

आयकर अपीलिय अधिकरण "I" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.154/Mum/2015

(निर्धारण वर्ष / Assessment Year : 2009-10)

M/s Rosoboronservice (India) Ltd., Plot No. R-700, TTC Industrial Area, MIDC Rabale, Post: Ghansoli, Navi Mumbai - 400 701.	बनाम/ v.	ACIT - TDS- 3(2), 10 th floor, Smt. K.G. Mittal Ayurvedic Building, Opp. Charni Road Station (West), Mumbai - 400 002.
स्थायी लेखा सं./PAN : AADCR0040B		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by :	Shri Sanjay Rane
Revenue by :	Shri Asgarzain V P , DR

सुनवाई की तारीख / **Date of Hearing** : 30-01-2017

घोषणा की तारीख / **Date of Pronouncement** : 27-02-2017

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 154/Mum/2015, is directed against the appellate order dated 1st October, 2014 passed by the learned Commissioner of Income Tax (Appeals)- 14, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2009-10, the appellate proceedings before the learned CIT(A) arising from the order dated 17th January, 2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 201(1)/201(1A) of the Income-tax Act,1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) read as under:-

“1) On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) -14 has erred in holding that the assessee was liable to deduct the tax on salary paid Mr. A.D. Negreev and Mr. Alexander V. Gorelyshev for managerial fees. She ought not to have done so.

2) On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) -14 has categorically said in her order dtd.01.10.2014, that she does not find any congruity with the order of the Learned. CIT (A) - 22. At the same time, she has passed order saying appeal is Dismissed. She ought to be unambiguous in her views in deciding the appeal.

The learned CIT (A) - 22, was not justified in holding that the payment falls under the provisions of section 194J of the Income Tax Act, 1961, i.e. fees for professional or technical services on which TDS is required to be made, whereas the amount paid / payable to two non-resident directors, i.e. Mr. AD. Negreev and Mr. Alexander V. Gorelyshev are salaries for the services rendered outside India as their employments are exercised in Russian Federation, which are not taxable in India. He ought not to have done so.

3) On the facts and in the circumstances of the case and in law, both, the learned ACIT- TDS -3 (2) and the learned CIT (A) -14 erred in recognising the fact, the appellant has already preferred appeal before the ITAT, Mumbai against the original order passed by the learned ITO - 10 (3) (4) u/s 143 (3) of the Income Tax Act, 1961 against disallowance of salaries paid/payable to two non-resident directors. The appeal is yet to be heard by the ITAT as 'D' bench did not function on the scheduled dates in the last calendar year.”

3. The brief facts of the case are that the A.O. during the proceedings u/s 201(1)/201(1A) of the Act observed that the assessee has made payment of Rs. 42 lacs to its Directors in Russia on which tax has not been deducted at source. The assessee was show caused on this issue and in reply the assessee submitted that the said payment was made to its two foreign

Directors one Mr. A.D. Negreev and Mr. Alexander V. Gorelyshev and both these directors were employees of the company. They were non-resident Directors who were not tax-resident of India . Hence, their salaries are not taxable in India , and that is why the assessee did not deduct tax at source while making payment of salary of Rs. 42 lacs to these Directors.

The A.O. after considering the reply of the assessee rejected the same for the following reasons:-

“3. The reply filed by the assessee is carefully considered, but the same is not acceptable. In this case, in the assessment order dated 14.12.2011, the Assessing Officer disallowed amount of Rs.42 lakh u/s 40A(iii) of the IT. Act. The relevant para of the order is reproduced as under:-

"3.1 On perusal of schedule 18 of the Tax Audit Report u/s 44AB of the Act, it is seen that under the said clause viz; particulars of payment made to persons specified u/s 40A(2)(b) it was shown that salary and performance bonus was paid to foreign Directors at Rs.42,00,000/-. In view of this information, the assessee was asked vide letter dated 30-05-2011 to furnish the full details of this payment and also asked to file the details of TDS deducted while making payment to non resident Directors as per the provisions of Ch.XVII-B of the Act. In response to this letter the assessee has submitted the reply vide its letter dated 02.07.2011. As per the details the following amounts have been paid as remuneration to non resident Directors ;

a) Mr. Anatoly Negreev	Rs. 24,00,000/-
b) Mr. Grelyshe Alexander	<u>Rs. 18,00,000/-</u>
Total	<u>Rs. 42,00,000/-</u>

3.2 The assessee has during the assessment proceedings stated that the TDS has not been deducted on remittances paid to foreign Directors since Indo-Russian DTAA is applicable. However, it is noticed that the assessee company has not deducted any tax while remitting the payment as provided with

the provision of Chapter XVII-B regarding deduction of tax at source. As per clause (iii) sub section (a) of Section 40 the amounts shall not be deducted in computing the income chargeable under the head "Profit and gains of business or profession in the case of any assessee, any payment which is chargeable under the head "salaries", if it is payable.

In the instant case salary has been paid outside India to foreign Directors who are non residents. From the above, it is clear that the assessee violated the provisions as contained in Sec.40(a)(iii) and ought to have deducted TDS as per sec.40(a)(iii). Since the withholding tax has not been deducted, therefore the amount of Rs. 42 lakh is disallowed and added back to the total income of the assessee u/s 40(a)(iii) of the Act.

The AO also observed that on appeal, the ld. CIT(A) -22 vide his order dated 7th March, 2012 has confirmed the disallowance in quantum proceedings by holding as under:-

"I have gone through the assessment, order, perused the submissions made by the appellant and also discussed the case with the A.R. of the appellant. AO noted from the Tax Audit Report that assessee had made payment to the foreign Directors at Rs. 42 lakhs being Rs. 24 lakh to Mr. Anatoly Negreev and Rs. 18 lakh to Mr. Gorelyshev Alexander. The AO also noted that in this case salary are credited to foreign Directors to which provisions of Sec.40(a)(iii) are applicable and since the tax have not been deducted. He disallowed the fully salary of Rs.42 lakh. Before me, it was submitted that Sec.40(a)(iii) applies only when the salary is chargeable under the head "salaries" and since as per provisions of Sec. 9(1)(iii) services are not rendered in India, the salaries paid to foreign Directors are not earned in India and hence it cannot be deemed to be accrued in India and hence no TDS was deductible. I have considered the case of the appellant and also perused copy of the agreement furnished for payment of so called salaries to these persons. As per agreement dated 30.3.2007 the amount is stated to be payable to these persons for performing following duties:

"Duties and Power.' The company hereby retains employee and employee hereby accepts employment as the company's

Director (business development). As Director (business development), employee shall be responsible for promoting the business of the company, managing the day-to-day operations of company in Russia and its office in Moscow and subject to the rights and powers of company's Board of Directors and stockholders, shall have such functional autonomy as is consistent with his office."

From the above, it may be noted that the payment has been made by the appellant company to Mr. Anatoly Negreev and Mr. Gorelyshev Alexander for managing day to day operations of the company in Russia and its office in Moscow and hence the case falls under the provision of Sec. 194J i.e. fees for professional or technical services on which TDS is required to be made. Explanation (2) to Sec. 9(1)(vii) defines the term "fees for technical services" as under :-

"Explanation (2) - For the purpose of this clause, "fees for technical services" means any consideration (including any lump sum 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 of 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".

From the relevant clause in the agreement it is clear that the payment is made to manage day to day operations of the company in Russia and since rendering of managerial services is included in the payment of fees" for technical services, the provisions of Sec.194J are applicable.' Coming to the issue of being non-resident, explanation to Sec. 9(2) is relevant which is reproduced as under:-

"Explanation - For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub section (1) and shall be included in the total income of the non resident, whether or not -

- (i) The non resident has a residence or place of business or business connection in India; or
- (ii) The non resident has rendered services in India

From the above explanation it may be noted that same has been made applicable w.e.f. 01,06.1976 and applies to the year under consideration. Thus, even where non resident has not rendered any services in India as income shall be deemed to accrue or arise in India being fees from technical services. The assessee claims that the payment is on account of salary, but during the course of hearing the AR of the appellant confirmed that no other payment (eg. perquisite, etc.) than this amount has been made to those persons in Russia. Thus, merely by mentioning the nature of payment as salary to the employee the same does not amount to salary. As per copy of passport of Mr. Anatoly Negreev, he never visited India during this financial year and hence not participated in proceedings of the company. The managerial fees of these persons paid in Russia on behalf of the appellant is certainly fees for the technical services. Hence I am of the considered opinion that for non deduction of the tax, the payments were disallowable u/s.40(a)(ia). Accordingly, the disallowance made by the AO is upheld.”

Based upon the above quantum proceedings in first round of litigation, the A.O. held that the assessee was liable to deduct tax at source on payment of Rs. 42 lakhs to these foreign directors and the TDS rate on professional/technical fees is 10%, hence, assessee is held to be an assessee-in- default u/s 201/201(A) of the Act whereby he passed the order dated 17.1.2014 and the demand was raised as under:-

Interest for the period from 1.4.2009 to 17.1.2014 58 months @ 1% p.m.	=Rs. 4,87,200
TDS default u/s 201(1)	=Rs. 8,40,000/-
Interest u/s 201(1A)	=Rs.4,87,200/-
Total	=Rs.13,27,200/-

4. Aggrieved by the order dated 17-01-2014 passed the A.O. u/s 201(1) and 201(1A) of the Act, the assessee filed first appeal before the ld. CIT(A) who

confirmed the order of the A.O. vide appellate order dated 01-10-2014 passed by learned CIT(A).

5. Hence being aggrieved , the assessee is in further appeal before the tribunal against the appellate order dated 01-10-2014 passed by learned CIT(A).

6. The Id. Counsel for the assessee, at the outset, submitted that the scrutiny assessment was framed u/s 143(3) of the Act wherein it was held by the A.O. in first round of litigation that the assessee has paid salary to the non-resident directors and the amount was disallowed u/s 40(a)(iii) of the Act as tax was not deducted at source on the salaries paid to foreign directors who were non-residents. The Id. CIT(A) in the first appeal against quantum assessment in the first round of litigation held that the payment made by the assessee to these foreign directors are fee for technical services. The matter went up to the tribunal in the first round of litigation and the Tribunal in appeal in the quantum proceedings in ITA No. 2039/M/2012 for assessment year 2009-10 vide orders dated 11th March, 2015 remitted the matter back to the file of the A.O. with the following directions:-

“After hearing both the parties and perusal of the orders of the Revenue Authorities as well as the relevant material filed before us, we find the admitting of the additional evidence is in the interest of justice. On perusal of the said additional evidences/documents placed before us, considering the importance of the said documents, we find it relevant to admit the same. Accordingly, we admit the additional evidences/documents filed by the assessee and remand them to the file of the Assessing Officer. Assessing Officer shall consider the same and decide the issue afresh after affording a reasonable opportunity of being heard to the assessee. Accordingly, grounds raised by the assessee are allowed for statistical purposes.”

It is submitted that the A.O. has now framed the quantum assessment order in second round of litigation in compliance with the direction given by the tribunal in ITA No. 2039/M/2012 vide orders dated 11-3-2015 , wherein the assessment is now framed by the AO u/s 143(3) r.w.s. 254 of the Act vide orders dated 18th October, 2016 wherein the A.O. has held that these payments which are made by the assessee to its non-resident directors are salaries on which tax has not been deducted at source and hence the additions were made by the AO by disallowing said salary of Rs. 42 lacs u/s 40(a)(iii) of the Act . The relevant part of the assessment order dated 18-10-2016 passed by the A.O. u/s 143(3) r.w.s. 254 of the Act is reproduced below:-

“The submissions made on behalf of the assessee company have been carefully considered. In its submission the assessee has explained that there does not exist any tax exigency in respect of the payment made by it to its Directors. The assessee company stated that the TDS has not been deducted on remittances paid to Foreign Directors since Indo-Russian DTAA is applicable. However, it is noticed that the assessee company has not deducted not tax while remitting the payment as provided with the provision of Chapter XVII-B regarding deduction of tax at source.

A plain reading of section 40(a)(iii) indicate that no deduction would be allowable in respect of any payments chargeable under the head 'Salaries' if (a) the same are payable outside India and (b) if tax has not been paid or deducted thereon under Chapter XVII B of the Act. The said clause (iii) was substituted by virtue of the Finance Act, 2003 with effect from 1-4-2004. By virtue of the aforesaid amendment, the rigor of sub clause (iii) of clause (c) of section 40 now also extends to any amount payable as salaries in India. Plainly, the principal object of the aforesaid sub clause (iii) is to provide a further disincentive for non-compliance of provisions of section 192. [Para 11).

Further the provisions of section 9(1)(ii) speaks about the salary earned in India and not about salary paid to non resident. foreign directors. As the assessee company has not deducted tax

on the salary paid to non resident Director's, therefore no relief is allowed to assessee company under this head and additions of Rs. 42 lacs made u/s 40(a)(iii) of I.T. Act is sustained.”

Thus, it is submitted that while framing order dated 17.1.2014 u/s 201(1)/201(1A) of the Act by the AO which was later upheld by learned CIT(A) vide appellate order dated 01-10-2014, the A.O. and the ld. CIT(A) has framed orders on the wrong premise that the payments made by the assessee were professional/technical fees , which has now been adjudicated by the AO in quantum proceedings in second round of litigation in compliance of order of tribunal dated 11.03.2015 in ITA no. 2039/Mum/2012 for assessment year 2009-10, wherein the AO has held that the assessee made payment of salary of Rs. 42 lacs to its non-resident Directors instead of payment being in the nature of professional/technical fee. Thus, it was prayed by learned counsel for the assessee before the tribunal that the matter may be set aside and restored to the file of the A.O. for de-novo determination of the issue on merits in proceedings u/s 201(1)/201(1A) of the Act as the whole premise of the order u/s 201(1) and 201(1A) which was confirmed by learned CIT(A) is wrong as it treated the said payment of Rs. 42 lacs to its Directors as professional/technical fee.

7. The ld. D.R. submitted that the payments have been made to the foreign nationals who are non-residents to the tune of Rs. 42 lacs on which tax was not deducted at source and hence the assessee is an assessee in default as contemplated u/s 201(1) and 201(1A) of the Act. It was submitted that since in pursuance of the order of tribunal in quantum proceedings in first round of litigation, the AO has held the nature of payment to be salary in second round of litigation, the matter may be set aside to the file of the AO for de-novo determination of issue on merits in accordance with law.

8. We have considered rival contentions and also perused the material available on record. We have observed that an amount of Rs. 42 lacs was paid by the assessee to the foreign non-resident directors whereby the A.O. has now held in second round of litigation in set-aside quantum assessment proceedings vide his order dated 18-10-2016 passed u/s 143(3) r.w.s. 254 of the Act as payment of salaries on which no tax was deducted at source by the assessee wherein the A.O. made an addition of Rs. 42 lacs as income of the assessee after holding that the assessee did not comply with the provisions of Section 40(a)(iii) of the Act . Order u/s 201(1)/201(1A) of the Act framed by the Revenue which is confirmed by the Id. CIT(A) was based on the premise that these payments were made to foreign non-resident directors towards professional/technical fees , which view was taken based on the view taken by the learned CIT(A) in first appeal in quantum assessment proceedings in the first round of litigation. Hence, in our considered view, the order u/s 201(1)/201(1A) of the Act which is confirmed by the Id. CIT(A) cannot be sustained now keeping in view detailed discussions in the preceding para's which are not repeated here for sake of brevity , and needs to be set aside and restored to the file of the AO for de-novo determination of the matter on merits in accordance with law in the light of fresh assessment order dated 18-10-2016 passed by the AO u/s 143(3) r.w.s. 254 of the Act in quantum assessment proceedings in second round of litigation framed by the A.O in compliance with the directions of the tribunal vide orders dated 11-3-2015 (supra) wherein the tribunal remanded the matter to the file of the AO, wherein said payment of Rs. 42 lacs made by the assessee to its foreign directors who are non-resident was held to be salary payment by the AO in quantum proceedings in second round of litigation. The assessee shall be allowed by the AO to submit relevant and necessary evidences and explanations in its defense in set aside remand proceedings before the AO in accordance with law. Needless to say proper and reasonable opportunity of

being heard shall be allowed by the AO to the assessee in accordance with principles of natural justice in accordance with law. We order accordingly.

9. In the result, appeal filed by the assessee in ITA No. 154/Mum/2015 for assessment year 2009-10 is allowed for statistical purposes.

Order pronounced in the open court on 27th February, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 27-02-2017 को की गई ।

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 27-02-2017

व.नि.स/ र.क., Ex. Sr. PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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