

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

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 6421/MUM/2018
(Assessment Year: 2013-14)
&
ITA No. 6420/MUM/2018
(Assessment Year: 2014-15)**

**Silver Brook Financial Learning Centre
Private Limited,**

1301, Lodha Supemus, Saki Vihar Road,
Andheri (East), Mumbai - 400072

[PAN: AAKCS5159H]

..... **Appellant**

Income Tax Officer – 5(3)(2), Mumbai,

Room No. 526, 5th Floor, Aayakar Bhavan,

M.K. Road, Mumbai - 400020

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Ajay R. Singh
Shri Akshay Pawar

For the Respondent/Department : Shri Amit Pratap Singh

Date

Conclusion of hearing : 29.01.2024

Pronouncement of order : 27.02.2024

ORDER

Per Rahul Chaudhary, Judicial Member:

1. These are 2 appeals pertaining to Assessment Years 2013-14 and 2014-15 preferred by the Appellant against the common order, dated 05/07/2018, passed by the Ld. Commissioner of Income Tax (Appeals)-10, Mumbai [hereinafter referred to as 'the CIT(A)']. Since the appeals involve identical issues the same were heard together and are being disposed by way of a common

order.

ITA No. 6421/MUM/2018 (Assessment Year: 2013-14)

2. We would first take up appeal for the Assessment Year 2013-14 which has been preferred by the Appellant challenging the order, dated 05/07/2018, passed by the CIT(A) for the Assessment Year 2013-14, whereby the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 17/02/2016, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
3. The Appellant has raised following grounds of appeal in ITA No. 6421/Mum/2018:

"Ground No. 1

The Income-tax Officer - 5(3)(1), Mumbai (AO), erred in determining income at Rs.92,58,394/- as against Rs. 29,48,383/- returned by the appellant

Ground No. 2

The AO erred in disallowing professional fees of Rs. 59,85,896/- u/s 40(a)(i) paid to the director on the ground that tax was not deducted on the said payment u/s 195 of the Act.

Ground No. 3

The AO erred in not considering, while passing the order, the fact that as per Article 15 of the Double Taxation Avoidance Agreement (DTAA) between India and USA, the said payment is not taxable in India as the director does not have a fixed base in India nor his stay in India was more than 90 days in the year under consideration.

Ground No. 4

The AO erred in disallowing the said professional fees of Rs.59,85,896/- again u/s 40A(2)(a) of the Act on the ground that no documentary evidences for rendering these services were

provided by the appellant without considering the submissions filed by the appellant during the course of assessment proceedings.

Ground No. 5

The AO erred in disallowing travelling expenses of Rs.2,57,800/- as non-business expenses and are for the personal benefit of the director. The appellant submits that these expenses are for the purpose of business and incurred during the course of business and therefore are allowable under law. The AO disallowed travelling cost without discussing the same with the appellant.

4. The relevant facts in brief are that the Appellant is a company engaged in the business of providing training, customize programme and certificate course in finance, capital markets and related areas. For the Assessment Year 2013-14, the Appellant filed return of income on 29/09/2013. The case of the Appellant was selected for scrutiny. Vide Assessment Order, dated 17/02/2016, passed under Section 143(3) of the Act, the Assessing Officer completed the assessment after making, inter alia, following additions/disallowance:
 - (a) Disallowance of INR 59,85,896/- in respect of the professional fee paid to founder/director of the Appellant-company; and
 - (b) Disallowance of INR 2,57,800/- in respect of the travelling expenses of the aforesaid founder/director
5. The Appellant carried the issues in appeal before the CIT(A). Vide order dated 05/07/2018, the CIT(A) disposed off the appeal as partly allowed. However, the CIT(A) declined to delete the above said two additions/disallowances.
6. Being aggrieved, the Appellant is now in appeal before us on the

grounds reproduced in paragraph 3 above which are taken up hereinafter in seriatim.

Ground No. 1

7. Ground No. 1 raised by the Appellant does not require adjudication and the same is disposed of as being general in nature.

Ground No. 2 to 4

8. Ground No. 2 to 4 pertain to disallowance of professional fee of INR 59,85,896/- paid by the Appellant to Mr. Neil Shah (hereinafter referred to as '**Mr.N**'), founder/director of the Appellant-Company under Section 40(a)(i) and/or Section 40A(2)(a) of the Act.
9. During the assessment proceedings, the Assessing Officer noted that the Appellant had made payment of INR 59,85,896/- as professional fee to Mr. N Since no tax was deducted at source from the aforesaid payment, the Appellant was asked to provide explanation for the same. In response the Appellant filed reply contending that Mr. N was tax resident of USA and was entitled to claim benefit of Article 12 of the Double Taxation Avoidance Agreement between India and USA (for short '**DTAA**'). It was the urged by the Appellant that the services rendered by Mr. N did not fulfill the 'make available' criteria and therefore, the professional fee paid to Mr. N was not liable to tax in India as Fee for Technical Services in terms of Article 12 of DTAA. Further, it was also urged during the assessment proceedings that the services provided by Mr. N were also not liable to tax in India in terms of Article 15 of

DTAA. Mr. N was not in India for more than 90 days during the relevant period; all the activities were carried out outside India; and that Mr. N did not have a fixed place of business/profession in India. However, the Assessing Officer was not convinced. The Assessing Officer concluded that the payment of INR 59,85,896/- made by the Appellant to Mr. N was liable to tax in India in terms of Article 15 of DTAA and therefore, the Appellant was under obligation to deduct tax at source from the aforesaid payments under Section 195 of the Act. Since the Appellant had failed to deduct tax at source, the Assessing Officer made a disallowance of INR 59,85,896/- invoking provisions contained in Section 40(a)(i) of the Act. The Assessing Officer also concluded that the Appellant failed to bring on record any evidence to show that Mr. N has provided any professional services to the Appellant and therefore, invoking provisions contained in Section 40A(2)(a) of the Act, the Assessing Officer concluded that the payment of INR 59,85,896/- made by the Appellant to Mr. N was excessive and therefore, the Assessing Officer proposed addition of INR 59,85,896/- in the hands of the Appellant under Section 40A(2)(a) of the Act. Thus, while computing the assessable income, the Assessing Officer made an addition of INR 59,85,896/- to the return income vide order, dated 17/02/2016, passed under Section 143(3) of the Act.

10. Being aggrieved, the Appellant carried the issue in appeal before CIT(A). Vide order, dated 05/07/2018, the CIT(A) rejected the contention of the Appellant that Mr. N had provided professional services to the Appellant. According to CIT(A), the document/evidence produced by the Appellant before CIT(A) only demonstrated the involvement of Mr. N as a Director. The CIT(A)

agreed that the Assessing Officer that the payments of professional fee made by the Appellant to Mr. N was for the services rendered by Mr. N in his capacity as a Director of the Appellant-company and not as independent professional. Further, the services provided by Mr. N could at best be regarded as managerial services which fall outside the scope of the expression 'professional services' contained in Article 15 of DTAA. Therefore, Mr. N was could not take shelter of the beneficial provisions contained in Article 15 of the DTAA. The CIT(A) further observed that as per Article 17 of the DTAA, the Director Fee or similar payment derived by a director resident in USA from a company resident of India may be taxed in India. Therefore, the payment made to Mr. N in his capacity as a Director of the Appellant-company was liable to tax in India in terms of Article 17 of DTAA; and that the Appellant was liable to withhold tax from payments made to Mr. N under Section 195 of the Act. Accordingly, the CIT(A) confirmed the disallowance of INR 59,85,896/- for the Assessment Year 2013-14. In relation to disallowance made under Section 40A(2) of the Act, the CIT(A) granted relief to the Appellant by concluding that deduction can be allowed to the Appellant on account of payment made to Mr. N to the extent of INR 26,34,967/-, being the payment made to other Directors i.e. Mr. Apoorva Sheth. However, the CIT(A) noted that since the Appellant had failed to deduct tax at source from the payment made to Mr. N, the Appellant would be entitled to the aforesaid relief only the fulfillment of conditions provided under Section 40A(2) of the Act. Thus, the CIT(A) disposed off the issue raised in appeal vide order, dated 05/07/2018.

11. Being aggrieved, the Appellant is now in appeal before us on this issue.
12. Before us, it was contended on behalf of the Appellant that the services provided by Mr. N to the Appellant were in the nature of independent personal services since the Appellant was providing educational or teaching services to the Appellant.
13. On perusal of the remittances certificate in Form No. 15CB, we find that it has been claimed that remittances are stated to have been made in respect of professional services provided by Mr. N outside India which were not liable to tax in India in Article 15 of DTAA since Mr. N did not have a fixed place of profession in India.
14. Whereas in the remittance instructions given by the Appellant to the authorised dealer/bank stated that the Appellant was towards management consultancy services (as opposed to educational or teaching services).
15. Further, on perusal of supporting invoices filed by the Appellant we find that it has been stated therein professional fee was payable for the services rendered in the relevant area: (a) Presentations to clients, (b) Business development & management interaction; (c) Interacting & short-listing new professors, (d) Interacting with existing facilitators on various training issues, (e) Business plan & roadmap for 2012-2013, (f) Tele conference calls with business managers, and (g) facilitators interviews.
16. On the other hand on perusal of the assessment order, we find that it was contended on behalf of the Appellant during the assessment proceedings that the services provided by Mr. N to the

Appellant included:

- (a) Interacting and guiding top executives in running of the day to day business activities of the company
 - (b) Advising the company with regard to undertaking to various training course
 - (c) Developing and strengthening business relationship with clients such Credit Suisse, Goldman Sache, Wells Fargo, Jones Lang Lasalle, Volkswagon, etc.
 - (d) Providing strategic directions to the company as and when required.
17. Having examined the material placed before Assessing Officer and CIT(A) (forming part of the paper-book), we are of the view that the nature of services rendered by the Mr. N to the Appellant cannot be ascertained. The material placed on record does not substantiate the stand of the Appellant that the nature of services provided by Mr. N to the Appellant were in the nature of independent personal services falling within the ambit of Article 15 of DTAA.
18. On the other hand, we find merit in the contention advanced on behalf of the Appellant, that the CIT(A) had not confronted the Appellant as regards applicability of Article 17 of DTAA. We note that the Assessing Officer had taken a position that the services provided by Mr. N to the Appellant were in the nature of services provided by director and the professional fee of INR 59,85,896/- received by Mr. N was in the nature of Director fee. However, on perusal of the order impugned, we find that the CIT(A) has not confronted the Appellant in this regard by way of a show-cause

notice or otherwise.

19. During the course of hearing the Ld. Authorised Representative for the Appellant had placed on record, the additional documents/details along with the application for admission of additional evidence to support the stand of the Appellant that the nature of services provided by Mr. N. to the Appellant were not in the nature of royalty/fee for technical services and that the same were in the nature of independent personal services.
20. Given the fact and circumstances of the present case we are of the view that in order to determine the correct character of the fee of INR 59,85,896/- paid by the Appellant to Mr. N further enquiry/verification is required. Accordingly, we remand this issue back to the file of Assessing Officer for denovo adjudication. The Appellant would free to file all the relevant documents/details before the Assessing Officer who shall decide the issue afresh as per law after taking the same into consideration and after granting the Appellant reasonable opportunity of being heard. Thus, Ground No. 2 to 4 raised by the Appellant are allowed for statistical purposes.

Ground No. 5

21. Ground No. 5 pertains to the travel expenses of the Director of the Appellant-Company amount to INR 2,57,800/- disallowed by the Assessing Officer.
22. During the Assessment Year 2013-14, the Appellant had incurred expenses of INR 3,24,115/ towards the air travel of Mr. N from New York to Mumbai and Mumbai to New York. The Assessing

Officer during the assessment proceeding disallowed the travelling expenses under Section 37(1) of the Act.

23. Subsequently in the appeal before CIT(A) against the disallowance of travelling expenses under Section 37(1) of the Act, the CIT(A) allowed the travelling expenses of INR 66,315/-stating that Mr. N is the director of company and he is non-resident. As such, the expenses can be considered for the purpose of business and allowable under Section 37(1) of the Act. However, since the copy of invoice of travel agent of INR 2,57,800/- was not supported by e-ticket as such, same was not allowed.
24. Being aggrieved the Appellant carried the issue in appeal before the Tribunal
25. We have heard the rival contention and perused the material on record. The Ld. Authorised Representative for the Appellant had contended that the relevant documents/details could not be filed before the authorities as the same were not available/traceable at the relevant time. However, the Appellant has now filed invoice of travel agent along with copy of E-ticket as the additional evidence to support the claim for deduction of travel expenses to INR 2,57,800/-. It was submitted that the aforesaid travelling expenses of INR 2,57,800/- were incurred towards the air travel of Mr. N from New York to Mumbai and Mumbai to New York, and the same were allowable as revenue expenses under Section 37 of the Act. Per Contra Ld. Departmental Representative supported the order passed by the Assessing Officer and CIT(A) and submitted that the Appellant had failed to support the claim of deduction with supporting evidence. Hence, no fault could be

found with the order passed by the CIT(A) confirming the disallowance of INR 2,57,800/-.

26. We have already remanded the issue raised in Ground No. 2 to 4 to the file of Assessing Officer. Accordingly, keeping in view the facts and circumstances of the present case, we deem it appropriate and the interest of justice to admit the additional evidence and remand the issue raised in Ground No. 5 relating to disallowance of travel expenses of INR 2,57,800/- back to the file of Assessing Officer for denovo adjudication after granting the Appellant a reasonable opportunity of being heard. Thus, Ground No. 5 raised by the Appellant is allowed for statistical purposes.

ITA No. 6420/MUM/2018 (Assessment Year: 2014-15)

27. We would next take up appeal for the Assessment Year 2014-15 which has been preferred by the Assessee challenging the order, dated 05/07/2018, passed by the CIT(A) for the Assessment Year 2014-15, whereby the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Assessment Order, dated 23/12/2016, passed under Section 143(3) of the Act
28. The Appellant has raised following grounds of appeal in ITA No. 6420/Mum/2018:

"Ground No. 1

The Income-tax Officer-5(3)(2), Mumbai (AO), erred in determining income at Rs.83,86,850/- as against Rs. 34,86,550/- returned by the appellant

Ground No. 2

The AO erred in disallowing professional fees of Rs. 49,00,298/- u/s 40(a)(i) paid to the director on the ground that tax was not

deducted on the said payment u/s 195 of the Act.

Ground No. 3

The AO erred in not considering, while passing the order, the fact that as per Article 15 of the Double Taxation Avoidance Agreement (DTAA) between India and USA, the said payment is not taxable in India as the director does not have a fixed base in India nor his stay in India was more than 90 days in the year under consideration

Ground No. 4

The AO erred in disallowing the said professional fees of Rs.49,00,298/- again u/s 40A(2)(a) of the Act on the ground that no documentary evidences for rendering these services were provided by the appellant without considering the submissions filed by the appellant during the course of assessment proceedings.

Each of the above grounds of appeal is independent of one another.

Your Appellant craves leave to add, amend, alter, change or cancel all or any of the above ground of appeal on or before the date of hearing.

Ground No. 1

29. Ground No. 1 raised by the Appellant does not require adjudication and the same is disposed of as being general in nature.

Ground No. 2 to 4

30. As regards Ground Nos. 2 to 4 are concerned, during the course of hearing both the sides had agreed that Ground No. 2 to 4 raised in appeal for the Assessment Year 2014-15 were identical to the Ground No. 2 to 4 raised in appeal for the Assessment Year 2013-14 and that there is no change in the facts and circumstances of the case. Therefore, our finding/adjudication in relation to the same for the Assessment Year 2013-14 shall apply mutatis

mutandis to Assessment Year 2014-15. Accordingly, adopting the reasoning given while remanding issue raised in Ground No. 2 to 4 in appeal for the Assessment Year 2013-14, we remand the issue raised in Ground No. 2 to 4 relating to the claim for deduction for professional fee of INR 49,00,298/- paid by the Appellant to Mr. N back to the file of the Assessing Officer for denovo adjudication. The Appellant is directed to file all the relevant documents/details on which the Appellant wishes to place reliance before the Assessing Officer on receiving the notice of hearing. The Assessing Officer is directed to decide the issue as per law after giving the Appellant a reasonable opportunity of being heard, and after taking into consideration the details/documents furnished by the Appellant. Thus, Ground No. 2 to 4 raised by the Appellant are allowed for statistical purposes.

31. In result, both, the appeals preferred by the Assessee are allowed for statistical purposes.

Order pronounced on 27.02.2024.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 27.02.2024
Alindra, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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