IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI

Before Dr. B. R. R. Kumar, Accountant Member,

Sh. Anubhav Sharma, Judicial Member

ITA No. 1613/Del/2016 : Asstt. Year: 2012-13

Gecom International Pvt. Ltd., 2/3, 2nd Floor, Jullena Complex, Opposite Hotel Crown Plaza, New Friends Colony, New Delhi-110025	Vs	DCIT, Circle-10(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AADCG3295R		

Assessee by : Sh. Ved Jain, Adv. &
Sh. Aman Garg, CA
Revenue by : Ms. Parul Singh, Sr. DR

Date of Hearing: 19.06.2024		**Date of Pronouncement: 21.06.2024**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of ld. CIT(A)-16, New Delhi dated 16.01.2015.

2. Following grounds have been raised by the assessee:

" 1. That the learned Assessing Officer ('AO') erred in passing the impugned assessment order dated February 2, 2015 ('Assessment Order') and the Hon'ble Commissioner of Income Tax (Appeals) ('CIT(A)') vide his appellate order under Section 250(6) of the Income-tax Act, 1961 ('Act') received by the Appellant on February 3, 2016 erred in partly disallowing the appeal made by the Appellant under Section 246A of the Act. On the facts and circumstances of the case and in law, the learned AO erred in assessing the income of the Appellant at Rs.7,52,40,570 as against the returned income of Rs.7.12,87,080.

2. On the facts and circumstances of the case and in law, the learned AO and the Hon'ble CIT(A) erred in making several allegations, observations and assertions based on mere conjectures and surmises, without any relevant material on

record. Inter-alia the incorrect assumptions/ inferences made by the Hon'ble CIT(A) are as under:

(a) The Hon'ble CIT(A) has erred in rejecting the contentions of the Appellant that the Appellant has not acted as the permanent establishment ('PE'). The Hon'ble CIT(A) has erred in holding that the Appellant has acted as a PE of the foreign university on the premise that there is no express written contract between the Appellant and University of Cambridge ('foreign university').

(b) The Hon'ble CIT(A) has erred in not appreciating the fact that the foreign university has granted an affiliation certificate to the Appellant based on Appellant meeting all the standards as required by foreign university and the payments made by the Appellant to the foreign university are in pursuance of the invoices raised by the foreign university and there is no express written contract between both the parties.

(c) The Hon'ble CIT(A) has erred in alleging that the Appellant is avoiding the production of contract before income tax authorities and hence has erred in confirming the alleged addition made by the Learned AD on the ground that the Appellant has acted as a Permanent Establishment of the foreign university.

(d) The Hon'ble CITIA) has red not appreciating that the Appellant may obtain affiliation of any other foreign university and offer any curriculum to its candidates and it not bound by any contract with any foreign university in conduct of its activities.

3. On the facts and circumstances of the case and in law, the learned AO erred in making and addition and the Hon'ble CIT(A) further erred in confirming the action of learned AO under the provisions of the Act and Double Tax Avoidance Agreement entered between India and United Kingdom of Great Britain and Northern Ireland(Tax Treaty) without appreciating that income of the foreign university on account of payments for examination fee made by the Appellant:

(a) that not accrued/arisen in India under Section 5(2) of the Act.

(b) could not be deemed to have accrued arisen in India under Section 9 of the Act, and

(c) was not taxable in India under the Tax Treaty.

5. On the facts and circumstances of the case and in law, the learned AO erred in alleging and the Hon'ble CIT(A) further erred in confirming that the Appellant is an Associated

Enterprise of the foreign university in India solely because the Appellant is paying examination fees to the foreign university.

6. On the facts and circumstances of the case and in law, the learned AO as well as the Hon'ble CITIA) erred in not appreciating that as per Article 13(5)(c) of the Tax Treaty any amount pad the teaching in or by educational institutions does not classify as fee for technical services under the Tax Treaty and accordingly the payments for examination lees made by the Appellant to foreign university are not chargeable to tax in India under the provisions of the Tax Treaty.

