आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'D' BENCH, CHENNAI
श्रीएन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री ए.सजयरामन, लेखासदस्य के समक्ष
BEFORE SHRI N.R.S.GANESAN, JUDICIAL MEMBER
AND SHRI S.JAYARAMAN, ACCOUNTANT MEMBER

आयकरअपीलसं/I.T.A. No.2562/Chny/2018
निर्धारणवर्ष/Assessment Year : 2010-11

M/s. Nippon Paint (India) Pvt.Ltd K-8(1)Phase 2,SIPCOT Industrial Park, Mambakkam Village, Sriperumbudur,Sunguvarchatiram Kancheepuram-602 106.	Vs	The Deputy Commissioner of Income Tax, International Taxation-2(2) Chennai.
PAN: AACCN2352F		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Ms.N.V.Lakshmi,CA
प्रत्यर्थी की ओर से/Respondent by	:	Mr. M.Srinivasa Rao, CIT

सुनवाई की तारीख/Date of hearing	:	07.02.2019
घोषणा कीतारीख /Date of Pronouncement	:	29.03.2019

आदेश/O R D E R

Per S.JAYARAMAN, AM:

The assessee filed this appeal against the order of Commissioner of Income Tax (Appeals)-16, Chennai, in ITA No. 07/CIT(A)-16/2010-11 dated 28.06.2018 for assessment year 2010-11.

2. While making the assessment for the assessment year 2010-11 in this case, the Assessing Officer noticed, inter-alia, that the assessee has made remittances of ₹15,48,340/- to a non-resident abroad without

deducting TDS. The AO considered the assesseee's explanations and other material and held, inter alia, that the impugned remittance is technical assistances fees for providing technical support, training and accompanying activities. Further, the AO noticed that the assessee has paid salary reimbursement to foreign nationals taken on secondment from the group company who has taken up employment in India. After considering the assesseee's explanations and other material and relying on the ruling of the AAR in the case of Target Corporation of India (P) Limited, the AO held that the nature of the impugned salary is the income and it is not in nature of reimbursement of salary, and relying on the decision of Supreme Court in the case of Centrica India Offshore (P) Limited, held that salary reimbursement made for ₹29,62,869/- is payment for FTS. Since the assessee has not deducted TDS on the above payments u/s 195, the A O held that the assessee was in default in view of section 201(1), therefore liable to tax and interest under sections 201(1) and 201(1A) and levied accordingly. Aggrieved against that order, the assessee filed appeal before the CIT(A). The Ld CIT(A) dismissed the appeal. Aggrieved against the order of the Ld. CIT(A), the assessee filed this appeal.

3. The Ld A R submitted that the remittancesof Rs. 15,48,340/-were travel expenses incurred by various technical personal during their stay

in India. This expenses include their airfare, food expenses, local conveyance etc. It has no profit element in it .Relying on the case law decided by Mumbai ITAT in the case of Saipem SA Vs DDIT (2012) 54 SOT 111 (Mumbai), she pleaded that such allowance cannot be treated as fees for technical services and contended that reimbursement of expenses does not partake the nature of income, in the hands of the payee of such expenses. Therefore, the Ld CIT (A) erred in holding that TDS was required to be made on such payments. The Ld AR submitted that the entire sum of salary paid to the seconded employees suffered TDS u/s 192 , Therefore, the assessee is not liable to TDS u/s 195 and submitted that the Ld CIT (A) erred in holding that this payment is covered u/s 9(1) (vii) and hence TDS was required to be made. Therefore, she pleaded to allow the appeal.

4. Per contra, the Ld DR submitted that on the issue of the remittances of Rs. 15,48,340/-, on due examination, the Ld CIT(A) held that it is evident that the requirement of visits and stay of the personnel is required from foreign service providers and they are a pre-requisite to perform the services i.e the personnel visits forms part and parcel of the scope of services to be rendered. The necessity of visit of such personnel is very much part of the scope of service rendered. But for the visits of the personnel, the services would not have been rendered at all

or at the most could not have been performed to the extent of the service requirements. These expenses have been incurred in connection with technical services agreement, they bear a clear nexus with the technical services rendered and part and parcel in the process of service of a technical character. Therefore, the expenditure has been incurred for earning royalty/ FTS. The expenditure is that of service providers and not that of the assessee company. Moreover, Article 13 of Indo Japan DTAA provides for taxation of royalty/FTS in the source country on gross basis at a concessional rate of tax. Relying on the case laws decided by the Hon'ble Court in the case of Ashok Leyland Ltd vs DC1T (2009) .120 1TD 14 (Chennai) and CSC Technology Singapore (2012) 50 SOT 399 (Delhi) wherein it is held that the consideration paid to meet out travel and lodging needs of the service personnel is in itself towards the technical services rendered and hence forms part of the Fee for Technical Services, the Ld CIT(A) held that the alleged expenses for travelling etc are expenses of M/s Nippon Paint Co. Ltd, Japan and the reimbursements of said expenses are to be treated as income liable to tax in India and upheld the action of the AO to levy tax and interest u/s.201(1) and u/s. 201(1A) .

4.1 On the issue of reimbursement of salary costs on seconded employees, the Ld D R relied on the order of the Ld. CIT (A), the relevant portion is extracted as under :

"I have carefully gone through the appellant contentions above. The case lawsreferred by the appellant are clearly distinguishable on the facts of the case of theassessee. In the present case, the employees had been sent to exchange experience and skill as stated by assessee. "employee is sent to work somewhere else temporarily" assumes significance. It is that the employees is sent to work by the employer. i.e. the employer in this case is the entity which is seconding. once the term of the secondment is over the employee will return back to their original employer. In the relevant issue in the case of Target Corporation India (P) Ltd, The Hon'ble AAR held that Seconded employees shall continue to have their pay-roll processed by T but applicant is to reimburse Tfor those amounts and also pay T a service charge - Right to terminate employee is with T - Whether since applicant has not become employer of seconded employees, what applicant pays to T is income of Tand not in nature of reimbursement of salary and while paying amounts applicant has obligation to withhold taxes under section 195- Held, yes (In favour of revenue], similarly, Hon'ble Supreme Court in the case of Centrica India Offshore (P) Ltd, an Indian company, entered into 'secondment agreement' with overseas companies and sought some employees on 'secondment' from overseas entities held that since employees of those companies used their technical knowledge and skills while assisting assessee in conducting its business of quality control and management, amounts reimbursed by assessee to overseas companies towards salaries of seconded employees amounted to fee for technical services' liable to tax in India and the case decided by ITAT Bengaluru in the case of Food World Supermarkets Ltd Assessee entered into agreement with DFCL in terms of which DFCL agreed to assign its employees to assessee - It was agreed between parties that DFCL would pay salary to assigned personnel and assessee would reimburse such amount to DFCL - Assessee made reimbursement without deduction of tax at source - Assessing Officer opined that remittance made by assessee constituted fee for technical services' under section 9(1)(vii) and, therefore, assessee was liable to deduct tax under section 195 - It was clear from records that all five secondees were not ordinary employees or workers but they were deputed at high level managerial/executive positions - Whether once it was found that secondees were rendering managerial and highly expertise services to assessee, payment for such services fell within ambit of FTS defined in explanation 2 to section 9(1)(vii) - Held, yes - Whether, therefore, impugned order passed by Assessing Officer was to be confirmed - Held, yes Para 10] in favour of revenue]. In view of the above discussion, I held that assessee was in default in view of section 201(1) of the Act having assessee not deducted TDS on remittances of Reimbursement of salary costs INR 29,62,869/-, therefore I upheld the action of the AO to levy tax and interest u/s 201(1)and U/s 201(1A) of the Act."

5. We heard the rival submissions and gone through relevant material. On both the above the issues, the Ld. CIT (A) on due examination has clearly recorded the above findings and applied the law as laid down by Courts/AAR/tribunal. On the issue of the remittances of ₹15,48,340/-, the necessity of visit of such personnel is very much part of the scope of service rendered. But for the visits of the personnel the services would not have been rendered at all or at the most could not have been performed to the extent of service requirements. The expenses have been incurred in connection with technical services agreement , they bear a clear nexus with the technical services rendered and part and parcel in the process of service of a technical character. Therefore, the expenditure has been incurred for earning royalty/ FTS. The expenditure is that of service providers and not that of the assessee company. On the issue of the issue of reimbursement of salary costs on seconded employees, the Ld. CIT(A) held, *inter-alia*, that the seconded temporarily employees exchanged experience and skill training by the employer. i.e. the employer in this case is the entity which is seconding and once the term of the secondment is over, they will return back to their original employer and they do not loose the employer-employee relationship of the parent organization. Since the assessee has not become employer of seconded employees, what the assessee paid to Nippon Paint Company Limited and Wuthela Holdings

Pte Limited at INR 29,62,869/- is the income of those companies and not in nature of reimbursement of salary. Further, the Ld. CIT (A) applied the ratios of the Apex court/ HC/AAR and Tribunal, supra. Although, the assessee filed this appeal, it has not laid any material to dislodge the findings recorded by the Ld CIT(A) on the above issues, supra, and hence we do not find any reason to interfere with the order of the Ld CIT(A). Therefore, the assessee's appeal is dismissed.

6. In the result, the assessee's appeal is dismissed.

Order pronounced on 29th March, 2019

(**एन.आर.एस. गणेशन)**	(**एस.जयरामन**)
(N.R.S.Ganesan)	(S.Jayaraman)
(न्यायिकसदस्य /Judicial Member)	(लेखासदस्य /Accountant Member)

चेन्नई/Chennai,
दिनांक/Dated 29th March , 2019
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आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. Appellant 2. Respondent 3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT 5. विभागीयप्रतिनिधि/DR 6. गार्डफाईल/GF