आयकर अपीलीय अधिकरण
दिल्ली पीठ "डी", दिल्ली
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री नवीन चंद्र, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

आअसं.3741/दिल्ली/2023(नि.व. 2021-22)
ITA No. 3741/Del/2023(A.Y 2021-22)

Lummus Technology Heat Transfer B.V,
Second Floor, Infinity Tower B, DLF Cyber City,
Sector 25A, Phase II, Gurugram, Haryana 122001
PAN: AABCA-9045-K ..... अपीलार्थी/Appellant

बनाम Vs.

Assistant Commissioner of Income Tax,
International Taxation, Gurugram,
Haryana 122001 ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by	:	Shri Vishal Kalra, Advocate, Ms. Reema Grewal, Chartered Accountant & Ms. Snigdha Gautam, Advocate
प्रतिवादीद्वारा/ Respondent by	:	Shri Nikhil Kumar Govila, CIT
सुनवाई की तिथि/ Date of hearing	:	07/07/2025
घोषणा की तिथि/ Date of pronouncement:	:	06/10/2025

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 27.10.2023, passed u/s. 143(3) r.w.s 144C(13) of the Income Tax Act,1961(hereinafter referred to as 'the Act').

2. The gist of grounds raised by the assessee in appeal assailing the assessment order is as under:

(i) Assailing addition of Rs.1,98,27,369/- in respect of donations made to the Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (PM CARES Fund) Rs. 1,62,40,213/-and the Prime Minister's National Relief Fund (PM NRF) Rs.35,87,156/-;

(ii) Attribution of Rs.16,63,100/- as income of the Branch Office of the assessee in respect of offshore supplies made from outside India to Haldia Petrochemicals Ltd. (HPL) in India;

(iii) Disallowance of 2,87,58,211/- u/s. 40(a)(i) of the act holding reimbursement of salary by the appellant/assessee to Lummus LLC;

(iv) Addition of Rs.26,83,615/- on account of interest on Income Tax refund; &

(v) Disallowance of Rs.53,62,585/- on account of foreign exchange loss claimed by the assessee.

3. In addition to the above grounds of appeal, the assessee has also raised additional grounds of appeal vide application dated 3rd February 2025. The same reads as under:-

"5.3. Without prejudice to ground nos. 5(5.1, 5.2), that on facts and circumstances of the case and in law, the AO/DRP have erred in not granting benefit of Article 11 of the India-Netherlands Tax Treaty which taxes interest income at the rate of 10 per cent.

5.4. Without prejudice to ground nos.(5.1,5.2,5.3), that on facts and circumstances of the case and in law, the AO has erred in not granting the credit of tax deduced at source on interest on refund amounting to INR 26,83,615."

4. Shri Vishal Kalra, appearing on behalf of the assessee narrating facts of the case submits that the assessee is a tax resident of Netherlands. The assessee has a Branch Office in India. It is engaged in providing Engineering Design Services and supply of equipment to its head office, other associated enterprises and third-party customers in oil, gas, fertilizer and petrochemical industries in India. In respect of ground of appeal no. 2, the ld. Counsel for assessee submitted that during the

period relevant to assessment year under appeal, the assessee had incurred expenditure on Corporate Social Responsibility (CSR) of Rs.1,98,27,369/-. The assessee under CSR had contributed aforesaid amount towards PM CARES Fund and PM NRF. Both the funds are eligible for deduction u/s. 80G of the Income Tax Act,1961(hereinafter referred to as 'the Act') Accordingly, the assessee claimed deduction u/s. 80G of the Act. The AO disallowed assessee's claim of deduction u/s. 80G of the Act. The ld. Counsel submitted that the issue is now squarely covered by various decisions of the Tribunal holding that where CSR expenditure is incurred towards any donations, eligible for deduction u/s. 80G of the Act, the same should be allowed. In support of his submissions, the ld. Counsel placed reliance on following decisions:-

(i) Cheil India (P.) Ltd. vs DCIT, 122 ITR 194 (Del-Trib.); &

(ii) Interglobe Technology Quotient (P.) Ltd. vs. ACIT, 114 ITR (T) 611 (Del-Trib.).

4.1. In respect of ground no. 3 of appeal, the ld. Counsel submits that during the impugned assessment year the head office earned revenue amounting to Rs.1,33,04,798/- for supply of spare parts to Haldia Petrochemicals Ltd. The spare parts were fabricated and shipped from outside India and the consideration for supply of said spare parts was directly received by the head office outside India. The AO and the DRP have not brought on record any evidence to demonstrate existence of any relation in functions performed by branch in respect of off shore supplies by the Head Office. The AO in an arbitrary manner has attributed 25% of gross receipt to the Branch Office. The addition is based on mere allegations and assumptions. He pointed that the issue is now squarely covered by the order of Tribunal dated 31.10.2013 in assessee's own case for AY 2006-07 reported as *42 taxmann.com 113 (Delhi-Trib.)*. The order of Tribunal was accepted by the Revenue,

hence, the issue attained finality. Thereafter, similar issue arose in AY 2007-08 to 2009-10, the issue was consistently decided by the Tribunal in favour of the assessee. The appeal of Revenue for AY 2008-09 was dismissed by the Hon'ble High Court on account of delay. The Hon'ble High Court upheld the order of Tribunal in deleting the addition in the Revenue's appeal for AY 2007-08 and 2009-10. The Tribunal order for AY 2010-11 and 2013-14 decided in favour of assessee were accepted by the Revenue as no further appeal was filed. He further referred to quotations from Head Office to Haldia at pages 98 and 99 of the paper book and correspondence between Head Office and Haldia at pages 100 to 107 of the paper book, to show that the transaction was between Head Office and Haldia Petrochemicals Ltd. and the Indian Branch Officer had no role to play.

4.2. In respect of ground no. 4 of appeal, relating to disallowance u/s. 40(a)(i) of the Act, the ld. Counsel for the assessee submits that this issue arises on account of payments made for secondment of employee holding it to be Fee for Technical Services (FTS) by the AO. Consequent to Secondment Agreement dated 27.06.2019, Lummus Technology LLC (Lummus USA) surrendered all its rights as an employer over the seconded employee Shri Rajesh Dilip Samarth during his secondment tenure. Lummus USA did not exercise any authority with regard to the conduct of his duties during the term of the secondment. Shri Rajesh Dilip Samarth was duly interviewed and approved by the branch office that is the assessee. During the course of employment, control over work and tenure of the secondment employee vested with the assessee/appellant. The seconded employee was accountable for performance of work to the assessee and not Lummus USA. The letter of appointment to the seconded employee was issued by the assessee. Further, the agreement also provided that the power to terminate services were

with the assessee and upon expiry or early termination of the agreement, the employee will not be automatically employed by Lummus USA and there may not be continuity of service. The obligation to pay all compensation and benefits to employ are in the accordance with rules of the assessee. Further, the assessee bears the cost of seconded employee; Lummus LLC only facilitates disbursement of salary to him in his home country. He submitted that when their is employee, employer relationship between seconded employee and assessee, reimbursement of salaries paid to the seconded employee is not Fee for Technical Services (FTS). To support his argument he placed reliance on the decision in case of *DCIT vs. Flipkart Internet P. Ltd. 171 taxmann.com 693 (Karnataka), DIT vs. Abbey Business Services India (P.) Ltd. 122 taxmann.com 174 (Karnataka).*

In any case no disallowance u/s. 40(a)(i) of the Act is warranted as salary paid to seconded employee was subject to TDS u/s. 192 of the Act. Without prejudice to earlier submissions, even if it is presumed that any services were rendered by Lummus LLC to the assessee still no TDS was required to be deducted as 'make available' clause under Article 12 of India-Netherland DTAA was not satisfied.

4.3. In respect of ground no. 5 of appeal to be read with additional grounds of appeal, the ld. Counsel submits that during the impugned assessment year the assessee has received Rs.26,83,615/- as interest on income tax refund. The said income tax refund and interest thereon pertains to PE i.e. the Branch Office in India. The assessee holds valid Tax Residency Certificate of the Netherlands. Thus, the Income Tax refund received by the assesssee should be taxed at treaty rate.

4.4. The last issue in appeal by the assessee is with regard to foreign exchange losses. The ld. Counsel submitted that during impugned year the assessee incurred net exchange loss on foreign currency transaction Rs.1,90,79,980/-. Such exchange

loss has been disclosed under "other expenses" in Note 15 to the audited financial statements. The AO and the DRP disputed the allowability of net foreign exchange loss for certain transactions undertaken by the assessee with the head office. The AO treated head office and branch office as one unit. The ld. Counsel submitted that the transaction undertaken by the assessee that resulted in net foreign exchange loss pertain to receivables/payables arising out of transactions undertaken in normal course of business and therefore, should be considered as revenue in nature. The receivables on which the net foreign gain/loss has arisen pertains to services rendered by the assessee to its head office. In preceding assessment years i.e. AY 2014-15, 2016-17 and 2020-21 when there was foreign exchange gain on account of similar transactions, the assessee had offered to tax. The AO accepted the same and completed the assessment u/s. 143(3) of the Act. Now in the impugned assessment year when there is foreign exchange loss, the AO has declined to accept the same on identical set of facts. The ld. Counsel placed reliance on the decision rendered in the case of *CIT vs. Woodward Governor India (P) Ltd. 312 IT 254* to contend that when department has accepted foreign exchange gains in the preceding assessment years, deduction in respect of foreign exchange loss has to be allowed.

5. Per contra, Shri Nikhil Kumar Govila representing the department vehemently defended the assessment order and prayed for dismissing appeal of the assessee. In respect of ground no.4 of appeal, relating to secondment of employees, the ld. DR pointed that the right of termination is with Lummus US. Hence, the US company has ultimate control over the employee. To support his submission, he placed reliance on para 3.4.5 at page 15 of the assessment order.

6. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the decisions and the documents on which rival sides have placed reliance during the course of submissions.

7. Ground No. 1 of appeal is general in nature, hence, require no separate adjudication.

7.1 In ground No. 2 of appeal, the assassee has assailed disallowance of assessee's claim of deduction u/s.80G of the Act, in respect of contribution made to PM CARES Fund and PM NRF from the amounts set apart for CSR. In so far as the expenditure of Rs.1,98,27,369/- under CSR, the same is not under dispute. The assessee has placed on record receipts in respect of contribution towards PM CARES Fund and PM NRF. The assessee has claimed deduction in respect of contribution made towards PM CARES Fund and PM NRF. Both the said funds are eligible for deduction u/s. 80G of the Act. The coordinate Bench of Tribunal in the case of Cheil India (P.) Ltd. vs. DCIT (supra) while dealing with the similar issue placing reliance on the decision rendered in the case of *Ratana Sagar P. Ltd. vs ACIT in ITA No. 2556/Del/2023* decided on 29.08.2024, held that where donations are made which are eligible for deduction u/s. 80G of the Act, the same should be allowed. The deduction u/s. 80G of the Act cannot be denied merely on the ground that the donation amount was from the amount set apart for CSR under mandatory provisions of the Companies Act and was not voluntary in nature. We find similar view has been expressed by the Tribunal in the case of Interglobe Technology Quotient (P.) Ltd. vs. ACIT (supra) and various other cases. Thus, in light of undisputed fact of the case and the decisions referred above, we find merit in ground no. 2 of appeal. The AO is directed to allow the benefit of deduction u/s.

80G of the Act in respect of amounts contributed towards PM CARES Fund and PM NRF under CSR. Thus, ground of appeal no. 2 is allowed.

7.2. In the ground no. 3 of appeal, the assessee has assailed attribution of income to the Branch Office in respect of offshore supplies made by Head Office (outside India) to Haldia Petrochemicals Ltd. in India. The assessee has referred to communications between Lummus Technology Heat Transfer BV Hague and Haldia Petrochemicals Ltd. in India at Pages 98 to 207 of the paper book. The quotations at page 98 and 99 of the paper book reveal that it is a communication between Lummus Hague and Haldia Petrochemicals Ltd. In the entire communication there is no reference or involvement of any activity being carried out by the Branch Office in India. The assessee has also placed on record trail of emails between Lummus Hague and Haldia Petrochemicals Ltd., with regard to confirmations, technical queries and settlement of the price. Again there is no reference of the assessess that is branch office in India. We find that this issue is a legacy issue arising since assessment year AY 2006-07. The Co-ordinate Bench decided the issue in favour of assessee reported as 42 taxmann.com 113 (Del.) (supra). The coordinate Bench decided the issue as under:-

> *"4.1 Ground No. 13 of the appeal is against confirmation of addition of Rs. 2,89,06,431/-.*
>
> *4.2 The facts apropos this ground are that the assessee was asked to furnish the details of sates made/services rendered in India by the HO directly and the copies of agreements with HO. The assessee submitted vide its letter dated 29.12.2009 that the above information was not available with the branch office. In the absence of such details forthcoming from the side of the assessee, the Assessing Officer proceeded to estimate the receipts of the assessed in respect of direct transactions between HO and Indian customers equal to the disclosed receipts of the assessee branch at Rs. 2.89 crore. The same was held to be Fees for technical services'*

chargeable to tax @10%. That is how this amount of Rs. 2.89 crore was added to the assessee's total income, which has been assailed through this ground.

