आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL,

INDORE BENCH, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.448 & 449/Ind/2019

Assessment Years: 2015-16 & 2016-17

M/s. Snap Computer Systems Pvt. Ltd, 49, Kanadia Road, Manbhavan Nagar, Inodre	Vs.	ITO (IT & TP), Bhopal
(Appellant)		(Revenue)
PAN AAKCS6389R		

Appellant by	Shri S.S. Deshpande, C.A
Revenue by	Shri Ashish Porwal, Sr. DR
Date of Hearing	07.07.2020
Date of Pronouncement	16.09.2020

O R D E R

PER MANISH BORAD, AM.

The above captioned appeals filed at the instance of assessee pertaining to Assessment Year 2015-16 and 2016-17 are directed against the orders of Ld. Commissioner of Income Tax (Appeals)13 (in short 'Ld.CIT'], Ahmedabad dated 15.02.2019 which is arising

out of the order u/s 201 of the Income Tax Act 1961(In short the 'Act') dated 26.07.2016 framed by ITO (Intl. Taxn.), Bhopal.

2. Assessee has raised following grounds of appeal;

ITA No.448/Ind/2019 A.Y.2015-16

01. That the Learned CIT(A)-13 erred in maintaining the order of the Ld. ITO(IT&TP) Bhopal in respect of applicability of section 195/201 of the Income Tax Act.

02. That on the facts and circumstances of the case the Ld. CIT(A) has erred in confirming the action of the Ld. ITO by holding that services provided by System Integration Inc. USA are covered as fees under the India-USA double taxations avoidance agreement (DTAA) and hence taxable under Article 12 of DTAA.

03. That the Ld. CIT(A) has erred in confirming the addition of Ld. ITO (TDS) that the services provided in USA and payments made in USA are covered u/s 195/201 of the I.T. Act.

04. That the Ld. CIT(A) has erred in holding that the services provided by Systems Integrations in USA is considered as making technology available as per the service agreement.

05. The claim of the appellant about non deductibility of TDS be allowed and the order of the Ld. CIT(A) be quashed.

06. The appellant craves to add, alter, delete and amend any of the grounds of appeals.

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3. As the issues raised in these appeals are common and relates to the same assessee, these were taken together and are being disposed off by this common order for the sake of convenience and brevity.

4. Brief facts of the case as culled out from the records and narrated by the Ld. Counsel for the assessee are that the assessee is a Private Limited company engaged in the business of export of software services. The assessee is responsible for deducting tax at source under Chapter XVII of the Income Tax Act. The assessee

made payments of Rs.17,98,000/- and Rs.42,14,000/- to Non resident company namely M/s System Integration Inc, USA (In short SII) during Financial Year 2014-15 and Financial Year 2015-16 respectively. The payments were made without deducting tax at source u/s 195 of the Act treating the amount as not eligible for deduction of tax at source. Ld. A.O subsequently on going through the Form 15CB issued by the Chartered Accountant wherein it was mentioned that the payments were made towards "consultancy services" and also on perusal of the invoices raised by the Non resident company for the services rendered, came to the conclusion that the alleged amount is towards payment of "fees for technical services". Ld. A.O further applying the provisions of Section 9 of the I.T. Act framed order u/s 201(1)/201(1A) r.w.s. 195 of the Act treating the assessee in default for not deducting the tax at source and computed the default of TDS at Rs.6,17,313/- and Rs.14,46,807/- along with levying interest u/s 201(1A) of the Act at Rs.1,11,858/- and Rs.1,28,063/- for Financial Year 2014-15 and Financial Year 2015-16 respectively. The detailed working of the computation of TDS and interest is mentioned below:-

Financial Year 2014-15

S.No.	Name of Recipient	Total Amount remitted in Rs.	Date of remittance	Gross up amount as per Section 195A of the Act	Default of TDS @25.75% incl. cess	Interest thereon u/s 201(1A) till date
1	Systems Integrations Inc, USA.	15,82,000/-	27.02.15	21,09,333/-	5,43,153/-	97,768/-
2	Systems Integrations Inc, USA.	2,16,000/-	24.01.15	2,88,000/-	74,160/-	14,090/-
Total		17,98,000/-		23,97,333/-	6,17,313/-	1,11,858

Financial Year 2015-16

S.No.	Name of Recipient	Total Amount remitted in Rs.	Date of remittance	Gross up amount as per Section 195A of the Act	Default of TDS @25.75% incl. cess	Interest thereon u/s 201(1A) till date
1	Systems Integrations Inc, USA.	24,20,000/-	22.12.15	32,26,667/-	8,30,867/-	66,469/-
2	Systems Integrations Inc, USA.	17,94,000/-	12.10.15	23,92,000/-	6,15,940/-	61594/-
Total		42,14,000/-		56,18,667/-	14,46,807/-	1,28,063/-

5. Aggrieved assessee preferred appeal before Ld. CIT(A) but failed to succeed. Though assessee made necessary submission that the nature of services are not in nature of "technical services" but is the payment for procurement of orders. Once the orders are procured then the assessee provides necessary services to the client. The Non resident company i.e. Systems Integrations Inc (In short 'SII') has no other role to play except of procuring orders and refer them to the assessee company. However Ld. CIT(A) did not

find any merit in the submissions and he after referring to the relevant clauses of the agreement as well as the Article 12(4)(b) of the Tax Treaty between India and USA confirmed the finding of Ld. A.O and dismissed the assessee's appeal.

6. Now the assessee is in appeal before the Tribunal challenging the finding of Ld. CIT(A) confirming the action of Ld. A.O for treating assessee in default for non deduction of tax at source u/s 195 of the Act on the payments made to SII, USA during Financial Year 2014-15 and Financial Year 2015-16.

7. Ld. Counsel for the assessee by referring to the paper book dated 29.01.2020 running from page 1 to 55, submission dated 17.02.2020 and also strongly supporting the letter issued by the Non resident Company namely SII, USA dated 19.2.2020 to the Registrar, Income Tax Appellate Tribunal, Indore submitted that "SII" has certified that their company has acted as a liaison and procurement agent between the assessee company namely Snap Computer Pvt. Ltd and client based in USA and further certified that "SII" has not provided any technical or managerial services. He further submitted that Non resident company SII was only working

as interface to get the order and all the work was done by the assessee's team by connecting to the clients net work using Virtual Private Net Work (VPN) and Virtual Desktop Image (VDI). Ld. Counsel for the assessee also submitted that though in the agreement between the assessee and Non resident company "SII" there appears the words "consulting services, project work and procurement and any other task" but that should not be given much importance over and above the actual work under taken by the Non resident company. Since no technical services have been provided and the payment was just in the nature of commission for procurement of orders assessee should not have been treated as assessee in default for non deducting tax on services on payment of technical services. Reliance was placed on following two decisions;

(i) Dr. Reddy Laboratories Ltd (2016) 73 taxmann.com 144/ 243 taxman 127/289 CTR 24 (AAR New Delhi)

(ii) CIT V/s Bharti Cellular Ltd (2009) 319 ITR 139 (Delhi)

8. Per contra Ld. Departmental Representative vehemently argued supporting the orders of both the lower authorities.

9. We have heard rival contentions, perused the records placed before us and carefully gone through the decisions referred and relied by the assessee. In the instant appeal for Assessment Year 2015-16 and Assessment Year 2016-17 though the assessee has raised various grounds of appeal but the sole issue for adjudication is that whether the Ld. CIT(A) erred in confirming the action of the Ld. A.O by holding that the payments made for services provided by SII, USA were in the nature of technical services liable for deduction of tax at source u/s 195 of the Act.

10. The assessee company is engaged in the business of export of software services. It has entered into an agreement with the U.S.A based company M/s. System Integration Inc (SII) which agreed for providing of consulting services, procurement of orders and other tasks given. This fact is not in dispute that the Non resident company do not have any permanent establishment in India nor having any business connection in India and the income of such Non resident company i.e. SII can be deemed to accrued or arise in India only if the payments are of the nature provided u/s 9 of the I.T. Act.

11. It is further agreed by both the parties that the issue which finally needs to be adjudicated is whether the payment made to the "SII" was for providing technical services or was it for the procurement of orders.

12. As far as service agreement dated 1.2.2015 is concerned which is at page 24 to 30 of the paper book, reference is made to Exhibit-1 of the service agreement. For better understanding this exhibit-1 is reproduced below:-

Attachment I

to the

Services Agreement

by and between SYSTEMS INTEGRATIONS INC. and

Snap Computer system Pvt. Ltd. dated

01/02/2015

1. DUTIES OF !NTEGRATOR -In General SYSTEMS INTEGRATIONS INC.

   Consulting Services, project work procurement and any other task given to consultant by Snap Computer Systems Pvt. Ltd.

2. COMPENSATION AND EXPENSES

   A. For tile performance of its duties and services hereunder, Integrator shall be paid based upon actual time and materials used in the performance of its duties hereunder. Charges for services performed within the scope of the Agreement are as follows:

      Vaishali Paranjpe $. 48/hour *(01/02/2015)*

3. DURATION OF AGREEMENT

A. Either party may terminate this agreement upon giving one month prior written notice: to the other. Termination of this agreement does not relieve either party of responsibilities or indebtedness incurred while the contract was in force.

B.

13. In the above exhibit nature of work to be performed by "SII" is mentioned and in one line it can be summarised as "consulting services, project work procurement and any other task". We also need to understand the actual work performed by the Non resident company. For looking into the same we first need to go through the description of services shown in the invoices raised by SII. In one of the invoice dated 14.3.16 placed at Page-50 of the paper book under the head description it is mentioned "Onsite Project Management and Procurement". Similar description is given in all other invoices. It has been submitted by Ld. Counsel for the assessee that the payment made to SII was only for procurement of orders and no other services of technical in nature were received. This submission of the Ld. Counsel for the assessee further gets strengthened by the certificate issued by SII, USA dated 19.2.2020 which reads as follows:-

SYSTEMS INTEGRATIONS INC.

4213 Peakview CT, Fairfax VA 22033

(609)-662-0145

February 19th 2020

TO-WHOM-IT--MAY CONCERN -

This is to certify that we, Systems Integrations Inc. have acted as a Liaison and procurement agent between Snap Computer Systems Pvt LTD and clients based in USA.

We have not provided any technical or managerial services.

We were only working as an interface to get order. All the work was done by the Snap Systems team by connecting to the clients' network using VPN (Virtual Private Network) and VDI (Virtual Desktop Image).

14. The above certificate makes the picture very clear that "SII" has only have acted as a Liaison and procurement agent between assessee and clients based in USA. SII was working only as an interface to procure orders and hand over the same to the assessee who in turn was to carry out the work through its team by connecting to the clients network using Virtual Private Network and Virtual Desktop Image. There remains no dispute to the fact that apart from the work of procurement orders for the assessee no other services were rendered by "SII". Software services were rendered by the assessee directly to the customers by logging in directly with the clients network. Though in the agreement the

payment is nomenclated as consulting services but it is only paid as a commission for procuring orders from the customers. “SII” has not rendered any service except directing the customers to the assessee for supply of software services. “SII” do not have any interface in supplying such services. There is no evidence to show that SII was having any role of providing technical services in the work performed between assessee and its clients. For getting the orders the agent normally gets commission and reimbursement of expenses on the basis of actual time spent. In short “SII” simply obtains the orders on the basis of nature of services to be provided by the assessee and nature of services required by the client. Once both these things are matched the orders are procured and communicated to the assessee who thereafter develops the software in India as per the need of the client. In view of the above discussions we are of the considered view that Non resident company M/s System Integration Inc. has not provided any technical services to the assessee and the alleged amount received by it were only for the commission and incidental expenses for liaison work and procurement order.

15. As far as provision of Section 9 of the Act are concerned which in the instant case has been applied by both the lower authorities. Most specifically Section 9(1)(vii) which reads as follows:-

> *(vii) income by way of fees for technical services payable by-*
> *(a) the Government; or*
> *(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or*
> *(c) a person who is a non- resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:*
>
> *Explanation (2) to section 9(1).-*
>
> *For the purposes 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 for 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"*
>
> *Explanation after Sec. 9(2)*
>
> *For the removal of doubts, it is hereby declared that for the purpose 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 connection in India; or*
> *(ii) The non-resident has rendered services in India.]*

A.

16. Section 9(1)(vii) provides for accrual of income only for the "fee for technical services" which includes specialized services like

managerial, technical and consultancy. But in the instant case "SII" has not rendered any technical or managerial services to the assessee but is merely project work procurement agent. In the case of Dr. Reddy Laboratories Ltd *(supra)* it has been held that service fees payable by the applicant to DRL Russia under the agreement for promotion of goods cannot be regarded as fees for technical services under section 9(1)(vii) or under article 12 of the India-Russia treaty.

17. In light of above discussion and in the given facts and circumstances of the case we are of the considered view that the alleged payment made by the assessee to Non resident company SII is not for any fee "for technical services" and the payment was only towards commission for procurement of orders and reimbursement of incidental charges incurred. Since the payment was not for "fees for technical services" and further the payment was made to the Non residential company having no permanent establishment or business connection in India, the alleged payment for procurement of orders are not subject to deduction of tax at source u/s 195 of the Act. Thus Ld. CIT(A) erred in confirming the action of the Ld.

A.O. We set aside the finding of Ld. CIT(A) and allow the grounds raised by the assessee by holding that the alleged payments of Rs.17,98,000/- and Rs.42,14,000/- to SII in USA during Financial Year 2014-15 and 2015-16 respectively are only towards the charges for procurement or orders and reimbursement of expenses and are not in the nature of "fees for technical services" and thus do not fall in the ambit of Section 9 of the Act and thus Section 195 of the Act is not applicable in these payments. Revenue is thus directed to delete the demand for default of TDS and interest levied u/s 201(1A) of the Act.

18. In the result both the appeals ITA No.448 & 449/Ind/2019 of the assessee are allowed.

The order pronounced in the open Court on 16.09.2020

Sd/-	Sd/-
(KUL BHARAT)	**(MANISH BORAD)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

नांक /Dated : 16 September, 2020
/Dev
Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,

Asstt.Registrar, I.T.A.T., Indore