आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH, CHENNAI

श्री वी दुर्गा राव,न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.:949/CHNY/2017**

निर्धारण वर्ष / Assessment Year: 2005-06

M/s. TVS Electronics Limited, "Jayalakshmi Estate", 29, (Old No.8), Haddows Road, Chennai – 600 006.	v.	**The ACIT,** Corporate Circle 3(1), Chennai – 34.
PAN: AAACI 0886K		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Vikram Vijayaraghavan, Advocate

प्रत्यर्थी की ओर से/Respondent by : Shri G. Johnson, Addl.CIT

सुनवाई की तारीख/Date of Hearing : 15.09.2021

घोषणा की तारीख/Date of Pronouncement : 24.09.2021

आदेश /O R D E R

Per G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against order of learned Commissioner of Income Tax (Appeals)-11, Chennai, dated 15.02.2017 and pertains to assessment year 2005-06.

2. The assessee has raised the following grounds of appeal:-

1. <u>Disallowance of expenditure amounting to Rs 1,04,50,448 under section 40(a)(i) of the Act for non-deduction of tax at source on payment made to non-resident</u>

1.1 The learned CIT(A) has erred on the facts and circumstances of the case and in law 'in confirming the disallowance of Rs 1,04,50,448 under section 40(a)(i) of the Act for non-deduction of tax at source on payment made to a non-resident towards fees for conducting market survey for consumer electronics sector in Asia.

1.2 The learned CIT(A) erred in concluding that the fees for providing market survey services qualify as fees for technical services under section 9(1)(vii) read with Explanation to section 9 of the Act.

1.3 The learned CIT(A) erred in relying on the Hon'ble Income Tax Appellate Tribunal's observation that in absence of any specific clause on 'Fees for Technical Services' in the India — Mauritius Double Taxation Avoidance Agreement (India — Mauritius DTAA), the provisions of the Act are to be applied despite the fact that the direction of the Hon'ble Income Tax Appellate Tribunal was to reconsider the matter in accordance with law.

1.4 The learned CIT(A) failed to appreciate that in the absence of 'Fees for Technical Services' clause in the India-Mauritius DTAA, the fees for market survey are in the nature of 'business profits' falling within the ambit of Article 7 of the India-Mauritius DTAA and in the absence of a Permanent Establishment in India of the non-resident, the payments are not taxable in India.

1.5 Without prejudice to the above, fees paid for Technical Services rendered outside India prior to amendment to section 9(2) is not taxable in India and hence, the appellant could not have anticipated amendment and deducted tax at source.

The Appellant craves leave to add to, alter, amend or withdraw

all or any of the grounds of appeal herein above and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law."

3. The brief facts of the case are that the assessee is engaged in the business of manufacture of computer peripherals and uninterrupted power display system, etc., filed its return of income for the assessment year 2005-06 on 31.10.2005 declaring loss of Rs.43,16,754/-. The case was taken up for scrutiny and during the course of assessment proceedings, the AO noticed that the assessee has made a payment amounting to Rs.1,04,50,458/- to M/s.Rosewell Group Services Ltd., based in Mauritius, for a survey conducted by them for preparation of project report called 'Opportunities in Asia for Electronics'. Since, the assessee has not deducted TDS on said payment, the AO has disallowed entire sum u/s.40(a)(i) of the Income Tax Act, 1961 (hereinafter the 'Act') and the ld.CIT(A) has allowed relief to the assessee and deleted additions made by the AO towards management fees paid to M/s. Rosewell Group Services. The Revenue had preferred further appeal before the ITAT. The ITAT, 'B' Bench, Chennai after considering relevant facts has

remitted the issue back to the file of the AO with an observation that although the nature of payments made by the assessee to Mauritius based company is in the nature of fees for technical services, but when DTAA between India and Mauritius does not cover technical service fees, whether fees received for such services could be considered as business profit in the hands of the recipient has not been analyzed by any of the authorities.

4. Pursuant to the directions of the Tribunal, the AO has taken up the proceedings and called upon the assessee to substantiate its claim for non-deduction of tax at source on fees for technical services paid to M/s. Rosewell Group Services Ltd., Mauritius. In response, the assessee claimed that amount paid to Mauritius based company is neither taxable as fees for technical services as per DTAA between India and Mauritius nor business profits because the recipient does not have permanent establishment in India. Further, the payment was made outside India to a non-resident and the services were rendered outside India. Therefore, said sum cannot be brought to tax in India and hence, question of

deduction of TDS on said payment does not arise and thus, payment cannot be disallowed u/s.40(a)(i) of the Act, for non-deduction of tax at source u/s.195 of the Act. The AO, however was not convinced with the explanation furnished by the assessee and according to him, as per explanation to Section 9(2) of the Act, introduced by Finance Act, 2010 with retrospective effect from 01.06.1976, the requirement for a non-resident to have a residence or place of business or business connection is no more necessary and thus, the assessee cannot take refuge to an alternative stance in the wake of such clarity in the statute. He, further observed that as per Section 90 (1) & (2) of the Act, it is very clear that when there is no specific provision in DTAA for taxation of particular income then, the provisions contained in Income Tax Act needs to be brought in. Therefore, he opined that as per provision of Section 9(1)(vii), explanation 2, payment made for any services in the nature of managerial, technical or scientific work comes under the definition of fees for technical services which attracts TDS provisions as per Section 195 of the Act. Thus, he opined that payment made to a non-

resident without deduction of tax at source u/s.195 of the Act, cannot be allowed as deduction u/s 40(a)(i) of the Act.

5. Being aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee has filed detailed written submissions on the issue which had been reproduced at Para 4.3.2 on pages 5 to 8 of ld.CIT(A) order. The sum and substance of argument of the assessee before the ld.CIT(A) are that payment made to a non-resident recipient is neither taxable under the Act as fees for technical services nor taxable under DTAA as business profits because payment made to non-resident for services rendered outside India is outside the scope of definition of FTS before amendment to Section 9(1)(vii) by the Finance Act, 2010 with retrospective effect from 01.06.1976. He, further submitted that DTAA between India and Mauritius is silent about taxation of FTS and once the DTAA does not provide for taxation of FTS, any payment made to non-resident shall come under Article 7(1), which deals with business profits. If you apply Article 7 of India-Mauritius DTAA then, the same is not taxable as business profits, because the non-resident does not

have any permanent establishment in India. The ld.AR further referring to various decisions including decision of Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT, 288 ITR 408, when liability was fastened on the assessee on the basis of subsequent retrospective amendment of law then, on the basis of impossibility of performance to deduct TDS, disallowance cannot be made u/s.40(a)(i) for non-deduction of tax at source u/s.195 of the Act. The assessee has relied upon the following judicial precedents:

(i). Ishikawajma-Harima Heavy Industries Ltd. vs. DIT, 288 ITR 408 (SC)
(ii). Channel Guide India Ltd., vs. ACIT, 20 ITR 0438 (Mum-Trib)
(iii). Sterling Abrasive Ltd., vs. ACIT, 140 TTJ 0068 (Ahmd-Trib)
(iv). Metro & Metro vs. Addl.CIT, 147 ITD 207 (Agra-Trib)

6. The ld.DR on the other hand supporting order of the ld.CIT(A) submitted that the ITAT has clearly held that payment made to a non-resident is nothing but fees for technical services which is taxable u/s.9(1)(vii) of the Act and thus, as per amended provision of explanation to section 9(2), there is no requirement for service provider to have permanent establishment in India. Therefore, once it comes under the definition of fees for technical services and taxable

in India, as per amended provisions then even if said payment is not taxable as per DTAA, the same can be taxed as per provisions of Income Tax Act. Since, the assessee has failed to deduct TDS on impugned payment, the AO was right in disallowing said payment u/s.40(a)(i) of the Act, and hence, their orders should be upheld.

7. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, the DTAA between India and Mauritius does not cover fees for technical services. It is also an admitted fact that if two provisions are considered between DTAA and Indian Income Tax laws, then provisions more beneficial to the assessee should be considered. If you go by the said rule, then payment made by the assessee to a non-resident entity for services rendered outside India should be considered in light of DTAA between India and Mauritius. As we have already stated earlier, India-Mauritius DTAA does not cover FTS. Once FTS is not covered under DTAA, then by virtue of residual clause 22 of DTAA between India and Mauritius, said sum can be considered under Article 7 as

business profits. Further, as per Article 22, where any item of income of a resident of a contracting state, wherever arising, which are not expressly dealt with in the foregoing Articles of this Convention, shall be taxable only in that Contracting State. If you go by Article 22, then if anything not expressly provided in this convention, then same cannot be taxed in India, even if said sum comes under the definition of FTS as per Indian Tax laws. Insofar as, taxation of impugned payment under Article 7 as business profits, we find that since non-resident does not have permanent establishment in India, same cannot be taxed as business profits.

8. Be that as it may. The issue before us is not taxability of payment made by the assessee to non-resident entity for services rendered outside India as fees for technical services or not in terms of section 9(1)(vii) of the Act. The issue before us is disallowance of sum paid to non-resident without TDS u/s 40(a)(i) of the Act. Admittedly, the AO has brought amended explanation 9(2) with retrospective effect from 1-4-1976 by the Finance Act, 2010 and held payment made by the assessee as FTS u/s 9(1)(vii) of the Act and further, for non

TDS disallowed the same u/s 40(a)(i) of the Act. Therefore, to decide the issue, one has to understand the judgment of Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT, *(supra. The Hon'ble Supreme court while deciding the issue of FTS has considered pre-amended provisions of section 9(1)(vii) and held that* if any payment in the nature of FTS to be taxed in India, as per provisions of section 9(1)(vii) of the Act, then, both services rendered and services received to be in India. If services are rendered outside India, even such services are received in India then same cannot be brought to tax under Indian Income-Tax laws as per the judgment of Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT. Although, definition of FTS was amended by the Finance Act, 2010 with retrospective effect from 01.06.1976 but, the law prevailing at the time of making payment by the assessee to the non-resident was on the basis of judgment of Hon'ble Supreme Court which clearly held that payment made to a non-resident for services rendered outside India cannot be brought to tax in India as fees for technical services in absence of place of business / permanent establishment in India.

Since, there was clear law by the decision of Hon'ble Supreme Court, the assessee has made payment without deducting tax at source. Therefore, liability towards TDS cannot be fastened on the assessee on the basis of subsequent amendment to law with retrospective effect, because it was impossible on the part of assessee to deduct tax on income of non-resident because the assessee cannot foresee the amendment and deduct TDS on said payments. This view is supported by various decisions of Tribunal including decision of ITAT, Mumbai Bench in the case of Channel Guide India Ltd., vs. ACIT and the Ahmadabad Tribunal in the case of Sterling Abrasive Ltd., vs. ACIT and Agra Bench in the case of Metro & Metro vs. Addl.CIT, where the Tribunal by following the decision of Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT, held that at the relevant point of time, it was impossible on the part of the assessee to deduct tax at source on income of non-resident and thus, on that basis no disallowance can be made towards payment made to a non-resident u/s.40(a)(i) of the Act.

9. In this view of matter and considering facts and circumstances of this case, we are of the considered view that the ld.AO as well as the ld.CIT(A) were erred in disallowing payment made to a non-resident u/s.40(a)(i) of the Act for failure to deduct TDS u/s.195 of the Act. Hence, we direct the AO to delete addition made towards disallowance u/s.40(a)(i) of the Act.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the court on 24th September, 2021 at Chennai.

Sd/-	Sd/-
(वी दुर्गा राव)	(जी. मंजुनाथ)
(V. Durga Rao)	**(G. Manjunatha)**
न्यायिक सदस्य/Judicial Member	लेखा सदस्य /Accountant Member

चेन्नई/Chennai,
दिनांक/Dated, the 24th September, 2021

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त /CIT	5. विभागीय प्रतिनिधि/DR	6. गार्ड फाईल/GF.