IN THE INCOME TAX APPELATE TRIBUNAL
BANGALORE "B" BENCH : BANGALORE

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

I.T.(T.P.)A.No.1509/Bang/2012
Assessment Year 2008-2009

The Income Tax Officer Ward 11(1), Bangalore.	vs.	M/s. Cerner Health Care Solutions P. Ltd., Bangalore – 560 034. PAN AACCC3795R
(Appellant)		(Respondent)

For Revenue :	Mr. P.K. Srihari
For Assessee :	Mr. Chavali Narayan

Date of Hearing :	28.07.2015
Date of Pronouncement :	4.9.2015

ORDER

PER SMT. P. MADHAVI DEVI, J.M.

This appeal filed by the Revenue is directed against the Order of the Ld. CIT(A)-I, Bangalore dated 31.08.2012 for the A.Y. 2008-2009 in granting relief to the assessee by deleting the disallowances made by the A.O. under section 40(a)(ia) of the Act as well as section 10A of the Act.

2. Brief facts of the case are that the assessee company, engaged in the business of development of software, filed its return of income for the A.Y. 2008-2009 on 09.09.2008 declaring 'NIL' income after claiming deduction of Rs.7,69,50,102 and Rs.1,09,84,784 under

section 10A and 10AA of the I.T. Act respectively. During the course of assessment proceedings under section 143(3) of the Act, the A.O. observed that the assessee had made payments of Rs.4,09,77,678 to M/s. Cerner Corporation, USA as reimbursement of expenses. He observed that the assessee has not made any TDS from such payments on the ground that they were in the nature of reimbursement of expenses and do not constitute income in the hands of the non-resident. The A.O. asked the assessee to explain as to why TDS was not made, as according to him, it constitutes 'fees for technical services'. Vide letter dated 21.10.2011, the assessee company submitted that during the financial year relevant to A.Y. 2008-2009, Cerner India i.e., assessee herein, had incurred certain expenses in foreign currency aggregating to Rs.4,09,04,600 being in the nature of salaries paid to its employees, staff welfare expenses, communication expenses, travelling expenses, legal and professional charges and other miscellaneous expenses and that Cerner Corporation, USA, had made these payments to the respective parties on behalf of the assessee herein purely for administrative convenience and assessee had reimbursed Cerner Corporation, USA at cost without any mark-up thereon. It was also stated that only for the month of April, 2007, the salary of the employees of Cerner India amounting to Rs.1,13,32,486 was inadvertently transferred to the employees of Cerner India from the bank account of Cerner Corporation instead of using the bank account of Cerner India and from May

2007 onwards, salary to Cerner India employees was paid directly from Cerner India bank account. He submitted that Cerner India reimbursed the salary cost of Rs.1,13,32,486 to Cerner Corporation at cost basis. The assessee therefore submitted that the reimbursement of expenses is not liable for income tax withholding under section 195 of the Act. It relied upon various judicial decisions in support of assessee's contention that reimbursement *per se* do not bear the character of income. The A.O. however, did not agree with the contentions of the assessee and held that the payments made by the assessee to Cerner Corporation, USA, a non-resident, is liable for deduction of tax at source under section 195 of the Act. Further he also held that even otherwise, the payment made was towards 'fees for technical services' and on this count also the payments are liable for TDS. He accordingly disallowed the entire payment made to Cerner Corporation and brought it to tax under section 40(a)(ia) of the I.T. Act.

2.1. Further, on perusal of the P & L account of the assessee, the A.O. observed that the assessee has incurred communication expenses of Rs.1,51,52,880 and travelling expenses of Rs.3,28,06,568. On perusal of the details of these expenses, he noticed that an amount of Rs.1,49,65,548 was towards data communication/voice communication expenses and Rs.83,87,831 was towards travelling expenses incurred in foreign currency and that these expenses have not been reduced from the export

turnover for the purpose of computing the deduction under section 10A of the Act. After considering the assessee's contentions at length, the A.O. reduced these expenses from the export turnover only while computing the deduction under section 10A of the Act. Aggrieved by the above disallowance and the consequential additions, the assessee filed an appeal before the Ld. CIT(A) who granted relief to the assessee on both the issues. Against the order of the Ld. CIT(A), the Revenue is in appeal before us by raising the following grounds of appeal.

1. *The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.*

2. *The Ld. CIT(A) has erred in deleting the addition made under secion 40(a)(i) amounting to Rs 4,09,77,678, when the payments made by the assessee to, the US company were in the nature of income and therefore fell within the ambit of sec 195.*

3. *The Ld. CIT(A) erred in deleting the disallowance u/s 40(a)(i) when the decision of the ITA T in the assessee's own case for the AY 2006-07 in ITA No.627/(Bang)/2011 has not been accepted by the department and the same has been appealed against under s 260A.*

4. *The Ld. CIT(A) was not justified in directing the AO to re-compute the deduction u/s.10A after reducing the telecommunication expenses of Rs 1,49,65,548 and travelling expenses of Rs 83,87,831 from the total turnover also.*

5. *The CIT(A) ought to have appreciated that there is no provision in sec 10A which requires the*

concerned expenses to be reduced from the total turnover.

