IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE

BEFORE SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER
and
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No.1327/Bang/2014
(Assessment year: 2012-13)

Asst. Director of Income-tax
(International Taxation,
Mangalore. ... Appellant

Vs.

J.J.M.Medical College,
Stadium Road,
M C C B Block,
Davangere-577004 ... Respondent
PAN:BLRB00770A

Appellant by: Shri Sunil Kumar Agarwala, JCIT(DR.
Respondent by: Shri P. Dinesh, Advocate.

Date of hearing : 19/10/2015
Date of pronouncement: 28/10/2015.

O R D E R

Per VIJAY PAL RAO, JM:

This appeal by the revenue is directed against the order dated 27/8/2014 of the CIT(A)-IV, Bangalore, arising from the order passé du/s 201(1) and 201(1A) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short], for A. Y. 2012-13.

2. The revenue has raised the following grounds:

1. *"The order of the Learned CIT(A) is opposed to Law and facts of the case.*

2. *The Learned CIT(A) ought to have upheld the decision of the Assessing Officer of treating the payment of Rs.60,76,000/- made to M/s Nugrahan SDN of Malaysia, by the assessee as "Fees for technical services" as per Explanation 2 of section 9(1)(vii) of the Income tax Act.*

3. *The learned CIT(A) has erred in holding that no part of the payment made is chargeable to tax in India in the hands of the Malaysian entity as it does not maintain a permanent establishment in India whereas, it has been established that the payment is "fees for technical services" under clause (vii) of subsection 1 of section 9 and in view of the explanation to the subsection 2 of the said section 9, the provisions of sec.195 apply and therefore, the question of the Malaysian entity M/s. Nugrahan SDN having a permanent establishment in India, to render the payment liable to tax in India, does not arise at all.*

4. *The Learned CIT(A) has erred in holding that the services rendered by the recipient foreign entity to the assessee cannot be classified as managerial, technical or consultancy in nature whereas, the assessee itself has furnished the activities of the recipient as being (i) Education placement consultant (ii) To act as Education agent and Education management consultant and (iii) to render management, industrial, commercial, financial, secretarial, public relations, industrial relations and other services to any person, firm, corporation, private and government institution, local and overseas engaged in education business and activities and whereas the said foreign company would have no role to play in promoting or recommending suitable candidates to the assessee in the absence*

of the MOU drawn up between the assessee and M/s Nugrahan SDN, as is clear from the clause 3 of the MOU which reads " The First party has agreed to appoint the second party as the sole and exclusive representative for carrying on the promotion of Medical education and admission of medical students to MBBS course in JJM Medical college" and therefore, the assessee is a client of the foreign company which provides managerial and consultancy services to the assessee and the said income has arisen to the foreign company only on account of the assessee's business activities in India and not independently.

5. *The learned CIT(A) has erred in holding that the payments in question made to the Malaysian Entity can best be considered as referral fees on placing foreign students in the assessee's medical college whereas, the services provided by the recipient M/s Nugrahan SDN are in the nature of consultancy services which require knowledge and skill to promote medical education in the assessee's college in India to the foreign students and whereas the learned CIT(A) has failed to note that the MOU is a "colourable device" so worded as to avoid any withholding obligations on the payer and tax obligation of the payee.*

6. *For these and such other grounds it is urged that the order of the Learned CIT(A), on the above points may be set aside and the order of the Assessing Officer be restored.*

7. *The appellant craves leave to add, alter or amend all or any of the grounds of appeal before or at the time of the hearing of the appeal."*

3. The assessee is a medical college managed by the trust Bapuji Education Association, Davangere District. There was a Memorandum of Understanding dated 19/1/2012 between Bapuji

Education Association and Nugrahan, a company incorporated in Kaulalampur and engaged in the business in Malaysia as counselors in recruiting and placing qualified Malaysian students for assessee's J.J.Medical College in Davangere, Karnataka. The assessee has remitted/paid charges to Nugrahan SDN, Malaysia and claimed the same as commission payment. The Assessing Officer (AO) noted that the assessee and the other institutions made payments to the said foreign company in respect of services rendered to the institution and therefore, the AO held that payments made by the assessee were amenable to TDS as per provisions of sec.195 of the Act. Since the assessee failed to deduct tax at source before remittance, he proceeded to pass orders u/s 201 and 201(1A) to determine the tax liability. The assessee contended before the AO that the Malaysian company is only an agent of the assessee for the purpose of admissions of foreign students in the medical institution of the assessee. Thus, the assessee submitted that the agent is a tax resident of Malaysia and covered under the Indo-Malaysian DTAA. Since the agent has neither rendered any service in India nor does have any place in India and hence, assessee is not liable to deduct tax at source on the income earned by the foreign company which is not chargeable to tax under the Act. The AO did not accept the contention of the assessee and held that the payment made by the assessee is in respect of fee for technical services and

therefore, the assessee was liable to deduct tax u/s 195 of the Act, failure of which the assessee was held as assessee in default.

4. The assessee challenged the action of the AO before the CIT(A) and reiterated its contention that the payment in question does not fall under the definition of fee for technical services either under the Act or under the provisions of the DTAA and therefore, the assessee was under no obligation to deduct tax at source. The CIT(A) set aside the assessment order by allowing the claim of the assessee that the payment in question cannot be classified as for services rendered as managerial, technical or consultancy in nature.

5. Before us, the learned Departmental Representative has submitted that as per the terms and conditions of MoU, the services rendered by the foreign company was in the nature of consultancy and therefore, it falls under the definition of fee for technical services as per provisions of sec.9(1)(vii) r.w. Explanation 2. The learned Departmental Representative further contended that the foreign company was engaged by the assessee to function as the counselor in recruitment and placing qualified Malaysian students in the assessee's medical college and therefore, the services rendered by the foreign company is technical in nature apart from the consultancy and therefore, the AO was justified in treating the fee paid by the assessee to

foreign company as fee for technical services. He has relied upon the order of the AO as well as the decision of the Chennai bench of the Tribunal in the case of *ACIT vs. Evolv Clothing Co. (P) Ltd.* (142 ITD 618).

On the other hand, learned AR of the assessee has submitted that the AO decided the issue by considering the wrong facts as the business of the foreign company and not on the basis of the actual services rendered by the foreign company to the assessee. He has further submitted that the payment in question is nothing but a commission payment. The foreign company has referred foreign students for admission to the assessee's medical college. MoU between parties is not for rendering any technical service, consultancy service or managerial service but it was only for facilitating scrutinization of Malaysian students for admission in the assessee's medical college. He has relied upon the decision of the Hon'ble Bombay High Court in the case of *Director of Income-tax(International Taxation) vs. Wizcraft International Entertainment Pvt. Ltd.* (364 ITR 227) and submitted that when the nature of services rendered by the foreign company does not fall under the definition of technical services, then the payment made to the agent/foreign company cannot be treated as fee for technical services and creates any obligation on the part of the assessee to deduct tax u/s 195 of the Act. He has supported the order of the CIT(A).

6. We have considered the rival submissions as well as relevant material on record. At the outset, we note that the assessee has contended before the AO as well as before the CIT(A) that the payment in question does not fall under the definition of fee for technical services and further since the foreign company does not have a permanent establishment/place of business in India, therefore, the assessee was not required to deduct tax at source on such payment which is not chargeable to tax in India. The assessee has claimed the benefit of Indo-Malasia DTAA. However, neither the AO nor the CIT(A) has gone through the relevant provisions of DTAA for the purpose of adjudicating the issue of fee for technical services. It is pertinent to note that the definition under the Tax treaty is not identical as given under Explanation 2 to sec.9(1)(vii). The AO has decided the issue in the light of the provisions of the IT Act without considering the provisions of DTAA in respect of payment held as fee for technical services. We further note that the CIT(A) has not discussed the facts of the case and the only finding is given by the CIT(A) is in para.6.5 as under:

> *"6.5 Applying the above said decision, it is very clear that the services rendered cannot be classified as managerial, technical or consultancy in nature and hence the action of the AO cannot be sustained in first appeal and is hereby stuck down"*

Thus it is clear that the CIT(A) has not discussed the provisions of IT Act or DTAA as well as the relevant clauses of the MoU for the purpose of determining the issues whether the payment in question can be held as fee for technical services. The CIT(A) has simply quoted certain judgments on the point and given the finding which is very cryptic in nature and not based on the facts of the case. Accordingly, we set aside the impugned order of the CIT(A) and remit the matter to the record of the CIT(A) for deciding the issue afresh on merits on the basis of the facts of the case after considering the relevant clauses of the MoU as well as the provisions of DTAA. Needless to say the assessee be given appropriate opportunity of hearing before deciding the issue.

7. In the result, the departmental appeal is allowed for statistical purposes.

Pronounced in the open court on 28th October, 2015.

sd/-	sd/-
(Abraham P George)	**(Vijay Pal Rao)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

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Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore