

**आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम**  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
VISAKHAPATNAM BENCH, VISAKHAPATNAM

**श्रीदुव्वूरुआरएलरेड्डी, न्यायिकसदस्यएवंश्रीएसबालाकृष्णन, लेखासदस्यकेसमक्ष**

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &  
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकरअपीलसं./ I.T.A. No.49/Viz/2022

(निर्धारणवर्ष/ Assessment Year : 2017-18)

Diamond Manufacturing  
Management and Consultancy  
Limited Mauritius.

PAN: AADCD 6598 E

(अपीलार्थी/ Appellant)

अपीलार्थीकीओरसे/ Assessee by

प्रत्यार्थीकीओरसे/ Revenue by

सुनवाईकीतारीख/ Date of Hearing

घोषणाकीतारीख/Date of

Pronouncement

Vs. Assistant Commissioner of  
Income Tax,  
Circle – International Tax,  
Vizag.

(प्रत्यर्थी/ Respondent)

Sri PVSS Prasad, AR

Dr. Satyasai Rath, CIT-DR

: 20/03/2024

: 26/03/2024

**ORDER**

**PER S. BALAKRISHNAN, Accountant Member :**

This appeal filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-10, Hyderabad in appeal No. ITBA/APL/S/250/2021-22/1039488281(1), dated 7/2/2022 arising out of the order passed U/s. 143(3) r.w.s 144C of the Income Tax Act, 1961 [the Act] for the AY 2017-18.

2. Briefly stated the facts of the case are that the assessee is a foreign company incorporated in Mauritius Companies Act, 2001 and is a tax resident of Mauritius. The assessee is engaged in the business of managing diamond factories and facilitating diamantaires to operate economically for high quality diamond factories across the Globe. The assessee has entered into a technical collaboration with its Associated Enterprises [AEs] in India viz., Worldwide Diamond Manufacturers Pvt Ltd and Worldwide Diamond Sorting Pvt Ltd for providing technical, process, marketing and sales assistance services outside India. The assessee has received Fees for Technical Services [hereinafter it is referred in short "FTS"] of Rs. 1,80,19,861/- from M/s. Worldwide Diamond Manufacturers Pvt Ltd and Rs. 69,98,338/- as FTS from M/s. Worldwide Diamond Sorting Pvt Ltd during the FY 2016-17. On perusal of the Form 15CA and 15CB submitted by the assessee, the Ld. AO observed that the Indian entity has deducted tax at source @ 10% while remitting the FTS to the Mauritius company. The Ld. AO considered that the assessee is having "Service PE" in India and thereby invoked the provisions of section 9(1)(vii) r.w.s 115(A)(1)(b) of the Act and concluded that the FTS are chargeable to Income Tax in India. Aggrieved by the above addition made by the Ld. AO, the assessee preferred an

appeal before the Ld. CIT(A). The Ld. CIT(A) considering the submissions made by the assessee, directed the Ld. AO to tax the fees received by the assessee as FTS @ 10% as per the provisions of section 115A of the Act. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds of appeal:

- “1. *The Ld. CIT(A), Hyderabad-10 erred in law and as well as facts of the case by holding that the technical collaboration fees received by the appellant, a Mauritius tax resident, are chargeable to tax @ 10% as per section 9(1)(vii) r.w.s 115A(1)(b) of the Act and the India-Mauritius tax treaty.*
2. *The Ld. CIT(A), Hyderabad-10 failed to appreciate that it is a settled position that the taxpayer has the legal right U/s. 90(2) of the Act to apply the provisions of the Act or applicable tax treaty whichever is more beneficial and the same is not legal opportunism.*
3. *The Ld. CIT(A), Hyderabad-10 failed to appreciate that under the India – Mauritius Tax Treaty, the Article on taxation of Fees for Technical Services was inserted with effect from 1<sup>st</sup> April, 2017 ie., after the year under consideration and for the year under consideration the said income was business profits which could not be taxed in India in absence of a Permanent Establishment [PE] in India.*
4. *The Ld. CIT(A), Hyderabad-10 failed to appreciate the point that the facts of the case of the appellant are identical to the appellant’s own case for AY 2016-17 wherein the Ld. CIT(A) held that the provisions of India-Mauritius Tax Treaty would prevail and FTS income would not be taxable in India as the appellant does not have a PE India.*
5. *The Ld. CIT(A), Hyderabad-10 erred in law and as well as facts of the case in confirming the order of the AO that the appellant had a service Permanent Establishment [PE] in India without appreciating that the clause on service PE was inserted in India – Mauritius Tax Treaty with effect*

*from 1<sup>st</sup> April, 2017 ie., after the year under consideration.*

6. *Without prejudice to the above, the Ld. CIT(A), Hyderabad-10 erred in law and as well as facts of the case in holding that the appellant has a Service PE in India, disregarding the factual position that the appellant has no presence in India and has not rendered any services in India through its employees or otherwise. The Ld. CIT(A), Hyderabad has not brought on record any fact or argument to controvert this factual position.*
7. *Any other ground that may be urged at the time of hearing with the approval of the Hon'ble Members."*

3. The only issue emanating from the above grounds raised by the assessee is with respect to taxation of Technical Collaboration Fees @ 10% U/s. 9(1)(vii) r.w.s 115A(1)(b) of the Act. The Ld. AR argued that in the assessee's own case for the earlier assessment year, the Ld. CIT(A) has allowed the appeal of the assessee. He also submitted that there is no "Service PE" existing in India but the Ld. CIT(A) failed to appreciate that fact. The Ld. AR also argued that the penal proceedings were dropped after the Ld. CIT(A)'s order. The Ld. AR further submitted that the assessee vide letter dated 24/12/2019 during the scrutiny assessment proceedings has voluntarily agreed to tax the FTS U/s. 115A of the Act to buy peace, to avoid litigation and also to avoid penal proceedings. However, the Ld. AR pleaded that this amount is not taxable in India, in the absence of Service PE and

hence pleaded that the addition made may kindly be deleted. In this context, the Ld. AR relied on the following case laws:

- (i) Decision of the jurisdictional Bench of the ITAT in the case of Paramina Earth Technologies Inc vs. DCIT reported in [2020] 116 taxmann.com 347 (Visakhapatnam – Trib.)
- (ii) Bangkok Glass Industry Co. Ltd vs. ACIT [2013] 34 taxmann.com 77 (Madras).
- (iii) Zynga Game Networks India (P.) Ltd vs. ACIT [2018] 97 taxmann.com 44 (Bangalore – Trib.)
- (iv) ABB FZ – LLC vs. ITO (IT) [2016] 75 taxmann.com 83 (Bangalore – Trib.)
- (v) IBM India Private Limited vs. DDIT [IT(ITA) Nos. 489 to 498/Bang/2013 (ITAT, Bangalore)
- (vi) Mckinsey Business Consultants vs. DDIT [ITA No. 5452 Mumbai 2014]
- (vii) DCIT (IT) vs. Wellspun Corporation Ltd, 77 taxmann.com 165 (Ahmedabad – Trib.)
- (viii) Andaman Sea Foods Pvt Ltd vs. DCIT [ITA No. 1412/Kol/2011]
- (ix) Kalpataru Power Transmission Ltd vs. DCIT [2023] [149 taxmann.com 484]
- (x) Michelin ROH Co. Ltd vs. DCIT [2022] [138 taxmann.com 497]
- (xi) Smt. Malti Mishra vs. CIT-II [2013] 38 taxmann.com 160]

4. The Ld. AR therefore pleaded that in the absence of any specific clause in the DTAA between India and Mauritius, FTS be taxed as per Article-7 of the DTAA as business profits and in the instant case since the assessee does not have any PE in India, these business profits cannot be taxed in India.

5. Per contra, the Ld. Departmental Representative [DR] argued that in the absence of any specific provisions in DTAA regarding

the taxability of the income, the provisions of section 115A squarely applies. The Ld. DR also further submitted that the assessee has also paid a differential tax amount of Rs. 1,78,700/- during the scrutiny assessment and it is only an afterthought to the earlier accepted stand of the assessee. He therefore pleaded that the order of the Ld. CIT(A) be upheld. The Ld. DR relied on the Circular No. 333 [F.No.506/42/81-FTD], dated 2-4-1982.

6. We have heard both the sides and perused the material available on record as well as the orders of the Ld. Revenue Authorities and the written submission made by the assessee. There is no dispute on the fact that the assessee is not having a Permanent Establishment [PE] in India. Further, there is no specific clause in the DTAA entered into between the Republic of India and Mauritius as pointed out by the Ld. AR in his written submissions, Article-12A was inserted w.e.f 1/4/2017 and cannot be applied for the FY 2017-18. We also find that various judicial pronouncements including the Coordinate Benches and various Hon'ble High Courts have held that in the absence of any specific provisions in the DTAA, the scope of taxing the said income shall be only business profits subject to existence of PE

in India, and cannot be tax under the residuary Article of the relevant DTAA. It was also held that the said income cannot be expanded within the scope of section 9(1)(vii) r.w.s 115A of the Act. The reliance placed by the Ld. AR on the jurisdictional Bench of the ITAT in the case of Paramina Earth Technologies Inc vs. DCIT (International Taxation) Visakhapatnam observed as under:

*“6.3 In the instant case, there is no dispute that the payment made was in the nature of FTS and there is no article in DTAA for taxing the FTS separately. Therefore, the payment made to the non resident required to be taxed under article 7 under the head 'business profits'. There is no PE in India to non resident. The AO has not made out a case of having PE to non resident in India. Therefore, the payment made to non resident are not to be taxed in India as business profits. Though the department has tried to distinguish the case laws, the fact remains that in the case laws referred above, the payment was made in the nature of Fee for Technical Services and the department has also accepted that the payment made to the non resident was in the nature of FTS. Therefore, the facts of the assessee's case are squarely covered by the decision of ITAT Bangalore (supra). Accordingly, we hold that the lower authorities have erred in taxing the FTS separately u/s9(1)(vii) of the Act. Accordingly orders of the lower authorities are set aside and the appeals of the assessee are allowed.”*

Further in the case of DCIT, Circle-4(2), New Delhi. Vs. Campus Eai India Pvt. Ltd in ITA No. 355/Del/2021 Asstt. Year: 2017-18 the Coordinate Bench of Delhi Tribunal has held as under:

*“14. From the above, it is abundantly clear that the Ld. CIT(A) after considering the impugned issue in detail has given his finding that invocation of the provisions of section 40(a)(i) of the Act by the Ld. AO is erroneous for the reason that the income of a non-resident agent from provision of marketing and sales support services rendered for overseas client cannot be included under section 5(1) of the Act as the same does not deem to accrue or arise in India based on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Eon Technology P. Ltd. (ITA No. 1167/2011) and further holding that in the absence of a specific clause on*

*FTS under the India-UAE DTAA, provisions of Article 22 on residuary/ other income cannot be invoked based on the decision in the case of Kingfisher Airlines Ltd. (supra). In view of the factual and legal position as well as our findings in respect of ground No.1 (para 8, 8.1, 8.2 and 10 referred), we are inclined to uphold the order of the Ld. CIT(A). Accordingly ground No. 2 of the Revenue is dismissed.”*

The Hon’ble Madras High Court in the case of Bangkok Glass Industry Co. Ltd vs. ACIT reported in[2013] 34 taxmann.com 77 (Madras) has held as follows:

*“ Even though the revenue canvassed this issue before the Tribunal, in the absence of any material to read the clauses otherwise, rightly, the Tribunal came to the conclusion that a sum of 4,79,640 USD alone would fall for consideration under article 12 as royalty income and the other to be assessed as by way of technical services. Since the assessee had no PE, the said amount cannot be brought under article 7. In the light of the above, the order of the Tribunal is confirmed. [Para 19]*

*As far as the order in article 22 is concerned, there is no justifiable ground to uphold that portion of the order after the discussion on the extent of income falling for consideration under royalty as defined under article 12 and the amount paid as towards technical services falling for consideration under article 7. Since the said income does not fall as miscellaneous income, the same cannot be brought under article 22. [Para 20]*

*Even though it was submitted that the fee paid towards technical services cannot be brought towards business income, yet in the absence of any material to show that the same is not related to the business of the assessee, the said contention is rejected. Even assuming for a moment that the assessee is an Indian company, given the nature of business of the assessee, if the income earned would qualify for consideration on the normal computation as business income, the said character would not undergo a change merely on the score that the assessee is not an Indian company. [Para 21]*

*In the light of the above, the assessee's appeals are allowed. The order of the Tribunal as far as its consideration on article 22 of DTAA is concerned, is set aside. [Para 22]”*

This decision of the Hon’ble Madras High Court (supra) has reversed the decision of the Chennai Tribunal in the case of TVS

Electronics Limited. It is settled position of law that in the absence of a clause in DTAA not dealing with a particular item of income, the payments are not be regarded as residuary income but as business income which is not chargeable to tax in India, in the absence of any PE of the Non-Resident in India. In the light of the above discussions cited above, following the ratio laid down in the various judicial pronouncements as discussed above, we are inclined to allow the grounds raised by the assessee.

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

Pronounced in the open Court on 26<sup>th</sup> March, 2024.

Sd/-

(दुव्वूरुआर.एलरेड्डी)

(DUVVURU RL REDDY)

न्यायिकसदस्य/JUDICIAL MEMBER

Sd/-

(एसबालाकृष्णन)

(S.BALAKRISHNAN)

लेखासदस्य/ACCOUNTANT MEMBER

Dated : 26.03.2024

OKK - SPS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee–Diamond Manufacturing Management and Consultancy Limited Mauritius, C/o. Prasad and Prasad, Cas, Flat No. 301, MJ Towers, H.No. 8-2-698, Road No.12, Banjara Hills, Hyderabad, Telangana-500034.
2. राजस्व/The Revenue –Asst. Commissioner of Income Tax, Circle International Tax, O/o. ITO, Infinity Towers, Sankaramatam Road, Visakhapatnam, Andhra Pradesh-530016.
3. The Principal Commissioner of Income Tax,

4. आयकरआयुक्त (अपील)/ The Commissioner of Income Tax
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/ DR,ITAT,  
Visakhapatnam
6. गार्डफाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary  
ITAT, Visakhapatnam