6. *The Ld. CIT(A) erred in allowing the relief, relying on the decision of the Hon'ble High Court in the case of CIT Vs Tata Elxsi and others in the consolidated order dated 30.8.2011 in ITA No. 70/2009 & others (2012) reported in 247 CTR 334, which has not been accepted by the department and SLP ,has been filed before the Hon'ble Supreme Court.*

7. *For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT (A) be reversed and that of the Assessing Officer be restored.*

8. *The appellant craves leave to add, alter, amend or delete any of the grounds that may be urged at the time of hearing of the appeal.*

3. The learned D.R. supported the orders of the A.O. and submitted that the CIT(A) has granted relief to the assessee by deleting the disallowance under section 40(a)(ia) of the Act by placing reliance upon the order of this Tribunal in assessee's own case for the A.Y. 2006-2007 even though the same has not been accepted by the department and further appeals have been filed before the Hon'ble High Court under section 260A of the Act. As regards the computation of deduction under section 10A of the Act and reduction of communication expenses from both the export turnover as well as the total turnover for such computation, the learned D.R. submitted that the Ld. CIT(A) has followed the decision of the Jurisdictional High Court in the case of Tata Elxsi Limited reported in

247 CTR 334 even though the same has not been accepted by the department and SLP has been filed before the Hon'ble Supreme Court.

4. The Ld. Counsel for the assessee, on the other hand, supported the orders of the Ld. CIT(A) and submitted that this issue had arisen in assessee's own case in the earlier A.Y. 2006-2007 wherein the Tribunal had decided both issues in favour of the assessee. A copy of the said order of the Tribunal has been filed before us.

5. Having regard to the rival contentions and the material on record, we find that both the issues against which the Revenue has filed this appeal before us are covered in favour of the assessee by the decision of this Tribunal in assessee's own case for the earlier assessment year. As regards the disallowance under section 40(a)(ia) is concerned, we find that the Tribunal had followed the decision of Coordinate Bench of this Tribunal in the case of IDS Software India P. Ltd., in ITA.No.87/Bang/2008 dated 21.01.2009 wherein the issue of secondment of employees to the assessee in India and the reimbursement of expenses to the associated enterprise in US has been considered at length and it has been held that such reimbursement of expenses are not income in the hands of the non-resident and therefore, TDS provisions are not applicable. Further, it has also been held that it is also not in the nature of fees for technical

services. For the sake of convenience and ready reference, the relevant paragraphs are reproduced hereunder.

> *"11. The secondment agreement as we have already held, constitutes an independent contract of service in respect of the employment of Dr. Sundararajan with the assessee company. It may be true that IDS, the US company is the employer of Dr. Sundararajan in a legal sense but since his services have been seconded to the assessee company under the secondment agreement and further since the assessee company is to reimburse the emoluments paid by IDS to Dr. Sundararajan, it is the assessee company which for all practical purposes is to be looked upon as the employer of Dr. Sundararajan during the relevant period. In this behalf we were referred to the views expressed by Professor Klaus Voegel in his treatise on Double Taxation Conventions under the heading "International Hiring Agreements" at page 885. The view put forth by him is reproduced hereunder :*
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> > *"The question of who is the employer arises particularly in situations in which the employee is sent abroad to work for a foreign enterprise as well In such cases, the determination of employer rests on the degree of personal and economic dependence of the employee towards the enterprises involved Accordingly. the foreign enterprise does not quality as an employer merely because the employee performs services for it or because the enterprise was issuing to the employee instructions regarding his work; or places tools, etc., at his disposals (of Hinnekens. L. Interfax 331 (1988). The situation is different if the employee works exclusively for the enterprise in the State of employment and was released for the*

> *period in question by the enterprise in his State of residence (BFH 114 (1986) re Germany's DTC with Spain). "*

If this view is applied to the present case, the assessee company can be considered as the economic employer because the services are rendered by Dr. Sundararajan to it, the salary is met or borne by it. Be that as it may, the person who actually controls the services of Dr. Sundararajan is the assessee company. Under the secondment agreement he is to act in accordance with the reasonable requests, instructions and directions of the assessee company. He shall devote the whole of his time, attention and skills to the assessee company. He is reportable and responsible to the assessee company. He can be rejected by the assessee company in which case the US company is bound to replace him. Under clause 86 of the Articles of Association of the assessee company, which we have already noticed, the assessee company may remove Dr. Sundararajan before the expiration of the period of his office. Clause 89 of the articles empowers the Board of Directors of the assessee company to regulate the powers and duties of Dr. Sundararajan by passing appropriate resolutions which they have already done. Thus reading the Articles of Association as well as the second agreement together, it seems to us that Dr. Sundararajan was an employee of the assessee company, subject to the supervision and control of its Board of Directors, in addition to being the Managing Director of the assessee company.

12. For the above reasons, we hold that Dr. Sundararajan was an employee of the assessee company during the relevant time and the amount payable to him was not to suffer tax deducted at source at the time, of remittance to

IDS since the tax has been deducted and paid to the Indian Income-tax authorities.

13. The next question is whether the amount can be considered as fees for technical services within the meaning of Explanation 2 below section 9(l)(vii) of the Income-tax Act Under this Explanation fees for technical services means any consideration including lumpsum 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". It is not denied before us on behalf of the assessee that Dr. Sundararajan is a technical person. What is however submitted is that Article II and VI of the secondment agreement would be out of place in a contract for providing technical services. Article II as we have already seen contains eight clauses outlining the duties and obligations of the seconded employee. Article VI provides for indemnification which has also been earlier noticed by us. We are inclined to agree with the submission that these two articles are out of place in a contract for providing technical services. For example, clauses (A) to (C) of Article IT make the seconded employee responsible and subservient to the assessee company which cannot be the case if the agreement is for providing technical services by IDS to the assessee company, Similarly clause (E) which requires the seconded employee to also act as officer or authorized signatory or nominee or in any other lawful personal capacity for the assessee company, would also be out of place in an agreement for rendering technical services as it cannot be imagined that a technical person would also be required to act

in non-technical capacities under an agreement for rendering technical services. Clause (H), on which considerable reliance was placed by the department to contend that the agreement is one for rendering technical services, is merely a clause ensuring secrecy and confidentiality of the information accessed by the seconded employee in the course of his employment with the assessee company. Such confidentiality extends not only to technical information, which would be the case if the agreement is one for rendering technical services but also financial or accounting information, price or cost data and any other proprietary or business related information. Article VI which provides for indemnity, that is to say, the liability of the assessee company to indemnify the US company from all claims, demands, etc., consequent to any act or omission by the seconded employee is also inconsistent with the claim of the department that this is an agreement for rendering technical services. The Article further provides that nothing in the agreement shall be construed as a warranty of the' quality of the seconded employee. It is not usual to find such a stipulation in an agreement for rendering technical services.

14. The Department has drawn our attention to the ruling of the Authority for Advance Rulings in the case of AT & S India P. Ltd., (2006) 287 ITR 421. In this case the agreement entered into by the Indian company with its Austrian parent company was titled "Foreign Collaboration Agreement". Article 4 of the agreement obliged the Austrian company to provide all assistance and cooperation to the Indian company in its venture by providing appropriate support technology. Article 4.2 required the Austrian company to offer the services of its technical experts to the assessee for working on the project that was being executed. There was another agreement called

the secondment agreement between the Indian and Austrian companies and it inter alia provided that the Austrian company can at any time remove the seconded person and replace him with similarly qualified persons. Referring to the secondment agreement, the AAR observed that a plain reading of the above clause would show that the Austrian company retained the right over the seconded personnel and had the power to remove any seconded personnel from the assessee subject only to the condition that a suitable replacement should be made. In the present case under the secondment agreement it is the assessee company which has control and supervision of the work of the seconded employee namely, Dr. Sundararajan. He was appointed as Managing Director by the Board of Directors of the assessee company and not by IDS. In fact, the assessee company could even terminate the services of Dr. Sundararajan as Managing Director during the period of eight months during which he was to serve the assessee company. There was no separate foreign collaboration agreement of the kind which was entered into between the Indian and the Austrian companies in the ruling of the AAR. It appears to us on a reading of the ruling of the AAR that in that case the secondment agreement was subservient to the foreign collaboration agreement. These are thus the features which distinguish the present case from the decision of the AAR. We are, therefore, unable to apply the said decision to the present case.

15. The department has also relied on another ruling of the AAR in South West Mining Ltd., In Re (2005) 278 ITR 233. This is a clear case of technical consultants visiting India for collecting random samples for the purpose of sending reports from abroad on the basis of the analysis of the samples. The question was

> *whether the fees paid to the non-resident consultant were fees for technical services. There can be no doubt that the services rendered by, the non-resident consultants were technical and consultancy services. In this case there was no secondment agreement. It was a clear and simple case of rendering technical services. This case has nothing in common with the present case.*
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> *16. For the above reasons we are also not able to hold that the payment to IDS represented fees for technical services.*

6. As the facts and circumstances before us are also similar and the Ld. CIT(A) has followed the order of this Tribunal in the assessee's own case to give relief to the assessee, we see no reason to interfere with the order of the Ld. CIT(A). Ground Nos. 2 and 3 raised by the Revenue are, thus, rejected.

7. As regards ground Nos. 4 to 6, we find that this issue is covered by the decision of the Jurisdictional High Court in the case of Tata Elxsi reported in 247 CTR 334 wherein it was held that if any item is reduced from export turnover, then the same has to be reduced from total turnover also for computation of deduction under section 10A of the Act. Merely because the department has filed an appeal before the Hon'ble Supreme Court, it does not loose its precedential value. As the Ld. CIT(A) has followed the judicial precedent on the issue in giving relief to the assessee, we do not see any reason to interfere with the same. Therefore, ground Nos. 4 to 6 are also rejected.

8. Ground Nos. 1, 7 and 8 are general in nature and no need for adjudication.

9. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court on 4th Sept., 2015.

Sd/-	**Sd/-**
(JASON P. BOAZ)	**(P. MADHAVI DEVI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore, Dated 4th Sept., 2015.

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