

| आयकर अपीलिय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER

I.T.A. No. 4494/Mum/2023
Assessment Year: 2010-11

Assistant Commissioner of Income Tax, Circle -6(1)(2), Mumbai	Vs	KPMG India Pvt. Ltd. 2 nd Floor, Block T2 B Wing Lodha Excelus Apollo Mills Compound N.M. Joshi Marg Mahalaxmi Mumbai - 400011 [PAN: AAACK2138K]
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Ajit Kumar Jain & Shri Siddhesh Chaugule, A/Rs
Revenue by :	Shri Anil Sant, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 15/07/2024
घोषणा की तारीख /Date of Pronouncement: 15/07/2024

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

This appeal by the revenue is preferred against the order of the ld. CIT(A) / Addl/ JCIT(A) - Thiruvananthapuram, dt. 18/10/2023, pertaining to AY 2010-11.

2. The grievance of the revenue reads as under:-

"1. Whether on the facts and circumstances of the case and in law, the ld. CIT(A) is erred in directing the AO to allow the payments made to foreign parties without TDS, disallowed by the AO u/s. 40(a)(i) on the grounds that the same were in the nature of professional fees paid to non-residents and not in the nature of royalties and other income and not subject to tax withholding in the absence of a permanent establishment/fixed base of the non-resident in India and thus not hit by the provisions of Section 40(a)(i) r.w.s. 195 of the IT Act, 1961.

2. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

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

3. At the very outset, it has been brought to our notice that the impugned issue has been decided by the Co-ordinate Bench in favour of the assessee and against the revenue from AY 1999-2000 and 2001-02 and For AY 2005-06 and 2007-08. We also find that the Id. CIT(A) while deleting the disallowance has followed the earlier orders of the Co-ordinate Bench. We find that the Co-ordinate Bench in ITA No. 4861/Mum/2013 & 4555/Mum/2013 for AY 2007-08, order dt. 23/12/2015, has considered an identical disallowance and held as under:-

"6. We have considered the submissions of the parties and perused the material available on record. As far as contention of the learned Departmental Representative that necessary details relating to services rendered by the assessee were not furnished before the Departmental Authorities, we are unable to accept the same. On a perusal of the documents submitted in the paper book, we find that all necessary details relating to service rendered by overseas entities for which professional charges were paid have been furnished before the Assessing Officer / Commissioner (Appeals). Further, on a perusal of the assessment order, it is clear that the Assessing Officer has failed to establish the fact that the payments made were for the use of any copyright, literary, artistic or scientific work including cinematography film or work on film tape or other means of production for use in connection with radio or television broadcasting any patent, trademark, design or model plan, secret formula or process, or for information concerning industrial, commercial or scientific experience including gains derived from the alienation of any such right or property which are contingent on productivity for disposition thereof so as to bring it within the term of "royalty" as provided under Article-12 of Indo-US DTAA. Further, it is evident from record that the payment made by the assessee towards professional charges are akin or similar to payment made to the overseas entities in assessment year 1999- 2000 and 2001-2000, decided by the Tribunal. As the learned Departmental Representative has failed to bring to our notice material difference in facts between the preceding assessment years considered by the Tribunal and the impugned assessment year, which is discernable from record, we are unable to agree with him for restoring the matter back to the file of the Assessing Officer for deciding afresh. In our view, as the Assessing Officer has failed to establish that the payments made by the assessee towards professional charges to the non-

resident are in the nature of royalty, as provided under Article-12 and 13 of the respective DTAA, the disallowance under section 40(a)(i) is not correct. For the sake of completeness, we may observe that the co-ordinate bench of the Tribunal in assessee's own case in ITA no.8824/Mum/2004, etc., dated 8th June 2012, while deciding Department's appeal, has upheld the decision of the learned Commissioner (Appeals) in deleting the disallowance under section 40(a)(i) held as under:-

"We have carefully considered the rival submissions and also gone through the findings given by the Assessing Officer as well as the CIT(A). The relevant facts are that the assessee company was engaged as a consultancy services in connection with sale of its energy business. consultant by Essar Oil Limited to provide Such a sale was expected to require application of high level office skills besides technical and industry knowledge. For rendering such consultancy a significant number of such overseas companies are based in USA. The assessee engaged the services of KPMG Dallas, which is a firm of individual and resident of USA, which had the skill and technical knowledge relating to energy division based industry and technical parameters in giving such consultations and conduct negotiations with the potential parties. It was in lieu of this, that a professional fee of USD 46,248 which in terms of INR come to 20,89,906/-, was paid. The second payment was made to KPMG consulting LP Canada for rendering professional services for the Essar Oil Limited for retail oil marketing and other related services. The payment towards fee was made at USD 30,678/- which in terms of INR is 13,37,229/-, which also included reimbursement of expenses in the nature of transportation, lodging, meals and other expenses. The Assessing Officer has given categorically finding that so far as the Article 15 of DTAA is Concerned, the same does not apply to KPMG USA as it does not have any PE or business based in India and the services were not rendered for a period exceeding 90 days within the period of 12 months. His only case is that the professional fees paid to KPMG are in the nature of royalties within the meanings of 'explanation' to section 9(1)(vi) and is taxable under Article 12 of Indo-US DTAA. The royalties and fees for included services is taxable as per Article 12 in clause 3, reads as under :-

"3. The term "royalties" as used in this Article means:
 (a) payments of any kind received as a consideration for the use of or the right to use any copyright or a literary, artistic or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or

scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity use or disposition thereof: and"

18.1 Looking to the nature of professional services rendered to the KPMG USA, it is evident that it does not fall in any of the terms of definition given for Royalty under Article 12 of Indo US DTAA. It was purely a professional service for consultancy which were industrial or commercial knowledge or information. Thus, nature of rendered outside India and nor for supply of scientific, technical, made under section 49(ia) is uncalled for. Similarly, in the case of payment do not fall within the meaning of Article 12 and, therefore, there was no liability to deduct TDS and consequently disallowance services and reimbursement of expenses, which in any manner payment made to KPMG, Canada were also purely for professional was no liability to deduct TDS and consequently Section 40(ia) will does not fall under Article 12. Thus, on such payment also there not be applicable. The finding of the CIT(A) is, thus, upheld. Accordingly, ground No.1 as raised by the department is dismissed.

7. The aforesaid decision of the co-ordinate bench of the Tribunal was again followed in assessee's own case for the assessment year 1999-2000 in ITA no.8823 and 8786/Mum./2004, dated 5th December

2012, by holding as under:-

"7. We have heard argument of both the sides and also perused the relevant material on record. The Ld. Representative of both As the sides have agreed that this issue is squarely covered in favor of the assessee by the decision of the Tribunal in assessee's own case for the earlier Assessment Year 2001-02 rendered vide its order dated 8th June, 2012. A copy of the said order is also placed on record before us and perusal of the same shows that a similar issue has been decided by the Tribunal in favor of the assessee for the following reasons given in Para 18 & 18.1 of its order.

"18. We have carefully considered the rival submissions and also gone through the findings given by the Assessing Officer as well as the CIT(A). The relevant facts are that the assessee company was engaged as a consultant by Essar Oil Limited to provide consultancy services in connection with sale of its energy business. Such a sale was expected to require application of high level office skills besides technical and industry knowledge. For rendering such consultancy a significant number of such overseas companies are based

in USA. The assessee engaged the services of KPMG Dallas, which is a firm of individual and resident of USA, which had the skill and technical knowledge relating to energy division based industry and technical parameters in giving such Consultations and conduct negotiations with the potential parties. It was in lieu of this, that a professional fee of USD 46,248 which in terms of INR come to 20,89,906/-, was paid. The second payment was made to KPMG consulting LP Canada for rendering professional services for the Essar Oil Limited for retail oil marketing and other related services. The payment towards fee was made at USD 30,678/- which in terms of INR is Rs. 13,37,229/-, which also included reimbursement of expenses in the nature of transportation, lodging, meals and other expenses. The Assessing Officer has given categorically finding that so far as the Article 15 of DTAA is concerned, the same does not apply to KPMG USA as it does not have any PE or business based in India and the services were not rendered for a period exceeding 90 days within the period of 12 months. His only case is that the professional fees paid to KPMG USA are in the nature of royalties within the meanings of 'explanation' to section 9(1)(vi) and is taxable under Article 12 of Indo-US DTAA. The royalties and fees for included services is taxable as per Article 12 in clause 3, reads as under :-

"3. The term "royalties" as used in this Article means:

(a) payments of any kind received as a consideration for the use of or the right to use any copyright or a literary, artistic or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information ITA No. 8823 & 8786/Mum/2004 KPMG India Private Limited concerning industrial commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity use or disposition thereof and"

18.1 Looking to the nature of professional services rendered to the KPMG USA, it is evident that it does not fall in any the terms of definition given for Royalty under Article 12 Indo US DTAA. It was purely a professional service consultancy which were rendered

outside India and nor supply of scientific, technical, industrial or commercial knowledge or information. Thus, nature of payment do fall within the meaning of Article 12 and, therefore, there was no liability to deduct TDS and consequently disallowance made under section 49 (ia) is uncalled for.

Similarly, in the case of payment made to KPMG, Canada

were also purely for professional services and reimbursement of expenses, which in any manner does not fall under Article 12. Thus, on such payment also there was will not be applicable. The finding of the CIT(A) is, thus, no liability to deduct TDS and consequently Section 40(ia) upheld. Accordingly, ground No.1 as raised by the department is dismissed."

8. As the issue involved in the year under consideration as well as the material facts relevant thereto are similar to that of assessment year 2001-02, we respectively follow the decision of Coordinate Bench of the Tribunal rendered in assessee's own case for Assessment Year 2001-02 and, uphold the impugned order of the CIT(A) deleting the disallowance made by AO u/s 40(a)(i) to the extent of Rs.40,83,558."

8. Respectfully following the decisions of the co-ordinate bench of -the Tribunal in assessee's own case for the assessment year 1999-2000 and 2001-02, we uphold the decision of the learned Commissioner (Appeals) on the issue by dismissing the ground raised by the Department."

4. Respectfully following the decision of the Co-ordinate Bench (*supra*), we decline to interfere.

5. In the result, appeal of the revenue is dismissed.

Order pronounced in the Court on 15th July, 2024 at Mumbai.

Sd/-

(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

Sd/-

(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Mumbai, Dated 15/07/2024

S.S.P.

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :

1. □ पीलर्षी / The Appellant
2. प्रत्यर्षी / The Respondent
3. संबंघित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (□ पील) / The CIT(A)-
5. विभर्षीय प्रतिनिधि , आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai