आयकर अपीलीय अधिकरण, मुंबई न्य□यपीठ 'एल' मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

श्री आर. सी. शर्म□, लेख□सदस्य, एवं श्री अमरजीत सिंह, न्यायिक सदस्य, के समक्ष
BEFORE SHRI R.C.SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No. 5808/Mum/2013 & I.T.A. No.6468/Mum/2014
(**निर्धारण वर्ष** / Assessment Year: 2010-11 & 2011-12)

M/s. Nagpur Power & Industries Ltd. 20th Floor, Nirmal, Nariman Point, Mumbai - 400021	**बनाम**/ Vs.	D.C.I.T. 3(2) Aayakar Bhavan, Marine Lines, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAACN5438N		
(□ पीलार्थी **/Appellant**)	..	(प्रत्यर्थी **/ Respondent**)

Assessee by:	Shri Surinder Mehra
Revenue by:	Shri Rajguru M. V.

सुनवाई की तारीख / Date of Hearing: 23.02.2017
घोषणा की तारीख /Date of Pronouncement: 23.03.2017

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the above mentioned appeals against the order dated 16.08.2013 and 14.07.2014 passed by the Commissioner of Income Tax (Appeals)-4, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2010-11 & 2011-12.

I.T.A. 5808/Mum/2013:-

2. The assessee has raised the following grounds:-

1.a) That the CIT(Appeals) has erred in upholding capitalization by the assessing officer of Rs.14,09,811/- out of repair and maintenance account and making addition of Rs.11,98,339/- after allowing deprecation of Rs.2,11,471/-

b) That all the expenses incurred are of revenue nature and no part of the same is to be capitalized. The entire expense is incurred to maintain existing assets and no new asset has come into existence.

2.a) That the CIT(Appeals) has erred in upholding disallowance u/s.40(a)(ia) of the Act made by the assessing officer of professional fee of Rs.3,90,025/- paid to Mr. Arnold Allen.

b) That under Article 15 of the Double Taxation Agreement between India and U.K. the said fee is not taxable in India and the provisions of DTA override provisions of the Act.

c) That the disallowance of the said amount of Rs.3,90,025/- may be cancelled.

3. The brief facts of the case are that the assessee filed E-return of income for the A.Y.2010-11 declaring total income to the tune of Rs.13,61,10,940/- on 18.09.2010. The return of income was processed u/s.143(1) of the Income Tax Act, 1961 (in short "the Act"). Subsequently, the case was selected for scrutiny under CASS. Notice u/s.143(2) of the Act dated 27.09.2011 was issued which was duly served upon the assessee. Thereafter the notice u/s.142(1) of the Act dated 27.07.2012 was issued to the assessee. Thereafter the questionnaires dated 01.10.2012 and 09.11.2012 were issued to the assessee. The assessee was engaged in the business of manufacturing of Ferro Manganese, Silico Manganese and Value added Ferro Alloys, Ferro Manganese Slag and such other products. The Assessing Officer capitalized an amount of Rs.14,09,811/- of repair and maintenance whereas the same was revenue in

nature and made an addition to the tune of Rs.11,98,339/- after allowing the depreciation of an amount of Rs.2,11,471/-. The Assessing Officer also disallowed the professional fees to the tune of Rs.3,90,025/- paid to Mr. Arnold Allen u/s.40(a)(ia) of the Act whereas the said fee was not taxable in view of the Article 15 of the Double Taxation Agreement between India and U.K. Since the assessee was not satisfied on the point of the above said addition, therefore the assessee filed an appeal before the CIT(A), who confirmed the said addition, therefore the assessee has filed the present appeal before us.

ISSUE NO.1:-

4. Under this issue, the assessee has challenged the addition of amount of Rs.11,98,339/- after allowing depreciation of Rs.2,11,471/-. Infact, the assessee has shown the repair and maintenance of the asset to the tune of Rs.14,09,811/- but the Assessing Officer dealt the same as capital in nature. The learned representative of the assessee has argued that the assessee claimed repair and maintenance expenses in total to the tune of Rs.27,99,980/- which includes repair of plant and machinery of Rs.3,44,539/-, building Rs.9,00,992 and others Rs.15,54,449/-. Out of these said expense a sum of Rs.14,09,811/- was paid to M/s. Romi Interior for Mumbai office which includes repairing of sliding window, painting wall and ceiling, fixing roll blind on glass window, removing wooden flooring, providing and fixing new flooring, scrapping the existing floor and skirting, flooring and skirting in PUT Coating etc. and the said expenses are revenue in nature except the expenses of Rs.1,38,694/- which had already capitalized by the company specifically in view of the law

settled by Hon'ble Bombay High Court in the case of CIT Vs/ Talathi and Panthaky Associated Pvt. Ltd. reported in 343 ITR 309 and CIT Vs. Hede Consultancy Pvt. Ltd. and another reported in 258 ITR 380 and Hon'ble ITAT, Chandigarh bench in the case of M/s. IDS Infotech Ltd. Vs. DCIT, Circle 4(1), Chandigarh in ITA No.52/Chd/2016 for A.Y.2009-10 dated 24.05.2016. However, on the other hand the learned departmental representative has strongly relied upon the order passed by the CIT(A) in question.

5. On appraisal of the facts and circumstances of the case it seems that the assessee has incurred the expenditure to the tune of Rs.14,09,811/- on account of repairing of sliding window, painting wall and ceiling, fixing roll blind on glass window, removing wooden flooring, providing and fixing new flooring, scrapping the existing floor and skirting, flooring and skirting in PUT Coating etc. and the said amount was paid to M/s. Romi Interior for the repair of Mumbai office. These expenditure falls in the category of revenue expenses as held by the Hon'ble Bombay High Court in the case of CIT Vs/ Talathi and Panthaky Associated Pvt. Ltd. reported in 343 ITR 309 and CIT Vs. Hede Consultancy Pvt. Ltd. and another reported in 258 ITR 380 and Hon'ble ITAT, Chandigarh bench in the case of M/s. IDS Infotech Ltd. Vs. DCIT, Circle 4(1), Chandigarh in ITA No.52/Chd/2016 for A.Y.2009-10 dated 24.05.2016. It is not in dispute that the assessee was already having the asset which was reconstructed and repaired. The matter of controversy has duly been covered by the above said law in which such kind of repair has been treated as revenue in nature. In view of the said circumstances we are of the view that the finding of the

CIT(A) on this issue is wrong against law and facts and is not liable to be sustainable in the eyes of law, therefore, finding of the CIT(A) on this issue has been ordered to be set aside and the expenditure incurred by the assessee on account of repair and renovation etc. of the Mumbai office and the amount of which was paid to M/s. Romi Interior has been allowed as revenue expenditure. Accordingly, this issue is decided in favour of the assessee against the revenue.

ISSUE NO.2:-

6. Under this issue the assessee has challenged the disallowance of professional fees to the tune of Rs.3,90,025/- u/s.40(a)(ia) of the Act. The learned representative of the assessee has argued that in view of the Article 15 of the Double Taxation Agreement between India and U.K. the professional fees is not taxable in India, therefore, the professional fees to the tune of Rs.3,90,025/- is liable to be allowable. The assessee company has paid an amount of Rs.3,90,025/- to Mr. Arnold Allen who was an independent Director of the company. The professional fees was paid to him. No TDS was deducted. The learned representative of the assessee has argued that the assessee company has paid an amount of Rs.3,90,025/- as technical fees to Mr. Arnold Allen who was an independent Director of the company which is not taxable in India in view of the section 15 of the Double Taxation Agreement and Mr. Arnold Allen did not stay in India more than 60 days and in this regard the copy of Chartered Accountant is on record, therefore, in the said circumstances the said amount is not taxable in India and this matter of controversy has also been decided in favour of the assessee in view of the decision of the Hon'ble ITAT,

Chandigarh bench in the case of M/s. IDS Infotech Ltd. Vs. DCIT, Circle 4(1), Chandigarh in ITA No.52/Chd/2016 for A.Y.2009-10 dated 24.05.2016. However, on the other hand the learned representative of the department has relied upon the order passed by the CIT(A) in question. Before going further it is necessary to advert the Article 15 of the Double Taxation Agreement between India on record:-

"**Article 15**
Independent personal services

1. Income derived by an individual, whether in his own capacity or as a member of a partnership, who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character may be taxed in that State. Such income may also be taxed in the other Contracting State if such services are performed in that other State and if:

   (a) He is present in that other State for a period or periods aggregating to 90 days in the relevant fiscal year; or

   (b) he or the partnership, has a fixed base regularly available to him, or it, in that other State for the purpose of performing his activities;

   but in each case only so much of the income as is attributable in those services.

2. For the purpose of paragraph 1 of his Article an individual who is a member of a partnership shall be regarded as being present in the other State during days on which, although he is not present, another individual member of the partnership is so present and performs professional services or other independent activities of a similar character in that State.

3. The term professional services includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

7. It is not in dispute that the appellant has paid professional fees to the tune of Rs.3,90,025/- to M/s. Arnold Allen who was the Chartered Accountant and was residing in U.K. He was not residing in India and not stayed in India for more than 90 days. In this regard Mr. Arnold Allen has also gave an undertaking which is at page 34 of the paper book. The Assessing Officer took up the matter in view of the Article 17 of the Double Taxation Avoidance Agreement which is reproduced as under:-

Article 17
Directors fees
Directors fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

On appraisal of the Article 17 we are of the view that the same is nowhere applicable in the present case being Mr. Arnold Allen nowhere received the said amount in the capacity as a member of Board of Director of the company. He received the said amount on account of service rendered by him which is professional in nature. No doubt the said payment falls in view of Article 15 of the Double Taxation Avoidance Agreement. However, in this regard it is also cleared by the Hon'ble Supreme Court of India in case of CIT Vs. P.V.A.L. Kulandagan Chettiar 267 ITR 654 (SC) in which it is specifically held that the provision of Double Taxation Avoidance Agreement was having the overriding fact over normal provisions of the Act. The payment was certified by the Chartered Accountant by issuance of certificate to Mr. Arnold Allen, on account of his professional services. In this regard we found support of case decided by the Hon'ble ITAT, Chandigarh bench in the case of M/s. IDS Infotech Ltd. Vs. DCIT, Circle 4(1), Chandigarh in ITA No.52/Chd/2016 for A.Y.2009-10 dated 24.05.2016. The Assessing Officer was also of the view that Mr. Arnold Allen is having fixed place in India. In this regard the Article 5 of the Double Taxation Avoidance Agreement between India and U.K. described about the permanent establishment which means about the fix place of business through which business on an enterprise was wholly and partly carried out. There is no iota of evidence on record to which it can be assumed that Mr. Arnold Allen was having fixed place in India. In this regard the finding given by the Hon'ble Income Tax Appellate Tribunal, Mumbai Bench in ITA No.2353/Mum/2006 for A.Y.2002-03 in the case titled as M/s.Rheinbraun Engineering Und Wasser GmbH (Now changed to RE EmbH) Vs. Dy. Director of Income Tax (Intl. Taxation)

2(1) dated 04.03.2016 are on record and para 7 speaks about the permanent establishment in India, which reproduced as follows:-

> "7. In our opinion, in the case under consideration the basic issue to be decided is as to whether the assessee had PE in India or not. If it had rendered services in India for more than 6 months continuously, it has to be held that it had PE in India. Therefore, it would be useful to find out as what services were rendered by the assessee in India. We find that the assessee had issued 10 invoices (page no.49-58 of the paper book) to three Indian parties, that only one invoice was issued to GIPCL, two to NLC and balance seven to MNBECL. A close scrutiny of the invoices prove that the assessee had rendered services that were of consultancy nature and therefore same are governed by the provisions of Article 12 of the DTAA. In our opinion, for computing continuous stay for PE purpose actual stay of employees has to be considered and not the entire contract period. We would like to refer to the matter of J Ray Mcderrmott Easter Hemisphere Ltd. (54 SOT 363). In that matter it was held that period of stay in India for a non resident entity has to be counted from the actual date of commencement and completion of the contract, that the date on which invoices were raised were not decisive factors to decide the existence of PE. We find that the assessee had deputed one of its employee. Dr.Dittrich in India and he had not stayed in India for more than 180 days.

The assessee had informed the AO that Dr.Dittrich had visited India in pursuance of the agreements entered into with NLC and MNBCEL (pg. 46 of the PB). It is also a fact the in tow of the contracts no supervisory charges were booked by the assessee for the year under appeal, that the assessee had offered its income under the head FTS in its return. Article 12(4) deals with FTS and talks of services of managerial, technical or consultancy nature. Considering the above, we are of the opinion that payments received by the assessee should be assessed as per the provisions of Article 12 and not as per Article 7 of the Indo-German DTAA.

There is one more aspect to the PE. Protocol to the DTAA has provided as under:

"With reference to Article 7

a. …….

b. Income derived from a resident of a Contracting State from planning, project construction or research activities as well as income from technical services exercised in that State in connection with a permanent establishment situated in the other Contracting State, shall not be attributed to that permanent establishment"

So, even if it is assumed that the assessee had PE in India for the year under consideration, it will not be governed by Article 7 of the tax treaty. We have gone through the

order of Birla Corporation Ltd. (supra). We find that the issue in that matter was about installation and commissioning of projects and it did not deal with the issue before us. So, in our opinion the decision is of no held to adjudicate the issue. In these circumstances, reversing the order of the FAA, we hold that the payments received by the assessee from GIPCL, NCL and MNBECL have to be taxed @ 10% and that the provisions of section 115A would not be applicable. Effective ground of appeal is decided in favour of the assessee.

8. In view of the said circumstances, it is quite clear that the said fees is not liable to be considered under the article 17 whereas the fees is liable to be consider in view of the article 15 of the Double Taxation Avoidance Agreement and accordingly, this payment is not liable to be taxed in India. Accordingly, this issue is decided in favour of the assessee against the revenue.

ITA NO.6438/MUM/2014:-

9. The assessee has raised the following grounds:-

1.a) That the CIT(Appeals) has erred in upholding disallowance u/s.40(a)(ia) of the Act made by the assessing officer of professional fee of Rs.3,81,200/-.

b) That under Article 15 of the Double Taxation Agreement between India and U.K. the said fee is not taxable in India and the provisions of DTA override provisions of the Act.

c) That the CIT(A) has erred in referring to the explanation to Section 9 for disallowing appeal of the appellant company on this issue. The explanation to section 9 is applicable only to specific clauses that is clause (v), clause (vi) and (vii) of sub-section (1) of Section 9 of the Act which relate to payment of interest, payment of royalty and payment of fee for technical services. The said explanation has no application whatsoever to professional fees paid by the appellant company. As such the upholding of the disallowance by the CIT(A) is not in order and the said disallowance may be cancelled.

d) That the disallowance of the said amount of Rs.3,81,200/- may be cancelled

10. The brief facts of the case are quite similar to the facts mentioned above in ITA No.5808/M/2013, however, figures are different. Therefore, there is no need to repeat the same. The issue raised in the present appeal is also the same which has been decided in favour of the assessee while deciding the appeal of the assessee in ITA No.5808/M/2013. Accordingly, the above said issue is also decided in favour of the assessee against the revenue.

11. In the result, both the appeals filed by the **assessee are hereby ordered to be Allowed.**

Order pronounced in the open court on 23rd March, 2017.

Sd/-	Sd/-
(R.C.SHARMA)	**(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 23rd मार्च, 2017
MP

<u>आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**