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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 1009/DEL/2015 [A.Y 2011-12]
ITA No. 6332/DEL/2016 [A.Y 2012-13]
ITA No. 8081/DEL/2018 [A.Y 2013-14]
ITA No. 2893/DEL/2018 [A.Y 2014-15]
ITA No. 4716/DEL/2018 [A.Y 2015-16]
ITA No. 7366/DEL/2019 [A.Y 2016-17]
ITA No. 1008/DEL/2019 [A.Y 2012-13]

M/s Avtec Limited 8th Floor, Birla Tower, 25, Barakhamba Road New Delhi	Vs.	The A.C.I.T LTU, Circle - 1 New Delhi

PAN - AAFCA 1313 C

(Applicant) (Respondent)

Assessee By : Shri Salil Kapoor, Sr. Adv
Shri Anil Chachra, Adv
Ms. Ananya Kapoor, Adv

Department By : Shri Vipul Kashypa, Sr. DR

Date of Hearing : 28.10.2024
Date of Pronouncement : 29.11.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

The above captioned bunch of seven separate appeals by same assessee are preferred against separate ordersof the ld. CIT(A) pertaining to different Assessment Years.

2. Since the underlying facts are common in all the appeals of the assessee and pertain to same assessee, they were heard together and are disposed of by this common order for the sake of convenience and brevity.

ITA No. 1009/DEL/2015 [A.Y 2011-12]

3. Grounds raised by the assessee read as under:

> **"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.4,52,848/- by allocating the expenses of head office against the profits of the MEPZ unit and thereby erred in decreasing the profit of the appellant from the MEPZ unit that too by recording incorrect facts and findings and without providing adequate opportunity of hearing.**

2. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in allocating the bank and loan processing charges amounting to Rs. 73,311/- to the MEPZ unit despite the fact that no loan amount was used in the MEPZ unit and thus erred in reducing the profit of MEPZ unit by an amount of Rs.73,311/- that too by recording incorrect facts and findings and without providing adequate opportunity of hearing.

3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in sustaining the action of Ld. AO in making addition of Rs.24,69,687/- by calculating a notional profit @12.30% and applying the same on the gross value of goods transferred by the assessee at cost to MEPZ unit that too by recording incorrect facts and findings and without providing adequate opportunity of hearing.

4. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in sustaining the action of Ld. AO in making disallowance of Rs.5,05,156/- on account of prior period expenses.

5. That having regards to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging the interest u/s 234B and 234C of the Income Tax Act, 1961.

6. That the appellant craves to leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other."

4. Briefly facts necessary for adjudication of the controversy at hand are that the assessee is in the business of manufacturing and selling of automobile power-trains and power-shift transmissions along with components forming part of heavy duty power trains. The appellant company has three units. The unit at Chennai is known as MEPZ unit where exemption is claimed u/s 10AA of the Act (referred to as the "eligible unit"). The other units are the Power Product Division (PPD) at Tamil Nadu and Power Unit Plant (PUP) at Pithampur, Madhya Pradesh (referred to as the "non-eligible unit").During the year under assessment, the assessee has declared income of Rs.41,31,42,853/- under normal provisions of the Act and a book profit of Rs 32,28,72,128/- u/s 115JB of the Act.

3. The AO made addition/disallowance on account of Rs 4,52,848/- on account of allocation of head office expenses against MEPZ unit of Rs.25,48,189/-; on account of allocation of bank and loan processing charges against MEPZ unit of Rs.73,311/-; on account of provision of 10AA(9) r.w. section 80IA(8) of Good transferred from other units to

MPEZ unit of Rs.48,24,337/-; disallowance of prior period expenses of Rs.41,51,598/-; disallowance of amount written off claimed as expenditure of Rs.11,27,679/- and disallowance of amount on account of warranty claims of Rs.43,57,377/- and payment of employees contribution beyond due date of Rs 5,31,027/-.

4. The Assessing Officer noticed that the expenses such as Audit fees; Tax audit fees; Certification fees; out of pocket expense; Directors commission and sitting fees amounting to Rs 82,48,607/- were shown only under the head 'Head Office'. The AO observed that the expenses of the head office which have not been allocated to the manufacturing units, should be allocated to the MEPZ in the ratio of their turnover as they relate to every aspect of the business and cannot be isolated for any single unit and attributed to the head office. The Assessing Officer further observed that the effect of not allocating the expenses to tax exempt unit is that the loss is reduced in that unit and profit is reduced in the taxable units. Accordingly, the Assessing Officer relying upon the decision of the decision of the ITAT Mumbai Bench in the case of Asea Brown Boveri Ltd 77 TTJ Mum 502, allocated a sum of Rs. 4,52,848/- to the MEPZ unit in the ratio of their turnover and made addition of the same.

5. Similarly, the AO allocated the Bank and loan processing charges of Rs 73,311/- to the MEPZ unit. Regarding addition on account of price difference in respect of goods transferred to 10AA unit, the Assessing Officer observed as per Central Excise Act, the profit @ 10% is assumed and duty is charged @ cost plus 10%. The AO however, adopted the GP ratio @ 12.30% of the assessee and computed the profit on transfer of goods to the MPEZ unit invoking the provisions of section 10AA(9) read with section 80IA(8).

6. Aggrieved, the assessee went in appeal before the ld. CIT(A) who confirmed the action of the Assessing Officer by observing that in the absence of any other alternative basis for allocation was suggested by the assessee, the findings of the Assessing Officer of allocation basis of head office is considered reasonable. The CIT(A), however, reduced the addition on account of price difference in respect of goods transferred to 10AA unit by considering the net profit attributed to all purchases and sales made by the MEPZ unit.

7. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

8. Before us, the ld. counsel for the assessee vehemently contended that this issue has been decided by the co-ordinate bench in assessee's own case for A.Y 2008-09 in ITA No. 4165/DEL/2014 vide order dated 04.01.2019 wherein this issue has been decided in favour of the assessee and against the revenue. It was also submitted that the ITAT in AY 2009-10 and 2010-11 has allowed the assessee appeal on these grounds.The ld AR contended that the expenses not directly linked in the eligible unit can not to be taken into account. It is submitted that for the allocation of head office expenses and bank and loan processing charges, there is no provision in the Act which prescribes about the allocation of expenses. Further, the ld AR argued that the eligible unit need to be independently assessed. It relied on the decision of

1) DCW Ltd.vs. ADIT [2010] 37 SOT 322 (Mumbai) 132 TTJ 442

2) Punjab Con-Cast Ltd vs. ACIT (1994) 49 ITD 430 (Chandigarh-Tri) (Mumbai)

9. With respect to Goods transferred to 'MPEZ' unit, the ld AR argued that the AO has compared the profit rate with the Excise law. It was submitted that the AO without application of mind, has made the additions of GP @ 12.30%-. With regard to Section 10AA (9) vis a vis 80 IA (8), it is stated that theAO is not empowered to reallocate the

expenses u/s 801A (8)- as held in ***Punjab Con-Cast Ltd***. by Chandigarh Tribunal. The ld AR questioned as to how the GP ratio can be compared with FMV and that the AO is required to find out the corresponding FMV as held in Wipro Informa Technology vs. DCIT 88 TTJ 778.

11. Per contra, the ld. DR submitted that the decision of ITAT in 2008-09 to 2010-11 has been given on different facts. The ld DR submitted that for AY 2008-09 to 2010-11, the assessee had declared loss in its MEPZ unit. The issue decided by the CIT(A) was that the loss of the MEPZ unit be set off against the income of the other units. Consequently, the CIT(A) held that the allocation of HO expense and bank and processing charge to the eligible unit will have no tax implication and allowed the assessee appeal. This finding of the CIT(A) was confirmed by the ITAT. The ld DR submitted that in the impugned year the issue of loss in the MEPZ unit to be set off with the profits of other unit does not exist and hence the factor of expense allocation being tax neutral as decided by the CIT(A) and the ITAT for AY 2008-09 will not apply in the AY 2011-12.

12. We have heard the rival submissions and have perused the relevant material on record. Having heard the rival submissions, we find that the facts in the instant year are materially different from the facts as available in AY 2008-09 and 2009-10. In AY 2008-09 and 2009-10, the assessee had declared loss from the 10AA eligible unit and the question before the CIT(A) was whether the loss of eligible unit of MEPZ u/s 10AA can be set off against profits of the taxable units while computing the gross total income. The CIT(A) held that the loss of the MEPZ unit be set off against the income of the other units of the assessee and since the loss is to be set off, apportioning certain expenses against the profit of the MEPZ unit will have no tax implication. The decision of the CIT(A) for allowing set off of loss from profits of other Units and apportioning expense to loss making MEPZ unit being tax neutral, was held valid, legal and plausible view by the ITAT. Further the decision of CIT(A) that was also confirmed by ITAT as follows:

> ***"15. Since grounds no.2, 3, 4 & 5 are offshoot of Ground No.1 being the addition on account of allocation of head office expenses; allocation of bank and loan processing charges; bad debts written off and addition on account of goods transferred to 10AA unit, the same have been rightly decided by ld. CIT (A). So, finding no illegality or perversity, the same are determined against the Revenue."***

13. We therefore find no force in the contention of the ld. counsel for the assessee that this issue has been decided in favour of the assessee vide order dated 04.01.2019 in assessee's own case [supra]. In AY 2008-09 and 2009-10, there was loss in the MEPZ unit and therefore the CIT(A)/ITAT held that the apportionment of expense to MEPZ unit will be tax neutral. In the instant year, issue of loss of the MEPZ unit does not exist and there is no question of setting off of loss of MEPZ unit from profit of other units. The issue of apportioning the HQ expenses to the eligible MEPZ unit was not substantially decided in the ITAT (Supra) decision.

14. We are of the considered opinion that in the instant year, the common expenditure of the head Quarters needs to be allocated on areasonable and scientific basis to the eligible unit for correctly determining its profit during the year. We also of the considered view that the commission and fees paid to the Directors, the audit and certification fees, claimed as HO expense,was in thenature of the expenses that relate to activities at the strategic, managerial, regulatoryand overall oversight level and has a direct nexus with the activities at MPEZ availing deduction under Section 10AA. TheHeadOffice (HO) does not exist for its own sake, but itsexistence is

relevant for all activities undertaken by various undertakings /divisions/profitcentersand ought to be reasonably allocatedto the eligible undertakings.We also note that allocating the expenses on proportionate basis of turnover is reasonable.We are, therefore, of the considered opinion that the AOis justified in allocating such expenses in the nature of commission to the Directors, Audit fees and bank and loan processing charges to the MEPZ units.

15. We are supported in our view of apportionment of expense by the decision of the hon'ble Delhi High Court in the case of ***EHPT India P ltd***Delhi Court 350 ITR 41 which accepted,in principle, the concept of allocation of expense to the eligible units as follows:

> ***"In the light of the observations of the Supreme Court in Hukum Chand Mills Ltd. (supra),in a case where alternative methods of apportionment of the expenses are recognized and there is no statutory or fixed formula, the endeavour can only be towards approximation without any great precision or exactness. If such is the endeavour, it can hardly be said that there is an attempt to distort the profits".***

In view of the above discussion, the ground no 1 and 2 is decided against the assessee.

16. As far as the income attributed to the MEPZ unit on account of Goods transferred to 'MPEZ' unit, we find that the CIT(A) has not recorded a finding that such goods are transferred at the Fair Market Value.Respectfully following the decision of ***Wipro Ltd*** ITA no 1349/Bang/2010, relied upon by the assessee, we remit this issue back to the AO for ascertaining the fair market value of such goods transferred to and from the MEPZ unit to arrive at the profit of the eligible unit. The ground no 3 is decided accordingly.

17. Ground No. 4 relates to the disallowance of Rs. 5,05,156/- on account of prior period expenses.

18. During the course of assessment proceedings, the Assessing Officer observed that the assessee has not been able to substantiate with concrete documentary evidence that the prior period expenses are crystallized in the year under consideration. Accordingly, addition of Rs. 41,51,598/- was made by the Assessing Officer.

19. Aggrieved, the assessee went in appeal before the ld. CIT(A).After considering the facts and submissions, the ld. CIT(A) came to the conclusion the that no detailed explanation was furnished by the

assessee in respect of the miscellaneous expenses of Rs. 3,05,156/- and, therefore, it cannot be held that liability had crystallized in the current years. With regard to Rs. 1 lakh towards legal and profession expenses, the ld. CIT(A) was of the view that there is no evidence of any dispute with the other party and with respect to repair and maintenance expense of Rs 1 lakh, no details were given.

20. The ld. CIT(A) further held that approval for such expenses were given late in the current year and as the work was done in the earlier year, the assessee had accounted for it in the books and there is no reason as to why the same could be held to have crystallized in the current year. Accordingly, out of total disallowance of Rs. 43,03,903/- an amount of Rs. 5,05,156/- was held to be relating to prior period and sustained the same.

21. The aggrieved assessee is in appeal before us.

21. Before us, the ld. counsel for the assessee vehemently reiterated what has been stated before and argued that the prior period expenses quantified during the year is allowed in the year of booking. The ld.

counsel for the assessee relied upon the following decisions to support his contention:

- CIT vs. Indian Petrochemicals Corp [2016] 74 Taxmann 163 (Gujarat)
- ACIT v National Agricultural Co-operative Marketing Federation of India
- PCIT vs. Balmer Lawrie and Company Ltd. [2023] 149 Taxmann 286 (Cal)
- PCII vs. Rajasthan State Seed Corporation Ltd. [2017] 88 Taxmann 445 (Raj)

21. Per contra, the ld. DR relied upon the orders of the authorities below.

22. We have heard the rival submissions and have perused the relevant material on record. We find that the decision relied upon by the assessee propound the principle that expense is allowed in the year when the same is crystalised. We also find that the CIT(A), while dealing with the prior period expense of Rs 41,51,598/-, has found for a fact that expense amounting to Rs 36,46,442/- on account of prior period expense has crystalised during the year and allowed the same. The CIT(A) however, disallowed Rs 5,05,156/- by giving a finding that the liability to that extent has not crystalised in the current year. The

assessee, before us, has argued that the prior period expenses quantified during the year is allowed in the year of booking. The assessee however, has not controverted the findings of the CIT(A) that assessee did not furnish any detail explanation with respect to misc. expense of Rs 3,05,156/-, repair and maintenance expense of Rs 1 lakh and legal and profession fees of Rs 1 lakh. As the assessee has not been able to substantiate its claim of such expense being crystalised in the current year, the findings of the CIT(A) is sustained. The ground no 4 is dismissed.

23. Ground No. 5 pertaining to charging of interest u/s 234B and 234C is consequential in nature.

24. In the result, appeal of the assessee in ITA No. 1009/DEL/2015 is partly allowed.

ITA No. 6332/DEL/2016 [A.Y 2012-13]

25. Ground Nos. 1 to 6, pertaining to allocation of head office expenses and loan processing charges,have already been discussed and dealt by us elaborately hereinabove and decided in favour of the

Revenue and against theassessee. Respectfully following the same, we direct accordingly. Ground no 1 to 6 are dismissed.

26. The only other issue vide Ground Nos 7 to 9 which needs adjudication is with regard to Fees for Technical Services [FTS].

27. Brief facts relating to this issue are that the assessee entered into a contract with M/s ESG International Inc for warehousing facilities for keeping the goods stored in its premises for the period from 2007-2012. The assessee has paid Rs. 99,88,079/- to M/s ESG International for keeping the goods stored in its premise during the year under consideration.

28. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has not deducted TDS on the payment made to M/s ESG International. The Assessing Officer was of the view that the scope of services under the contract include managerial /technical services and consequently the payment made to ESGI was in the nature of Fees for Technical services. Therefore, on such services, TDS was required to be made. As no TDS was deductedon the payment

made by it to M/s ESG Internationalas per provisions of section 195 of the Act, the Assessing Officer disallowed the amount of Rs. 99,98,079/-

29. When the aggrieved assessee went in appeal before the ld. CIT(A), the ld. CIT(A) confirmed the disallowance.The ld. CIT(A) was of the view that if the assessee wished to dispute the liability to deduct tax on the ground that the sum paid would not be the income chargeable to tax in case of recipient, an assessee is expected to approach the Assessing Officer u/s 195(2) of the Act rather than taking the decision himself in respect of an issue for which the jurisdiction has been conferred upon him.

30. The ld AR of the assessee vehemently argued that ESGI is an Independent warehouse service provider, based out in USA. It is submitted that the scope of the contract include, among other things, that the ESGI provide appropriate floor space at its warehouse at USA; to accommodate AVTEC consignments; receiving AVTECH export documents from their designated bank; Loading/Uploading of Material/ Unpack all pieces, conduct perpetual inventory checks; insuring stock/ Provide Quality Engineering Services. It is the say of the AR that AVTECH has no control over the activities of ESGI.

31. The ld AR lead us to the provision of section 195 and vehemently submitted that the moment a remittance is made to non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under section 4, 5 and 9 of the I T Act.It is stated that apart from the above charging provisions sections 90, 91 and DTAA are also relevant as the charging sections are subject to section 90, 91. To support his view, the ld. counsel for the assessee relied upon the decisions by the Hon'ble Supreme Court in ***GE India Technology Cen (P) Ltd. vs. CIT*** [2010] 193 Taxmann 234 (SC)].

32. With regard to the observation of theAssessing Officer in the assessment order that the payment to ESG is a composite contract and the assessee needs to apply to Assessing Officer u/s 195(2), the ld. counsel for the assessee, relied on ***Transmission Corpn of AP ltd*** V CIT (1999) 239 ITR 587(SC),to state that such an approach to the concerned authority is available where payer is in doubt of taxability of the payment in the hands of recipient. In the instant case, the assessee did was not in doubt.

33. It is the say of the ld AR argued that the payment made to ESG International, USA is not an income accrued or arise in India as per section 4,5 &9(1)(vii)(b)r.w. Article 12 of the India -USA DTAA.

34. It was submitted that the Explanation 2 of section 9(1)(vii) defines the Fees for technical services means any **managerial, technical or consultancy services**. Whereas, as per Article 12 of India-USA DTAA, Fees for technical services means **technical or consultancy services**. On the joint reading of Explanation 2 and Article 12 of India-USA DTAA, it is stated thatunder DTAA the managerial services are missing. Only the technical or consultancy services are given with the conditions of **"make available"**of technical knowledge, experience or skill.

35. It is argued by the ld AR that as per the scope of work even if the warehouse charges are treated as managerial services under the Income Tax Act, only the technical or consultancy services are prescribed in DTAA. As per section 90(2), the income tax Act or DTAA whichever is more beneficial will be applicable. As the DTAA has restricted meaning of 'fees for technical services' as compared to the Income Tax Act, definition as per the DTAA will be applicable in the

said case. Meaning thereby that as no managerial services are in DTAA, no income is deemed to accrue or arise in India for ESG International. The AR relied on the decision of Delhi High Court in the case of ***Steria India Ltd*** (2016) 72 Taxmann 1 (Delhi).

36. It was further argued that the “Make Available” conditions,as per USA-DTAA,are not fulfilled for treating the payment made for warehouse charges as fees for technical services. It is stated that there is a continuation of services i.e., the assessee is paying the warehousing charges on yearly basis to ESG International.The Hon'ble Delhi High Court in ***CIT vs. Bio-Rad Lab (Singapore) Pte Ltd*** 155 Taxmann 646 (Delhi) (2024) for the proposition that the continued provisioning and rendering of services over a substantial period of time would clearly detract from an assumption that technical or consultancy services had been ‘made available’.

37. The ld AR vehemently argued that mere rendering of services would not be sufficientfor beingTechnical or consultancy services. It has to be read alongside and in conjunction with "make available". Both the rending of service and the skill, knowledge and expertise being made available are conditions which must be concurrently and

cumulatively satisfied. Mere furnishing of services would not suffice and a liability of tax would be triggered only if the technical or consultancy service were coupled with a transfer of the expertise itself. The AR relied on the Hon'ble Delhi High Court in ***International Management Group (UK) Ltd***. V CIT [2024] 164 taxmann 225 (Del). It is submitted that as per the scope of contract as stated [supra] the functions rendered by ESG International includes day to day warehousing operations. In the said case the assessee is utilizing the space for warehousing operation on yearly basis as held in Bio Rad [supra] that the payment made on yearly basis indicates no technology has been transferred. The AR submitted that the payment made to ESG International will not be in the nature of fees for technical services as per DTAA as no technology was transferred and hence the 'make available' conditions are not complied with. So, there is not requirement of tax deduction in India.

38. The ld AR presented another argument that the assessee has made payment outside India for business or profession carried on by such person outside India and for the purposes of making or earning any income from any source outside India. It is submitted that payment forthe space utilization of warehouse was made to ESG International

USA for the international operation including the services like loading, unloading of material, inventory management, quality control, insurance. The assessee is utilizing the space for the delivery of material through the warehouse to the overseas customers. There is no business activity in India of ESG International USA. The space charges were paid outside India for business or profession carried on by assessee for the overseas operations hence no income is deemed to accrue or arise in India. Even under the second exception of section 9(1)(vii)(b) to the taxability of FTS paid by a resident, wherein FTS payable in respect of services utilized for the purpose of making or earning any income from any source outside India is not an income within the ambit of section 9 of the Act. The ld AR relied on the following decisions:

i) **International Management Group (UK) Ltd. vs. CIT [2024] 164 Taxmann 225 Delhi)**

ii) **HCI. Singapore Pte. Ltd. v ACIT [2024] 158 taxmann 45 (Delhi-Tri)**

iii) **ITO (International Taxation) v. HCL Technologies [2024] 166 taxmann 193 (Delhi- Tri)**

iv) **QAI India Ltd. v DCIT [2024] 165 Taxmann 118 (Delhi-Tri)**

v) **ACTT v. LX Pantos India (P) Ltd [2024] 162 Taxmann 701 (Delhi-In)**

vi) **Orbit Bearing India (P) Ltd. v. ACIT** [2024] 163 Faxmann 112 (Rajkot-Tri)

39. The ld AR presented still another argument that the amendment made in Explanation to section 9 does not nullify the exception provided in section 9(1)(vii)(b). In other words, even where the non-resident has provided services outside India and received payment thereof, the payment would not be deemed to accrue or arise in India, if the services provided by the non-resident are utilized by the resident in a business carried on outside India or for the purposes of earning income from any source outside India. He relied on the following judgements :

i) International Management Group (UK) Ltd. vs. CIT [2024] 164 Taxmann 225 (Delhi)

ii) CIT v IndusInd Bank Ltd. [2019] 106 taxmann 343/264 Taxmann 190/415 ITR 115 (Bom)

iii) HCL Singapore Pte. Ltd. v ACIT [2024] 158 taxmann 45 (Delhi-Tri)

40. Per contra the ld DR vehemently supported the orders of the authorities below.

41. We have heard the rival submissions and have perused the relevant material on record. Having heard the rival submissions, we find that the factual matrix of the instant case is that the assessee has made payment to ESGI, a non-resident independent warehouse service

provider based in USA for providing appropriate warehousing facilities at its warehouse at USA. ESG International, USA has no business activity in India. The assessee has made payment for warehousing charges outside India for business or profession carried on by assessee for the overseas operations.The issue to be adjudicated is whether such payment received by the non-resident from the assessee is exigible to tax in India. In the event the receipt by ESGI is taxable as deemed income in India, the assessee would be obligated to deduct tax u/s 195(2).

42. We find that the application of section 195 is not automatic. For that we need to analyse section 195 of the Act which reads as under:

> **(1) Any person responsible for paying to non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head salaries shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash, or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income- tax thereon at the rates in force.**
>
> **(2) Where the person responsible for paying any such chargeable under this Act (other than salary) to non-resident considers that the whole of such sum would not be income chargeable in the case of recipient he may an application in such form and manner to the Assessing Officer to determine in such manner, as may be prescribed the appropriate proportion of such sum so chargeable, and upon such determination,**

tax shall be deducted under sub- section (1) only on that proportion of the sum which is so chargeable. [Emphasis Supplied).

43. From the reading of the provision, we find that the section provides that TDS u/s 195 is to be made on payment made to non-resident on i.e., "any other sum chargeable" under the act. We therefore find force in the assessee argument that the assessee is required to deduct tax at source only in cases where the remittance made by the assessee is 'any sum chargeable' under section 4, 5 and 9 of the I T Act and that provisions of sections 90, 91 and DTAA would also have to be considered. This view is supportedby the decisionby the Hon'ble Supreme Court in ***GE India Technology Cen (P) Ltd. vs. CIT*** [2010] 193 Taxmann 234 (SC)] which held as follows:

"The payer is bound to deduct TDS only if the tax is assessable in India. If tax is not so assessable, there is no question of tax being deducted."

44. We are also inclined to agree with the contention that in cases of composite contract, the assessee needs to apply u/s 195(2) only in the event where payer is in doubt of taxability of the payment in the hands of recipient. This view is supported by the decision of ***Transmission Corpn of AP ltd*** V CIT (1999) 239 ITR 587(SC), which held as under:

"..195(2) provides a remedy by which a person may seek a determination of the appropriate proportion of such sum so chargeable where a proportion of the sum so chargeable is liable to tax. The said sub-section gets attracted only in cases where the payment made is a composite payment in which certain proportion of payment has an element of income chargeable to tax in India. The words 'such sum' clearly indicate that the observation refers to a case of composite payment <u>where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India."</u>

45. Coming to the crux issue whether the payment made to ESG International, USA is an income accrued or arise in India as per section 4,5 &9(1)(vii)(b)r.w. Article 12 of the India -USA DTAA, we need to examine the relevant provisions of section 9 and Article 12 of the DTAA. The same is reproduced below:

Section 9(1)(vii)(b)-

Income by way of fees for technical services payable by-

a. …..

b. a person who is resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India. [Exception Clause]

Explanation 2 of section 9(1)(vii)(b)

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.

Explanation of section 9

For the removal of doubts, it is hereby declared that for the purposes of this section income of a non-resident shall be deemed to accrue or arise in India under clause (v) or (vi) or (vii) of sub-section (1) and shall be included in the total income of the non-resident, <u>whether or not.</u> -

(i) the non-resident has a residence or place of business or business connection in India

or

(ii) the non-resident has rendered services in India [Emphasis Supplied)

Article 12 India - USA DTAA

Fees for included services [FIS]

12(4)- For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any <u>technical or consultancy services</u> (including through the provision of services of technical or other personnel) if such services:

a. ……

b. <u>make-available</u> technical knowledge, experience, skill, know-how, or processes or consists of the development and transfer of a technical plan or technical design.

45. From the readings of the provisions of section 9(1)(vii)(b), we find that itprovides an exception to the taxability of Fees for technical service(FTS) paid by a resident, wherein FTS payable is in respect of services utilized for the purpose of making or earning ***any income from any source outside India***. In the instant case, the assessee made payment made to ESG International USA for the space utilization of warehouse, outside India, for the international operation andfor the delivery of material through the warehouse to the overseas customers of the assessee. The ESG International, USA has no business activity in India. We therefore are of the considered opinion that the payment made by the assessee to ESG International, USA is not an income within the ambit of section 9 of the Act.We are supported in our findings by the following decisions:

i) International Management Group (UK) Ltd. vs. CIT [2024] 164 Taxmann 225 (Delhi)

ii) HCI. Singapore Pte. Ltd. v ACIT [2024] 158 taxmann 45 (Delhi-Tri)

46. On the issue of application of Article 12 of the Indo-USA DTAA, we find that the condition of "**managerial**" services do not find any mention in the Article 12 of the said DTAA. There is a restrictive definition of FTS provided in DTAA and it will, on account of the provision of section 90(2) of the Act, have precedence over the wider definition provided in Explanation 2 of section 9(1)(vii) which includes **managerial, technical or consultancy services**. We are therefore with the assessee's contention that even if the warehouse charges paid by the assessee are treated as 'managerial services' under the Income Tax Act, the payment received by the ESG International cannot be considered as deemed income that has accrued or arisen in India as DTAA incorporates only the 'technical' or 'consultancy' services and does not prescribes the 'managerial' services as FTS. The view is supported by the decision of Delhi High Court in the case of ***Steria India Ltd*** (2016) 72 Taxmann 1 (Delhi).

> **"19. The next question that arises is concerning the extent to which the benefit under the India-UK DTAA can be made available to the assessee. As already noticed the definition of fee for technical services' occurring in article 13(4) of the Indo-UK DTAA clearly excludes managerial services. What is being provided by SF to the assessee terms of the Management Services Agreement is managerial services. It is plain that once**

the expression 'managerial services' is outside the ambit of 'fee for technical services', then the question of the assessee having to deduct tax at source from payment for the managerial services, would not arise, It is therefore, not necessary for the Court to further examine the second part of the definition, viz, whether any of the services envisaged under article 13(4) of the Indo-UK DTAA are 'made available' to the assessee by the DTAA with France. [Emphasis Supplied)

47. We also note that the definition of FTS in Article 13(4) of Indo-France is similarly worded as in Article 12 of the Indo-USA DTAA. We therefore are of the considered view that the payment made to ESGI is outside the ambit of fees for technical services as the USA-India DTAA do not provide for ‘managerial’ services as FTS. We therefore hold that there did not deemed to accrue or arise in India any income for ESGI and hence there is no requirement of tax deduction u/s 195 of the Act on such payment.

48. We also find force in the assessee argument that the “Make Available” conditions, as per USA-DTAA, are not fulfilled for treating the payment made for warehouse charges as fees for technical services. We find that the assessee is paying the warehousing charges on yearly basis to ESG International which indicates no technology has been transferredand hence the 'make available’ conditions are not

complied with. Therefore, the decision of the Hon'ble Delhi High Court in ***CIT vs. Bio-Rad Lab (Singapore) Pte Ltd*** 155 Taxmann 646 (Delhi) (2024) squarely applies that the continued provisioning and rendering of services over a substantial period of time would clearly detract from an assumption that technical or consultancy services had been 'made available'. On this account also the payment made to ESGI do not fall under the description of FTS and accordingly we hold that there is no requirement of tax deduction u/s 195 of the Act in India for such payment. In that view of the matter, Ground No. 7 to 9 of the assessee is allowed.

49. Ground Nos. 10 to 12 are general in nature.

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

ITA No. 8081/DEL/2018 [A.Y 2013-14]

51. Ground No. 1 is general in nature.

52. Ground No. 2 pertaining to allocation of head office expenses has already been dealt by us hereinabove and decided in favour of the Revenue and against the assessee. Respectfully following the same, we direct accordingly.

53. Ground No. 3 relating to FTS – Ware house charges has already been discussed and decided by us in favour of the assessee and against the Revenue hereinabove while dealing with Ground No. 7 to 9 in A.Y 2012-13. Respectfully following the same, we order accordingly.

54. Ground Nos. 4 pertain to Foreign Travelling Expenditure.

55. Brief facts relating to this issue are that the Assessing Officer noticed that the assessee has claimed expenditure of Rs 1,25,533/- for foreign travelling pertaining to AY 2012-13 which was disallowed by the AO. The CIT(A) held that as the expense related to prior period, sustained the addition.

56. The ld AR before us prayed that the expense pertained to earlier previous year, hence may be allowed in the AY 2012-13.

57. We have heard the rival submissions and have perused the relevant material on record. Having heard the rival submissions, we find in the factual matrix of the instant case, there is no reason to interfere with the order of the CIT(A). Ground Nos. 4is therefore dismissed.

58. Ground Nos. 5 pertain to Foreign Travelling Expenditure. Brief facts relating to this issue are that the Assessing Officer noticed that the assessee has claimed expenditure for foreign travelling of its Directors in connection with two of its subsidiaries, namely ASSAG and ZVD, amounting to Rs. 15,55,239/- pertaining to A.Y 2012-13. The Assessing Officer disallowed 30% of Rs. 15,55,239/- on adhoc basis i.e., Rs 4,66,572/- of the foreign travel expensesas the assessee failed to prove the benefit which has accrued to it on account of foreign travelling.

59. When the assessee went in appeal before the ld. CIT(A), the upheld the finding of the Assessing Officer.

60. Aggrieved further, the assessee in appeal before us. The ld AR of the assessee stated that ASSAG is a Swiss based Company, subsidiary of the appellant. It is stated that its core competencies include developing, producing customized solutions based on mechanical transmissions and in rotating applications. It is submitted that the appellant is having Joint Venture (JV) company and JV's role was to sell the appellant and subsidiary products like their components and transmissions making Tooling Machine in Russia.Hence, as the

Subsidiary/ JV were formed to advance the business interest of the appellant, the said travelling expenditure expense may be allowed.

61. The ld AR further, relying upon the decision of the Hon'ble Supreme Court in the case of ***SA Builders*****,** submitted that the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the holding company would ordinarily be entitled to deduction of interest on its borrowed loans. The ld. counsel for the assessee also relied upon the decision of the Hon'ble Madras High Court in the case of ***Elgi Equipment Ltd*** 20 Taxmann 142.

62. Per contra, the ld. DR relied upon the orders of the authorities below.

59. We have heard the rival submissions and have perused the relevant material on record. Having heard the rival submissions, we find force in the contentions of the ld. counsel for the assessee. The ld. CIT(A) has admitted that the said expense has been incurred for subsidiary company and the joint venture. We find that the ld DR has not controverted the claim that the directors of the assessee

undertook foreign travel for the selling the products of the JV and the subsidiary. This would, in our opinion, naturally advance the business interest of the assessee and there is commercial expediency in undertaking such travel. In view of this and following the decision of the Supreme Court in ***S.A.Builders***, we direct the AO to delete this addition of foreign travel of the directors. The ground no 5 is allowed.

60. Ground No. 6 is with regard to upholding of disallowance of Rs. 2513/- on account of professional tax has not been pressed on the smallness of the amount. The same is dismissed as not pressed.

61. Ground No. 7 and 8 are general in nature. In the result the appeal of the assessee is partly allowed.

ITA No. 2893/DEL/2018 [A.Y 2014-15]

62. Ground No. 1 relating to FTS – Ware house charges has already been discussed and decided by us hereinabove while dealing with Ground No. 7 to 9 in A.Y 2012-13 in favour of the assessee. Respectfully following the same, we order accordingly.

63. Ground No. 2 pertains to upholding of the disallowance of Rs. 14,09,369/- made by the Assessing Officer towards irrecoverable taxes claimed by the assessee.

64. Briefly the facts are that the Assessing Officer held that an amount of 14,09,369/- under the head irrecoverable taxesin relation to excise duty on sales return,debited by the assessee is wrongly claimed.

65. When the aggrieved assessee went in appeal before the ld. CIT(A), the ld. CIT(A) observed that the same cannot be claimed as business loss for tax purposes as the excise duty is part and parcel of manufacturing activity which has not been refunded by the Excise Department.

66. Aggrieved, the assessee is before us.

67. The ld AR submitted that Irrecoverable taxes are in relation to excise duty on sales return. It is stated that the excise duty was paid earlier when the goods were manufactured. However, in case of sales return, though the assessee was eligible for reverse Cenvat credit of the excise duty so paid at the time of manufacture under the existing excise regime, the same was denied by the excise department. It was

argued that the same was considered as cost to the company and consequently the same was charged to profit and loss account. It was further submitted that no claim of excise duty was received from the Excise Department subsequently. The ld. counsel for the assessee further stated that where payment of excise has been made, MODVAT credit constituted an expense u/s 37 of the Act. The ld. counsel for the assessee relied upon the decision in the case of CIT Vs. Samtel India Ltd 43 Taxmann 104(Delhi). and Mohan Spinning Mills 27 Taxmann.com 332 [Chandigarh Tri].

68. Per contra, the ld DR relied on the orders of the authorities below.

69. We have heard the rival submissions and have perused the relevant material on record. Having heard the rival submissions, we find force in the contentions of the ld. counsel for the assessee. We note that the assessee has paid the excise duty on the raw materials for the goods manufactured at the time of manufacturing. When the goods are returned, the assessee does not get back the excise duty paid on the raw materials. Such a payment on account of excise duty has to be allowed as a deduction u/s 37(1) as the same is incurred for

the business purpose. This proposition was allowed by the hon'ble Delhi High Court in the case of ***Samtel India*** (supra). The AO's method of adding back the non-reversed excise duty to WIP once the sales return takes place, is not correct as when the goods are received back on return, excise duties are not reversed by the Excise Department. Followingthe decision of ***Samtel India*** (2014) 43 Taxmann 104(Delhi), we therefore direct the AO to delete the addition on account of irrecoverable taxes. The ground no 2 is allowed.

70. Ground Nos. 4, 5 and 6 are general in nature. In the result the appeal of the assessee is allowed.

ITA No. 4716/DEL/2018 [A.Y 2015-16]

71. The assessee has raised 7 grounds of appeal. However, the solitary issue pertains to Ground No. 1 relating to FTS – Ware house charges has already been discussed and decided by us hereinabove in favour of the assessee while dealing with Ground No. 7 to 9 in A.Y 2012-13. Respectfully following the same, we order accordingly.

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

ITA No. 7366/DEL/2019 [A.Y 2016-17]

73. Ground No. 1, 2 and 3 relating to FTS – Ware house charges has already been discussed and decided by us hereinabove in favour of the assessee while dealing with Ground No. 7 to 9 in A.Y 2012-13. Respectfully following the same, we order accordingly.

74. Ground No. 4 and 5 relating to disallowance of 5% of foreign traveling expenses. The CIT(A) held that it was not ascertainable from the evidence that the same is exclusively for business purpose.

75. The ld AR vehemently argued that disallowance on adhoc basis is not allowed. He argued that firstly the Books of accounts needs to be rejected and relied on PCIT v R.G. Buildwell Engineers Ltd. [2018] 99 Taxmann 284 (SC). He further stated that there is no Specific finding by the AO with regard to disallowance and relied on ACIT vs. Mitsui & Co India (P) Ltd [2023] 155 Taxmann 19 (Delhi- Tri). The ld AR also pointed out that the expense is to be proved as bogus expenditure - before disallowance and relied on Sheo Bhagwan Goel v ACIT [2022] 139 Taxmann 259 (Raipur-Tri). Similarly, he stated that Mere estimation of disallowance under facts and circumstances is not

permissible and relied on J.J. Enterprises vs. CIT 254 ITR 216 (SC). Th ld AR finally submitted that Company Assets used for personal purpose by employees are allowed and relied on Sayon ji Iron &Engg Co. [2002] 121 Taxmann 43 (Gujarat).

76. Per contra the ld DR relied on the authorities below.

77. We have heard the rival submissions and have perused the relevant material on record. Having heard the rival submission, we find considerable force in the assessee argument. We are of the considered view that where the expense incurred is not under doubt and the same is incurred for the business purposes, the same is required to be allowed. We accordingly direct the AO to delete the ad hoc addition on account of travelling expenditure. The ground no 4 and 5 is allowed.

78. Ground No. 6 pertains to upholding that disallowance of 93,040/- on account of Gift and present.

76. The Assessing Officer observed that the amount of Rs. 1,02,520/- relating to gift and personal expenses have no relation to business activity and accordingly made disallowance of the same.The ld. CIT(A)

observing that no breakup of the same was submitted, and the assessee could not explain how the gift articles given to auditors is for business purposes, partly allowed the claim and confirmed Rs. 93,040/-
.

77. The ld. counsel for the assessee vehemently contended that expenditure incurred is incidental to his trade for the purpose keeping the trade going is an allowed expenditure. For this contention, he relied on the decision of the Hon'ble Supreme Court in the case of Delhi Safe Deposit Co. Ltd. [133 ITR 756] (SC). The ld. counsel for the assessee relied on the decision in the case of CIT v ChandulalKeshavlal& Co 38 ITR 601 wherein it has been held that "If the expenditure is incurred for the purpose of trade of the assessee and it does not matter thatpayment may enure for the benefit of third party, is allowed." The ld AR also relied on the case of ACIT vs. Chhattisgarh Steel & Power Ltd. [2023] 156 Taxmann 606 (Raipur-Tri), where it has been held that gift expenses claimed by assessee-company related to and incurred for purpose of its business which were duly reflected in books of account were allowable as business expenditure.

78. The ld. DR relied upon the orders of the authorities below.

79. We have heard the rival submissions and have perused the relevant material on record.Having heard the rival submission, we find considerable force in the assessee argument. We are of the considered view that where the expense incurred is not under doubt and the same is incurred for the business purposes, the same is required to be allowed. We accordingly direct the AO to delete the addition on account of Gift and present. The ground no 6 is allowed.

80. Ground Nos. 7 to 12 relate to garden expenses.

81. The Assessing Officer noticing that the assessee did not submit supporting proof to establishthe genuineness of the claim on account of garden expenses to the tune of Rs. 24,52,573/-, disallowed proportionate amount @ 25%.The ld. CIT(A) partly allowed this ground of appeal holding that the ld. counsel for the assessee has not been able to establish that the entire expenses are incurred for business purposes and restricted the disallowance to 10% of Rs. Rs. 25,52,573/-.

82. The ld. counsel for the assessee submitted the expenditure may be allowed as the same is for business purpose u/s 37(1). The ld AR relied upon the decisions in the case of Modi Spg. &Wvg. Mills Co Ltd.

[1993] 202 ITR 708 (Delhi) and CIT v. Torrent Pharmaceuticals Ltd. [2013] 29 Taxmann 405 (Gujarat).

83. The ld. DR relied upon the orders of the authorities below

84. We have heard the rival submissions and have perused the relevant material on record. Having heard the rival submission, we find considerable force in the assessee argument. We are of the considered view that where the expense incurred is not under doubt and the same is incurred for the business purposes, the same is required to be allowed. We accordingly direct the AO to delete the addition on account of Garden expense. The ground no 7 and 8 is allowed.

85. Ground 9 to 13 are general in nature.

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

ITA No. 1008/DEL/2019 [A.Y 2012-13]

87. Ground Nos. 1 to 3 pertain to penalty imposed u/s 271(1)(c) of the Act.

88. Briefly the facts of the case is that the Assessing Officer levied penalty on account of addition made on account of allocation of HQ expense of Rs 4,79,486/-; allocation of bank loan and processing charge of Rs 3,27,223/- and addition of FTS of 99,98,079/- on the grounds of assessee having furnished inaccurate particular of income.The AO relied upon the decision of the Hon'ble Supreme Court in the case of Union of India and another Vs. Dharmendra Textiles 306 ITR 277 and Atul Mohan Bindal 317 ITR 1 wherein it has been held that mens rea need not be established before imposition of penalty u/s 271(1)(c) of the Act.

89. Aggrieved, the assessee went in appeal before the ld. CIT(A).

90. After careful consideration of the facts and submissions, the ld. CIT(A) deleted the penalty on account of allocation of HQ expense of Rs 4,79,486/- and allocation of bank loan and processing charge of Rs 3,27,223/-. The CIT(A), however, relying upon Explanation 1 to section 271(1)(c), upheld the penalty on addition of FTS of 99,98,079/-.

91. Aggrieved, the assessee is in appeal before us.

92. We have heard the rival submissions and have perused the relevant material on record and perused the materials on record. The substantiveaddition on account of payment made to ESGI as FTS of 99,98,079/- has been deleted by us in AY 2012-13 hereinabove.Considering the facts of the case, we take recourse in the legal dictum of 'sublatofundamento, cadit opus', meaning thereby, that in case the foundation is removed, the super structure falls. Since the foundation [assessment] has been removed, the super structure i.e. penalty must fall. Once the basis of a proceeding is gone, all consequential acts, actions, and orders would fall to the ground automatically. We, therefore hold that the decision of the CIT(A), confirming the penalty on account of payment made to ESGI as FTS is unsustainable and direct the Assessing Officer to delete the penaltyu/s 271(1)(c) of the Act for AY 2012-13. The ground no 1 to 3 is allowed.

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

95. In the final result, the appeal of the assessee for the various years are decided as below:

ITA No. 1009/DEL/2015 [A.Y 2011-12] is partly allowed.

ITA No. 6332/DEL/2016 [A.Y 2012-13] is partly allowed.

ITA No. 8081/DEL/2018 [A.Y 2013-14] is partly allowed.

ITA No. 2893/DEL/2018 [A.Y 2014-15] is allowed.

ITA No. 4716/DEL/2018 [A.Y 2015-16] is allowed

ITA No. 7366/DEL/2019 [A.Y 2016-17] is allowed.

ITA No. 1008/DEL/2019 [A.Y 2012-13] is allowed.

The order is pronounced in the open court on 29.11.2024.

Sd/- **Sd/-**

[VIKAS AWASTHY**]** **[NAVEEN CHANDRA]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated: 29th November, 2024.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

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Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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