IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER
AND
SHRI VINAY BHAMORE, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1454/PUN/2023
निर्धारण वर्ष / Assessment Year : 2013-14

CMA CGM Agencies India Private Limited, One International Centre, Tower-3, 8th Floor, Senapati Bapat Marg, Elphistone Road- West, Mumbai- 400013. PAN : AADCC3951G	Vs.	DCIT, Circle-1(1), Pune.
Appellant		Respondent

Assessee by	:	Mahenov Thakkar
Revenue by	:	Shri Nitin Patil
Date of hearing	:	24.07.2024
Date of pronouncement	:	22.08.2024

आदेश / ORDER

PER VINAY BHAMORE, JM:

This appeal filed by the assessee is directed against the order dated 03.11.2023 passed by Ld CIT(A)/NFAC for the assessment year 2013-14.

2. The appellant raised the following grounds of appeal :-

"Disallowance under section 40(a)(ia) of the Act amounting to Rs.4,86,77,518/-

1. *erred in upholding the action of the learned Assessing Officer ('AO') and holding that payment of IT services to be in the nature of royalty under section 9(1)(vi) of the Act/ fees for technical services under section 9(1)(vii) of the Act;*

> 2. *erred in not following the ruling of the Hon'ble Income-tax Appellate Tribunal in the Appellant's own case for AY 2012-13 which has decided the issue in favour of the Appellant;*
>
> *Disallowance under section 40(a)(i) of the Act amounting to Rs.41,34,292/-*
>
> 3. *erred in upholding the action of the learned AO and holding that payment made for leased line charges is covered under section 194J of the Act and disallowing an amount of Rs.41,34,292/- under section 40(a)(i) of the Act;*
> 4. *erred in holding that leased line services providing high bandwidth cannot be maintained without human interference;*
>
> *Initiating penalty proceedings under section 271(1)(c) of the Act*
>
> 5. *erred in initiating penalty proceedings under section 271(1)(c) of the Act.*
>
> *The Appellant craves leave to add, alter, modify or delete such other objection before or during the course of hearing."*

3. The facts of the case, in brief, are that the assessee is a domestic company in which public is not substantially interested. The assessee company is engaged in the business of shipping agents. The return of income was filed on 27.11.2013 declaring an income of Rs.71,76,93,230/-. The case was selected for scrutiny and notice was issued u/s 143(2) of the IT Act on 02.08.2014. During the course of assessment proceedings, it was found by the Assessing Officer that the assessee has debited an amount of Rs.4.87 crore towards software maintenance charges but the TDS was not made on this payment. It was further found by the Assessing Officer that an amount of Rs.41,34,292/- was paid as leased line charges/ data link charges, but TDS was also not

deducted on this payment. The Assessing Officer enquired about the reason for non-deduction of TDS on both the above payments. In response, it was submitted by the assessee that the TDS is not required to be made on above payment of Rs.4.87 crore being payment made to parent company and it does not fall in definition of FTS and Rs.41,34,292/- payment of leased line charges/data link charges also does not attract liability of TDS. Being unsatisfied with the reply of the assessee, the Assessing Officer passed an assessment order u/s 143(3) of the IT Act on an income of Rs.77,08,55,040/- against the income returned by the assessee at Rs.71,76,93,230/-. The above assessed income includes disallowance u/s 40(a)(ia) of the IT Act of Rs.5,28,11,810/- (Rs.4,86,77,518/- + Rs.41,34,292/-). The Assessing Officer also initiated penalty proceedings u/s 271(1)(c) of the IT Act on the basis of above addition/disallowance.

4. Being aggrieved with the above assessment order, an appeal was preferred before the ld. CIT(A)/NFAC, who vide impugned order dated 03.11.2023 dismissed the appeal of the assessee after considering the reply of the assessee.

5. Being aggrieved with the decision of the ld. CIT(A)/NFAC, the appellant is in appeal before this Tribunal.

6. During the course of hearing, the ld. AR submitted before us that both the disallowances made by the Assessing Officer and sustained by the ld. CIT(A)/NFAC are not correct in the light of the orders passed by the Co-ordinate Bench of the Tribunal in the case of assessee itself. It was further submitted before us that the similar addition was made in the assessment year 2012-13 in the case of assessee itself on the ground of non-deduction of TDS on payment made u/s 195 of the IT Act by presuming that the payment is in the nature of royalty as well as FTS. But the Hon'ble ITAT by an order dated 02.01.2020 in ITA No.2314/PUN/2017 in the case of assessee itself has held that the payment which is in the nature of software maintenance charges does not fall in the category of fees for technical services i.e. FTS and, therefore, no TDS was required to be made by the assessee.

Regarding the second addition of Rs.41,34,292/-, it was submitted that the Co-ordinate Bench of the Tribunal for the assessment years 2015-16 and 2017-18 in the case of the assessee itself has held that no TDS is required to be made on the payment towards leased line/ data link charges. It was therefore prayed before the Bench to delete both the impugned additions made by the Assessing Officer and sustained by the ld. CIT(A)/NFAC.

7. On the other hand, ld. DR could not bring any adverse order in this regard but supported the order passed by the ld. CIT(A)/NFAC.

8. We have heard ld. Counsels from both the sides and perused the material available on record. We find that similar additions were made in the case of the assessee itself for assessment years 2012-13, 2015-16 and 2017-18 and the Co-ordinate Bench of the Tribunal was pleased to delete the additions. As regards to the disallowance of software maintenance charges of Rs.4,86,77,518/-, the Co-ordinate Bench of the Tribunal in the case of assessee itself for the assessment year 2012-13 decided appeal in favour of the assessee by observing as under :-

> *"38. The ld. CIT(A) has discussed this aspect on page 22 onwards of the impugned order. He found that the word `or' and not the word `and' has been used between the clauses (a) and (b) of Article 12(4) of the DTAA with Portuguese. He held the case of the assessee to be falling under clause (a). Thus it is seen that the ld. CIT(A) admitted that the clause (b) is not attracted to the facts of the instant case because CMA CGM, France did not make available any technical knowledge, experience or skill etc. to the assessee. In so far as clause (a) is concerned, it talks of any payment for services which are ancillary and subsidiary to the application or enjoyment of the right, property or information for which payment described in paragraph 3 is received. It is only if the services ancillary to the enjoyment of right, property or information as per para 3 are availed that they will fall within the ambit of `fees for included services'. Para 3, in turn, defines the term 'Royalties' to mean : `payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work ....'. To this extent, the definition of `royalties' as per the DTAA with Portuguese is similar to that given under section 9(1)(vi) of the Act in as much as it also talks of `consideration for the use or, or the right to use, any copyright of literary, artistic or scientific work..' . While discussing the Royalty aspect under the Act supra, we*

have held that payment for use of software made by the assessee to CMA CGM, France does not satisfy the requirement of `use of, or the right to use, any copyright of software'. Once it is held that para 3 of Article 12 is not attracted, as a sequitur, the application of clause (a) of para 4 of Article 12 of the DTAA with Portuguese would automatically be ousted, thereby making the amount of Rs.6.85 crore paid by the assessee to CMA CGM, France for use of LARA, DIVA and Ocean software as immune from taxation in India. Going by the beneficial provision in the DTAA vis-à-vis the Act, it is held that there was no requirement on the part of the assessee to deduct tax at source which should have called for any disallowance u/s.40(a)(i) of the Act. We, therefore, order to delete the addition."

9. As regards to the disallowance of leased line/data link charges of Rs.41,34,292/-, the Co-ordinate Bench of the Tribunal in the case of assessee itself for the assessment years 2015-16 and 2017-18 decided appeal in favour of the assessee by observing as under :-

"6. We heard the rival submissions and perused the relevant material on record. The issue that arises for our consideration, in the facts of the present case, is whether or not the lower authorities were justified in disallowing the payment of leased line /data link charges paid by the assessee for non deduction of tax at source by invoking the provisions of section 40(a)(ia) of the Act. This issue is no more res integra as the same is settled in favour of the assessee by the Hon'ble Supreme Court in the case of CIT Vs. Kotak Securities Ltd. 383 ITR 1 (SC) wherein it was held that the charges paid towards leased line are not in the nature of Technical services within the meaning of section 9(1)(vii) of the Act. The relevant paragraphs of the judgment of Hon'ble Apex court read as under :

> *"5. The relevant provisions of the Act which have a material bearing to the issues arising for determination in the present appeals may now be noticed. Section 194J; Section 40(a)(ia) of the Act introduced by Finance (No.2) Act, 2004 with effect from 1st April, 2005; and Explanation 2 of Section 9(1)(vii) which are relevant for the purpose of the present case reads as under:*
>
> *"194J. Fees for professional or technical services.*
>
> *(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—*

(a) fees for professional services, or

(b) fees for technical services or

(c) royalty, or

(d) any sum referred to in clause (va) of section 28 shall at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to five per cent of such sum as income-tax on income comprised therein:

....

....

Explanation.—For the purposes of this section,—

(a)............................

(b) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

....

40. Amounts not deductible. 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 during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub- section (1) of section 200 such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid. Explanation.- ....

9. Income deemed to accrue or arise in India (1) The following incomes shall be deemed to accrue or arise in India:-

(i).....................

....

....

(vii) income by way of fees for technical services payable by—

(a) ....

(b) ....

(c) ....

....

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".

6. What meaning should be ascribed to the word "technical services" appearing in Explanation 2 to clause (vii) to Section 9(1) of the Act is the moot question. In Commisioner of Income-Tax Vs. Bharti Cellular Ltd.[1] this Court has observed as follows:

"Right from 1979, various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services".

7. "Managerial and consultancy services" and, therefore, necessarily "technical services", would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts including this Court in Bharti Cellular Ltd. (supra). However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made.

8. A reading of the very elaborate order of the Assessing Officer containing a lengthy discourse on the services made available by the Stock Exchange would go to show that apart from facilities of a faceless screen based transaction, a constant upgradation of the services made available and surveillance of the essential

parameters connected with the trade including those of a particular/ single transaction that would lead credence to its authenticity is provided for by the Stock Exchange. All such services, fully automated, are available to all members of the stock exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange. "Technical services" like "Managerial and Consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would therefore stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialized, exclusive and individual requirement of the user or consumer who may approach the service provider for such assistance/service. It is only service of the above kind that, according to us, should come within the ambit of the expression "technical services" appearing in Explanation 2 of Section 9(1)(vii) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act."

7. Following the above binding precedent, we hold that no TDS is required to be made on the payment towards leased line/data link charges. Therefore, the order of NFAC is hereby reversed. The grounds of appeal raised by the assessee stands allowed."

10. Therefore, respectfully following both the above decisions of the Co-ordinate Bench of the Tribunal passed in the case of assessee itself for the assessment years 2012-13, 2015-16 and 2017-18 respectively and in the absence of any change in facts and circumstances of present case/disallowance, we delete the additions made by the Assessing Officer and sustained by the ld. CIT(A)/NFAC. Thus, the ground nos.1 to 4 are allowed.

11. In the ground no.5, the assessee has also challenged the initiation of penalty proceedings u/s 271(1)(c) of the IT Act, as we have already deleted the above additions/disallowances on the basis of which penalty proceedings u/s 271(1)(c) of the IT Act was initiated, the ground no.5 becomes infructuous and dismissed as such.

12. In the result, the appeal filed by the assessee stands partly allowed.

Order pronounced in the open Court on 22nd day of August, 2024.

Sd/-	**Sd/-**
(G. D. PADMAHSHALI)	**(VINAY BHAMORE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 22nd August, 2024.
Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT concerned.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**C**" बेंच, पुणे / DR, ITAT, "**C**" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.