आयकर अपीलीय अधिकरण "ए" न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, CHENNAI

माननीय श्री एबी टी. वर्की, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI ABY T. VARKEY, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ ITA No.105/Chny/2020
(निर्धारणवर्ष / Assessment Year: 2015-16)

M/s Spel Semiconductor Limited #5, CMDA Industries Estate Chennai-603 209.	बनाम/ Vs.	**ITO** Corporate Ward -6(2) Chennai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACS-8519-B**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Vikram Vijayaraghavan (Advocate) -Ld. AR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Dr. Samuel Pitta (JCIT) -Ld. Sr. DR

सुनवाईकीतारीख**/Date of Hearing**	:	21-08-2024
घोषणाकीतारीख **/Date of Pronouncement**	:	18-10-2024

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2015-16 arises out of an order passed by Learned Commissioner of Income Tax (Appeals)-15, Chennai CIT(A)] on 31-10-2019 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s 143(3) of the Act on 04-12-2017. The grounds raised by the assessee read as under:-

1. The Order of the Commissioner of Income Tax (Appeals) is contrary to law, facts and circumstances of the case.
2. The Commissioner of Income tax (Appeals) erred in dismissing the appeal without giving sufficient opportunity of being heard to the appellant.
3. The Commissioner of Income tax (Appeals) erred in confirming the disallowance under section 40(a)(i) r.w.s. 195 and 9(i)(vii) of the Act

3.1 The Commissioner of Income tax (Appeals) erred in confirming the treatment of marketing fees paid to Natronix Singapore and SPEL America as 'fees for technical services'.
3.2 The Commissioner of Income tax (Appeals) should have found that the nature of work of Natronix Singapore and SPEL America is that of a commission agent simpliciter and not managerial or technical in nature.
3.3 The Commissioner of Income tax (Appeals) ought to have taken cognizance of the DTAA between India and Singapore and ought to have noted that marketing fees will not be liable to TDS u/s 40(a)(i).
3.4 The Commissioner of Income tax (Appeals) ought to have found that the purpose of the agreement with SPEL America was to undertake services to advertise, market and promote the Appellant's services throughout its territory, and SPEL America is an independent contractor and is not an agent or representative of the Appellant.
3.5 The Commissioner of Income tax (Appeals) ought to have found that SPEL America does not manage the business of the Appellant outside India and does not have a PE in India. This is marketing fees paid and the transaction is in the nature of commission simpliciter constituting business income of SPEL America and therefore, no tax is deductible from such payments.
3.6 The Commissioner of Income tax (Appeals) ought to have appreciated that as per Article 12 of the India-USA DTAA there is a requirement that there must be a Technical knowledge, skill or experience or processes available to the recipient of the services to term it as fee for included services"; and, In this case, no technical knowledge, experience or any intangibles are made available to SPEL India.
3.7 The Commissioner of Income tax (Appeals) ought to have noted that no technical knowledge or expertise has been made available to the assessee either by Natronix or SPEL America and hence the payment is not fee for technical services.
4. The appellant relies on decisions in CIT Vs. Faizan Shoes Pvt.Ltd. 367 ITR 0155 ; GE India Technology Cen (P) Ltd. Vs CIT 327 ITR 456 (SC)

As is evident, the sole issue that arises for our consideration is disallowance made by Ld. AO u/s 40(a)(i) for want of TDS on certain payments.

2. The Ld. AR advanced arguments and filed written submissions. The Ld. Sr. DR also advanced arguments supporting the case of the revenue. Having heard rival submissions and upon perusal of case records, our adjudication would be as under. The assessee being resident corporate assessee is stated to be engaged in semi-conductor IC assembling and testing. The brief facts of the impugned issues are as under: -

3. Payment to M/s Natronix Semiconductor Technology Pvt. Ltd., Singapore (NSTPL) for Rs.106.31 Lacs

3.1 The assessee paid marketing fees to this entity without deducting tax at source. The same was in pursuant to Marketing and Sale agreement as entered into by the assessee with that entity on 01-03-2013. The Ld. AO observed that the payment was to manage the overseas marketing. As per Explanation 2 to Sec. 9(1)(vii), fees for technical service includes consideration for rendering of managerial services also. The assessee relied on technical opinion. It was stated that NSTPL was a mere commission agent simplicitor and it had no PE in India. In such a case, the case law of Hon'ble High Curt of Madras in the case of **Faizan Shoes Pvt. Ltd. (48 Taxmann.com 48)** would apply. The assessee also relied on Article-12 of India Singapore DTAA to submit that 'make available' clause as specified therein was not satisfied. However Ld. AO held that that the services would fall within the ambit of 'Fees for Technical Service' in terms of Sec. 9(1)(vii) of the Act. The Explanation to Sec. 9(2) provides that such services would be taxable in India irrespective of the fact whether payees have PE in India or not. Accordingly, the payment so made was disallowed u/s 40(a)(i) for want of TDS.

4. Payment to M/s SPEL America Inc. USA for Rs.56.64 Lacs

Similar payment was paid to US entity pursuant to Marketing Service Agreement dated 01-04-2009 which was extended on 01-04-2012. This entity was also free to develop and carry out marketing campaign for the assessee at its sole discretion. Taking the same view, Ld. AO made disallowance u/s 40(a)(i) for want of TDS.

5. The Ld. CIT(A) endorsed the stand of Ld. AO and held that payees had special expertise in the field of marketing / managerial services and rendering of such services was critical to the business of the assessee as carried out in India. Reliance was placed on the decision of Hon'ble High Court of Madras in the case of **Regan Powertech Pvt. Ltd. (110 Taxmann.com 55)** to support it conclusion. The assessee's reliance on the terms of DTAA was also rejected on the ground that the service involve specialized knowledge and strategy which results in benefit to the taxpayer in relation to the business carried on in India. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

6. The Ld. AR has submitted that that both payments were in the nature of payments to foreign agents for marketing & sales which would not be taxable in India u/s 9(1)(i) & Article-7 of respective DTAAs. The payments were towards marketing and sales. The Agreements clearly show that these are foreign agents who had sole responsibility to develop marketing campaign in overseas markets for securing orders for Indian Entity. The Ld. AR drew out attention to relevant causes in respective agreements. The Ld. AR stated that both the payees do not have any PE in India and therefore, their business profits would not be taxable as per the cited decision in **Faizan Shoes Pvt. Ltd. (supra);** decision in **Evolve Clothing Ltd. (94 Taxmann.com 449)** as well as another recent decision of this Tribunal in **Laserwoods US Inc. vs. DCIT ({IT(TP) No.45/Chny/2021 dated 10-05-2024).** In the alternative, Ld. AR submitted that the payment to Singapore Entity is not Fees for Technical Service under Article 12 of India- Singapore Treaty since the 'make available' clause was not satisfied. Similarly, the payment made to

US entity would not be fees for included services under Article 12 of India USA DTAA due to similar 'make available' clause. Even otherwise this payment would fall under Article-7 as business profits. The Ld. AR has drawn our attention to the nature of services as contained in relevant clauses of the agreement which read as under: -

Between Appellant and Natronix Semi Conductor Singapore

"4. Service Strategy:

N-sg shall develop and carryout suitable campaign as it deems necessary or advisable in its sole discretion. In this regard, N-sg shall be solely responsible to develop materials, develop demographic customer profiles, and coordinate all service efforts through all available channels. In addition to the foregoing, N-sg shall provide such advice, assistance and any other services as SPEL-In Et N-sg may agree from time to time during the term of this Agreement"

Between Appellant and SPEL USA

"4.Marketing Plan

"*SPEL America shall develop and carryout a carryout a marketing campaign as it deems necessary or advisable or advisable in its sole discretion. In this regard, SPEL America shall be solely responsible to develop marketing materials, develop demographic customer profiles and coordinate marketing efforts through all available channels. In addition to the foregoing, SPEL America shall provide such advice, assistance and any other marketing services as SPEL India and SPEL America may agree from time to time during the terms of this agreement"*

The Ld. AR thus submitted that these are payments to foreign agents who have no Permanent Establishment (PE) in India and the aforesaid payment constitute their Business Profits which is not taxable in India as per Article-7 of the respective DTAAs. The Ld. Sr. DR, on the other hand, has submitted that the services are managerial in nature and therefore, the same would be taxable in terms of Sec.9(1)(vii) r.w.s. 9(2).

7. Upon perusal of above clauses of the relevant agreements, it would appear that impugned payments are for marketing and sales services. The assessee has paid marketing fees to the payees. In such a case, in our opinion, the 'make available' condition would not be applicable at all. The arguments of Ld. AR are multifold i.e., these services do not constitute 'Fees for Technical services' since these are more of

commission agent services which have been rendered in foreign territory. Since both the payees do not have any PE in India, the same would not be taxable in India in terms of cited judicial decisions. Another argument of Ld. AR is that the impugned payments would be business profits for the payees and therefore, the same, as per the terms of applicable DTAAs, would be taxable in Singapore and US only.

8. We are of the considered opinion that the terms of DTAA or the provisions of the Act, whichever are more beneficial to the assessee, would apply. All these arguments as stated by Ld. AR need to be re-examined by lower authorities. The terms of the agreement, nature and place of services rendered would be decisive factors to ascertain the nature of payment. Beside this, the finding that whether the payees have PE in India or not, would also be vital to adjudicate the issue. Therefore, we set aside the impugned order and restore the impugned issue back to the file of Ld. AO for de novo adjudication in terms of various arguments as advanced by Ld. AR. All the issues are kept open. The assessee is directed to substantiate its case.

9. The appeal stand allowed for statistical purposes.

Order pronounced on 18th October, 2024

Sd/-	**Sd/-**
(ABY T. VARKEY)	**(MANOJ KUMAR AGGARWAL)**
न्याय□यिक सदस्य /JUDICIAL MEMBER	**लेख□सदस्य / ACCOUNTANT MEMBER**

चेन्नई Chennai; दिनांक Dated :18-10-2024
DS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT Chennai.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF