

**आयकर अपीलीय अधिकरण, मुंबई “ एल” खंडपीठ**  
**Income-tax Appellate Tribunal -“L”Bench Mumbai**  
**सर्वश्री राजेन्द्र,लेखा सदस्य एवं, राम लाल नेगी, न्यायिक सदस्य**  
**Before S/Shri Rajendra,Accountant Member and Ram Lal Negi,Judicial Member**  
**आयकर अपील सं./I.T.A./389/Mum/2013, निर्धारण वर्ष /Assessment Year: 2008-09**  
**आयकर अपील सं./I.T.A./390/Mum/2013, निर्धारण वर्ष /Assessment Year: 2009-10**

Lloyd's Register Quality Assurance Limited (India Branch Office) 63-64, Kalpataru Square, 6 <sup>th</sup> Floor, Kondivita Lane, Off.Andheri-Kurla Road, Andheri (E), Mumbai-400 059. <b>PAN:AAACL 9740 K</b>	Vs.	ADIT, -Intl. Taxation-4 (1) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

**आयकर अपील सं./I.T.A./519/Mum/2013, निर्धारण वर्ष /Assessment Year: 2008-09**  
**आयकर अपील सं./I.T.A./520/Mum/2013, निर्धारण वर्ष /Assessment Year: 2009-10**

ADIT, -Intl. Taxation-4 (1) Mumbai.	Vs.	Lloyd's Register Quality Assurance Limited (India Branch Office),Mumbai-59.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

**Revenue by: S/Shri Jasbir Chauhan-CIT and Rajguru M.V.**

**Assessee by: Shri Nitesh Joshi-AR**

**सुनवाई की तारीख / Date of Hearing: 07.04.2017**

**घोषणा की तारीख / Date of Pronouncement: 07.06.2017**

**आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश**

**Order u/s.254(1)of the Income-tax Act,1961(Act)**

**लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-**

Challenging the order,dated 15.10.2012 of the CIT(A)-11,Mumbai the Assessee and the Assessing Officer(AO)have filed cross appeals for the above mentioned two AY.s.Assessee- is engaged in the activities of Quality Management System Audit, Environment Management System Audit, Occupational Health Safety Assessment and Trading for above activities. Details of filing of returns of income, returned incomes, assessed incomes, etc.,can be summarised as under :-

A.Y.	ROI filed on	Returned Income	Assessment dt.	Assessed Income
2008-09	30/09/2008	Rs.55,20,269/-	07/02/2011	Rs.1,96,32,080/-
2009-10	30/09/2009	Rs.1.30crores	14/02/2012	Rs.2,97,86,310/-

**ITA/519/Mum/2013,AY. 2008-09:**

2.First ground of appeal,raised by the AO, is about treatment of licence fee, IT recharge and 50%of management services as head officer expenditure covered by section 44C of the Act. During the assessment proceedings,the AO found that as per the licence agreement dated 16/07/2003between Lloyds Register(LR)and Lloyds Register Quality Assurance Ltd. (LRQAL) ,

LR had granted licence to use brand LR for royalty and that licence fee was payable as per Schedule 6 of the agreement, that LRQAL in turn allocated the royalty attributable to its Indian branch and the Indian branch paid the same to LRQAL which in turn had been paid to LR, that another management service agreement was entered into on 16/07/2003 between LR and LRQAL, that on 01/05/2007 IT Recharge Agreement was entered into between LR and LRQAL for providing services to various regional offices as per the Schedule 3 of the said agreement, that it included different kind of services such as data centre operations, management of WAN and telecom services, PC management and support services as well as data base-management. He held that payment of management fees and IT recharge by the Indian branch to LRQAL for onward payment to holding company was Head Office (HO) expenses of the assessee, that its liability was limited by section 44C of the Act, that the payment of management charges and IT recharge was reimbursement of expenses incurred by LR for various group companies.

Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it was argued that services including the brand LR had been given by parent company, that services and brand had been used by LAQ, that common bills for all the branches for the services were raised by parent company before against the , that LR had already offered royalty received by it for taxation in the returns filed by it. A chart of royalty paid by India branch to its head office and royalty offered to tax by LR in India was furnished before the FAA. He observed that the debit note was raised by LRQAL, UK that TDS had been done on account of LR and not on account of LRQAL(UK), that the payment to LRQAL was only reimbursement of cost allocated to WAN & Telecom Services, PC management and support Services and Data base management. The assessee relied upon the case of Emirates Commercial Bank Limited (262ITR55) and argued that expenditure under various heads was initially incurred by the head office, that subsequently same was recovered from the branch in India by issuing debit note, that expenditure was incurred in India and hence it was not hit by provisions of section 44C of the Act, that the reimbursement cost could not be regarded as HO expenses, that the AO had ignored the real essence of transaction between the HO and the branch, that royalty had been allocated to Indian branch on the basis of revenue in pursuance of the Agreement, that IT recharge and management charges had been allocated mainly on total sales except one item, namely chairman group consolidation.

After considering the submission of the assessee, the FAA held that as per the license fee agreement royalty was payable to LRQAL to LR, that royalty was a function of profits as provided in the Schedule, that royalty was payable at different rates, that it was payable to LR through LRQAL (UK) head office. He referred to the Explanation to section 44C and held that HO expenses meant executive and general administrative expenditure incurred by the assessee outside India, that it included expenditure incurred in respect of rent, rate taxes, repairs or insurance of any premises outside used for the purpose of business/profession, salary, wages, annuity, pension, fees etc., that it also included expenditure incurred on travelling by any employee or other person in managing the affairs of any office outside India, that royalty/licence fee paid by the assessee was not hit by the definition of HO expenditure as envisaged by section 44C. He directed the AO not to consider royalty/license fee expenditure incurred by the assessee as HO expenditure. With regard to IT recharge, the FAA held that the nature of expenditure included services provided for data centre operation, management of WAN/Telecom services, PC management/support services and data base management, that all these services were technical in nature as per the provisions of section 9(1)(vii) of the Act, that same could not be included as administrative services. He directed the AO not to consider the IT recharge expenditure as HO expense. With regard to management fee he held that the nature of expenditure included corporate communications, corporate finance, global quality, legal matters, marine business, that all these activities were not covered by the activities mentioned in section 44C of the Act. He further held that the expenditure incurred for Chairman's office, CHR activities, insurance, pension provision, regional office expenditure etc. and that same were different than provided in the section, that expenses incurred by the assessee included expenses incurred in chairman's office, CHR group, corporate secretary, insurance, pension department, pension provisions, that items of expenditure in the nature of executive and general administration were to be limited by section 44C of the Act. Referring to the order for the AY.2006-07 to 2008-09 in the case of LR India Office, the then FAA he held that 50% of management fee was hit by section 44C, that the balance expenditure was not covered by the said section.

**2.2.** Before us, the Departmental Representative (DR) supported the order of the AO and stated that he had rightly taxed the licence fee, IT recharge and managerial fees u/s. 44C of the Act. The Authorised Representative (AR) stated that the issue of licence fee stood covered in favour of the assessee by the order of the Tribunal in the case of Lloyd's Register Asia a group entity. He referred to pages 214-216 of the PB in this regard. About IT recharge he stated that services rendered by the assessee under the head were in the nature of specialized

services, that the same did not fall within the definition of HO expenses as enumerated by clause 4 of Explanation to sec.44C of the Act.

**2.3.** We find that issue of licence fee was deliberated upon and decided by the Tribunal in the case of Lloyds Register Asia (ITA/387/Mum/2013AY.2005-06 dated.10/06/2015), a group concern. We would like to reproduce paragraph 14 of the said order and it reads as under:

*“14. Section 44CC, is a non obstante clause stating that “notwithstanding anything to the contrary contained in sections 28 to 43A in the case of an assessee, being non-resident, no allowance shall be made in computing the income chargeable under the head “Profits and gains of business or profession”, in respect of so much of expenditure in the nature of head office expenditure as is in excess of the amount computed as an amount equal to five percent of the adjusted total income ; or the amount of so much of the expenditure in the nature of head office expenditure incurred by the assessee as is attributable to the business or profession of the assessee in India, whichever is less”. The meaning of the term “head office expenditure” for the purpose of section 44CC has been enumerated in clause (iv) of Explanation to section 44CC. The said clause reads as under:*

*“iv) “head office expenditure” means executive and general administration expenditure incurred by the assessee outside India, including expenditure incurred in respect of –*

*(a) rent, rates, taxes, repairs or insurance of any premises outside India used for the purposes of the business or profession;*

*(b) salary wages, annuity, pension, fees, bonus, commission, gratuity, perquisites or profits in lieu of or in addition to salary, whether paid or allowed to any employee or other person employed in, or managing the affairs of, any office outside India;*

*(c) travelling by any employee or other person employed in, or managing the affairs of, any office outside India; and*

*(d) such other matters connected with executive and general administration as may be prescribed.*

*From the aforesaid definition/illustration of the scope of head office expenditure, it is evident that it is in the nature of executive and general administration expenditure incurred by the assessee outside India. The nature of such expenditure has been illustrated to include certain kinds of expenditure. From the nature of expenditure as enumerated in sub clause (a) to sub clause (c) of the aforesaid Explanation and if compared with the nature of expenditure incurred by the assessee branch, then it will be seen that none of the expenditure under the head “license fees” falls within this category, even remotely. The payment of ‘license fee’ is purely for using of brand/trademark and other business intangibles, which are in the nature of intellectual property. Nowhere such types of expenditure fall within the scope of “head office expenditure” as illustrated in clause (iv). So far as general, technical and marketing support services are concerned, they are in the following nature: -*

*- Provision of sales and marketing materials including brochures and product factsheet.*

*- Provision of market research data and analysis*

*- Provision of training and standards for use by operations and their clients in training surveyors, inspectors and assessors*

*- Technical support and advice on the technology documents including product updates and the marketing and sale thereof*

*- Specialised technical services such as Ship Emergency Response procedures, Condition Assessment Programme procedures and Fuel and Lubricant Analysis procedures*

*- Co-ordination function for marketing and sales activities in relation to major contract opportunities and/or quotations for specialized industrial sectors*

*- Sales support in respect of global customer accounts.*

*These again are neither in the nature of rent, rates, taxes, repairs, insurance, salary, wages, bonus, commission, etc., or travelling by any employee. Expenditure under the “License fee” have nothing to do with these kind and nature of expenditures. Thus, the entire payment of*

*license fees do not fall within the ambit of section 44CC as illustrated in clauses (a) to (c) of the Explanation and, therefore, the learned CIT(A) has rightly held that royalty or license fees expenditure cannot be treated as head office expenditure.”*

Respectfully following the above, we hold that royalty/licence fee is covered by the provisions of section 44C of the Act.

**2.3.1.** As far as IT recharge is concerned we would like to mention that On a combined reading of the Explanatory Memorandum explaining the provisions of the Finance Bill, 1976, introducing section 44C in the Income-tax Act, 1961, as well as Circular No. 202 dated 5/07/1976 (105 ITR (St.)17), issued by the Central Board of Direct Taxes, it is clear that the section is intended to be made applicable only in the cases of those non-residents who carry on businesses in India through their branches. The section was introduced with a view to getting over difficulties in scrutinising and verifying claims in respect of 'general administrative expenses' incurred by the foreign head office in so far as such expenses can be related to their business or profession in India having regard to the fact that foreign companies operating through branches in India sometimes try to reduce the incidence of tax in India by inflating their claims in respect of head office expenses. In our opinion, the FAA has rightly held that IT recharge does not fall under the head administrative expenses and therefore provisions of section 44C will not be applicable.

**2.3.2.** Now, we would like to deal with the management fees. We find that the FAA had bifurcated the expenses claimed under the said head and had held that part of the expenses were to be limited by the provisions of section 44C of the Act, that he had relied upon the order of his predecessor for the earlier year, that in that order the then FAA had held half of the management charges had to be taxed as same as fee for technical services. In our opinion, order of the FAA does not suffer from any legal or factual infirmity as the issue was decided after analysing the schedule 3 of the management services agreement. So, confirming his order we decide the issue against the AO.

**3.2.3.** The Assessee has also challenged the order of the FAA with regard to management fees. As the FAA had held that half of the management charges was taxable, so, the AR argued that whole of the management fees was not taxable. We find that while deciding the appeal in the case Lloyds Register-India Office, for the AY.s.2006-07 to 2008-09, the FAA had deliberated upon the terms of the management agreement in detail and held that 50% of the charges were taxable. In our opinion, there is no need to interfere with his order. Ground no.1 raised by the assessee with regard to management fees is decided against it.

In short, grounds regarding management charges raised by the AO and the assessee are decided against them.

4. Ground No.2, raised by the AO, is about levy of interest u/s. 234B of the Act. It was brought to our notice that the Hon'ble Jurisdictional High Court in case of NGC Network Asia LLC (313ITR187) has decided the issue in favour of the assessee. We find that the Hon'ble Court has held that when a duty was cast on the payer to deduct the tax at source, on failure of the payer to do so, no interest could be imposed on the assessee. Respectfully following the above judgment, 2<sup>nd</sup> Ground is decided against the AO.

**ITA/389/Mum/2013, AY.2008-09:**

5. First effective ground of appeal (GOA-2), raised by the assessee, is about 50% of management charges. The FAA had, as stated earlier, held that half of the charges were in the definition of HO expenditure, as per the provisions of section 44C of the Act. We have dealt the issue in paragraph 3.2.3. Considering the discussion held in that paragraph we dismiss Ground no.2, raised by the assessee.

6. Next effective ground of appeal (GOA -3&4) is about application of section 40(a)(ia) of the Act to management charges. During the assessment proceedings, the AO held that the assessee had to deduct tax at source on all the payments unless he had approached the AO and had obtained certificates for NIL TDS. The FAA dismissed the appeal filed by the assessee in that regard.

6.1. Before us, the DR supported the order of the AO. The AR contended that the Hon'ble Supreme Court in the case of GE India Technology Centre P.Ltd. (327ITR456) had held that obligation to deduct tax at source would arise only when an amount was chargeable to tax, that it was not necessary to obtain nil withholding tax certificate, that tax had not to be deducted at source in each case, that the India Branch office had reimbursed the payments towards management charge to its HO in UK, that it in turn had made the payment to LR in UK. He further argued that the issue stands decided in favour of the assessee by the judgment of the Hon'ble Delhi High Court in the case of Herbalife International India P.Ltd. (384 ITR 276).

6.2. We have heard the rival submissions and perused the available material. We find that in the case of Herbalife International India P.Ltd. (supra) the Hon'ble Delhi High Court has dealt the issue as under:

*“Section 40 of the Act is in the nature of a non obstante provision and therefore, it overrides the provisions contained in sections 30 to 38 of the Act. This means that the expenditure which is allowable under sections 30 to 38 of the Act in computing business income would be subject to the deductibility condition in section 40 of the Act. Section 40(a)(i) at first did not provide for deduction of tax at source where the payment was made in India. The requirement of deduction of tax at source on payments made in India to residents was inserted for the first time by way of section 40(a)(i) of the Act with effect from April 1, 2005. Section 40(a)(i) of the Act in providing for disallowance of a payment made to a non-resident if tax is not deducted at source, is no doubt meant to be a deterrent in order to compel the resident payer to deduct tax at source while making the payment. However, that does not answer the requirement of article 26(3) of the DTAA that the payment to both residents and non-residents should be under the “same conditions” not only as regards deduction of tax at source but even as regards the allowability of such payment as deduction. It has to be seen that in those “same conditions” whether the consequences are different for the failure to deduct tax at source. The expression “under the same conditions” in article 26(3) of the DTAA clarifies the nature of the receipt and conditions of its deductibility. It is relatable not merely to the compliance requirement of deduction of tax at source. The lack of parity in the allowing of the payment as deduction is what brings about the discrimination. The consequence of non-deduction of tax at source when the payment to a non-resident has an adverse consequence to the payer. Since it is mandatory in terms of section 40(a)(i) for the payer to deduct tax at source from the payment to the non-resident, the latter receives the payment net of tax deducted at source. The object of article 26(3) of the Double Taxation Avoidance Agreement was to ensure non-discrimination in the condition of deductibility of the payment in the hands of the payer where the payee is either a resident or a non-resident. That object would get defeated as a result of the discrimination brought about qua non-resident by requiring the tax to be deducted at source while making payment of fees for technical services in terms of section 40(a)(i) of the Act.”*

Respectfully, following the above judgment, we allow grounds no.3-4.

7. Last ground of appeal (GOA-5) is about exchange rate to be applied. During the assessment proceedings the AO observed that license fee was paid as the percentage of profit and not as percentage of sales, that the assessee had passed on the benefits derived by it on account of its own efficiencies and caused deduction to the licensor, that expenses were paid on the basis of Debit notes in bonds raised on 31/3/2008, that bond was to be multiplied by Rs.80.12 for converting it into Indian currency, that the rate of conversion as on 31.3.2008 was Rs.80.12 for selling, that the assessee did not sell pound on 31.3.2008, that it had purchased the British currency for payment of license and other expenses, that purchasing rate of pound was Rs.74/- on 31.3.2008. He worked out the excess claim on account of difference in the currency rates and made disallowance of Rs.2.60 lakhs.

7.1. The FAA after considering the assessment order and the submissions of the assessee, held that the conversion rate of remittance in foreign currency for TDS purpose was the rate at which such currency was made available to banks through TT. Finally, upholding the order of the AO, he dismissed the appeal.

7.2. Before us, the AR argued that as per the Rules 115 and 26 of Income tax Rules, 1962, the exchange rate to be applied was telegraphic transfer buying rate, that during the relevant period rate was Rs.80.12 per British Pound, that the buying rate of the assessee would be selling rate for the Bank, that the assessee was not concerned with difference between TT selling rate and TT buying rate. The DR supported the order of the FAA.

We have heard the rival submissions. We find that the assessee had calculated the licence fee expenditure, in the debit notes, at a particular rate, that the AO and the FAA has ignored the provisions of Rule 115 and 26 of the Rules, that the difference in buying and selling rate was rightly calculated by the assessee. Therefore, reversing the order of the FAA, we decide ground no.5 in favour of the assessee.

**ITA/520/Mum/2013,AY.2009-10:**

8. Both the grounds of appeal, raised by the AO, are identical to the grounds raised in the last AY. Following our order of that year, we dismiss GOA no.1 &2.

**ITA/390/Mum/2013,AY.2009-10:**

9. Following our order for the earlier AY., we decide first effective ground of appeal against the assessee. Second effective ground of appeal (GOA-3 &4) raised by the assessee is also allowed, following the same order.

As a result, appeals filed by AO are dismissed and the appeals of the assessee are partly allowed

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपीलें नामंजूर की जाती हैं और निर्धारिती की अपीलें अंशतः मंजूर की जाती हैं।

Order pronounced in the open court on 7<sup>th</sup> June, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 7<sup>th</sup> जून, 2017 को की गई।

Sd/-

Sd/-

(राम लाल नेगी / Ram Lal Negi)

(राजेन्द्र / Rajendra)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 07 .06 .2017.

Jv.Sr.PS.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "L" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.