

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I" DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
&  
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.2920/DEL/2018  
Assessment Year 2012-13

<b>JCIT, Special Range-1</b> New Delhi	Vs.	<b>Axis Risk Consulting Services P. Ltd.</b> Delhi Information Technology Park Shastry Park Delhi.
TAN/PAN: AAECA9833G		
(Appellant)		(Respondent)

Appellant by:	Shri Vishal Kalra, Adv. Shri Ankit Sahani, Adv. Mr. Yishu Goel, AR		
Respondent by:	Dr. Anupama Singh, Sr.DR		
Date of hearing:	19	12	2023
Date of pronouncement:	14	02	2024

**ORDER**

**PER PRADIP KUMAR KEDIA-A.M. :**

The captioned appeal is directed against the first appellate order of the Commissioner of Income Tax (Appeals)-XXXII, New Delhi ('CIT(A)' in short) dated 15.09.2017 arising from the assessment order dated 22.03.2016 passed by the Assessing Officer (AO) under Section 143(3) r.w. Section 144C(3) of the Income Tax Act, 1961 (the Act) concerning AY 2012-13.

2. The grounds of appeal raised by the Revenue read as under:

*"1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.88,64,605/-made by the AO on account of Share Based compensation expenses debited to P&L account.*

*2. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance of Rs. 73,44,502/- made by the AO u/s. 40(a)(ia) of the Income-tax Act, 1961 due to non deduction of TDS on reimbursement to Ztek Consulting Inc., USA is in the nature of 'Fee for Technical Services '(FTS) and taxable in the hands of both as per the provisions of Income-Tax Act, 1961 as well as the provision of Indo-USA DTAA."*

3. Briefly stated, the assessee is a wholly owned subsidiary of

Genpact India Holdings, Mauritius (GI). The assessee is engaged in the business of providing risk consultancy, advisory and risk assurance services for the Assessment Year 2012-13. The assessee filed return of income declaring total income at ₹ 24,62,85,760/-. The return filed by the assessee was subjected to scrutiny assessment. In the course of assessment, the AO made the following additions in question;

(i) disallowance of ₹ 88,64,605/- on account of share based compensation; and

(ii) disallowance of ₹ 73,44,502/- under Section 40a(ia) on account of non deduction of TDS.

4. As regards the disallowance of ₹88,64,605/- on account of share based compensation, the AO disallowed the ESOPs expenses on the ground that such expenditure are capital in nature since security premium is a capital item; and secondly, the issue of shares is not crystallized till the employee exercises its option and thus expenses debited during the vesting period remains contingent in nature.

5. As regards disallowance of ₹73,44,502/- under Section 40a(ia) of the Act, the AO observed that the assessee has not deducted TDS on payments made to Ztek Consulting Inc. USA towards services provided by Ztek in the nature of manpower supply and placement services.

6. Aggrieved by the additions so made, the assessee preferred appeal before the CIT(A).

7. With reference to disallowance on account of share based compensation expenses, the CIT(A) supplied the ratio and judgment delivered by the Hon'ble Delhi High in the case of *CIT vs. Lemon Tree Hotels Ltd. in ITA No.107/2015 order dated 18<sup>th</sup> August, 2015* and decision of the Co-ordinate Bench in *Novo Nordisk India (P) Ltd. in (2014) 42 taxmann.com 168 (Bangalore Tribunal)* wherein it was held that the difference between the Fair Market Value of the shares of the

parent company and the price at which those shares were issued to the employees of Indian AE was an ascertained liability and is revenue in character. The CIT(A) took note of the detailed submissions and reversed the additions made on following terms.

*“Ground No 2 pertains to the contention of the appellant that the AO had erred in making disallowance on account of deduction for ESOP.*

*5.3 The facts of the case submitted by the appellant are as follows. The appellant recognized a share based compensation expense of Rs.1,25,52,050 as part of its total 'Employee benefit expenses'. Genpact Limited, the ultimate holding company of the appellant, rolled-out Employee Stock Option plans ('ESOP') for the benefit of its subsidiaries worldwide including the employees of the appellant. ESOPs were intended to promote the interests of affiliates of Genpact Limited by attracting talent and retaining key employees of the affiliates. Accordingly, employees of the appellant were also covered under the ESOP plan of Genpact Limited. The stock options of Genpact Limited granted to the employees of the appellant were offered to the employees at a pre-determined exercise price. Genpact Limited in turn cross-charges the proportionate cost (representing the difference between the prevailing market price and the exercise price) in relation to the ESOPs allotted to the employees of the appellant. Accordingly, during the year, the appellant recognized total share based compensation expenses of Rs.1,25,52,050 as part of its total 'Employee benefit expenses'. The eligibility of above expenditure as an allowable claim while computing the taxable income has been specifically mentioned in the Circular No. 9/2007 dated December 20, 2007 issued by the Central Board of Direct Taxes, wherein, against FAQ No. 16, it has been stated that where the employer purchases the shares and then subsequently transfers such shares to its employees, the expenditure so incurred is allowable as deduction in computing the taxable income of the employer company.*

*5.3 The appellant has also relied upon a number of judgments of various courts and Tribunals. The appellant has stated that the on similar set of facts, the issue has been decided in favour of the appellant by the Bangalore ITAT in the case of Novo Nordisk India (P) Ltd. V. DCIT [2014] 42 taxmann.com 168 (Bangalore Tribunal). In this case, the assessee's employees were granted shares (at less than the market price) of the assessee's listed overseas group company. The difference between purchase price of the shares and the market price of the shares was recharged by the overseas group company to the assessee which was recognized and claimed as a deductible expenditure by the assessee as ESOP recharge cost. The assessing officer, however, disallowed the ESOP costs treating the same to be of capital nature. In appeal, the Hon'ble ITAT held as follows:-*

*"19..... The foreign parent company has a policy of offering ESOP to its employees to attract the best talent as its work force. In pursuance of this policy of the foreign parent company, allowed its subsidiaries/affiliates across the world to issue its shares to the*

*employees. As far as the assessee in the present case which is an affiliate of the foreign parent company is concerned, the shares were in fact acquired by the assessee from the parent company and there was an actual outflow of cash from the assessee to the foreign parent company. The price at which shares were issued to the employees was paid by the employee to the Assessee who in turn paid it to the parent company. The difference between the fair market value of the shares of the price at which shares were issued to the employees was met by the Assessee. This factual position is not disputed at any stage by the revenue. In such circumstances, we do not see any basis on which it could be said that the expenditure in question was a capital expenditure of the foreign parent company. As far as the assessee is concerned, the difference between the fair market value of the shares of the parent company and the price at which those shares were issued to its employees in India was paid to the employee and was an employee cost which is a revenue expenditure incurred for the purpose of the business of the company and had to be allowed as deduction. There is no reason why this expenditure should not be considered as expenditure wholly and exclusively incurred for the purpose of business of the assessee."*

*5.4 The issue has been decided in favour of the taxpayer by the Delhi High Court in the case of Lemon Tree Hotels Ltd ITA NO 107/2015 dated 18.08.2018 where the High Court has relied upon the judgment of the Madras High Court in the case of CIT-III Chennai vs. PNP Ventures Ltd. (TC(A) No. 1023/2005) and order of the Delhi High Court in the case of CIT vs. Oswal Agro Mills ITA No. 02/2002 to decide in favour of the taxpayer. In the case of PNP Venture Ltd., the Madras High Court held that as per the SEBI Guidelines, the difference between the market price and the price at which the option was exercised was an ascertained liability, and not a contingent liability, and the taxpayer could legally debit it in its profit and loss account.*

*5.5 The material facts of the case are the same in the instant year as in the judgments discussed above. In accordance with the principle of consistency and respectfully following the order of the Hon'ble Delhi High Court in the case of Lemon Tree Hotels Ltd (supra) and the order of the Bangalore Tribunal in the case of Novo Nordisk India (P) Ltd(supra), it is held that expenditure on ESOP is revenue expenditure. The disallowance made by the AO on account of ESOP is deleted. The ground of appeal is decided in favour of the appellant."*

8. The CIT(A) also reversed the disallowance under Section 40a(ia) on account of non deduction of TDS towards payment made to Ztek Consulting Inc. USA. The relevant operative paragraph is reproduced hereunder:

*"5.16 Ground No 6 pertains to the contention of the appellant that the AO had erred in erred in disallowing an amount of Rs.73,44,502 under Section 40(a)(i) of the Act for non-deduction of tax. The appellant had debited an amount of Rs.1,25,64,395 under the head "Legal and professional fee in the profit and loss account for the year ended March 31, 2012. Out of*

*Rs.1,25,64,395, an amount of Rs.73,44,502 represented reimbursement of actual expenses to Ztek Consulting Inc. The appellant claimed that the Assessing Officer had erred in disallowing an amount of Rs.73,44,502 under Section 40(a)(i) of the Act for non-deduction of taxes without appreciating that the provisions of Chapter XVIIIB were not applicable on the impugned expenditure/remittance.*

*5.17 The main contentions of the appellant are as follows:-*

*(i) During the Financial Year 2011-12, amount of Rs.73,44,502 was incurred by the appellant pursuant to the MSA entered into the by the appellant with Ztek. As per the MSA, Ztek had undertaken to provide manpower on contract basis to fulfill the staffing needs of the appellant for the appellant's projects executed in USA based on the criteria and information provided by the appellant. The personnel hired by the appellant through Ztek were deployed on appellant's overseas client assignments for providing risk advisory services. Before each contractor was deployed on any client assignment, Ztek and appellant entered into an Addendum to the MSA - Statement of Work ('SOW') setting forth the terms including agreed compensation, contractor's name, engagement title, engagement start date and end date, etc.*

*(ii) As evident from copies of the sample SOWs and sample invoices raised by Ztek on appellant during the Financial Year 2011-12, the services provided by Ztek pursuant to the MSA were essentially in the nature of manpower supply or recruitment/placement services. The appellant stated that personnel hired on contract basis under the MSA worked under the sole direction and supervision of the appellant and accordingly the services rendered by these contracted personnel became the services of the appellant to its clients and not the services of Ztek to the appellant.*

*(iii) it was further stated that Ztek's fee under the MSA was computed by applying the agreed hourly rate to the number of hours worked by the personnel provided on contract basis by the Ztek. In addition, appellant also reimbursed expenses incurred by Ztek while performing the services under the MSA including travel expenses, lodging and meals etc. Relevant extract from the MSA relating to Ztek's fee is reproduced below for reference:*

#### *4. VENDOR'S Fees*

*(a) VENDOR will collect a weekly time sheet for each Contractor and submit bi-weekly invoices to Client for all hours he/she worked, based upon the agreed upon compensation in the Addendum executed with respect to such contractor.*

*(b) In addition to fees, VENDOR's invoices will include and Client will be obligated to pay any reasonable expenses that VENDR incurs while performing services for Client, which includes VENDOR's reimbursement of Contractor expenses, incurred while performing services for Client provided these expenses are approved by the Client in advance. Reasonable expenses incurred by VENDOR's staff for travel, lodging and meals will be reimbursed by Client only on a "pre-approved" basis. No other administrative or other types of VENDOR's expenses are eligible for*

*reimbursement by Client.*

(c) .....

(iv) *The appellant stated that the amount of Rs.73,44,502 received by Ztek as per the terms of MSA and SOW represents the charges towards the cost of hiring personnel who worked on the appellant's projects outside India and reimbursements of the incidental expenses incurred on account of travelling, lodging and meals etc.*

(v) *Section 90(2) of the Act lays down that where the Central Government has entered into an agreement with the government of any other country for granting relief of tax or for avoidance of double taxation, then the provisions of this Act shall apply to the Appellant only to the extent that they are more beneficial to a taxpayer. During the Financial Year 2011-12, Ztek was a tax resident of USA and was eligible to be governed by the provisions of the Act or the provisions laid down in the India - USA Double Taxation Avoidance Agreement ('DTAA') whichever was more beneficial to Ztek. Further, for the year under consideration Ztek did not had a Permanent Establishment ('PE') in India within the terms of Article 5 of the DTAA.*

(vi) *Taxability of fee received/receivable as per the MSA in the hands of the Ztek has to be therefore analyzed considering the definition of 'fee for technical services' ('FTS') provided as per Explanation 2 of the Section 9(1)(vii) of the Act and 'fees for included services' ('FIS') provided under Article 12 of the India - USA DTAA.*

(vii) *As per Explanation 2 of Section 9(1)(vii) of the Act, the term FTS is defined as follows:-*

*Explanation [2].-For the purposes of this clause, "fees 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" .]*

(viii) *As per Article 12(4) of the DTAA, the term 'fees for included services' has been defined as under:*

*"For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services including the provision of services of technical or other personnel) if such services:*

(a) *are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or (b)*

(b) *make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design."*

*(ix) As evident from above, the definition of 'fee for included services' provided under the Article 12 of the DTAA is much narrower in scope as compared to the definition of FTS provided under the Act. As per Article 12 of the DTAA, consideration received by resident of USA for providing services to a resident of India can be taxed as 'fee for included services' only if such services, make available technical knowledge, experience, skill know-how or processes to the service recipient.*

*(x) The term 'make available' has been interpreted by various courts wherein it has been held that the 'make available' criteria can be said to have been fulfilled only if certain technical knowledge or skills is made available by the service provider and is imparted to and absorbed by the service recipient in such a manner that the recipient of the services is able to deploy similar technology or techniques in the future without recourse to the service provider.*

*(xi) Reliance in support of the above contentions is placed on the judgment of Hon'ble Hyderabad Tribunal in the case of IIC Systems (P.) Ltd. [2010] 127 TTJ 435. In this case, the assessee and IBM entered into a contract for providing software personnel for the projects of IBM across the globe including USA. The assessee in turn had entered into a contract with ACSC of USA for procuring software personnel in the USA for the projects of IBM in the USA. As per the arrangement, whenever IBM, Bangalore issued work authorization/purchase order, the assessee in turn issued a work order/purchase order on ACSC, USA who procured the required personnel and deployed them on the projects of IBM, USA. For the services rendered, ACSC used to raise an invoice on the assessee on hourly basis for supplying personnel and in turn the assessee raised invoice on IBM. The question was whether payments made by the assessee to ACSC for recruitment/placement services were fee for "included services" within the meaning of article 12(4)(b) of Indo-US treaty.*

*"We agree with the CIT(A) that what was required to be looked into is whether there is an element of technical services in the agreement between the assessee and the ACSC, which gives rise to income that can be brought to tax in India. It is because the payments remitted by the assessee to ACSC flows from the agreement between the assessee and ACSC and not from the agreement between the assessee and IBM. In our considered view, the primary services rendered by the ACSC to the assessee is akin to recruitment and placement service rather than making available any technology, plan, design, etc. ....*

*..... The CIT(A) has also gone through a number of copies of the purchase order, work order, invoice etc, before, coming to the conclusion that what is ordered through the purchase order is certain amount of manpower at a specified unit price per hour. No detail as to what work is to be done is mentioned even in the work order issued by the assessee. Thus, neither the agreement nor the invoice refer to any technical services rendered or any product or software developed for IBM. All the agreements, invoices and related documents produced before us lead to the fact that the payments have been made only for supply of manpower for certain amount of hours and nothing more. Since there is no technology, skill, experience, technical plan, design, etc. had been made available either by the assessee*

*or the ACSC, as held by the CIT(A), invoking the provisions of Art. 12(4)(b) of the DTAA for treating the payments as chargeable to tax in India, is not justified. In our view, the CIT(A) was justified in holding that the services rendered by the ACSC for which remittances in question have been made by the assessee are akin to those of a recruitment or placement agency, and would not come within the purview of 'fee for inducted services' within the meaning of art. 12(4)(b) of the DTAA between India and*

*USA."*

*(xii) The above view of the Hon'ble Hyderabad Tribunal was also accepted and followed by Hon'ble Mumbai Tribunal in the case of Apollo Consulting Services Corporation [2012] 26 taxmann.com 127.*

*(xiii) Reliance is also being placed on the judgment of the Hon'ble Mumbai Tribunal in the case of Lehman Brothers & Advisors (P.) Ltd [2016] 67 taxmann.com 225, wherein the Hon'ble Tribunal, while analyzing the taxability of recruitment or placement services under the India-USA DAA, held that services in the nature of recruitment or placement agency do not come under the purview of 'fees for included services' within the meaning of Article 12 of the India-USA DTAA.*

*5. In view of the above and relying upon the judgment of Hon'ble Hyderabad Tribunal in the Case Of IIC Systems (P.) (supra) Which was also accepted and followed by Hon'ble Mumbai Tribunal in the case of Apollo Consulting Services Corporation(supra)services as well as the judgment of the Hon'ble Mumbai Tribunal in the case of Lehman Brothers & Advisors (P.) Ltd, it is held that recruitment or placement agency do not come under the purview of 'fees for included services' within the meaning of Article 12 of the India - USA DTAA. Hence the addition made by the AO u/s. 40(a)(i) of the Act is deleted. The ground of appeal is decided in favour of the appellant."*

9. Thus, the CIT(A) granted relief and reversed the action of the AO on both counts under challenge.

10. Aggrieved, the Revenue is in appeal before the Tribunal.

11. The Id. DR for the Revenue relied upon the assessment order. As regards disallowance on account of deduction for ESOPs, the Id. DR submitted that the expenses in relation to the allotment of shares under employees stock of option plan of holding company at a predetermined exercise price is an expenditure in capital account and is not necessary for the purposes of carrying on the business. The AO has rightly disallowed the expenditure claimed on such account.

11.1 As regards failure to deduct TDS on payments of professional fees to Ztek Consulting Inc. USA, the Id. DR submitted that the assessee

failed to substantiate the plea before the AO which resulted in disallowance.

12. The ld. counsel for the assessee referred to the submissions made before the CIT(A) and supported the reversal of such additions / disallowances by the CIT(A) in the light of the factual matrix and judicial dicta in this regard.

13. We have carefully considered the rival submissions, perused the first appellate order and the assessment order as well as the order passed by the TPO under Section 92CA(3) of the Act.

14. Apropos Ground No.1 concerning disallowance of ₹88,64,605/- on account of share based compensation expenses, the assessee submits that during the year under consideration, Genpact Limited, Bermuda, the ultimate holding company of assessee (Parent Company), rolled-out ESOPs for the benefit of its subsidiaries worldwide including the employees of the assessee. The stock options were offered to the employees by the assessee-company at a predetermined exercise price. The parent company in turn charged proportionate cost to the assessee company being difference between prevailing market price and the exercise price in relation to ESOPs allotted to the employees of the assessee-company. The assessee-company thus recognized total ESOP costs of ₹1,25,52,050/- as part of its total personnel expenses as per the Guidance Note on 'Accounting for Employee Share Based Payment' issued by ICAI. The assessee on its own disallowed the provisions accrued amounting to ₹36,87,445/- towards share based compensation and contends that ESOPs are intended to promote the interests of affiliates of the parent company by attracting talent and retaining key employees of the affiliates. The employees of the assessee were also covered under the ESOP plan of the parent company to avoid high attrition rate prevalent in the service sector and to help in attracting and retaining the best human talent. The ld. counsel contends that ESOPs are an important tool of human resources policy and the stake in which the

assessee is placed, human resources constitute an important asset. The assessee operates in service industry and such ESOP costs are in the nature of personnel cost incurred by the assessee to incentivize, motivate and retain the key employees of the assessee.

14.1 On perusal of the first appellate order, we observe that the CIT(A) has applied the principle laid down in *Lemon Hotels (supra); PVR Ltd. vs. CIT (2022) 145 taxmann.com 311 (Del); CIT vs. PVP Ventures Ltd. (2012) 2011 taxmann.com 554 (Mad.) etc.* The issue is no longer *res integra*. The issue is also covered in favour of the assessee by Circular No.9/2007 dated December 20, 2007 wherein against FAQ No.16, it has been stated that where the employer purchases the shares and then subsequently transfer such shares to its employees, the expenditure so incurred is allowable as deduction in computing the taxable income of the employer company. In consonance with the view expressed by the Hon'ble Delhi High Court and Co-ordinate Benches, we do not see error in the conclusion drawn by the CIT(A) in favour of the assessee. We thus decline to interfere with the order of the CIT(A).

15. In the result, Ground No.1 of the appeal of the Revenue is dismissed.

16. Ground No.2 concerns disallowance of ₹73,44,502/- under Section 40a(ia) of the Act on account of non deduction of TDS.

17. As pointed out on behalf of the assessee, the assessee incurred expenditure of ₹1,25,64,395/- under the head 'Legal and Professional Fee' out of which ₹73,44,502/- represented the payments made to Ztek Consulting Inc. (Ztek) pursuant to Master Staffing Services Agreement (MSA) entered into by the assessee with Ztek. The assessee contends that withholding tax provisions are not applicable on such payments on the ground that recruitment or placement agency do not come under the purview of 'Fee for Included Services' within the meaning of Article 12 of India-USA Double Taxation Avoidance Agreement (DTAA). The

assessee submits that Ztek had undertaken to provide manpower on contract basis to fulfill the staffing needs of the assessee for providing risk advisory services to assessee's overseas clients, based on criteria and information provided by the assessee. The personnel hired on contract basis under the MSA worked under the sole direction and supervision of the assessee and accordingly, the services rendered by the contracted personnel became the services of the assessee to its clients and not the services of the Ztek to the assessee. Before deploying the contractor on any client assignment, assessee and Ztek entered into an Addendum to the MSA – Statement of Work setting forth the terms including agreed compensation, contractor's name, engagement title, engagement start date and end date etc. The services provided by Ztek are essentially in the nature of manpower supply or recruitment / placement services. As per MSA, Ztek fee was computed by applying the agreed hourly rate to the number of hours worked by the personnel provided on contract basis by the Ztek. In addition, the assessee also reimbursed expenses incurred by Ztek while performing the services including travel expenses, lodging and meals etc. The impugned expenditure amounting to ₹73,44,502/- paid to Ztek as per terms of MSA and statement of work, represents the charges towards the costs of hiring personnel who worked on the assessee's projects outside India and reimbursement of the incidental expenses incurred on account of travelling, lodging and meals etc. The recipient Ztek is a tax resident of USA and is thus governed by the provisions laid down in India - USA DTAA. Besides, Ztek do not have any permanent establishment in India within the terms of Article 5 of the DTAA. The assessee further submits that 'fee for included services' provided under Article 12 of the DTAA is much narrower in scope as compared to the definition of FTS provided under the Act and consideration received by resident of USA for providing services to a resident of India can be taxed as 'fee for included services' only if such services, make available technical knowledge, experience, skill knowhow or processes to the service recipient which is absent in the present case. A reference was made to the judgment

delivered by Hon'ble Delhi High Court in the case of *CIT vs. Bio Rad Laboratories (Singapore) Pte. Ltd. (2023) 155 taxmann.com 646 (Del)* to contend that make available clauses could be invoked in the present case since any technical knowledge and skill etc will not remain with the assessee receiving the services after the contract comes to an end. A reference was made to the judgment in the case of *DIT vs. Guy Carpenter & Co. Ltd. (2012) 346 ITR 504 (Del)* to submit that make available clause must be satisfied. The CIT(A), in the backdrop of arguments raised, found merit in the plea of the assessee and rightly held that staffing services cannot be considered as FTS under India-USA DTAA having regard to the judicial pronouncements in the similar factual matrix as noted in the first appellate order. The conclusion drawn by the CIT(A) thus cannot be faulted. We thus see no perceptible reason to interfere with the order of the CIT(A) towards reversal of addition to this score.

18. Ground No.2 of the Revenue's Appeal is thus dismissed.

19. In the result, the appeal of the Revenue is dismissed.

**Order pronounced in the open Court on 14/02/2024**

**Sd/-**

**[KUL BHARAT]  
JUDICIAL MEMBER**

DATED: /02/2024

*Prabhat*

**Sd/-**

**[PRADIP KUMAR KEDIA]  
ACCOUNTANT MEMBER**