7. That the learned Assessing Officer (AO) and the Hon'ble CIT(A) have erred in ignoring order dated 22 December 2014 passed by the Hon'ble Commissioner of Income Tax Appears on similar matter in respect of earlier assessment year, i.e. AY 2011-12 wherein the Hon'ble Commissioner of Income Tax (Appeals) 4 has clearly spelled out with detailed deliberations that the Appellant was not required to deduct any taxes at source of payment of examination fees to the foreign university.

8. That the learned AO erred in disallowing and the Hon'ble CIT(A) further erred in confirming the addition of Rs. 35,02,105 to the Appellant's returned income on account of disallowance under Section 40(a)(ia) of the Act without appreciating that Section 40(a)(ia) of the Act does not squarely cover payments made to non-residents. Section 40(a)(ia) of the Act covers only payments made to resident persons and inter alia reads as under:

> *"40. Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-*
>
> *(a) in the case of any assessee-*
>
> *(i)…….*
>
> *(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139.*
>
> ……..

9. On the facts and circumstances of the case and in law, the learned AO erred in levying interest under Section 234B of the Act and further erred in initiating penalty proceedings under Section 271 of the Act."

This is an appeal filed by the assessee against the order of CIT(A) dated 06.01.2015 whereby he has confirmed the disallowance of Rs. 35,02,105/- being the payment made to University of Cambridge on the reasoning that tax has not been deducted at source applying section 40(a)(ia).

It may be relevant to point out that similar addition was made in preceding A.Y. 2011-12 and the CIT(A) has deleted the addition holding that the amount paid by the assessee to University of Cambridge is not chargeable to tax in India and hence, no tax is required to be deducted.

Further similar issue has come up in succeeding Assessment years 2013-14 and 2015-16 where similar disallowance was made by the AO and the CIT(A) has deleted the addition on the reasoning that amount is not chargeable to tax and also judicial discipline require to follow the order of the predecessor passed in the case of assessee itself.

On the principle of consistency, the addition ought to have been deleted by the CIT(A).

It may be further relevant to point out that the assessment order passed in all these years are verbatim same.

Brief facts of the case are that the assessee company runs a school with the name Ryan Global School. Ryan Global School is affiliated with University of Cambridge since 07.01.2010. During the year under consideration, the assessee has made payment of examination fee amounting to Rs.35,02,105/-, collected from the students appearing in examination to Cambridge University. During the assessment proceedings, the Assessing Officer asked the assessee as to why the payment in respect of examination fee made to Cambridge University amounting to Rs.35,02,105/- should be not be disallowed u/s 40(a)(ia) of the Income Tax Act, 1961 on account of non-deduction of TDS on such payment.

The assessee filed its reply dated 30.01.2015 and submitted that assessee company's Ryan Global School are affiliated with University of Cambridge. Accordingly the students who sits in the exam has to pay exam fee to the University of Cambridge and examination fee so collected from students by the assessee was transferred to University of Cambridge.

It was further submitted that University of Cambridge is not a resident of India and it does not have any control over the assessee company and it also does not have unhindered and unlimited access to assessee premises. The arrangement between Assessee Company and University of Cambridge is simple that of affiliation. In terms of shareholding, managerial and professional control, University of Cambridge does not have any control over the assessee company. In support of its contention, the assessee submitted the following documents:

- Copy of form 10F furnished by University of Cambridge
- Copy of Tax Residency Certificate of University of Cambridge
- Copy of affiliation certificate

It was also submitted that verbatim same disallowance was made by the AO during the A.Y. 2011- 12 and it was deleted by the ld. CIT(A). However, the AO ignoring the detailed submissions made by the assessee, made the disallowance of Rs. 35,02,105/- u/s 40(a)(ia) of the Act, alleging that assessee is a Permanent Establishment of the University of Cambridge and income from conduct of examination in India is income arising in India for University of Cambridge and assessee has made payment to University of Cambridge without deduction of TDS.

Aggrieved by the order of AO, the assessee filed an appeal before ld. CIT(A).

Before the ld. CIT(A), the assessee reiterated its stand taken before the AO and it was also submitted that similar disallowance made by AO in A.Y. 2011-12, A.Y. 2013-14 and A.Y. 2015-16 has been deleted by the ld. CIT(A).

However, the Ld. CIT(A) ignoring the detailed submissions made by the assessee and also ignoring the order passed by the processor exactly the same facts confirmed the disallowance made by AO on the reasoning that since assessee has not entered into a formal agreement with University of Cambridge, nature of transaction cannot be examined.

Aggrieved, the assessee filed appeal before the Tribunal.

At the outset, it was submitted that the fee is collected by the assessee from the students and directly remitted by to the University of Cambridge, no part of such receipts is retained by the assessee and this fact is neither disputed by the AO nor by ld. CIT(A). It is also submitted the University of Cambridge is not a resident of India. Copy of Tax Residency Certificate of University of Cambridge and it does not have any Control over the assessee company and it also does not have unhindered and unlimited access to assessee premises. The arrangement between assessee company and University of Cambridge is that of affiliation. Further, in terms of shareholding, managerial and professional control, University of Cambridge does not have any control over the assessee company. Hence, assessee company cannot be held as the Permanent establishment of the University of Cambridge and payment of examination fee made by the assessee to University of Cambridge does not fall under the definition of fee for technical service as defined under explanation 2 to section 9(1) of the Act and as per Article 13(5)(c) of the India- UK DTAA and therefore not taxable in the hand of recipient in India.

It is further submitted that Ryan Global School has met the criteria to be affiliated with University of Cambridge and therefore was granted affiliation certificate and no further agreement is required for the arrangement between Assessee Company and University of Cambridge.

It is pertinent to mention that similar disallowance was made by AO in immediately preceding A.Y. 2011-12 and same was deleted by ld. CIT(A). Relevant finding of the ld. CIT(A) is as under:

> *"2 Regarding the Ground No. 1 of the appeal, keeping in view the certificate issued by HM Revenue and Customs dated 13.03.2010 in Form No. 10F, and keeping in view the facts of the case, it is evident that the University of Cambridge to whom payment was made is not resident in India. On careful consideration of the arrangements between the appellant and the University of Cambridge, it is seen that the appellant was engaged by University of Cambridge for the limited purposes i.e. to conduct examination at various Indian educational institutions run by the appellant. There is no evidence on record that the said Cambridge University had any supervision or control over the appellant company, nor does it indicate that it had unlimited and unhindered access to the appellant's premises. The arrangements between the appellant and the University of Cambridge are plain and simple as the appellant was getting the examination carried out for the University of Cambridge. The appellant company's Ryan Global School, Mumbai is certified to be a Cambridge International Centre, which was eligible to conduct the examinations for University of Cambridge. However, in terms of share holding, managerial and professional control, University of Cambridge did not have any hold over the appellant company. Under the circumstances it cannot be held that there exists any PE of M/s. Cambridge*

University, in the form of various educational institutions owned by the appellant company.

6.3 The provisions of Indo-UK DTAA clearly provide that in order to hold payment as "payment for technical services' the payee is to 'make available' technical knowledge, experience, skill, know-how etc. In the case of the appellant, evidently, the payment is made for getting the examination conducted based on academic system of University of Cambridge. No transfer of technical knowledge, etc. can be inferred to have been 'made available' to the appellant. Moreover, in terms of Para 5 of Article 13, the payment by 'educational institutions' does not get covered under the Fees for Technical Services. As the appellant is running educational institutions, evidently, payment for conduct of examination cannot be held as FTS. In view of the above, the appellant was not required to deduct TDS under Section 195 on such payments made to University of Cambridge. In view of this, the disallowance under Section 40(a)(ia) was not justified. Accordingly, the Ground No. 1 is allowed."