4.3 We have considered the rival submissions and perused the relevant material on record. It can be seen from the Assessing Officer's final order passed u/s 144C(13) that the entire issue has been discussed in a solitary para No. 6 of around 10 lines at page 37 of the order. It has been concluded that the assessee must have received a sum equal to its declared receipts in respect of direct transactions between the HO and its Indian customers and the further presumption is that it is in nature of fees for technical services. We are unable to appreciate the logic of the AO in drawing inferences, one after me other and the conclusions reached in this regard. There is no material worth the name to suggest, even remotely, that the assessee was rendering services to its head office or the Indian clients in respect of direct transactions between them. There is absolutely no bedrock for such presumption. The learned DR was required to invite our attention towards any material indicating the assessee's involvement in the direct transactions between the head office and Indian customers. In the name of reply, he took us through certain portions of the draft assessment order in which there is a reference to certain invoices of the HO indicating the role of the assessee in such direct transactions. On a careful scrutiny of the dates of such invoices, it can be seen that they relate to the financial year 2004-05 relevant to the preceding assessment year 2005-06. A copy of the assessment order for the A.Y. 2005-06 has been placid on record. It can be seen from such order dated 17.12.2007, that no addition was made in respect of such presumptions of the Assessing Officer. It is further relevant to note that the assessee's accounts were examined by the TPO, who has not pointed out even a single rupee expense attributable to the direct transactions between HO and Indian customers. When this is the position obtaining in this case, we fail to comprehend as to how an income can be estimated in this regard. Such addition made by the Assessing Officer is, therefore, directed to be deleted. This ground is allowed."

The said order of the Tribunal was accepted by the Revenue and no further appeal was filed by Department. Thereafter, in the subsequent assessment years i.e. AY 2007-08 and 2009-10 similar additions were made. The Tribunal granted relief to the assessee, the Revenue carried the issue in appeal before the Hon'ble High Court. The Hon'ble High Court after considering facts of the case as well as the

history of litigation on the issue held that following the principle of consistency there is no justification to entertain the appeals on the issue of attribution. Hence, dismissed appeals of the Revenue. In the impugned assessment year the Revenue has not been able to show any distinguishing factor. Thus, in light of the aforesaid decisions rendered in asseessee's own case, we find no merit in confirming the addition on account of attribution of income in the hands of assessee. The addition is directed to be deleted the assessee succeeds on ground no. 3 of appeal.

7.3. In ground no.4 of appeal, the assessee has assailed disallowance u/s. 40(a)(i) of the Act for non-deduction of TDS in respect of reimbursement of salary by the assessee to Lummus LLC in respect of seconded employee. The Revenue has held such reimbursement in the nature of fee for technical services/fee for included services. The Counsel has drawn our attention to the secondment agreement at page 221 to 227 of the paper book. A perusal of the terms and conditions of the agreement reveal that the seconded employee Shri Rajesh Samarth for all intent and purposes was under the employment and control of the assessee. Lummus Technology LLC US had no control over the seconded employee as per the terms and conditions of Article 2.6 of the agreement. Even after termination of employment with the assessee, the seconded employee had no recourse to his employment with Lummus Technology LLC. It is not in disputed that the assessee has been deducting tax at source u/s. 192 of the Act on payment of salary. The Hon'ble Karnataka High Court in the case of DCIT vs. Flipkart Internet P. Ltd. (supra) held that where assessee an Indian company had entered into secondment agreement with USA entity and there were all Indication of employer employee relationship between the Indian company and seconded employee, the assessee company was not required to deduct tax u/s. 195 of the Act on payment made to

foreign entity towards reimbursement of salaries paid to seconded employee. Thus, in facts of the case in light of and aforesaid decision, we find merit in ground no.4 of appeal, hence, the same is allowed.

7.4. The ground number no. 5 of appeal and additional grounds of appeal are taken up together for adjudication. The assessee in aforesaid ground has assailed in making addition of Rs.26,83,615/- on account of interest on income tax refund received by the assessee during the relevant assessment year. The AO and DRP have held that interest on income tax refund shall be taxed under Article 7 of India, Netherlands Tax Treaty as Business Income, considering the same to connected with the PE of the assessee in India. In the instant case assessee is a Branch Office PE, the provisions of Article 7 of DTAA are not attracted. The reliance is placed by the Counsel for the assessee on thedecision rendered by Special Bench in the case of *ACIT vs. Clough Engineering Ltd. 130 ITD 137 (Del.-Trib.) (SB).* The question for consideration before the Special Bench was:

> *"Whether, on the facts and in the circumstances of the case, interest on income-tax refund and fixed deposits with the bank is liable to tax with reference to Article 7 read with paragraph No.4 of Article 11 or paragraph no.2 of Article 11 of Indo-Australia Double Taxation Avoidance Agreement?"*
>
> The Special Bench answered the question as under:-
>
> *"11.4 Thus, we are again left with the fundamental question as to whether the debt-claim in this case can be said to be effectively connected with the PE. We have already held that the claim is connected with the PE in the sense that it has arisen on account of tax deduction at source from the receipts of the PE. However, it is also a fact that payment of tax is the responsibility of the foreign company. The same is determined after computation of its income and the tax forms not an expenditure for earning the income but an item of appropriation of profit. Therefore, even if the debt is connected with the receipts of the PE, it cannot be said to be effectively connected with such receipts because the responsibility to pay*

the tax lies on the shoulders of the assessee-company from the final profit ascertained as on the last date of the previous year and on closing the books of account. It is for the company to pay the tax from any source available with it. It so happened in this case that the tax got automatically deducted from the receipts of the PE by operation of law. Such collection of tax by force of law would not establish effective connection of the indebtedness with the PE as ultimately it is only the appropriation of profit of the assessee company. However, we may add that we do not venture to say that the interest income has to be necessarily business income in nature for establishing the effective connection with the PE because that would render provision contained in paragraph 4 of Article XI redundant. Thus, there may be cases where interest may be taxable under the Act under the residuary head and yet be effectively connected with the PE. The bank interest in this case is an example of effective connection between the PE and the income as the indebtedness is closely connected with the funds of the PE. However, the salme cannot be said in respect of interest on income-tax refund. Such interest is not effectively connected with PE either on the basis of asset-test of activity-test. Accordingly, it is held that this part of interest is raxable under paragraph No. 2 of Article XI. Thus, the ground referred to the Special Bench is partly allowed. The Division Bench shall dispose off the appeal in conformity with this order.

Considering facts of the instant case and the decision of Special Bench (supra), we direct the AO to apply treaty rates on interest on Income Tax refund. The ground of appeal no.5 of appeal is thus allowed.

7.5. The last issue in appeal by the assessee relates to foreign exchange loss. The assessee has suffered foreign exchange loss of Rs.53,62,585/- during the relevant period. The AO and the DRP has disallowed assessee's claim of loss holding that the assessee cannot have loss on transactions with the head office. The ld. Counsel for the assessee has pointed that in the preceding assessment years, whenever, there was profit on foreign exchange transactions with the head office, the assessee had offered the same to tax and the AO accepted the same. Since, in impugned assessment year it is loss, the AO has taken a different position. The rule of

consistency demands that, if in preceding assessment years, the assessee has offered to tax foreign exchange gain in respect of transaction with its head office and the same was accepted, for parity of reasons, the foreign exchange loss should also be allowed. The AO is directed to allow foreign exchange loss to the assessee in the impugned assessment year for parity of reasons. Thus, ground of appeal no.6 is allowed.

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

Order pronounced in the open court on Monday the 06th day of October, 2025.

Sd/-	Sd/-
(NAVEEN CHANDRA)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

दिल्ली/Delhi, दिनांक/Dated 06.10.2025

NV/-

<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT/CIT(A)
4. विभागीय प्रतिनिधि, आय.अपी.अधि., दिल्ली /DR, ITAT, दिल्ली
5. गार्ड फाइल/Guard file.

BY ORDER,

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(Asstt. Registrar) ITAT, DELHI