(1) Room No. 204, Aayakar Bhavan, M.K.Road, Marine Lines Mumbai – 400 020	Vs.	Total Oil India Pvt. Ltd. 3rd Floor, The Leela Galleria, Andheri (E) Mumbai 400 059
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACE2175M		
Appellant	..	Respondent

C.O No.57/Mum/2021

(A.Y. 2016-17)

Total Oil India Pvt. Ltd. 3rd Floor, The Leela Galleria, Andheri (E) Mumbai 400 059	Vs.	Dy. Commissioner of Income Tax-11(3)(1) Room No. 204, Aayakar Bhavan, M.K.Road, Marine Lines Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: : AAACE2175M		
Appellant	..	Respondent

Appellant by :	Niraj Sheth
Respondent by :	Ajay Kumar Sharma

Date of Hearing	30.11.2023
Date of Pronouncement	29.12.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

The appeal filed by the revenue is directed against the order passed by the ld. CIT(A)-55, Mumbai. Since the appeal filed by the revenue and cross objection filed by the assesse are based on identical facts on similar issue, therefore, for the sake of convenience both these appeals are adjudicated together.

ITA No.6997/Mum/2019

"1. *Whether on the facts and circumstances of case and in law, the Ld. CIT(A) was justified in deleting the disallowance of Rs 4.63 crores made on account of non-deduction of TDS u/s 40(a)(i) on demurrage charges ignoring the fact that these were not reimbursements and ultimately paid to a third party through a related entity?*

2. *Whether on the facts and circumstances of the case and in law, the Ld CIT(A) was justified in deleting the disallowance of Rs 4.63 crores made on account of non deduction of TDS u/s 40(a)(i) on demurrage charges ignoring the fact that these charges form part of freight income of ship owners which is chargeable to tax in India?*

3. *Whether on the facts and circumstances of case and in law, the Ld CIT(A) was Justified in deleting the disallowance of Rs 8.20 crores made on account of non deduction of TDS u/s 40(a)(i), ignoring the fact that these payments were made to group entities and not made to persons deputed in India?*

4. *Whether on the facts and circumstances of case and in law, the Ld CIT(A) was justified in deleting the disallowance of Rs 8.20 crores ignoring the fact that the group entities retained their rights over the persons deputed in India?*

5. *Whether on the facts and circumstances of case and in law, the Ld CIT(A) was justified in ignoring the decision of Hon'ble ARR in the case of Verizon Data Services India Pvt Ltd. (ARR No 856/2010) and AT & S India Pvt Ltd (2006) 287 ITR 421 wherein it was held that the reimbursement is in the nature of FTS and the fact that taxes are paid under the head 'Salaries' is of no consequence?*

6. *he appellant prays that the order of the Id. CIT(A) on the above grounds be set aside and that of the AO be restored*

7. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

2. Fact in brief is that return of income declaring total income of Rs.163,52,03,440/- was filed on 30.11.2016. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on

10.07.2017. The assessee is engaged in importing and reselling LPG and certain solvents and manufacturing and marketing of industrial and automotive lubricants. The assessment u/s 143(3) of the Act was finalised on 25.12.2018 at Rs.176,35,97,010/- after making certain disallowances. Further fact of the case are discussed while adjudicating the ground of appeal filed by the revenue.

Ground No. 1 & 2: Disallowance of Rs.4.63 crores made on account of non-deduction of TDS u/s 40(a)(ia) of demurrage charges:

3. During the course of assessment the assessing officer noticed that the assesse company has made certain payments to non-resident entities located outside India without deducting tax at source as per provisions of Section 195 of the Act. The detail of such payment made to non-resident under the head demurrage charges are as under:

Sr. No.	*Nature of Expenses/Treatment*	*Name of the party*	*Amount*
1.	*Reimbursement of Demurrage Expenses*	*SHV Gas Supply & Risk Management SAS, France*	*67,23,126*
2.	*Reimbursement of Demurrage Expenses*	*Total Oil Asia Pacific PTE Singapore*	*9,380*
3.	*Reimbursement of Demurrage Expenses*	*Exxonmobil Asia Pacific PTE Ltd, Singapore*	*65,38,747*
4.	*Reimbursement of Demurrage Expenses*	*S Oil Corporation, South Korea*	*3,13,06,400*
5.	*Reimbursement of Demurrage Expenses*	*Totsa Total Oil Trading SA, Switzerland*	*17,63,840*
Total			*4,63,41,493*

On query the assessee explained as under:

> *"1.2.1 That the demurrage charges paid to the supplier/carrier of oil is towards the delay in clearing / discharging cargo from the ship docked at the port of discharge in India. The charges are payable by the assessee to the supplier/shipping company if there is any delay in discharge of cargo over and above the free time stipulated by the Port Authority as per their rules and regulations or Charter Party agreement for transportation of*

the cargo. Thus, Demurrage paid by the assessee is in nature of reimbursement of expenses incurred by the shipping company or the supplier of goods for the payments made to Port Authorities in India.

1.2.2 That the shipping Company is required to make payment of demurrage charges for delay in discharge of cargo beyond the stipulated free time at the tune of sailing which in turn makes payment to Port Authority in India. The vessel will not be issued Port Clearance for sailing without make payment of demurrage charges to the Port. In order to recover such Port charges, the Charter Party/agreement stipulated recovery/levy of demurrage charges on the basis of supporting documents of delay and payment from the supplier and Port Authority. Thereafter, the supplier raises an invoice on the buyer (TOPIL) for such delay and makes similar payment to shipping company. Thus there is a back to back payment of demurrage charges by the recipient to shipping company and this is a case of reimbursement of expenses incurred for and behalf of the Buyer.

1.2.3 That the recipient being a non-resident, the liability to deduct tax is determined by the provisions of Section 195 ITA, 1961. Further, Section 195 provides that any person responsible for making any payment chargeable to tax under the provisions of the Act, shall at the time of payment or credit, deduct tax at source at the applicable rates. Correspondingly, section 40(a)(i) provides for disallowance of expenses on which tax has not been deducted and deposited as per the provisions of the Act

1.2.4 On conjoint reading of section 195 and 40(a)(i), it may be inferred that the Indian payer is obliged to deduct tax at source u/s 195 on payment made to Non-resident which is in nature of income chargeable to tax and pay over the tax as per the provisions of Section 40(a)(i) so as to be eligible to claim the payment as expenditure. Conversely, in case the payment to the Non-resident is not chargeable to tax either as per the provisions of the Act or the DTAA (Double Tax Avoidance Agreement), the Indian payer is not obliged to deduct tax and consequently there can be no dis-allowance u/s. 40(a)(i) for non-deduction of tax at source on such payments.

1.2.5 Assuming that there does arise a liability to pay tax u/s. 44B & 172 of the Act, Section 90(2) provides that wherever India has entered into Double Tax Avoidance Agreement with the country for relief of tax or avoidance of double tax, the provisions of the Income Tax Act will apply to the extent it is beneficial to the assessee. For e.g. Article 8 of India-Singapore treaty provides that profits derived by an enterprise from operations of ships or aircraft in international traffic are taxable in the country of residence of the enterprise. It is not dispute that freight paid to the Shipping Company is profits from operation of ship in international traffic nor is it disputed that Article 8 of the respective treaties is not applicable. Therefore, the companies being resident of countries with which India has DTAA, India does not have the jurisdiction to tax the profit arising out of the shipping business through international traffic. Hence, the recipient is not liable to tax in India. Therefore, provisions of Section 195 are not applicable and the assessee was not liable to tax."

The AO has not agreed with the submission of the assessee. The assessing officer was of the view that freight income generated in India was taxable income under the income tax act hence any payment of freight to a non-resident will subject to TDS u/s 195 of the Act. He also stated that if ship owner has paid taxes u/s 172 of the Act then the provision of Sec. 195 will not be applied. He further stated that in the case of the assessee non-resident ship owner had not included the demurrage charges while paying taxes u/s 172 of the Act, therefore, the assessee was liable to deduct tax u/s 195 of the Act. Accordingly, the AO has disallowed an amount of Rs.4,63,41,493/- as per the provisions of Sec. 195 r.w.s 9(1)(vii) and Sec. 40(a)(i) of the Act.

4. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee after following the decision of ITAT, Mumbai in the case of the assessee itself for assessment year 2010-11.

5. During the course of appellate proceedings before us the ld. D.R supported the order of lower authorities.

On the other hand, the ld. Counsel submitted that identical issue on similar fact has been adjudicated by the ITAT, Mumbai in the case of the assessee itself for assessment year 2010-11 to 2015-16 and also placed copy of these order in the paper book.

6. Heard both the sides and perused the material on record. During the year under consideration the assessee had claimed demurrage charges claimed as reimbursement to various non-resident entities as per detail given above in this order. The assessee submitted that demurrage charges was made on cost to cost basis without any mark-up and had no element of income, therefore, no taxes was required to be deducted u/s 195 of the Act on such reimbursement. With the assistance of ld. representative we have also perused the decision of the ITAT, Mumbai vide ITA No.4135/Mum/2016 for A.Y. 2010-11 dated

09.07.2019. The relevant extract of the part of the decision of ITAT which was adjudicated in favour of the assessee is reproduced as under:

"8. On appraisal of the above said finding, we noticed that the matter of controversy has been decided by the CIT(A) on the basis of decision of Bombay High Court in the case of Orient (Goa) (P) ltd., [20091 185 TaX 111311 131 Bombay. But the situation has been changed now specifically in view of the decision of Bombay High Court in the case of CIT Vs. Dempo and Co. P. Ltd. (381 ITR 303). The relevant finding has been given in para no. 46 to 54 which is hereby reproduced as under.: -

> *"46. A bare perusal thereof would indicate as to how this provision covers the case of an assessee who is a non-resident and engaged in the business of operation of ships. That stipulates a sum equal to 7½% of the aggregate of the amount specified in sub-section (2) of section 44B as deemed to be profits and gains of such business chargeable to tax under the head "Profits and Gains of Business or Profession". It is the explanation which refers to the demurrage and for the purpose of sub-section (2) of SRP 62/ 79ITXA989.15.doc section 44B. It clarifies that the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature shall for the purposes of sub-section (1) deemed to be the profits and gains of the business, namely, shipping business chargeable to tax under that head. The amounts which are paid or payable whether in or out of India to the assessee or to any person on his behalf on account of carriage of passengers, livestock, mail or goods shipped at a port in India and the amount received was deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India shall be deemed to be the profits and gains. On that the tax is payable by virtue of subsection (1) of section 172. That has to be levied and recovered in terms of the sub-sections of section 172 of the Income Tax Act.*
>
> *Once section 172 falls in Chapter XV titled as Liability in Special Cases - Profits of Non-residents, then section 172 is referable to section 44B. Both provisions open with a nonobstante clause and whereas section 44B enacts special provisions for computing profits and gains of shipping business in case of non-residents section 172 dealing with shipping business of non-residents is SRP 63/ 79ITXA989.15.doc enacted for the purpose of levy and recovery of tax in the case of any ship belonging to or chartered by a non-resident operated from India. These sections and particularly section 172 devise a scheme for levy and recovery of tax. The sub-sections of section 44B denote as to how the amounts paid to or payable would include demurrage charges or handling charges or any other amount of similar nature. The sub-sections of section 172 read together and harmoniously would reveal as to how the tax should be levied, computed, assessed and recovered. Therefore, there is no warrant in applying the provisions in chapter XVII for collection and recovery of the tax and its deduction at source vide section 195.*

47. To our mind, the Division Bench judgment in Commissioner of Income-tax vs. Orient (Goa) Pvt. Ltd. seen in this light does not, with greatest respect, take into account the scheme and setting as understood above. There need not be apprehension because there is no escape from the levy and recovery of tax. The tax has to be levied and collected. The ship cannot leave the port or if allowed to leave any port in India, it must either pay or make arrangement to pay the tax. Hence, the apprehension of SRP 64/ 79 ITXA989.15.doc avoidance or evasion both are taken care of by the legislature.

That is how advisedly the legislature cast the obligation to deduct tax at source on the person responsible to make payment to a non-resident in shipping business.

48. The resident assessee contended before the Division Bench in Orient (Goa) (supra) as well as the Division Bench which made the referring order that section 172 of the Income Tax Act has a bearing and an important one on the obligation to deduct tax at source.

Therefore, it is the recipient's position and the perspective in which the recipient's income would be taxed will have to be borne in mind. The non-resident shipping company in respect of it's income would be in a position to rely upon section 44B and consequently section 172. However, we do not see how there is an obligation to deduct tax at source on the resident assessee/Indian company before us. While computing the income of the non-resident Indian / foreign company, assistance can be derived by such non-residents from section 44B if they are in shipping business. It would also be in a position to rely upon section 172 but the responsibility of the person making payment to a non-resident in sub-section (1) of section 195 cannot be SRP 65/ 79 ITXA989.15.doc avoided in the manner set out in other cases. The scheme as above operates only to cases covered by section 172 of the IT Act and none else.

49. The term "non-resident" means a person who is not a resident as per section 2(30) of the Income Tax Act and for the purposes of sections 92, 93 and 168, includes a person who is not ordinarily a resident within the meaning of clause (6)of section 6.

The term "person" includes an individual, a HUF, a company, firm and every artificial juridical person not falling within any of the preceding sub-clauses of clause (31) of section 2. By section 2(23A), a foreign company is defined to mean a company which is not a domestic company. Hence, 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", would have to deduct the tax thereon at the rates in force.

50. The view that we are taking is based on the enunciation and exposition of law by the Hon'ble Supreme Court of India, firstly in SRP 66/ 79 ITXA989.15.doc the case of Union of India vs. Gosalia Shipping (PVT.) Ltd. reported in (1978) 3 SCC 23 . Insofar as section 172 of the IT Act as it stood then, its ambit and scope, the Hon'ble Supreme Court of India held as under:- ".....

3. Section 172 occurs in Chapter XV which is entitled "Liability in special cases" and the sub-heading of the section is "Profits of non- residents from occasional shipping business". It creates a tax liability in respect of occasional shipping by making a special provision for the levy and recovery of tax in the case of a ship belonging to or chartered by a non-resident which carries passengers, livestock, mail or goods shipped at a port in India. The object of the section is to ensure the levy and recovery of tax in the case of ships belonging to or chartered by nonresidents. The section brings to tax the profits made by them from occasional shipping, by means of summary assessment in which one-sixth of the gross amount received by them is deemed to be the assessable profit.

Before the departure of the ship, the master of the ship has to furnish to the Income-tax Officer a return of the full amount paid or payable to the owner or charter on account of the carriage of passengers, goods etc., shipped at the port in India since the last arrival of the ship at the port. In the event that, to the satisfaction of the Income-tax Officer, the master is unable so to do, he has to make satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf. A port clearance cannot be granted to the ship until the tax assessable under the section is duly paid or satisfactory arrangements have been made for the payment thereof.

4. The assessee in this case is the Aluminium Company of Canada which had time chartered the ship and on whose behalf its shipping agent, the respondent, had executed the guarantee bond. Since the Company is a non-resident and the ship carried goods which were shipped at a port in India, the conditions specified in subsection (1) are satisfied and the provisions of Section 172 will apply for the purpose of levy of tax, notwithstanding anything contained in the other provisions of the Income-tax Act.

5. The charging provision is contained in sub-section (2) of Section 172, the relevant part of which provides that where a ship belonging to or chartered by a non-resident carries goods shipped at a port in India, one-sixth of the amount paid or payable "on account of such carriage" to the owner or the charterer or to any person on his behalf shall be deemed tobe income accruing in India to the owner or charterer on account of such carriage. The ship was delivered to the time-charterers at Betul, Goa, whereupon they loaded it with their own goods to the fullest capacity of the ship. Under the charter-party, the charterers had agreed to pay to the owners of the ship a sum of 4.50 U. S. dollars per ton on the total dead weight carrying capacity, per calendar month, commencing on and from the date of the delivery of the ship. The short question for consideration is whether the amount which the time-charterers had agreed to pay to the owners of the ship was payable "on account of" the carriage of goods....."

51. Similarly, in the case of A. S. CLITTRES D/5 I/S GARONNE AND OTHERS vs. COMMISSIONER OF INCOME TAX, KERALA-II reported in (1997) 9 SCC 546 , once again, after reproduction of section 172 of the IT Act, the Hon'ble Supreme Court of India SRP 68/79ITXA989.15.doc explained the scheme of the section in the following words:-

"7. The Scheme of Section 172 of the Act appears to be this: Section 172(1) of the Act gives a right to the Income Tax Officer to levy and recover tax in the case of any ship belonging to a non-resident, in a summary manner, (ad hoc assessment) notwithstanding anything contained in the other provisions of the Act. It is an absolute right conferred on the assessing authority. The assessee has no right to object to the same. Normally, this will be assessment of the assessee for the year. But, under Section 172(7) of the Act a right is given to the assessee to claim before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment, according to the provisions of the Act, in a regular manner be made. Thus, a right is given to the assessee to opt for a regular assessment although a "rough and ready" or a "summary assessment" has already been made under Section 172(4) of the Act. It is a valuable right. If the assessee exercises the right conferred on him under section 172(7) of the Act, the Income Tax Officer is bound to make an assessment of the total income of the previous year of the assessee and the tax payable on the basis thereof "should be determined in accordance with the other provisions of the Act" and any payment made under the section (earlier) "shall be treated as a payment in advance of the tax" leviable for that assessment year and the difference between the sum so paid and the amount of tax found payable by him on such assessment, shall be paid to the assessee or refunded to him. The "ad hoc" assessment made under Section 172(4) of the Act is superseded and a "regular assessment" is made as per the provisions of the Act. In such a case, it is only proper and appropriate to hold that all "the provisions" of the Act in the determination of the tax liability including the ancillary or incidental or consequential matters pertaining to it are necessarily attracted.

8. Section 172(7) of the Act provides that payment made under the section shall be treated as a payment in advance of the tax leviable for that assessment year. It only means that such payment would be treated as advance of the tax leviable. Such payments are treated on a par with advance income tax payments. It is implicit from the tenor and phraseology employed in Section 172(7) of the Act to the effect, "payment made under the section .... shall be treated as a payment in advance of the tax leviable for that assessment year" that in substance, a legal fiction is created by which the payments have been treated as advance tax. That is the purpose for which the legal fiction is created. In construing the said legal fiction, it will be proper and necessary to assume all those facts on which alone the fiction can operate. The law on the point has been stated in innumerable decisions of this Court.

In Mond. Iqbal Madar Sheikh v. State of Maharashtra (1996) 1 SCC 722 a three-number Bench of this Court stated the law thus: "....

The effect of a legal fiction by deeming clause is well known. Legislature can introduce a statutory fiction and courts have to proceed on the assumption that such state of affairs exists on the relevant date, because when one is bidden to treat an imaginary state of affairs as real he has to also imagine as real the consequence which shall flow from it unless prohibited by some other statutory provision."

(emphasis supplied) So, necessarily all the provisions in the Act in respect of the payment of advance tax will apply.

On effecting the regular assessment, if there is any excess payment made by the assessee, then the assessee would be entitled to the excess amount paid and also interest, for payments made in excess of the tax assessed. We are unable to appreciate the distinction drawn by the High Court between "advance tax" and "payment in advance of the tax" Mentioned in Section 172(7) of the Act. We hold that the distinction so drawn has no basis. The High Court has furtehr held that the payment made under Section 172(4) of the Act is not a payment of SRP 70/79 ITXA989.15.doc advance tax within the meaning of the Act, as the tax under Section 172(4) of the Act is a payment on assessment and not a payment of advance tax under the Act. We are afraid that the High Court has failed to give due effect to the language employed in Section 172(7) of the Act and the scope of the legal fiction enshrined therein. The reasoning of the High Court is rather strained as the distinction drawn is without any substance or difference. Section 172(7) of the Act provides for a regular assessment, wherein all the provisions of the Act will apply. It is not a mere provision for adjustment. The High Court was swayed by the title used in the corresponding provision of the predecessor Act (Income Tax Act, 1922 - Section 44-C), wherein there was a heading to the section - "Adjustment".

Section 172 of the Act contains no such heading. We hold that the Income Tax Appellate Tribunal was justified in holding that since the payment made under Section 172(4) of the Act is, by fiction, treated as advance tax, all the provisions in respect of the advance tax will apply and if on regular assessment made under Section 172(7) of the Act, there is any excess payment made by the assessee, then the assessee would be entitled to it and also interest thereon under Section 214 of the Act. We answer the question referred to the High Court in the affirmative, in favour of the assessees and against the Revenue. ....."

52. Lastly, in the case of GE India Technology Centre Private Limited vs. Commissioner of Income Tax and Anr. reported in (2010) 10 SCC 29 the Hon'ble Supreme Court of India had an occasion to consider the ambit and scope of section 195 of the IT Act. After reproduction of the section, as it stood at the relevant time, the Hon'ble Supreme Court of India held as under:-

"6. Under Section 195(1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the I.T. Act in the case of non-residents only and not in the case of residents. Failure to deduct the tax under this Section may disentitle the payer to any allowance apart from prosecution under Section 276B. Thus, Section 195imposes a statutory obligation on any person responsible for paying to a non- resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the I.T. Act, to deduct income tax at the rates in force unless he is liable to pay income tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums

chargeable under the provisions of the I.T. Act to which the aforestated requirement of tax deduction at source applies.

7. The tax so collected and deducted is required to be paid to the credit of Central Government in terms of Section 200 of the I.T. Act read with Rule 30 of the I.T. Rules 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under Section 201 read with Section 221 of the I.T. Act. In addition, he would also be liable under Section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

8. The most important expression in Section 195(1) consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the I.T. Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the I.T. Act.

contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the nonresident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated October 30, 1995 the CBDT has clarified that the tax deductor can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3B) of the 1922 Act.

11. While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle ofSection 195. Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions.

12. Reference to ITO(TDS) under Section 195(2) or 195(3) either by the non-resident or by the resident payer is to avoid any future hassles for both resident as well as non-resident. In our view Sections 195(2) and 195(3) are safeguards. The said provisions are of practical importance. This reasoning of ours is based on the decision of this Court in Transmission Corporation (supra) in which this Court has observed that the provision of Section 195(2) is a safeguard. From this it follows that where a person responsible for deduction is fairly certain then he can make his own determination as SRP 73/79 ITXA989.15.doc to whether

the tax was deductible at source and, if so, what should be the amount thereof.

Submissions and findings thereon 13 If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in Section 195(1). The said expression in Section 195(1)shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not so assessable, there is no question of TAS being deducted. [See : Vijay Ship Breaking Corporation and Others Vs. CIT 314 ITR 309] One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in Section 195. For example, Section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, Sections 194EE and 194F inter alia provide for deduction of tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in Section 195(1). Therefore, this Court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act.

15. Section 195(2) is not merely a provision to provide information to the ITO(TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, Section 195 SRP 74/79 ITXA989.15.doc has to be read in conformity with the charging provisions, i.e., Sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in Section 195(1).

16. The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section 195(1). While interpreting a Section one has to give weightage to every word used in that section.

While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated Code.

17. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of C.I.T. Vs. Eli Lilly & Co. (India) (P.) Ltd.

[312 ITR 225] the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the I.T. Act form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the I.T. Act. It is true that the judgment in Eli Lilly (supra) was confined to Section 192 of the I.T. Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under SRP 75/79 ITXA989.15.doc the provisions of the Act", which expression, as stated above, do not find place in other Sections of Chapter XVII. It is in this sense that we hold that the I.T. Act constitutes one single integral inseparable Code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the I.T. Act.

18. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the I.T. Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum, i.e., the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence.

The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax.

19. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the SRP 76/79ITXA989.15.doc case of the Department that Section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the ITO(TDS) of payments made to nonresidents. In other words, according to the Department Section 195(2) is a provision by which payer is required to inform the Department of the remittances he makes to the non- residents by which the Department is able to keep track of the remittances being made to non-residents outside India.

20. We find no merit in these contentions. As stated hereinabove, Section 195(1) uses the expression "sum chargeable under the provisions of the Act." We need to give weightage to those words.

Further, Section 195 uses the word `payer' and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfill the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assesseein-default.

21. The abovementioned contention of the Department is based on an apprehension which is ill founded. The payer is also an assessee under the ordinary provisions of the I.T. Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income Tax Act for the said sum as an "expenditure". Under Section 40(a)(i), inserted vide Finance Act, 1988 w.e.f. 1.4.89, payment in respect of royalty, fees for technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the I.T. Act. This provision ensures effective compliance of Section 195 of the I.T. Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the I.T. Act. In a given case where the payer is an assessee he will definitely claim deduction under the I.T. Act for such SRP 77/79ITXA989.15.doc remittance and on inquiry if the AO finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the I.T. Act then it would be open to the AO to disallow such claim for deduction. Similarly, vide Finance Act, 2008, w.e.f. 1.4.2008 sub-Section (6) has been inserted in Section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from 1.4.2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage."

53. In the view that we have taken, it is not necessary to refer the judgment of a Division Bench of the Delhi High in the case of Emirates shipping Line, FZE vs. Assistant Director of Income Tax reported in (2012) 349 ITR 493 . Suffice it to note that the view taken by the Division Bench and particularly in paras 17 and 18 of this judgment accords with the conclusion reached by us.

54. The difficulty is presented only when provisions are not read together and harmoniously so also without bearing in mind the setting and placement thereof in the chapters. These chapters of the Income Tax Act cover several aspects in relation SRP 78/79 ITXA989.15.doc to imposition, levy, assessment, collection and recovery of tax on the income specified above. To the extent contrary to above, we overrule the view in Orient Goa's case (supra). The question referred is answered accordingly. Since the question above is referred to us, having answered it, let the Appeals be now listed for hearing before appropriate Division Bench."

9. On appraisal of the above mentioned finding, we noticed that the earlier finding in the case CIT Vs. Orient (Goa) Pvt. Ltd. has been overruled by this decision, therefore, in view of the decision of Hon'ble High Court in the case of CIT Vs. Dempo (supra), we set aside the finding of the CIT(A) on this issue and allowed the claim of the assessee."

Following the decision of coordinate bench as referred above we don't find any merit in the ground no. 1 & 2 of the appeal of the revenue, therefore, the same stand dismissed.

Ground No. 3 to 5: On the issue of deleting disallowance of Rs.8.20 crores made on account of non-deduction of TDS u/s 40(a)(i) in respect of payments made to group entities and not made to persons deputed in India:

7. During the course of assessment the assessing officer noticed that assesse has made reimbursement of salary on account of availing personnel services from its associate enterprise without deducting tax. The detail of such reimbursement to the amount of Rs.820,30,029/- is as under:

Sr. No.	*Nature of Expenses*	*Name of the party*	*Amount*	*Remarks*
1.	*Reimbursement of salary*	*Total Marketing Services*	*5,89,12,384*	*TDS u/s 192*
2.	*Reimbursement of Salary*	*Total Gestion Internationale*	*2,31,17,645*	*TDS u/s 192*

On query, the assessee submitted that payment to seconded employees were made on account of salary and allowances paid by the associate enterprise to their employees who were deputed with the assessee company and subsequently, such amount was recovered by them from the assessee company. However, the AO has not agreed with the submission of the assessee. He was of the view that employees have been seconded to India for a specific purposes and the associated enterprises has retained their rights as an employer over these

employees. The AO further stated that the right and control to appoint or remove these employees was still vested with the employers which was separate from the assessee company and it cannot be said that the payment made by the assessee company to such entities having control over the employees as employer amount to reimbursement of salary paid for services rendered in India on which TDS was applicable u/s 192 of the Act. He was of the view that such payment made by the assessee is to be treated as fees paid in lieu to technical services rendered by such associate enterprise to the assessee company. Therefore, the payment made by the assessee company cannot be held to be in nature of reimbursement but the same to be taken as payment made for services rendered by associate enterprise. The same cannot be treated as mere reimbursement of expenses and provision of Sec. 195 of the Act was applicable as such payment made to the associate enterprise for availing the personnel services. Therefore, the assessing officer has disallowed the amount of reimbursement made to the associate enterprise as per provision of Sec. 195 of the Act r.w.s 9(1)(vii) of the Act and added to the total income of the assessee.

8. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assesse. The relevant part of the decision is reproduced as under:

> ***Decision***
>
> *I have considered the facts and the circumstances of the case and information produced by the Appellant available on record. The Appellant has contended that the reimbursement of personnel costs amounting to Rs.8,20,30,029 represents mere reimbursement of expenses on actual basis and there is no mark-up element in the same. Accordingly, in absence of any income element, the expenditure was not liable to tax in India and no TDS was to be deducted. Further, it has been submitted that TDS under section 192 of the Act has been deducted by the Appellant on such salary payments to the non-residents.*
>
> *The arguments have been considered and found tenable Moreover, this issue has been decided in favor of the Appellant in the preceding years i.e AY 201011 to AY 2015-16 by my predecessor/ me It has also been brought to my notice that Hon'ble ITAT has also adjudicated this issue in favour of the Appellant for*

AY 2010-11. In view of this, I find the issue squarely covered by the Hon'ble ITAT order for AY 2010-11 and the appellate orders passed by my predecessor/ me. Therefore, I direct the AO to delete the disallowance so made. This ground of appeal is allowed."

The ld. CIT(A) has allowed the appeal of the assessee by referring the decision of ITAT for assessment year 2010-11 to 2015-16.

9. During the course of appellate proceedings before the ld. D.R referred the decision of Hon'ble Supreme Court of India in the case C.C.C.E. & S.T. Bangalore Vs. Northern Operating Systems (P) Ltd. (2022) 138 taxmann.com 359 (SC). The ld. D.R has also referred the case of Hon'ble Delhi High Court in the case of Centrica India Offshore P. Ltd. Vs. CIT (2014) 44 taxmann.com 300 (Delhi) wherein the Hon'ble High Court held that where in terms of 'secondment agreement' entered into by assessee with overseas companies, employees of those companies used their technical knowledge and skills while assisting assessee in conducting its business of quality control and management, amounts reimbursed by assessee to overseas companies towards salaries of seconded employees amounted to 'fee for technical services' liable to tax in India. The ld. D.R has also referred the para 14 of the decision Hon'ble Supreme Court in the case of C.C.C.E & S.T as referred supra wherein the revenue contended in that case that the agreement with the concerned employee clearly showed that the overseas employer provided the services to its employees to the assessee for the performance of agreed task. He further stated that for a temporary period the seconded employee was only operationally under the control of the assesse.

10. On the other hand, the ld. Counsel contended that C.C.C.E. & S.T. Bangalore Vs. Northern Operating Systems (P) Ltd. (2022) 138 taxmann.com 359 (SC) is the case pertained to the service tax and in that case the assessee was to perform and provide services to foreign group company whereas the facts of the case of the assessee are

distinguishable from these case law as the assessee company has merely reimbursed the salary of the employees deputed by the associate enterprise without any mark-up on cost to cost basis. He also submitted that due taxes have already been deducted on the entire salary cost u/s 192 of the Act and provision of Sec. 195 is not applicable to these cases. He also submitted that foreign associate enterprise of the assessee company has merely provided their personnel/employees to the assessee and no services have been provided by the foreign associate enterprise. It is also contended that assessee has only availed services of employees who were on the payroll of its foreign associate enterprise. However, for the administrative convenience the employees remained on the payroll and related cost were reimbursed by the assessee to the foreign associate enterprise on a cost to cost basis. The ld. Counsel has also referred the decision of Hon'ble Delhi High Court in the case of Pr. CIT VS. Boeing (I) Pvt. Ltd. (2023) 146 taxmann.com 131 (Delhi) wherein held that Sec. 195 has no application once nature of payment is determined as salary and deduction of tax at source has been made u/s 192 of the Act. The ld. Counsel has also referred the decision of Hon'ble Karnataka High Court in the case of Flipcart Internet (P) Ltd. Vs. DCIT (IT)(2022) 139 taxmann.com 595 (Karnataka). The ld. Counsel has also referred the decision of ITAT Delhi in the case of Ernst & Young U.S. LLP Vs. ACIT (IT) (2023) 153 taxmann.com 95 (Delhi – Trib.) wherein after considering the decision of Hon'ble Supreme Court in the case of C.C.C.E. & S.T. Bangalore Vs. Northern Operating Systems (P) Ltd. (2022) 138 taxmann.com 359 (SC) held that cost to cost reimbursement on account of secondment of employees is not fees for technical services as defined under Article 12 of India USA Double Taxation Avoidance Agreement. The ld. Counsel has also referred the decision of ITAT in the case of the assessee itself for A.Y. 2017-18 and 2018-19 vide ITA No. 97 & 96/Mum/2023 dated 03.11.2023 wherein after following the earlier

decision of ITAT the issue was decided in favour of the assessee holding that no tax is required to be deducted on reimbursement of salary to seconded employees.

11. Heard both the sides and perused the material on record. During the year the assessee had reimbursed a sum of Rs. 820,30,029/- to its foreign associate enterprise towards salary and related cost of employees secondment to the assessee company. However, the AO treated the same as services of technical nature rendered by the associate enterprise to the assessee company for which assessee is required to deduct tax u/s 195 of the Act. During the course of appellate proceedings the ld. Departmental Representative has referred the decision of Hon'ble Supreme Court in the case of C.C.C.E. & S.T. Bangalore Vs. Northern Operating Systems (P) Ltd. (2022) 138 taxmann.com 359 (SC) pertaining to service tax matter. In that case Hon'ble Supreme Court held that where employees were seconded to assessee by group entities the assessee was service recipient for manpower recruitment and assessee would be liable to pay service tax. We find that this case was discussed by the ITAT Delhi in the case of Ernst & Young U.S. LLP Vs. ACIT (IT) (2023) 153 taxmann.com 95 (Delhi – Trib.) as referred supra in this order and that case was in the context of manpower recruitment and supply of services for which the assessee was recipient of services and was liable to pay service tax. That judgment was rendered in context of service tax which is distinguishable from the fact of reimbursement of expenses made on cost to cost basis in the case of the assessee. The ITAT Delhi has also discussed and distinguish the facts of the decision in the case of Centrica India Offshore Pvt. Ltd.

12. We have further noticed that similar issue on identical facts has been adjudicated in favour of the assessee constantly in the earlier year by the ITAT Mumbai for assessment year 2010-11 to 2018-19. With the

assistance of ld. Representative we have perused the decision of ITAT for assessment year 2017-18 & 2018-19 dated 3.11.2023. The relevant operating part of the decision is reproduced as under:

> *"08. With respect to reimbursement of expenses of seconded employees, he submitted that this issue is also squarely covered in favour of the assessee by the decision of the Coordinate Bench in ITA No.1294/MUM/2017 filed by the Revenue for assessment year 2011-12, order dated 2/11/2019. He submitted that as per paragraph 12 of the above order, it was held by the Coordinate Bench that there is no income chargeable to tax in India. He further referred to identical issue in the case of the assessee in ITA No.4300/MUM/2016 while deciding issue No.1 at paragraph 15 of that order. He submits that identical set of agreement is in existence. Accordingly, both the issues are covered in favour of the assessee.*
>
> *09. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also perused the orders of the Coordinate Bench in the assessee's own case for earlier assessment years where identical issue arose and the issue is decided in favour of the assessee. We find that first time the issue arose in the case of the assessee with respect to reimbursement of demurrage charges in ITA No.4135/MUM/2016. While deciding the issue being ground No.2.1, at paragraphs 7 to 9 of the appeal, following the decision of the Hon'ble Bombay High Court in the case of CIT vs. Dempo and Co. P. Ltd., 381 ITR 303. Further, for subsequent years also, the Coordinate Bench has followed this decision. The Learned DR could not show us any reason as to why the above decision should not be followed. Accordingly, respectfully following the decision of the Coordinate Bench in the assessee's own case, we confirm the order of the Learned CIT-A in deleting the disallowance of demurrage charges paid by the assessee of Rs.2,48,16,533/-. Accordingly, ground No.1 of the appeal is dismissed.*
>
> *10. With respect to ground No.2 where the disallowance of reimbursement of salary paid to seconded employees on account of non-deduction of tax at source was deleted by the Learned CIT-A. We find that the issue first arose in the case of the assessee in ITA No.4300/MUM/2015 for assessment year 2010-11 where the Coordinate Bench has dealt with the issue in paragraphs 15 & 16 and deleted the addition. The Coordinate Bench for that year has relied upon the decision in the case of Burt Hill Design Pvt. Ltd. vs. DDIT (IT), 79 Taxmann.com 459. The Learned CIT-A has followed the decision of the Coordinate Bench in deleting the disallowance. Therefore, we do not find any infirmity in the order of the Learned CIT-A. Accordingly, ground No.2 of the appeal of the Assessing Officer is dismissed, holding that no tax is required to be deducted on reimbursement of salary to seconded employees, amounting to Rs.11,44,50,849/-. Thus, the appeal of the Assessing Officer for assessment year 2017-18 in ITA No.97/MUM/2023 is dismissed."*

13. We have also perused the decision of the ITAT in the case of the assessee company for the A.Y. 2010-11 which was followed in the subsequent years. In the A.Y. 2010-11 the ITAT has also considered the

Terms and conditions of assignment of seconded employees which indicate that during the period of deputation with the assessee company, the AE does not have any control over the non-resident employees who is functioning under the control and management of Indian party. Further deputation is not carrying out any activity mandated by the AE or any activity on behalf of the AE.

14. The ITAT in the A.Y. 2010-11 has also discussed that how the case of Centrica India Offshore (P) Ltd. as referred supra is distinguishable from the facts of the case of the assessee company. The relevant operating part of the decision of the ITAT is in the case of the assessee company for A.Y. 2010-11 vide ITA No. 4300/Mum/2016 dated 09.07.2019 is also reproduced here as under:

> *"15. Under this issue the revenue has challenged the allowance of the claim of assessee in connection with the reimbursement of salary cost of related relocation expenses made on account of availing personnel services from its AEs who has been India on an assignment. The Ld. Representative of the revenue has argued that the such type of payment falls within the ambit of Section 195 r.w.s. 9(1)(vii) of the Act and the Explanation to Section 9(2) of the I.T. Act, 1961, therefore, CIT(A) has wrongly allowed the claim of the assessee, hence, the finding of the CIT(A) is wrong against law and facts and is liable to be set aside. However on the other hand, the Ld. Representative of the assessee has refuted the said contention. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.:-*
>
> > *"9 Ground no. 5.2 relates to non-deduction of TDS on reimbursement of salary costs and related relocation expenses of Rs.6,47,96,467. During the year, the appellant has availed personnel services from various associate enterprises based on its requirements. For this, the appellant has entered into an arrangement with the companies whose manpower have been taken on deputation basis. As a matter of convenience and to ensure that the non-residents continued to have social benefits in their country of residence, salary was paid by the companies who deputed these personnel and charged to the appellant company. The appellant company, while making the reimbursement, deducted suitable taxes u/s 192 of the Act.*
> >
> > *9. I The AO has observed that the appellant has not paid the salary into the bank accounts of the deputed personnel directly but the amount has been paid towards cost to the deputing companies and the social security expenses. The AO has inferred that the employees have been seconded to India for specific purpose and the AEs have retained their rights as an employer over these employees. The right and control to appoint and remove these employees is still vested with the employer which is*

separate from assessee company and it cannot be said that the payments made by the assessee company to such entities having control over the employees as employers amounts to reimbursement of salaries paid for services rendered in India on which TDS is applicable lids 192. Re AO has claimed that this is a case of dual employment where the appellant is the economic employer and the AEs are legal employer. By sending their employees to India, the AEs arc actually rendering services to the assessee company in India and accordingly, the payments made by the assessee company are in the nature of Fee for Technical Service (FTS). Accordingly, the AO has concluded that TUS ought to have been deducted u/s 195 by the appellant.

9.2 The AO has relied on the decision of AAR in the case of Verizon Data Services India Pvt I.td (AAR No. 865 of 2010), Centrica Offshore Pvt Ltd (AAR No. 856 of 2010) and AT&S India Pvt Ltd [2006) 287 ITR 421 wherein it has been held that reimbursement is in the nature of FTS and the fact that taxes are paid under head 'Salaries' is of no consequence.

9.3 The submission made by the appellant on this issue is summarized as below;

9.3.1 The Appellant had availed services of personnel/employees who were oil payrolls of its Associated Enterprises ('AE'), and in lieu of the same, salary, relocation and other related charges were subsequently recharged (by way of reimbursements) by the AEs to the Appellant. It may be noted that for the purposes of administrative convenience, the employees remained on the payrolls of the AEs and their salary and other related costs were reimbursed by the Appellant to the AEs, instead of paying to the employees. Accordingly, time Appellant had reimbursed a sum of us 6,37,87,105 to its AEs towards salary and related costs of such personnel and Rs 10,09,452 towards relocation expenses. The appellant has contended that it had discharged its TDS obligations under section 192 of the Act on salary amount payable to the employees (paid through the AEs and not to employees directly due to administrative convenience).

9.3.2 The Appellant has contended that the salary, relocation and other related charges paid by way to the AEs had no element of mark-up involved (i.e. cost to cost reimbursements). Further, the AEs have merely provided their personnel/ employees to the Appellant no services have been provided by the AEs. Accordingly, in the absence of any services being provided by the ALs there is no question of withholding tax on recharge of the employees' salary costs (on which taxes have been deducted under section 192 of the Act) reimbursed to them on a cost-to-cost basis.

9.3.3 To substantiate that merely the salary costs have been reimbursed by the Appellant to the AEs and that there is no markup clement involved therein, the appellant has referred to clause 1-5 of the Cost Reimbursement Agreement entered into between the Appellant and Total SA wherein it is provided as under :

1. Total Petroleum India Private Limited intends to hire personnel of Total SA (hereinafter referred to as expatriates) for the purpose of its business operations in India

2. Total SA has agreed to second the expatriates to Total Petroleum Indio Private Limited for the above said purpose and for the specified period of time
3. For the sake of administrative convenience, Total SA will continue to pay the salary of the expatriates, for and on behalf of Total Petroleum India Private Limited in respect of the services rendered to by the expatriates in India to Total Petroleum India Private Limited
4……

3. Total Petroleum Indio Private Limited agrees that it shall reimburse/ repay to Total SA the actual cost of reimbursement and other costs related to the Indian assignment incurred by Total SA in respect of said expatriates during the period of their secondment to India. The said reimbursement/ repayment shall be without any markup/ profit"

9.3.4 The appellant has relied on a number of judicial pronouncements. Some of them are:

DDIT vs Tekmark Global Solutions LLC (38 SOT 7)(Mum), wherein the Mumbai Tribunal held that personnel deputed to the Indian company worked under the control and supervision of the Indian company and carried out work allotted to them by the Indian company.

IDS Software Solutions India (P) Ltd vs l'I'0 (122 TTJ 410) (Bang), wherein it was held that Indian Company exercising control and supervision over a seconded employee and bearing the salary cost should be considered as an economic employer and not liable to withhold tax on the reimbursement of the salary to the overseas company.

CIT vs 003 Engineers (32 Taxmann.com 271)(Bom) wherein it has been that reimbursement to sister concerns for payment of salaries to their employees as they were deputed to the respondent assessee on an actual basis is not liable to tax in India hence not subject to TDS.

Aon Specialty Services Private Limited (ITA No. 1640/ Bang/ 2012) wherein it was held that salary recharge by F Co to I Co would TICA be subject to tax withholding in India as it did not represent income in the hands of the F Co and hence, withholding under section 195 was not applicable.

9.3.5 The appellant has further contended that the learned AO has relied on the decision in the case of Centrica India Offshore Private Limited, without appreciating that the Said decision is not applicable to the facts of the instant ease. In the said decision, it was held that the amounts payable to the foreign entity were taxable as fees for technical services in India, since specified conditions were not satisfied.

9.4 The contention made by the appellant has been examined and the facts of the case have been perused. Perusal of the decisions quoted by the appellant as well as the AO lead to a conclusion that if rendering of

service by employees would constitute technical service if the employees work on behalf of the non-resident. If the employees work under the supervision and control of the appellant company, then the service rendered by them cannot be held to be fee for technical service.

9.5 In this regard, the contract entered into by the appellant with the companies deputing then manpower has already been submitted. The appellant has also submitted the letter issued by these companies to their employees who have been deputed to the appellant company. The letter is as reproduced below:

This offer letter confirms that you are being assigned by TOTAL RAFFINAGE MARKETING to work as a Managing Director of TOTAL LUBRICANTS India Ltd. You will report to Mr. Christian CHILAMAS of TOTAL Petroleum India Private Ltd or the Board of Directors. This assignment is contingent upon your securing and maintaining appropriate work authorization permits and any other authorization required for you to carry out this assignment with TOTAL LUBRICAN7S India Ltd. as required under the laws of Melia Assignment period Your assignment will start from 13m September, 2006 and end on Summer 2010. However, this assignment may be terminated or extended by you or TOTAL LUBRICANTS India Lid. with mutual consent by giving a prior notice of 90 days. Roles and responsibilities

1. You will be released from your duty/job with TOTAL RAFFINAGE M4RICETING while you are assigned to TOTAL LUBRICANTS India Ltd

You will work wholly and exclusively for TOTAL LUBRICANTS India Ltd.

During your assignment, you will perform such duties as TOTAL LUBRICANTS Ltd directs you to perform from time to time. TOTAL LUBRICANTS India Ltd. shall assume complete responsibility or the work carried out during your Indian assignment.

4. While assigned to TOTAL LUBRICANTS India Ltd you will be required to comply with any local employment regulations established by TOTAL LUBRICANTS India Ltd. at the assignment location.

5. Your performance evaluation will be done by TOTAL LUBRICANTS India Ltd. based on the performance objectives set by your supervisor and the actual results achieved during your assignment.

Terms and conditions.

The remuneration and other benefits that you be authorized during this assignment are specified in your addendum issued to you by TOTAL raffinage MARKETING dated I" September 2006.

We wish you good luck on your India assignment

9.6 The secondment letter as reproduced above indicates that during the period of deputation with the appellant company, the AE does not have any control over the non-resident employee who is functioning under the control and management of the Indian party. Further, the deputation is

not carrying out any activity mandated by the AE or any activity on behalf of the AE.

9.7 In the case of Centrica India, the services were held to be in the nature of FTS on account of following

4) The CIOP and seconded employees were to oversee the quality of service rendered by vendors to the overseas entities, which would fall within the scope of the technical or consultancy services.

(5) It was admitted by the petitioner that the reason for entering into the secondment agreement was to provide support for the initial years of operation, till the necessary skills were acquired by the resident employee group;

(6) The activity of the secondment was to make available their know-how acquired in the field to the petitioner for future consumption. The skills and knowledge required to ensure that the tasks entrusted were carried out diligently;

(7) None of the documents placed on record revealed that the petitioner could terminate the secondment arrangement, there was no entitlement or obligation clearly spelt out whereby the petitioner had to bear the salary cost of these employees. The seondees could not sue the petitioner for default in payment of their salary.

9.7.1 None of conditions mentioned above is found to be existing in the case of the appellant where the employment is a full time employment by the seconded employee. Ile can be removed and his appraisal is done by the appellant company. The payment is made by the AR on account of social benefit issues in the country of their residence but the entire tax on their salary is paid in India and deducted under section 192.

9.8 In light of the facts presented above, it is held that the reimbursement of salary of the seconded employees does not constitute FTS and hence is liable to tax u/s 192 and not section 195. The ground raised by the appellant is upheld and the disallowance u/s 40(a)(i) is directed to be deleted."

16. On appraisal of the above mentioned finding, we noticed that the employees who were serving in India or deputed in India had already deducted tax at source u/s 195 of the Act. The provision of TDS is not applicable on reimbursement of deputation expenses to foreign AE. The CIT(A) has relied upon the decision in the case of Burt Hill Design (P) Ltd. Vs. DDIT (IT) (79 Taxmann.com 459). The facts are not distinguishable at this stage. No law contrary to the law relied by the Ld. Representative of the assessee has been produced before us. In view of the said circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage."

Since facts and circumstances for different years were identical particularly in the case of the assesse therefore following the decision of

ITAT in the case of the assessee as discussed above and the decision of the ITAT Delhi in the case of Ernest & Young U.S LLP We do not find any reason to interfere in the decision of the ld. CIT(A). Therefore, this ground of appeal of the revenue is dismissed.

15. The appeal of the revenue is dismissed.

C.O. No. 57/Mum/2021

"General Objection to Department's Appeal

1. *erred in objecting the order of Ld. CIT(A) deleting various additions/disallowances made assessment without appreciating the facts of the case and submissions made, thereby further contesting various issues before the Hon'ble Tribunal by filing an appeal,*

Non consideration of taxability of demurrage expenses as per Double Taxation Avoidance Agreement ('DTAA)

2. *erred in not adjudicating the submission made by the Assessee on non-taxability of demurrage expenses as per DIAA between India and payee while adjudicating the ground of reimbursement of demurrage expenses and not holding that even as per the DTAA provisions no taxes were required to be deducted on demurrage payments,*

Non applicability of provision of section 40(a)(i) on account of short deduction of taxes

3. *erred in not holding that reimbursement of salaries of the employees shall not be disallow under section 40(a)(i) of the Act as the Assessee has already deducted taxes on salaries payment to employees and accordingly provisions of section 40(a)(i) shall not apply on short deduction of taxes,*

Deduction of DDT on Dividend Distributed as per DTAA

4. *The Ld AO be directed to compute tax payable by the Assessee under section 115 O of the Income-tax Act, 1961 ('the Act') at the rate prescribed in the DTAA between India and France respect of dividend paid by the Assessee to non-resident shareholders i.e Total Marketing Services and Total Holding Asie, tax resident of France,*

Deduction in respect of education cess and secondary & higher cess paid on income-tax and dividend distribution tax (collectively called as 'cess')

5. *The Ld. AO be directed to allow the deduction for cess paid on income tax and dividend distribution tax.*

16. Since, we have dismissed the ground of appeal of the revenue against the decision of ld. CIT(A) on the issue of disallowance of demurrage charges and reimbursement of expenses while adjudicating the appeal of Revenue in this order vide ITA no.6997/Mum/2019, therefore, grounds of cross objection 1 to 3 of the assessee have become infructuous therefore the same stand dismissed.

16. Ground No. 4 & 5 are not pressed therefore the same stand dismissed.

17. In the result, the appeal of the revenue is dismissed and the Cross Objection filed by the assessee is also dismissed.

Order pronounced in the open court on 29.12.2023

Sd/-	Sd/-
(Vikas Awasthy)	(Amarjit Singh)
Judicial Member	Accountant Member

Place: Mumbai
Date 29.12.2023
PS. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.