IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW 'A' BENCH, LUCKNOW

BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER

ITA No.147/Lkw/2018
A.Y. 2014-15

Tirubala International Pvt. Ltd., C-7, Panki Industrial Area, Kanpur, U.P.	vs.	Deputy Commissioner of Income Tax, Range-VI, Kanpur
PAN:AAECT2086J		
(Appellant)		(Respondent)

Assessee by:	Sh. Vikas Garg, FCA
Revenue by:	Sh. Sanjeev Krishna Sharma, Addl CIT DR
Date of hearing:	02.09.2024
Date of pronouncement:	25.10.2024

O R D E R

PER SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER:

This is an appeal filed against the order of the ld. CIT(A), dismissing the appeal of the assessee that was filed against the order of the DCIT-6, Kanpur passed on 19.12.2016. The grounds of appeal are as under:-

> *"1. That the AO, has erred in law and on facts in making an addition of Rs. 29,164/- on account of late payment towards Employees Contribution to ESI.*
>
> *2. That the authorities below have failed to appreciate that the payment of Rs.29,164 towards employee's contribution to provident fund was made before the "due date" of filing return of income u/s 139(1) of the Income Tax Act 1961 therefore there could not be any addition of the aforesaid amount to the returned income.*
>
> *3. That the authorities below have failed to appreciate that the due date as mentioned in 36(1) (va) is to be read in conjunction with section 43B(b)*

and due date as mentioned in section 36(1)(va) is the due date as mentioned in section 43B (b).

4. That the authorities below have erred in law and on facts in disallowing an amount of Rs.2,68,311/-, (paid to an overseas party on account of testing fees) u/s 40(a) (i) read with section 195 of the Income Tax Act, 1961.

5. That the authorities below erred in law and on facts in holding that payment of Rs.2,68,311/, made to an overseas party on account of testing charges, constitutes fees for technical services and therefore liable for deduction of tax at source u/s 195.

6. That the authorities erred in law and on facts in failing to appreciate that payment of Rs.2,68,311/- on account of testing fees did not constitute fees for technical services under "DTAA" with Spain and that the overseas party had no fixed establishment in India.

7. That the CIT(Appeals)-1, Kanpur erred in law and on facts in disallowing Rs.2,68,311/- u/s 40(a)(i) without appreciating that in appeal relating to AY 2013-14 he had allowed the appeal of the assessee on the same issue and on Identical facts.

8. That the authorities below have erred in law and on facts in making a disallowance of Rs.3,00,000/- out of expenses claimed under the sub head Travelling, Telephone and General expenses, grouped under the head other expenses.

9. That the said disallowance of Rs.3,00,000/- is adhoc, arbitrary, without any basis and therefore to be deleted.

10. The appellant craves leave to add, alter, amend any/all of the grounds of appeal before or during the course of the appeal."

2. The assessee also filed an application for admission of additional grounds of appeal which were listed as under:-

"Ground No. "11"

Because the CIT(Appeals)-II, Kanpur erred in law and on facts in passing an ex-parte order.

Ground No. "12"

Because under the facts and circumstances of the case the action of CIT(Appeals)-III Kanpur in passing an ex-parte order is contrary to principles of natural justice, equity and fair play.

Ground No. "13"

Because in light of settled legal principles, arising out of decisions of higher judicial authorities, the CIT(Appeals)-II, Kanpur erred in law and on facts in confirming the adhoc disallowance of Rs.3,00,000 even though the case was decided ex-parte

2. In its plea for admission of additional grounds the assessee relied on the decision of the Hon'ble Apex Court in the case of Jute Corporation of India Ltd. v. CIT (1991) 187 ITR 688 and the decision of the Hon'ble Delhi High Court in the case of Taylor Instrument Co. (India) Ltd. v. CIT (1992) 198 ITR-1.The Hon'ble Delhi High Court in the aforesaid decision held that it is the duty of the state to see that justice is done to its citizen, therefore shelter should not ordinarily been taken behind procedural technicalities with a view to defeat a just claim of an assessee . After consideration of the additional grounds of appeal and the case laws cited, the same are admitted for adjudication.

3. The facts of the case are that the assessee filed a return of income declaring a total income of Rs.18,22,65,760/-. The ld. AO observed that a sum of Rs. 29,164/- towards ESIC was paid after the due date and was disallowable in the light of the explanation to the provisions of section 36(1)(va). Since, the assessee did not submit any reply, the amount of Rs.29,164/- towards ESIC paid after the due date was disallowed under section 36(1)(va) and added back to the income of the assessee. Thereafter, the ld. AO observed that the assessee company had made payment to M/s Aitex Research Instituto Technologico Textile, Spain, a foreign company for testing and developing expenses. However, no TDS had been deducted on the same. Therefore, the assessee was asked to show cause as to why the above expenses should not be disallowed, in the light of the provisions of section 40(a)(ia).

In response, it was submitted that these payments would not fall within the scope of, 'fee for technical services' for which tax was liable to be deducted under section 195 r.w.s. 90(2) of the Income Tax Act, because the payments had been remitted to M/s Aitex Research Institute, for merely testing the samples and issuing test reports. The ld. AO found the submissions of the assessee company to be devoid of merit. He opined that the payment of testing charges for quality testing and for such certification that goods did not contain any harmful substance was a payment in the nature of, 'fee for technical services' covered under section 9(1)(vii) of the Act. He pointed out that as per the explanation to section 9 of the Act, whether the income of the non-resident was taxable in India or not, the assessee was required to deduct TDS on that payment, in the light of the provisions of section 195 of the Act. Therefore, invoking the provisions of section 40(a)(ia) of the Act, expenditure of Rs.2,68,311/- was disallowed and added back to the income of the assessee company. Finally, on perusal of the profit and loss account and other details submitted by the assessee company, the ld. AO observed, that expenses relating to travelling, general expenses and telephones were not properly vouched and therefore, not open for third party verification. Therefore, he asked the assessee company to show cause as to why an adhoc disallowance, of Rs.3,00,000/-, may not be made on this account. Upon not receiving any reply, he went on to make the addition.

4. The assessee was aggrieved at these additions and went in appeal before the ld. CIT(A). The ld. CIT(A) records that he issued two notices to the assessee on 28.09.2017 and 1.12.2017, for compliance on 9.10.2017 and 11.12.2017, through the ITBA platform. But there was no response to either of these two notices. The ld. CIT(A) therefore inferred, that the assessee was not interested in pursuing the appeal and he accordingly, (after going through the contents of AO's order) held that he had no reason to interfere with the stand taken by the ld. AO. He, therefore, dismissed the appeal.

5. The assessee is aggrieved at this summary dismissal of its appeal by the ld. CIT(A) and has accordingly approached the Tribunal. Shri Vikas Garg, FCA (hereinafter referred to as the "ld. AR") appeared on behalf of the assessee. With regards to ground nos. 1 to 3, the ld. AR did not press the aforesaid grounds.

Taking up arguments on ground nos. 4 to 7, the Ld AR submitted that one of the customers of the assessee company was M/s Mango Punto F.A. and Barcelona, Spain to whom the assessee company was exporting leather footwear. He submitted that as per the agreement with Mango, they have stipulated that goods supplied to them must not contain any sort of harmful substance or they must be within the limits stipulated by the current legislation. Accordingly Mango had entered into an agreement with M/s. Aitex Textile Research Institute, Spain to test samples in respect of goods being supplied to Mango by its' various suppliers. It was submitted that the assessee in accordance with agreement with Mango was required to send its sample (Prior to shipment of the consignment) to M/s. Aitex Textile Research Institute who would test the sample and the shipment would be permitted only on a satisfactory test report being obtained. Further, the testing charges of M/s. Aitex Textile Research Institute were to be paid by the assessee company, as per their agreement with Punto FA. He drew our attention to the relevant clauses of the agreement and also to the letter issued by PUNTO FA regarding this , which was submitted in the paper book.

The Ld AR thereafter submitted that, as per DTAA with Spain, Articles 13.4 defines the term "fees for technical services" "as consideration for the service of the technical or consultancy nature including the provision of services of technical or other personnel." He further pointed out that Para 7 below the Convention/agreement (which provision forms an integral part of the convention) provides that if India enters into any convention or agreement with any other country, being a member of the OECD and India, which limits its taxation at source,

on royalties or fees for technical service, to a rate lower or a scope more restricted then the rate or scope provided in that convention, then the same rate or scope as provided in that convention, shall be applicable to the convention with Spain.

Ld AR then drew our attention to the fact that the DTAA entered into by India with U.K. which is a member of the OECD) and which has come into force w.e.f. A.Y. 1995-96, provides for a very restricted meaning of "Fees For technical Services" which does not include within its scope, fees paid for testing reports. The relevant articles were 13.3, 13.4 and 13.5 of the DTAA with U.K, which were as under

13.3 For the purpose of this Article, the term "royalties" means:

Payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematograph films or work on films, 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; and Payments of any kind received as a consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

13.4 For the purpose of paragraph 2 of this Article, and subject to paragraph 5 of this Article, the term "Fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which:

(a) Are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this Articles is received; or

(b) Are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this article is received; or

(c) Make available technical knowledge, experience, skill, know-how or process, or consist of the development and transfer of a technical plan or technical design'

13.5 The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:

(a) For services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article;

(b) For services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) For teaching in or by educational institutions;

(d) For services for the private use of the individual or individuals making the payments; or

(e) To an employee of the person making the payment or to any individual or partnership for professional services as defined in Articles 15 (Independent personal services) of this Convention.

Ld AR submitted that in terms of Para 7 below the convention with Spain the definition of "Fees for technical services" as provided in the agreement with U.K. / U.S.A. would prevail being more restrictive in scope. He pointed out that , as per India USA/UK tax treaty, not all technical services would qualify as Fees for Technical Services. Only services which "make available any technical knowledge, experience, etc. to service recipient will qualify as fees for technical services. It was pointed out that, in the present case, Aitex only provides a testing certificate to the manufactures. The technical, experience and skills for analyzing the products for issuing a technical certificate remains with Aitex and is not passed on to the manufacturers. Furthermore, the manufacturers only obtain the technical certificate and do not utilize the services of Aitex for doing technical certification by themselves in future. Hence, it cannot be construed that Aitex is making available any technical knowhow, experience etc to manufactures. Therefore, the payment made to M/S Altex Textile Research Laboratory would not fall within the scope of "Fees for technical services" and no tax would liable to be deducted u/s 195, read with section 90(2) of the Income Tax Act, on payments remitted to M/S Aitex Research Institute for testing the samples and issuing test reports. It was further submitted that Aitex is a company which is a tax resident of Spain in terms of

Articles 4 of the India-Spain tax treaty and it did not have any permanent establishment in India . Therefore it was submitted that, the payments to Aitex cannot be considered as fee for technical services in India given the restrictive definition of FTS under the India-Spain tax treaty read with paragraph 7 of the protocol to the treaty. Therefore the service provided by Aitex, is business income and not subject to withholding taxes in India in the absence of Permanent Establishment of Aitex in India and TDS has rightly not been deducted on payments made to Aitex Textile Research Lab. In the circumstances there was no scope for disallowance under section 40(a)(i)(a).In support of his averments the Ld AR placed reliance on the decision of the Authority for Advanced Rulings in the case of **Interteck Testing Servies (P) Ltd. In re 307 ITR 418 (AAR) (New Delhi),** wherein, the Authority for advanced ruling held that under Article 13 of treaty with UK, payment of consideration would be regarded as 'fee for technical /included services' only if twin test of rendering services and making technical knowledge available at the same time is satisfied and that to fit into the terminology 'make available', technical knowledge skills etc. must remain with person receiving services even after particular contract comes to an end. Accordingly it was prayed that the addition made in this regard may be deleted.

6. With regard to the disallowance of adhoc expenses, it was submitted that the action of the ld. AO in making disallowances were against the very principles of natural justice, equity and laid down law. Placing reliance on several case laws , he submitted that the assessee is a company where accounts are audited u/s227 of the Companies Act, wherein the auditor is specifically required to enquire if personal expenses have been claimed in the financial statements and that there were no such adverse remarks in the audit report u/s227 of the Companies Act, 1956. Furthermore the AO had not identified any expenses of a personal nature . He therefore prayed that the disallowance may kindly be deleted.

7. On the other hand, Shri Sanjeev Krishna Sharma, ld. Sr. DR (hereinafter referred to as the “ld. DR”) relied upon the orders of the ld. AO and the ld. CIT(A).

8. We have duly considered the facts and circumstances of the case. As the ld. AR has not pressed ground nos. 1 to 3 i.e. disallowance under section 36(1)(va) of Rs.29,164/- on account of payment towards ESIC after the due date under that act, the said grounds are dismissed as withdrawn. With regard to the ground nos. 4 to 7, it is observed that the very same ld. CIT(A) had considered the issue of payment to M/s Aitex Insitituto Technologico Textile, Spain on account of sample testing in his order dated 30.10.2016, in Appeal No. CIT(A)-II/404/DCIT-VI/15-16/182 for the assessment year 2013-14 in the assessee’s own case. After making the detailed analysis of the issue, the ld. CIT(A) had held as under:-

> *“I have perused the facts and circumstances of the case. There is no doubt that the appellant has made payments to M/s Aitex Institute of Spain and M/s CTC of Lyon France amounting to Rs. 6,02,365/- and Rs. 93,644/- respectively for providing a testing certificate to the assessee. It is established from the documents on record hat both Aitex Institute Spain and CTC of Lyon France services consist of analyzing a sample of Products and issuing a certificate that states that the products comply with certain quality requirements. The technical experience and skills for analyzing the products for issuing a technical certificate remains with both Aitex, Spain and CTC, Lyon France and is not passed on to the appellant therefore, both Aitex, Spain and CTC of Lyon, France do not make available any technical knowhow, experience to the assessee. I agree with the appellant that the services provided by Aitex Institute Spain and CTC of Lyon France services consist of only analyzing a sample of products and*

issuing a certificate that states that the products comply with certain quality requirements which certificate is required at the instance of the customers of the assessee and the aforesaid does not make available any knowledge or knowhow and therefore does not constitute Fee for Technical Services.

In the case of Interteck Testing Services (P) Ltd. In re 307 ITR 418 (AAR) (New Delhi), Held:

> *In the above case the Authority for advanced ruling held that under Article 13 of treaty with UK payment of consideration would be regarded as 'fee for technical/included services' only if twin test of rendering services and making technical knowledge available at the same time is satisfied to fit into terminology make available' technical knowledge skills etc. must remain with person receiving services even after particular contract comes to an end.*
>
> *Rendering of service and making use of service go together. They are two sides of the same coin. But clause (c) of article 13.4 does not stop at that. It carves out a qualification thereto by employing the words 'which make available technical experience, skill know-how or processes." Rendering of technical or consultancy service is followed by a relative pronoun 'which' and if has the effect of qualifying the services. That means that the technical or consultancy service rendered should be of such a nature that' makes available' to the recipient technical knowledge, knowhow and the like. The service should be aimed at and result in transmitting the technical knowledge, etc. so that the payer of service could derive an enduring benefit and utilize the knowledge or know how in future on his own without the aid of the service provider. By making available the technical skills or know-how, the recipient of services would get equipped with that knowledge or experience and be able to make use of if in future, independent of the service provider. Ltd. A.Y.13-14 -CIT(A)-11/404/DCIT-6/2015-16 other words, to fit into the terminology 'make available' technical knowledge, skills etc. must remain with person receiving services even after particular contract comes to an end. The services offered may be the product of an intense technological effect and lot of technical knowledge and the experience of the service provider would have gone into it. But that is not enough to fall within the description of services which make available the technical knowledge, etc. the technical knowledge or skills of the provider should be imparted to an observed by the receiver, so that the receiver can deploy similar technology or*

techniques in future with depending on the provider. Taking some example, the training given to a commercial aircraft pilot or training the staff in particular skills, such as software development would fall within ambit of the said expression in clause (c). Supposing a prescription and advice is given by the doctor after examining the patient and going through the clinical reports, the services rendered by the doctor cannot be said to have made available to the patient the knowledge and expertise possessed by the doctor. On the other hand, if the same doctor teaches or trains the student on the aspect of diagnosis or techniques of surgery, that would amount to making available the available the technical knowledge and experience of the doctor (Para 110" pronoun 'which 'and it has the effect of qualifying the services. That means that the technical or consultancy service rendered should be of such a nature that 'make available' to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting the technical knowledge, etc. so that the payer of service could derive an enduring benefit and utilize the knowledge or know-how in future on his own without the aid of the service provider. By making available the technical skills or know-how, the recipient of services would get equipped with that knowledge or expertise and be able to make use of it in future, Independent of the service provider. In other words, to fit into the terminology 'make available' technical knowledge, skills, etc. must remain with person receiving services even after particular contract comes to an end. The services offered may be the product of an intense technological effort and lot of technical knowledge and the experience of the services provider would have gone into it. But that is not enough to fall within the description of services which make available the technical knowledge, etc. the technical knowledge or skills of the provider should be imparted to and absolved by the receiver so that the receiver can deploy similar technology or techniques in future without depending on the provider. Taking some examples the training given to a commercial aircraft pilot or training the staff in particular skills, such as software development would fall within ambit of the said expression in clause (c). Supposing a prescription and advice is given by the doctor after examining the patient and going through the clinical reports, the services rendered by the doctor cannot CIT(A)-II/404/DCIT-6/2015-16 be said to have made available to the patient the knowledge and expertise possessed by the doctor. On the other hand, if the same doctor teaches or trains the student on the amount to making available the available the technical knowledge and experience of the doctor (Para 11)".

The payments in the rest two cases aggregating to Rs.72,776/- relate to payment of packing, forwarding and other charges relating to import of material and do not constitute FTS and thereby provisions of section 195 of the Act are not attracted warranting any disallowance u/s40(a)(ia).

In view of above ground no. 3 to 10 of the grounds of appeal of the assessee are allowed and additions made by AO are deleted."

9. In our opinion, once the ld. CIT(A) was fully conversant with the issue, even if he was inclined to hear the appeal of the assessee *ex parte,* in the absence of compliance, it was not justified to summarily dismiss the appeal on grounds which had been considered and decided by him in the previous assessment year. We have perused the order of the ld. CIT(A) for the A.Y. 2013-14, as quoted above, and we see no reason deviate from the same. It is fairly clear, that in terms of the provisions of DTAA entered into by the India with the U.K., read with para 7 below the convention / agreement of the DTAA with Spain, fees for lab testing of samples, cannot be regarded as, "fees for technical services" that require deduction of tax at source under section 195 while making the payment for the same. In view of the decision of the authority for advance rulings in the case of Intertek Testing Services India (P) Ltd. Inre 307 ITR 418 (AAR) (New Delhi), we delete the addition of Rs.2,68,311/- made under section 40(a)(ia). Ground nos. 4 to 7 are accordingly allowed.

10. With regard to the adhoc disallowances made by the ld. AO, we observe that the books of the assessee company are audited, the auditors have not pointed out any defect on account of so called self-made vouchers, the ld. AO had not pointed out any defect in the books of accounts or rejected the books accounts. The ld. AO had also not pointed out that the expenses were excessive or that any part of these expenses were not made wholly and solely for the purposes of business. Therefore, keeping in mind the various case laws that have been relied upon by the assessee, in

the course of submissions and in the paper book placed before us, we hold that the adhoc disallowances of Rs.3,00,000/- are without any basis and accordingly, the same are deleted. Ground Nos. 8, 9 & 13 are accordingly allowed.

11. With regard to the additional grounds nos. 11 and 12 raised by the assessee on account of the decision of the ld. CIT(A) to pass the order *ex parte,* we observe that the ld. CIT(A) could have provided more opportunity to the assessee before summarily dismissing its appeal and, even if the appeal was to be decided, the grounds of appeal could have been considered on their merits in the light of his own previous orders. Ground nos. 11 and 12 are accordingly addressed.

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

Order pronounced on 25.10.2024 at Allahabad, U.P.

Sd/-
[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER

Sd/-
[NIKHIL CHOUDHARY]
ACCOUNTANT MEMBER

DATED:25/10/2024
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Copy forwarded to:
1. Appellant –
2. Respondent –
3. CIT DR , ITAT,
4. CIT,
5. The CIT(A)

By order
Sr. P.S.