Further, the similar disallowance was my by the AO in immediately succeeding A.Y. 2013-14 and the ld. CIT(A) following the principal of judicial principle, deleted the addition made by the AO. Relevant finding of the ld. CIT(A) is as under:

"Furthermore it was also submitted that, subsequently in similar matter pertaining to AY 2015-16 on a similar issue the appeal of the Appellant was allowed by the Commissioner of Income Tax (Appeals)-4, New Delhi vide order dated 18th January 2019. The ld. CIT(A) has observed as follows:

'6.1.4 I have considered the finding of the AO and the submissions of the appellant. On perusal of the finding of the AO, I am unable to find the basis on which the AO concluded that the appellant company is the Permanent Establishment of the Foreign University. Just because the Indian party is collecting examination fees cannot be the basis of being a Permanent Establishment. Furthermore, on perusal of the submissions filed by the appellant, I am also of the view that as per Article 13 (para 5) of the DTAA between India and UK the appellant company cannot be held to be the PE of the Foreign University as there is no fixed place under control and disposal of the foreign university. Furthermore, the appellant company does not have any principal agent relationship with foreign university. On careful consideration, I find no reason to deviate from the appellant order of my Ld. Predecessor on the issue for AY 2011-12.

6.1.5 In this regard, reliance is also placed on the decision of the Hon'ble Delhi Bench of Income Tax appellate Tribunal in the case of M/s. Hughes Escort Communications Ltd. Vs. DCIT, Circle 2(2) [ITA No. 752/Del/2005].

6.1.6 In this case, it was held that when role of the Indian Company was merely to enroll students, and provide the infrastructure by way of computer broad band access VSAT connectivity etc. for accessing course material in the class room and there is no use of Trademark by the Indian Company, the payment made by the Indian Company will not be treated as royalty and there is no business profit hence no TDS has to be deducted on the same.

6.1.7 Thus, in view of the above, I am of the opinion that no income has deemed to accrue or arise in India on account of

the University of Cambridge, hence no TDS was required to be deducted of Section 195 o the Act. As no TDS deduction is required, disallowance under section 40(a)(ia) of the Act would not be permissible. Thus, the disallowance made by the AO is deleted.

Ground of appeal raised by the appellant is allowed. '

Since the facts are similar, therefore, maintaining judicial discipline and respectfully following the decision of my predecessor, CIT(A)-4, Delhi the addition on this account are deleted."

Further, similar disallowance made by the AO in A.Y. 2015-16 was deleted by the ld. CIT(A).

In this regards, it is submitted that the Ld. CIT(A) has failed to follow principal of consistency without pointing out any change in circumstances and this action of against the settled position in law that where an issue has been considered and decided consistently in a number of earlier assessment years in a particular manner, for the sake of consistency, the same view should continue to prevail in subsequent years unless there is some material change in the facts and this contention of assessee is supported by the Hon'ble Delhi High Court judgment in the case of CIT Vs. Neo Poly Pack (P.) Ltd., 2000 (4) TMI 26 Dated 19-4-2000.

Furthermore, the assessee contention that examination fee made by the assessee to University of Cambridge does not fall under the definition of fee for technical service as defined under

explanation 2 to section 9(1) of the Act and as per Article 13(5)(c) of the India-UK DTAA and therefore not taxable in the hand of recipient in India is supported by ITAT Hyderabad judgment in the case of DCIT, Central Circle-3 (2) , Hyderabad Vs. M/s Hyderabad Educational Institutions Pvt. Ltd., 2023 (1) TMI 355 Dated May 26, 2022.

In the view of above mentioned submissions and judicial pronouncements, disallowance made by AO and confirmed by CIT(A),should be deleted.

26. Without prejudice to above, AO has made disallowance u/s 4(a)(ia) of the Act and the same is not applicable on payment made to non-residents. Relevant section is as under:

"40. Notwithstanding anything to the contrary in sections 30 to [38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) in the case of any assessee-

(ia) [thirty percent, of any sum payable to a resident], on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, 16[has not been paid on or before the due date specified in sub-section (1) of section 139],-

In the view of above, addition made by AO and confirmed by CIT(A) is liable to be deleted.

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

Order Pronounced in the Open Court on 21/06/2024.

Sd/-	**Sd/-**
(Anubhav Sharma)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 21/06/2024
Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR