IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D" NEW DELHI]

BEFORE SHRI G. S. PANNU, PRESIDENT

A N D

SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं/.I.T.A No. 5803/Del/2019
निर्धारणवर्ष/Assessment Year: 2013-14

JCIT [OSD] **Circle : 12 (2),** **New Delhi.**	**बनाम** **Vs.**	**M/s. Intertek India Pvt. Ltd., E-20, Block B-1, Mohan Co-op. Industrial Area, Mathura Road, New Delhi – 110 044.**
		PAN : AAACI6890F
अपीलार्थी / Appellant		**प्रत्यर्थी / Respondent**

निर्धारितीकीओरसे **/ Assessee by :**	Shri Pradeep Dinodia, F.C.A.; & Ms. Deepti Gupta, C. A.
राजस्वकीओरसे **/ Department by :**	Shri Sanjay Kumar, Sr. D. R.;

सुनवाईकीतारीख/ Date of hearing :	03/08/2022
उद्घोषणाकीतारीख/Pronouncement on :	29/09/2022

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. This appeal filed by the Revenue against the order of the ld. Commissioner of Income Tax (Appeals)-22 [hereinafter referred to as CIT (Appeals)] New Delhi, dated 30.04.2019 for the assessment year 2013-14.

2. The Revenue In its appeal has raised the following substantive ground of appeal:-

> "(a) On the facts & circumstances of the case and in law, the ld. CIT (A) has erred in deleting the addition made buy the AO of Rs.2,06,29,647/- by disallowing payment made for management services u/s 40(a)(i) ignoring the fact that as soon as advice/services received, such advice is available to the assessee company for making use of the same in the decision making process of management and financial decision etc., therefore, the technical knowledge expertise and knowhow was made available to the assessee and there is no continuity in treatment on expenses on management fees for A.Y. 2009-10, 2010-11, 2013-14 & 2014-15 on the payments made its group entity in UK.
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> (b) On the facts & circumstances of the case and in law, the ld. CIT (A) has erred in deleting the disallowance of this expenditure made buy the AO of Rs.2,06,29,647/- u/s 37 of the I. T. without considering that during the assessment proceedings, the assessee has submitted only some of invoices on a sample basis and not produced any other evidence.
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> (c) Whether on the facts & circumstances of the case and in law, the ld. CIT (A) has erred in deleting the addition of Rs.1,64,839/- made by the AO in respect of delayed payment of Employee's contribution to the EPF/ESI, by not appreciating that the Employees contribution to EPF/ESI is governed by the provision of section 2(24) r.w.s. 36(1)(va) and not by the section 43B of the I.T. Act.

3. The first ground relates to disallowance under section 40(a)(i) of the Income Tax Act, 1961 (the Act) in respect of payment made for management services. Briefly stated the facts are that during the course of assessment proceedings the assessee was required to furnish the details in respect of payments made outside India along with the nature of services received by the assessee. The assessee furnished that it had paid Rs.4,00,78,616/- to its group entities outside India under the head management charges. It was also stated that out of this amount Rs.1,94,48,969/- was paid to Intertek Testing Services

Hong Kong Limited on which TDS was deducted. The Assessing Officer noticed that the assessee made the following payments by the assessee to its group towards management services where the assessee deducted TDS:-

Sl. No.	Name of the entity.	Amount in Rs.
1	ITS Testing Services, UK Limited, London, Geneva Branch.	73,17,294
2	Intertek International Limited, UK.	35,59,301
3	Intertek Testing Services (Singapore) Pte Ltd.	54,80,512
4	Intertek USA Inc	33,32,480
5	Intertek Testing Services, NA, Inc, USA.	9,40,060

4. The assessee vide letter dated 7th December, 2016 submitted as under:-

- Certain entities within the Intertek group have specialized knowledge and/or capabilities in the field of executive, commercial, financial, marketing, information technology and administrative management systems and techniques.
- Since Intertek group entities constantly require various support services like finance, IT etc. as mentioned above and the fact that specialization in such support activities exist within the group, it is considered prudent and commercially expedient to take advantage of such specializations from within the group rather than sourcing the same from outside.
- With the above objective, a Global Management Services Agreement ('GMSA') was entered into between Intertek Testing Management Limited, UK ('ITM, UK'), a subsidiary of the Intertek

Group Plc and various entities of the Intertek group, assessee being a part of it. Copy of the GMSA and copies of invoices for management services (on sample basis) is enclosed as Annexure V.

- During the subject AY, pursuant to the GMSA, the assessee has availed management services which inter-alia includes Executive Services, Finance, Treasury and Tax Compliance, Information Technology and Administrative Management from its overseas group entities for better management of its business activities.

5. Justifying the non-deduction of TDS on the aforesaid payments the assessee submitted that provisions of the Income Tax Act provides that TDS is required to be deducted from payments made to non-residents only if such amounts are chargeable to tax under the provisions of the Act. It was contended before the Assessing Officer that it is legal position that by virtue of section 90(2) of the Act where the Government of India has entered into an agreement with the Government of any other country by granting relief of tax or as the case may be Avoidance of Double Taxation ('DTAA') then in relation to the assessee to whom such agreement applies the provisions of such DTAA shall apply to the extent which are more beneficial to the assessee. Therefore, it was contended that the provisions of DTAA over-ride the provisions of the Act to the extent these DTAA are favourable to the assessee.

6. The assessee further contended that the definition of Fees for Technical Services ('FTS') under the India UK DTAA and fees for included services (FIS) in the India USA DTAA covers only technical and consultancy services and does not include managerial services. Accordingly management charges which are in respect of managerial services availed by the assessee paid by the assessee to the foreign entity in USA and UK do not qualify as FIS and FTS as per the applicable DTAA. Reliance was placed on the decision of the Hon'ble Delhi High Court in the case of

Steria (India) Ltd. [TS-416-HC-216 (Del)]. Therefore, it was contended that since the term 'managerial services' is not specifically included in the definition of FTS in DTAA with UK and USA such services should not qualify as FS under the DTAA and, therefore, there was no requirement to deduct TDS while making such payments to the parties and consequently no disallowance should be made under section 40(a)(i) of the Act.

7. Without prejudice the assessee contended that even if 'managerial services' are considered as being included in the definition of FTS/FIS the same should still not be chargeable to tax in India in view of the presence of 'make available' claim in the definition of FTS/FIS. It was contended that the same is also applicable in respect of payment of management charges to foreign party in Singapore as definition of FTS in India Singapore DTAA also contends 'make available' company. Reliance was placed on the decisions of the ITAT in the case of Guy Carpenter & Co. Ltd. Vs. ADIT [15 taxmann.com 285 (Del)] which was subsequently confirmed by the Hon'ble Delhi High Court which was reported in [346 ITR 504]. CIT Vs. De Beers India Minerals (P) Ltd. [346 ITR 504 (Kar.)] and Raymond Limited Vs. DCIT [80 TTJ 120 (Mum)].

8. Not convinced with the submissions of the assessee the Assessing Officer placing reliance on the decision of the Chennai Bench of the Tribunal in the case of Foster Wheeler France S.A. [176 TTJ 521]; Cochin Bench of the Tribunal in the case of US Technology Resources (P) Ltd. [61 SOT 19] and the decision of the Hon'ble AIR in the case of Shell India Markets (P) Ltd. [18 taxmann.com 46] held that the payment made towards managerial services falls under "Fees for Technical Services" and are liable for TDS.

8. On appeal the ld. CIT (Appeals) considering the detailed submissions of the assessee furnished in the course of appellate proceedings and after analyzing the tax treaties applicable to the countries for which the assessee made payments to its AEs. and taking note of the fact that for assessment year 2010-11 the ld. CIT (Appeals) decided the issue in favour of the assessee, held that management charges paid by the assessee to its AEs do not fall under FTS and not liable to deduction of tax at source under section 195 of the Act.

9. The ld. DR strongly supported the order of the Assessing Officer. The ld. DR further submits that the Revenue did not file appeal for the assessment year 2010-11 where the CIT (Appeals) decided the issue in favour of the assessee in view of the meager disallowance. The ld. DR further submits that in subsequent years the assessee itself deducted TDS on the payments made towards managerial services to the entities in UK, Singapore and USA. The ld. Counsel for the assessee placed reliance on the order of the ld. CIT (Appeals). The ld. Counsel for the assessee further submits that even during the assessment year 2014-15 the issue was decided in favour of the assessee and the Revenue did not file appeal and accepted the order of the ld. CIT (Appeals). The ld. Counsel for the assessee further submits that the assessee has been making such management charges since 2006 through the Global Management Services Agreement (GMSA) entered between Intertek Management UK and various entities of the Intertek group.

10. Heard rival submissions perused the orders of the authorities below and the submissions made by the ld. Counsel. On perusal of the order of the ld. CIT (Appeals) we observe that the ld. CIT (Appeals) has dealt with this issue considering the elaborate submissions of the assessee and held that the payments made towards management services

to non-resident AEs by the assessee are not FTS and not liable for deduction of TDS under section 195 of the Act holding as under:-

7.2 It is submitted that from a plain reading of the Global management services agreement that the services are in the nature of standard support services i.e., human resources, legal, finance, tax and information technology. Ld. AR submitted that these are management services. In its submissions, the appellant has relied upon the following rulings of AAR in support of its contention that standard support services are not technical or consultancy but managerial in nature:

a. Measurement Technology Ltd. United Kingdom, In re [(2015) 60 taxmann.com 1 (AAR)]

b. M/s. Invensys Systems Inc. [AAR No. 796 of 2009]

7.3 On perusal of the above rulings, I find force in the appellant's stand that the services received by it are not technical or consultancy services. The entire focus of the AO that these services are specialized and the same are made available to the appellant. However, the AO has not brought on record either in the assessment order or in the remand report that such services do make available any technical knowledge/ experience/ skill to the service recipient. The scope of make available has been extensively discussed in the following judicial decisions relied upon by the Appellant:

- Guy Carpenter & Co. Ltd. vs ADIT, Circle 1(2), International Taxation, New Delhi [(2011) 15 taxmann.com 285 (Delhi)]
- CIT vs De Beers India Minerals (P) Ltd. [346 ITR 467]
- Raymond Limited vs Deputy CIT [80 TTJ 120] (Mumbai ITAT)

7.4 Based on an examination of the services received by the Appellant and the principles laid down in the above rulings, it is observed that the underlying services are routine in nature and do not enable the appellant to perform the functions in its own in the future. Thus, the make available condition is not satisfied and hence, these services do not qualify as FTS under the tax treaties. In case of UK and USA, DTAA, fees for technical services does not include managerial services. In the case of Singapore however, managerial services is included in the definition but that is subject to make available technical knowledge, experience, skill, knowhow or processes which enables the person acquiring the services to apply the technology contained.

7.5 In this regard, the AR has also submitted that in AY 2010-11, Ld. CIT(A) has decided this issue in its favour. I have carefully gone through the order of the CIT(A) for AY 2010-11 and observe that the same issue is decided by the Ld. CIT(A) in appellant's favour. The extract of the CIT(A) order is as follows:

"

10.3.5. Regarding the management fee of Rs. 3,30,000 and Rs. 548410 paid to M/s Intertek U.K., the appellant submitted that no TDS was to be deducted in respect of such payments u/s 195, in view of the specific provisions of India-U.K. Double Tax Avoidance Agreement Treaty. The appellant submitted that such services are not I in the nature of Fee for Technical Services (FTS) under the said treaty and pleased that accordingly no TDS was to be deducted thereon. The Ld. Counsel submitted that in terms of Article 4(c) of the Indo-UK DTAA, the term "fees for technical service" means, *"payment of any kind to any person in consideration for the rendering of any consultancy services, which 'make available' technical knowledge, experience, skill know-how or processes or consist of the development and transfer of a technical plan or technical design".*

It was submitted that this definition is similar to the one given in Article 12(4) of the India-US DTAA, where the meaning of the term "make available" has been explained in the Memorandum of Understanding. Reliance was placed in the decision of ***Boston Consulting Group (P) Ltd. 94 ITD 31 (ITAT Mumbai)*** *in this regard. On the scope of "make available", reliance was placed on the following decisions:*

(1) ***De Beers India Minerals (P) Ltd. [2012] 21 Taxmann.com 214 (Karnataka HC)***
(2) ***Guy Carpenter & Co. Ltd.[2012] 20 taxmann.com 21 (Delhi ITAT)***
(3) ***Raymond Ltd. Vs Dy.CIT [2002] 80 TTJ120 (Mumbai ITAT)***
(4) ***Intertek Testing Services India (P) Ltd.[2008] 307 ITR 418 (AAR)***

In view of this, it was submitted that no TDS was to be deducted on such payments as these are not in the nature of FTS. Further, it was pleaded that if such payment is treated as business income under the Act, then also it cannot be taxed under the treaty, as the payee did not have Permanent Establishment in India during the year.

10.3.6 On careful consideration of the provisions of Section 90(2) of the Act, read with the relevant provisions of Indo-UK DTAA, I find merit in the plea of the appellant and accordingly, I hold that such payments were not covered within the provisions of Section 195. in view of this, no disallowance under Section 40(a)(ia) was called for , which was erroneously done by the appellant in the computation of income. The ld. AO is directed to give allowance for the same. "

7.6 The facts and issues involved in the present appeal is identical to the facts of the case before the Ld. CIT(A for AY 2010-11 and in that year, the issue has been decided in favour of the appellant. Following the same, I agree with the appellant's contention that the management charges paid by it to its AEs are not liable for deduction of tax at source under section 195 of the Act based on the relevant provisions of the applicable tax treaties and in due deference to the case laws submitted by the appellant, the disallowance of management charges under section 40(a)(i) is deleted. The ground number 3 above is allowed.

11. None of the above findings of the ld. CIT (Appeals) were rebutted with evidences. On perusal of the assessment order it is noticed that the Assessing Officer gives a finding that the agreements show that the companies provided highly technical services and can be rendered only by a person who has high degree of expertise. It was also the observation of the Assessing Officer that the expertise which is available to the respective companies is made available to the assessee company for using the same in its managerial decision making process. While coming to such conclusion the Assessing Officer failed to refer to any specific clause of the agreement where the non-resident AE companies provide highly technical services. The Assessing Officer failed to list out what are the highly technical services the companies are providing to the assessee company. The Assessing Officer also failed to show that under which clause the expertise available with the companies is made available to the assessee company for using the expertise by the assessee in its managerial decision making process. We also observe that the issue has been decided in favour of the assessee during the assessment years 2010-11 and 2014-15 by the ld. CIT (Appeals) and the Revenue has accepted these decisions by not filing further appeals to this Tribunal.

It is also noticed that for the assessment year 2012-13 the Assessing Officer did not make any disallowance for non-deduction of TDS on management service charges paid by the assessee to its AEs. In the circumstances we do not see any valid reason to interfere with the findings of the ld. CIT (Appeals) in holding that the managerial services charges paid by the assessee to its non-resident AEs is not liable to TDS under the provisions of section 195 of the act. Thus, we sustain the order of the ld. CIT (Appeals) and reject ground No. (a) of grounds of appeal of the Revenue.

12. In ground No. (b) of the grounds of appeal of Revenue challenges the order of the ld. CIT (Appeals) in deleting disallowance of management charges disallowed by the Assessing Officer under section 37 of the Act.

13. On perusal of the order of the ld. CIT (Appeals) it is noticed that in the course of appellate proceedings remand report was called for by the ld. CIT (Appeals) on the additional evidences furnished by the assessee to prove whether the expenses were in fact incurred by the assessee for the purpose of its business.

14. The ld. CIT (Appeals) considering the remand report and the submissions of the assessee and the additional evidences furnished by the assessee deleted the disallowance of management charges made under section 37(1) of the Act observing as under:-

7.7 In the order, the AO has also disallowed management charges under section 37 of the Act by stating that the appellant did not produce any evidence (except for sample copies of invoices) to demonstrate that the services had actually been rendered by the AE's and how management charges were incurred wholly and exclusively for the business purpose of the Appellant.

7.8 During the appellate proceedings, the appellant has submitted detailed submissions and supporting documents in the form of invoices, email correspondences, copies of group policies etc as additional evidence. On examination of the same, it is clear that the management services had actually been rendered to the appellant and are incurred for the business purpose of the appellant. Also, it is observed that such services are routine and recurring in nature and qualifies as revenue expenditure. Further, it has been observed that the management charges have also been examined by the TPO during the Transfer Pricing assessment proceedings and no adverse inference was drawn i.e. the management charges have been accepted to be paid at arm's length price. On careful consideration of the above facts and examination of the supporting documents, I find force in the arguments put forward by the appellant in this regard. The AO is not justified in holding that management charges have not been incurred for the business purpose and therefore is not allowable under section 37. Accordingly, the disallowance of management charges under section 37 is deleted. The ground number 4 above is allowed.

15. On careful reading of the order of the ld. CIT (Appeals) we find that the ld. CIT (Appeals) has examined the evidences furnished and came to the conclusion that the expenses incurred towards management services are for the purpose of business and such services are routine and recurring in nature and qualify as Revenue expenditure. It is also the submission of the ld. Counsel for the assessee that the Assessing Officer in any of the earlier assessment years or in subsequent assessment years these expenses were disallowed invoking the provisions of section 37(1) of the Act.

16. In view of the above we do not see any infirmity in the order passed by the ld. CIT (Appeals) in allowing these expenses as Revenue expenditure incurred by the assessee for its business purposes. Ground No. (b) of grounds of appeal is rejected.

17. Coming to ground No. (c) of grounds of appeal, the Revenue challenges the order of the ld. CIT (Appeals) in deleting the disallowance made towards PF and ESI.

18. On perusal of the order of the ld. CIT (Appeals) we observe that the payments towards PF and ESI were made within due date for filing return of income under section 139 of the Act and the ld. CIT (Appeals) following the decision of the Hon'ble Delhi High Court in the case of CIT Vs. AIMIL Ltd. [321 ITR 508] held that there was no justification in making disallowance towards PF and ESI contributions. We see no infirmity in the order passed by the ld. CIT (Appeals). This ground of appeal is dismissed.

19. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on : **29/09/2022.**

Sd/-	**Sd/-**
(G. S. PANNU)	**(C. N. PRASAD)**
PRESIDENT	**JUDICIAL MEMBER**

Dated : 29/09/2022.

MEHTA

Copy forwarded to :

1. Appellant;
2. Respondent;

3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	22.09.2022
Date on which the typed draft is placed before the dictating member	27.09.2022
Date on which the typed draft is placed before the other member	29.09.2022
Date on which the approved draft comes to the Sr. PS/ PS	29.09.2022
Date on which the fair order is placed before the dictating member for pronouncement	29.09.2022
Date on which the fair order comes back to the Sr. PS/ PS	29.09.2022
Date on which the final order is uploaded on the website of ITAT	29.09.2022
Date on which the file goes to the Bench Clerk	29.09.2022
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	