

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH 'B', BANGALORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER  
AND  
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

**IT(IT)A No.1251(B)/2014  
(Assessment year : 2009-10)**

The Deputy Commissioner of Income-tax,  
(International Taxation)  
Circle-1(1)Room No.604,  
Nrupathunga Road,  
Bangalore-560 001

Appellant

**Vs**

M/s Carl Zeiss India (P)Ltd.  
India Branch Office,  
Plot No.3, Jigani Link Road,  
Bangalore-560 099  
**PAN No.AABCC 1589Q**

Respondent

**And  
IT(IT)A No.1258(B)/2014  
(Assessment year : 2009-10)**

M/s Carl Zeiss India (P)Ltd.  
India Branch Office,  
Plot No.3, Jigani Link Road,  
Bangalore-560 099  
**PAN No.AABCC 1589Q**

Appellant

**Vs**

The Deputy Commissioner of Income-tax,  
(International Taxation)  
Circle-1(1)Room No.604,  
Nrupathunga Road,  
Bangalore-560 001

Respondent

**And  
C.O.No.29(B)/2015  
(In IT(IT)A No.1251(B)/2014)**

M/s Carl Zeiss India (P)Ltd.  
India Branch Office,  
Plot No.3, Jigani Link Road,  
Bangalore-560 099  
**PAN No.AABCC 1589Q**

Cross objector

**Vs**

The Deputy Commissioner of Income-tax,  
(International Taxation)  
Circle-1(1)Room No.604,  
Nrupathunga Road,  
Bangalore-560 001

Respondent

**Revenue by : Shri Krishnan Narayanan, CA  
Asessee by : Dr. P.K.Srihari, Addl.CIT**

**Date of hearing                   : 08-07-2015  
Date of pronouncement : 24-07-2015**

**OO R D E R**

**PER SHRI VIJAY PAL RAO, JM:**

These cross appeals in IT(IT)A No.1251(B)/14 and IT(IT)A No.1258(B)/14 and cross objection in C.O.No.29(B)/15 is by the assessee are directed against the order dated 11-08-2014 of CIT(A)-IV, Bangalore for the assessment year 2009-10.

2. The assessee is a 100% subsidiary of Carl Zeiss, AG Germany. The Carl Zeiss group manufactures and sells optical products. The assessee is engaged mainly as a front office for Carl Zeiss group in India. The branch office in India facilitates the sale of Carl Zeiss group products in India, apart from providing sales support to its products in India. The assessee filed its return of income on 30-09-2009. During the course of assessment proceedings, the AO noted that the assessee has claimed Rs.1,12,51,602/- under the head cost of senior management pertaining to activities of Carl Zeiss India Branch, the same has been reimbursed to the

head office as payment is being made from there which is as per the agreement dated 16-09-2006 between head office and branch office. On query, by the AO, the assessee submitted that during the financial year a sum of Rs.15,69,598/- and Rs.21,76,060/- has been reimbursed to Carl Zeiss, Singapore Pte Ltd. being the cost allocated based on the proportion of work performed. Thus, it was submitted that the cost reimbursed by the assessee is in the nature of reimbursement on actual basis without any mark-up. The AO did not accept the contention of the assessee and was of the view that the services provided by the head office through Mr. Venkatechalam Raman Mr. Heather Lim and Mr.R. Muruganandam fall under the category of fee for technical services (**FTS**). Thus, the AO held that the remittance in truth and reality is consideration for technical services disguised as reimbursement of expenses. Since the assessee did not deduct tax at source, the said payment of Rs.1,12,51,602/- was disallowed and added to the total income.

3. The AO further noted from the schedule-15 annexed to the P&L account that the assessee has claimed an amount of Rs.2,45,55,427/- as advertisement and sales promotion expenses. The AO found that the assessee was liable to deduct tax at source, as per the provisions of respective sections as under;

Sl.No	Description of the expenses	Section under which TDS ought to be deducted	Amount involved
1	Printing	194C	4,38,909
2	Reimbursement of expenses	194C	7,97,687
3	Sales promotion	194C	94,93,367
4	Stall charges	194C	3,25,000
5	Training charges	194J	6,87,200
		Total	1,17,42,163

3.1 Thus, the AO made the addition in respect of the expenditure disallowed on account of advertisement, sales promotion and reimbursement to the head office as under;

Add: Expenditure disallowed

a) Advt. & Sales Promotion expenses	1,17,42,163
b) Payment by Carl Zeiss Singapore	
i) Venkatachalam Raman	75,05,944
ii) Heather Lim	15,69,598
iii) R. Muruganandam	21,76,060
Total	<u>1,21,51,601</u>

4. The assessee challenged the action of the AO before the CIT(A) and contended that reimbursement to head quarter is not FTS. The assessee referred to the agreement under which the payment was made as well as the provisions of DTAA between India and Mauritius. The assessee has also pointed out that the payment was made and the

amount was remitted only after obtaining a certificate from the AO u/s 195(2). The CIT(A) accepted the contentions of the assessee sofar as the payment in respect of Heather Lim of Rs.15,69,598/- and deleted the addition made by the AO whereas the addition made by the AO in respect of the payment on account of services rendered by Venkatachalam Raman (MD) and Ramu Pillai Muruganandam, (IT Specialist) has been upheld by the CIT(A) by holding that the payment was in the nature of FTS. As regards disallowance u/s 40(a)(ia) in respect of advertisement and sales promotion expenses, the CIT(A) deleted the said disallowance by holding that none of the payment falls under the provisions of section 194C or 194J of the IT Act. Since a part of relief was given to the assessee, therefore, both the revenue as well as assessee have challenged the impugned order of the CIT(A) by filing cross appeals and cross objection.

5. The revenue has raised the following grounds;

*“1. The ld.CIT(A) has erred in partly allowing the appeal of the assessee which is opposed to law, equity, facts and circumstances of the case.*

*2. The ld.CIT(A) erred in law by holding that the services rendered by Sri Heather Lim (Chief Officer HR and Quality) is of neither technical/consultancy nor managerial in nature.*

*3.The ld. CIT(A) erred in law by holding that services rendered by Sri Heather Lim (Chief Officer HR & Quality)*

*is of neither technical/consultancy or managerial in nature and is not liable to deduct TDS.*

*4. The ld.CIT(A) erred in not appreciating the reliance of the AO in the case of AT and S India(P)Ltd Vs CIT (2006) 287 ITR 421(AAR) as per which any consideration paid for rendering of a managerial technical or consultancy services which include provision of services of technical or other personnel, falls within the meaning of fee for technical services and hence attracts sec.9(1)(vii) of the IT Act.*

*5. The ld.CIT(A) erred in deleting the disallowance made u/s 40a(ia) of the IT Act by holding that the AO has not verified the agreements entered with the vendors, wherein the assessee did not submit any such agreements before the AO.*

*6. The ld.CIT(A) has not called for any remand report from the AO to examine the nature of payment as per agreements.*

*7. The appellant carves leave to add to and /or to alter, amend, modify the grounds herein above or produce further documents before or at the time of haring of this case”.*

6. In the cross appeal the assessee has raised the following grounds;

*“1.Order bad in law and on facts*

*The order passed by the DDIT under section 143(3) read with section 144C(3) of the IT Act and the ld.CIT(A) u/s 250 of the Act, on the issue of disallowance of payments of*

*Rs.9,682,004 to Carl Zeiss Singapore Pte.Ltd. (CZ Singapore) is bad in law and on facts.*

*2. Disallowance of payment of Rs.9,682,004 to CZ Singapore*

*2.1 The CIT(A) erred in confirming the disallowance made by the DDIT of Rs.9,682,004 in relation to payments by the Appellant to CZ Singapore pertaining to activities of the following employees of CZ Singapore;*

*Venkatachelam Raman and  
Ramupillai Muruganandam.*

*2.2 The CIT(A) erred in not holding that the payments to CZ Singapore were reimbursements on actual basis without any mark-up or other administrative charges.*

*2.3 The CIT(A) erred in holding that the employees of CZ Singapore had rendered managerial, technical and consultancy services to the appellant.*

*2.4 Without prejudice to the above, the DDIT/CIT(A) erred in disallowing the payments made by the appellant to CZ Singapore u/s 40(a)(i) of the Act, inspite of the fact that the appellant had obtained a nil withholding certificate u/s 195(2) of the Act for non-deduction of tax at source on payments to be made to CZ Singapore.*

*The appellant craves leave to add to or alter, by deletion, substitution or otherwise, the above grounds of appeal, at any time before or during the hearing of the appeal.*

*The appellant submits that the above grounds are independent and without prejudice to one another.*

7. Ground no.1 to 4 of revenue's appeal and grounds raised in the assessee's appeal are in respect of the common issue of payment made by the assessee under cost sharing arrangements and claimed as reimbursement to the head office. As we have already stated in the facts of the case that the assessee has made a total payment of Rs.1,12,51,602/- being reimbursement of the expenditure in respect of the services rendered by three persons namely Shri Venkatachalam Raman,(MD) Shri Heather Lim (CO,HR & Quality and Shri Ramupillai Muruganandam, (IT Specialist). The authorities below have confined their finding on disallowance of the payment on question whether the said payment was in the nature of **FTS** and therefore, the income in the hands of the non-resident is taxable in India, as per the provisions of section 9(1)(vii) of the IT Act, as well as under the provision of DTAA between India and Singapore. It is pertinent to note that the assessee has remitted the amount in question to the non-resident after obtaining a certificate from the AO u/s 195(2) dated 25-01-2009. The AO while granting the certificate u/s 195(2) has duly recorded the fact that the payment in question is in respect of availing the services of Carl Zeiss Pte.Ltd. Singapore under the agreement dated 01-10-2006 for providing certain managerial and human resources to India branch. The AO also have noted the facts that the payment were in connection with the salaries

and other cost of managerial and HR officials charged to Indian branch which includes the cost of MD, Chief Officer, HR & Quality, web administrator for IT application specialists. Thus, after considering the submissions of the assessee that these services provided by non-resident from Singapore does not fall under the ambit of technical knowledge, skill, know-how, expertise etc. as required by definition of FTS as per article-12 of Indo-Singapore DTAA, the AO allowed the assessee to make the remittance in para-4 of the said certificate as under;

*“4. The assessee’s submissions carefully and after the same the assessee hereby authorized to make remittance and SGD 340, 822 without deduction of TDS to M/s Carl Zeiss Pte Ltd. Singapore. This certificate is only provisional and is issued at the request of the assessee. The allowability of the above costs is subjected to verification at the time of regular assessment of M/s CarlZeiss India Pte.Ltd”.*

7.1 Now the question arises whether after obtaining the certificate u/s 195(2) the assessee can be held liable to deduction TDS and further, penalize u/s 40a(i) of the Act for non-deduction of TDS. It is pertinent to note that the provisions of sec.40(a) can be invoked only when there is a failure on the part of the assessee to comply with the provisions of Chapter-XVII B. The payment in question was to a non-resident co. and therefore, the provisions of deduction of TDS as provided u/s 195 are

relevant. Since the assessee has already made an application u/s 195(2) of the Act for seeking permission from the concerned authority to remit the said payment to the non-resident without deduction of tax at source and the AO concerned has determined the tax deductible at source as nil and allowed the assessee to remit the said amount without deduction of TDS. Therefore, once the assessee has complied with the provisions of sec.195 and obtained a certificate from the AO in accordance with the requirement of sec.195(2) than, the assessee cannot be penalized by invoking the provisions of sec.40a(i) of the Act. Accordingly, without going into the issue of the nature of payment whether FTS or not we are of the view that once assessee has complied with the provisions of sec.195 by obtaining the certificate u/s 195(2) then, no disallowance can be made in respect of the said amount paid to the non-resident by invoking the provision of sec.40a (i) of the Act. Hence, this issue is decided in favour of the assessee and consequently, ground no.1 to 4 of the revenue's appeal are dismissed and the grounds raised in the assessee's appeals are allowed.

8. Ground nos.5 & 6 of the revenue's appeal. The issue raised by the revenue in these grounds is relating to the disallowance made u/s 40(a)(ia) of the Act was deleted by the CIT(A).

9. We have already reproduced the details of expenses under the head advertisement and sales promotion expenses of Rs.1,17,42,163/-

which was disallowed by the AO for want of deduction of tax at source. The AO has held that the expenses on account of printing, reimbursement, sales promotion, stall charges are covered u/s 194C for the purpose of TDS and the expenses on account of training charges are covered u/s 194J of the Act. The CIT(A) deleted the addition/disallowance made by the AO by holding that these payments were not made for work contract executed by the recipients, but the AO failed to establish that the payment was in relation to the work contract executed in relation to advertisement, broadcasting, telecasting, carriage of goods and passengers and catering, as required under section 194 C of the Act. As regards the training charges the CIT(A) deleted the addition on the similar reason that the AO has not examined the terms and conditions of the agreement as to how the payment is covered u/s 194J of the Act.

10. We have heard the learned DR as well as the learned AR and considered the material on record.

10.1 The provisions of sections 40 a(ia) can be invoked in respect of the amount paid by the assessee on account of a specific nature of payment as provided under clause (ia) of sec.40a. For the sake of ready reference, we quote clause-ia as under;

*“ 40 Notwithstanding anything to the contrary in sec.30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head “profits an gains of business or profession”.*

*(a) in the case of any assessee;-*

*(ia) any interest, commission or brokerage, (rent, royalty,) fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work) on which tax is deductible at source under Chapter-XVIIIB and such tax has not been deducted or after deduction (has not been paid on or before the due date specified in sub-section (1) of section 139.*

***Provided.....*** *that where in respect of any such sum, tax has been deducted in any subsequent year or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid”.*

11. Thus, it is clear that an amount which is claimed as an expenditure can be disallowed by invoking the provisions of section 40a(ia), if the said amount is paid by the assessee on account of interest, commission or brokerage, rent, royalty, fee for professional services, fee for technical services to a resident or amount payable to contractors or sub-contractors. In the case on hand, the AO has given the details of the payment in para-6 as under;

Sl.No	Description of the expenses	Section under which TDS ought to be deducted	Amount involved
1	Printing	194C	4,38,909
2	Reimbursement of expenses	194C	7,97,687
3	Sales promotion	194C	94,93,367
4	Stall charges	194C	3,25,000
5	Training charges	194J	6,87,200
		Total	1,17,42,163

12. As it is manifest from the details that these payments were made on account of printing, sales promotion, stall charges, training charges etc. Though the payments may be under some agreements between the authorities, but the same does not mean that the payment was to a contractor of a sub-contractor for execution of the work contract on behalf of the assessee. The requirement of deduction of tax at source under chapter-XVIIIB and as per sec.194C of the IT Act, the payment is for getting the work done through the contractor or sub-contractor on behalf of the assessee which means if the assessee is carrying out its business activity and get its own work through the contractor or sub-contractor. In the case on hand there is no allegation by the AO that the payment was on account of the work executed under the work contract to contractor or sub-contractor. The payment is made simply for printing, sales promotion, stall charges and training charges which does not fall under the scope of

sec.194C or 194J. Accordingly, we do not find any error or illegality in the order of the CIT(A) for this issue.

13. In the cross objection, the assessee has raised an alternative plea in respect of disallowance made u/s 40(a)(ia). Since the issue in the revenue's appeal is decided in favour of the assessee therefore, the cross objection filed by the assessee becomes infructuous.

14. In the result, the revenue's appeal and cross objection of the assessee are dismissed and the assessee's appeal is allowed.

Pronounced in the open Court on the 24-07-2015.

**Sd/-**  
**(JASON P BOAZ)**  
**ACCOUNTANT MEMBER**

D a t e d : 24-07-2015

Place: Bangalore

**am\***

**Copy to :**

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**Sd/-**  
**(VIJAY PAL RAO)**  
**JUDICIAL MEMBER**

By order

AR, ITAT, Bangalore