INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE
SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA Nos. 2173 & 2174/Del/2023
Asstt. Years: 2020-21 & 2021-22

Ayesa Ingenieria Y Arquitectura S.A. D-99, 4th Floor, Sector-2, Noida, Uttar Pradesh 201301 PAN AAHCA8666J	Vs.	ACIT Int. Taxation Gurgaon
(Appellant)		**(Respondent)**

Assessee by:	Shri Vivek Sarin, Advocate Shri D.P.Singh, Advocate Shri D D Gupta, Advocate
Department by:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing:	07.03.2024
Date of pronouncement:	08.04.2024

O R D E R

PER ASTHA CHANDRA, JM

Both the appeals filed by the assessee are directed against two separate final assessment orders dated 31.05.2023 and 30.05.2023 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 **(the "Act")** in pursuance to the directions of Ld. Dispute Resolution Panel **("DRP")** pertaining to the Assessment Years **("AYs")** 2020-21 and 2021-22 respectively. Since common issues are involved in both the appeals, these were heard together and are disposed of by this common order.

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

AY 2020-21

"1. That in facts and circumstances of the case, the Ld. AO erred in law in making the addition of Rs. 1,83,71,951/-to the returned income of the appellant which is liable to be deleted.

2. That in facts and circumstances of the case, the Ld. AO erred in law in making addition of Rs. 1,83,71,951/- by applying provisions of section 7(3) of DTAA between India and Spain which is devoid of facts and merits of the case, hence hit addition made is liable to be deleted.

3. That in facts and circumstances of the case, the findings arrived at by the AO is perverse and based on erroneous assumptions, the Ld. AO failed to appreciate that the appellant company is working since 2009 as Branch Office in India, no special services being provided by the expatriates and there is no increase in revenue on YOY basis, the assessment order passed on the basis of pre-determined mind set of the Ld. AO and the same is not sustainable under law.

4. That in facts and circumstances of the case, the Ld. AO erred in law in considering the services between head office and Branch office as fees for Technical Services without appreciating that the condition of Make Available clause is not satisfied in transaction between head office and Branch office which is a pre-condition of Double Tax Avoidance Agreement between India and Spain read with protocol of Most Favored Nation (MFN), hence such transaction cannot be considered as Fees for Technical Services.

5. That in facts and circumstances of the case, the Ld. AO erred in law in considering the services between head office and Branch office as disallowable under Article 7(3) of DTAA between India and Spain without appreciating that the condition of Non-Discrimination Clause as per Article 26 of DTAA between India and Spain, hence such transaction cannot be disallowed under Article 7(3) of DTAA.

6. That in facts and circumstances of the case, the Ld. AO has erred in proposing addition in the hands of appellant company by completely failing to appreciate that in previous years assessments, contention of the appellant has been accepted by Income Tax Department and action of the Ld. AO leads to change of opinion which is not sustainable in law.

7. That in facts and circumstances of the case, the Ld. AO has erred in ignoring the part of the submission of the appellant made on 07.12.2022 which is against the principle of natural justice, hence the action of the Ld. AO is completely unjustified and illegal, additions proposed in draft assessment order are liable to be deleted.

8. *That in the facts and circumstances of the case, the entire salary amount payable to expatriate employees has suffered withholding tax under Section 192B of the Income Tax Act, 1961 and the same cannot be again subjected to withholding tax under Section 195 of the Income Tax Act.*

9. *That in facts and circumstances of the case, the Ld. AO completely fails to appreciate that even if services are in nature of Fees for Technical Services, it is a matter of deducting TDS under wrong head which cannot lead to disallowance u/s 40(a)(i) of Income Tax Act, 1961 and appellant cannot be treated as assessee in default u/s 201 of Income Tax Act, 1961."*

AY 2021-22

"1. That in facts and circumstances of the case, the Ld. AO erred in law in making the addition of Rs. 2,53,00,714/- to the returned income of the appellant which is liable to be deleted.

2. That in the facts and circumstances of the case, the entire salary amount payable to expatriate employees has suffered withholding tax under Section 192B of the Income Tax Act, 1961 and the same cannot be again subjected to withholding tax under Section 195 of the Income Tax Act.

3. That in facts and circumstances of the case, the Ld. AO erred in law in making addition of Rs. 2,53,00,714/ by applying provisions of section 7(3) of DTAA between India and Spain which is devoid of facts and merits of the case, hence addition made is liable to be deleted.

4. That in facts and circumstances of the case, the findings arrived at by the AO is perverse and based on erroneous assumptions, the Ld. AO failed to appreciate that the appellant company is working since 2009 as Branch Office in India, no special services being provided by the expatriates and there is no increase in revenue on YOY basis, the assessment order passed on the basis of pre-determined mind set of the Ld. AO and the same is not sustainable under law.

5. That in facts and circumstances of the case, the Ld. AO erred in law in considering the services between head office and Branch office as fees for Technical Services without appreciating that the condition of Make Available clause is not satisfied in transaction between head office and Branch office which is a pre-condition of Double Tax Avoidance Agreement between India and Spain read

with protocol of Most Favored Nation (MFN), hence such transaction cannot be considered as Fees for Technical Services.

6. *That in facts and circumstances of the case, the Ld. AO erred in law in considering the services between head office and Branch office as disallowable under Article 7(3) of DTAA between India and Spain without appreciating that the condition of Non-Discrimination Clause as per Article 26 of DTAA between India and Spain, hence such transaction cannot be disallowed under Article 7(3) of DTAA.*

7. *That in facts and circumstances of the case, the Ld. AO has erred in proposing addition in the hands of appellant company by completely failing to appreciate that in previous years assessments, contention of the appellant has been accepted by Income Tax Department and action of the Ld. AO leads to change of opinion which is not sustainable in law.*

8. *That in facts and circumstances of the case, the Ld. AO has erred in ignoring the part of the submission of the appellant made on 07.12.2022 which is against the principle of natural justice, hence the action of the Ld. AO is completely unjustified and illegal, additions proposed in draft assessment order are liable to be deleted."*

3. The assessee company is registered under the laws of Spain and operates in India through its branch office. The branch office is engaged in the business of providing engineering consultancy services to public and private bodies that are involved in the creation or renovation of all kinds of infrastructure such as transport infrastructure, water management, environment, architecture, town planning and renewable energy etc. The services of branch office are restricted to India only. For AY 2020-21 the assessee filed its return on 08.02.2021 and for AY 2021-22 on 15.03.2022 declaring total income at Rs. 5,08,46,350/- and Rs. 4,53,48,160/- under normal provisions of the Act and income of Rs. 3,97,93,333/- and Rs. 4,51,21,310/- under section 115JB of the Act respectively. The case of the assessee was selected for scrutiny through CASS and statutory notice(s) were issued and served upon the assessee. During the scrutiny proceedings from the perusal of Form 3CEB the Ld. Assessing Officer **("AO")** observed that the assessee (Branch Office) had paid Rs. 1,83,71,951/- in AY 2020-21

and Rs. 2,53,00,714/- in AY 2021-22 to its Head Office which the assessee categorised as reimbursement of salary expenses of expats. The Ld. AO issued a show cause notice dated 17.03.2022 for AY 2020-21 and 30.11.2022 in AY 2021-22 proposing to disallow the amount of Rs. 1,83,71,951/- and Rs. 2,53,00,714/- respectively under Article 7(3) of the India-Spain Double Taxation Avoidance Agreement **("India-Spain DTAA")** considering such amount(s) as fees for technical services **("FTS")**. The impugned amount(s) pertained to the amount paid by Head Office to the expats as part of their salary which was later on reimbursed by branch Office to Head Office. The assessee was asked to explain as to why expense of Rs. 1,83,71,951/- and Rs. 2,53,00,714/- be not disallowed under section 40(a)(i) of the Act. Vide response dated 22.03.2022 and 08.12.2022 the assessee contended that the above payments were on cost to cost basis reimbursement and the same were allowable under Article 7(3) of India-Spain DTAA and that disallowance under section 40(a)(i) is unwarranted for the following reasons:- (i) that salary of expats was reimbursed on cost to cost basis; (ii) that no income arise for the Head Office in India; (iii) that the assessee has a PE in India and income from such PE is liable to tax as Business Profits in India; (iv) that technical employees were deputed, however no technical services were rendered by the Head Office; (v) deputed employees were under command and control of the Branch Office; (vi) TDS was deducted under section 192 of the Act before making payment to the employees and taxing the same in the hands of Head Office would lead to double taxation; (vii) Article 7 'Business Profits' of the tax treaty is applicable instead of Article 13 (Royalty and FTS) in the current case & (viii) Branch Office is liable for taxation for income of Head Office and TDS cannot be deducted on payment to self. The response of the assessee was considered but not found tenable by the Ld. AO. The Ld. AO therefore proceeded to pass the draft assessment order under section 144C(1) of the Act pertaining to AY 2020-21 and AY 2021-22 on 23.12.2022 proposing to make addition of Rs. 1,83,71,951/- and Rs. 2,53,00,714/- respectively on the ground that impugned payments made to Head Office by Branch Office are in the nature

of FTS and the same are assessable in the hands of the assessee which have not been offered to tax.

3.1 Aggrieved, the assessee filed objections before the Ld. DRP who vide its direction dated 13.04.2023 concurred with the views of the Ld. AO for the reasons that - a) no strict employer/employee relationship between the Indian entity and expatriate employee; b) the reimbursement fee takes the nature of fees for technical services; c) payments are being made by the Branch Office to the Head office for getting quality technical services; d) the payments made to the expatriate employees has not suffered TDS since it is a case of cost to cost reimbursement from the Branch Office to Head Office; e) the objection on account of non-discrimination clauses under Article 26 of DTAA between India-Spain is not tenable and f) the objection on account of Most Favoured Nation is not applicable in absence of any separate notification with respect to the same.

3.2 Pursuant to the directions of the Ld. DRP, the Ld. AO passed the final assessment order under section 143(3) r.w. section 144C(13) of the Act making an addition of Rs. 1,83,71,951/- and Rs. 2,53,00,714/- to the returned income of the assessee for AY 2020-21 and 2021-22 respectively holding that payments made to the Head Office are in the nature of FTS and hence chargeable to tax under the provisions of the Act as well as under the India-Spain DTAA. Therefore the assessee was liable to withhold tax before making payment(s) to its Head Office. Since the assessee did not deduct tax on such payments the same are liable to be disallowed under section 40(a)(i) of the Act.

4. Aggrieved, the assessee is in appeal before the Tribunal and all the grounds of appeal relates thereto.

5. Ld. AR submitted that some of the expats who are national of Spain were working in the Branch Office in India during the relevant AYs. Major part of the salary of these expats was paid by the Branch Office in India and only some part of the salary was paid by the Head Office in Spain which was subsequently reimbursed by Branch Office to Head Office on cost to cost basis i.e without any mark-up. Copy of employment contracts and appointment letters of expats are placed on record by way of additional evidence at pages 4-22.

6. The Ld. AR submitted that these expats were working for the clients and contracts of Branch Office in India under complete supervision of Branch Office. These expats are residing in India since many years and are resident of India by virtue of Section 6 of the Act. Branch Office has accounted for the entire salary (salary paid in India as well as in Spain) to the expats as salary expense in its P&L account. Branch Office has deducted TDS under section 192 of the Act on the entire salary paid to such expats either in India or outside India and it has filed TDS returns for the relevant AYs evidencing the same. Form 16 issued to the expats for AY 2020-21 is placed on record by way of additional evidence at pages 23-97. Copy of acknowledgement of TDS returns filed by the assessee for relevant AYs are placed at pages 3-26 of compilation of documents. He submitted that the Ld. AO himself has acknowledged this fact that TDS was deducted under section 192 of the Act on salary paid to the expats. The Ld. AR relied on the decision of the co-ordinate Bench of Delhi Tribunal in the case of Serco India Pvt. Ltd. vs. DCIT rendered on 27.06.2023 in ITA No. 1432/Del/2016 in support of its contention that disallowance of salary reimbursement cost under section 40(a)(i) is unwarranted.

7. The Ld. DR on the other hand relied on the order of the Ld. AO/DRP.

8. We have heard the Ld. Representative of the parties and perused the records. The assessee has challenged the disallowance made by the Ld. AO under section 40(a)(i) of the Act on account of failure to withhold tax under section 195 of the Act on salary cost reimbursement to Head Office by the Branch Office treating such receipt of Head Office as FTS. It is an undisputed fact that the impugned payments made by Branch Office to Head Office are the reimbursement of salary cost of the expats working in the Branch Office in India on cost to cost basis without any mark-up. The entire salary payments made to the expats in India as well as outside India have been subject to TDS under section 192 of the Act which fact has been corroborated by Form 16 issued to the expats. We also note that the assessee has duly filed its return of income in India for the relevant AYs a copy of acknowledgment of which has been placed on record on page 1-2 of compilation of documents in respect of its business income attributable to its Branch Office in India. It is the case of the Revenue that the assessee has received the reimbursement amount for technical services and therefore it is FTS subject to TDS under section 195 of the Act. Nothing has been brought on record by the Ld. AO to show that Head Office has provided any technical services to the Branch Office and in consequence thereof has paid FTS. The Ld. AR has submitted before the lower authorities as well as before us that Branch Office is the real and economic employer of expats which is evident from the employment contract entered into between the Branch Office and the expats. The Branch Office is responsible for payment of salary to the expats in India as well as outside India. These expats are working for the Branch Office under its complete supervision since many years and have become resident of India by virtue of their continuous stay for many years in India. The expats are paid salary by the Branch Office after deduction of applicable TDS thereon which is duly reflected in Form- 16 and IT returns filed by the expats in India. This factual position on record also remains uncontroverted by the Revenue.

9. The moot question before us is whether provisions of section 40(a)(i) of the Act can be invoked to disallow an expense in respect of which due taxes have been withheld and deposited into the Govt. Account within the prescribed time period. We have perused the decision of the Co-ordinate Bench of Delhi Tribunal in the case of Serco India Pvt. Ltd. (supra) wherein the ITAT on similar set of facts held that where the assessee has deducted the tax at source under section 192 of the Act and deposited the same into the Govt. Account within specified time as prescribed under the Act, provisions of section 40(a)(i) of the Act are not applicable. The relevant paras of the decision of the Tribunal (supra) are reproduced hereunder:-

> *"21. Let us also consider, whether under the facts and circumstances of this case, disallowance u/s 40(a)(i) of the Act is justified or not. For ready reference conditions/parameters for making a disallowance under this provision, reads as under:*
>
> ***(i) Tax is deductible at source under Chapter XVII-B; and***
> *(ii)* ***Such tax has not been deducted or, after deduction, has not been paid*** *on or before the due date specified in sub-section (1) of section 139.*
>
> *From the provisions of this section, it is clear that disallowance u/s 40(a)(i) can be made only, when both the above conditions are satisfied.* ***Firstly****, the Tax is deductible at source under Chapter XVII-B which includes section* ***192*** *of the Act,* ***in which the Assessee has deducted the TDS. Secondly*** *such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139,* ***which is not the case here.*** *For clarity, we reiterate that the Assessee in this case has deducted the tax at source u/s 192 of the Act and deposited with the Government Account, within specified time as prescribed in the Act, hence not covered under the provisions of section 40(a)(i) of the Act.*
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> ***21.1*** *The Hon'ble tribunal in ACIT, Circle-1(1)(1), Bangaluru vs. AON Specialist Services (P.) Ltd. [2020] 116 taxmann.com 368 (Bangalore – Trib.) (PB-695 to 702)[Para 22 of the order] also dealt with the identical issue and held as under:*
>
> *In this case also the Assessee has reimbursed payment of salary of employees made by M/s AON Limited, UK and the Assessee had deducted tax at source on the salary expenses u/s 192 of the Act. According to the Assessing Officer, these payments were in the nature of Fees for Technical Service rendered and therefore, the Assessee*

ought to have deducted tax at source u/s 195 of the Act. Since, the Assessee did not deduct tax at source u/s 195, the AO disallowed the amount u/s 40(a)(i) of the Act. The DRP, however, deleted the addition made by the AO by following the decision of the Hon'ble ITAT in Assessee's own case in respect similar payments in ITO vs. AON Specialist Services (P.) Ltd. [2014] 43 taxmann.com 286 (Bangalore – Trib.) where it was held that the Assessee was real and economic employer of employees seconded from UK Company and reimbursement of salary cost etc. to UK company was without any profit element, it could not be regarded as income chargeable in hands of the UK company and therefore, reimbursement made by the Assessee to UK company was not liable for TDS u/s 195 of the Act.

In the appeal filed by the Revenue, the Hon'ble ITAT, after referring to the decisions in the cases of CIT vs. S. K. Tekriwal [2014] 46 taxmann.com 444 (Calcutta) and CIT, Manglore vs. Kishore Rao & Others (HUF) [2017] 79 taxmann.com 357 (Karnataka), observed that no disallowance u/s 40(a)(i) of the Act can be made as the Assessee has deducted tax at source u/s 192 of the Act as it is not a case of non-deduction of tax. The Hon'ble ITAT concluded as under:

> *"22. We have given a careful consideration to rival submissions. It is not disputed by the revenue that in respect of the payments made to Aon Services Corporation, USA towards reimbursement of salary expenses the Assessee has duly deducted tax at source u/s 192 of the Act. In fact, in the letter dated 2-03- 2015 the Assessee has highlighted this aspect in para-2 at page-3 of the aforesaid letter. Though, the Assessee has not taken a specific plea that no disallowance u/s 40(a)(ia) of the Act can be made for short deduction of tax at source, yet the fact remains that the aforesaid plea is a legal plea which can be adjudicated on the basis of facts already available on record. As far as the merits of the plea raised by the Assessee is concerned, we are of the view, that decision of 36 ITA No. 1432/Del/2016 Serco India Pvt. Ltd. the Hon'ble Karnataka High Court in the case of Kishore Rao (supra) clearly supports the plea of the Assessee. The decision rendered in case of S. K. Tekriwal (supra) by the Hon'ble Karnataka High Court, taking a view that there can be no disallowance of expenses u/s 40a(ia) of the Act for short deduction of tax at source has been followed by the Hon'ble Karnataka High Court. In the given facts and circumstances of the case, we are of the view that the order of CIT(A) has to be upheld. Therefore, the question whether the payment in question has to be regarded as fees for technical services rendered or mere reimbursement of expenses does not call for any adjudication. Accordingly, ground no. 7 to 9 raised by the revenue are dismissed."*

21.2 *In Pr. CIT-2 v. M/s Boeing India Pvt. Ltd. [2023] 146 taxmann.com 131 (Delhi) [PB 912 to 920] [Para 11 of the judgment], the Hon'ble Court on the identical facts as involved in this case, has held as under:*

> *"11. As far as disallowance under section 40(a)(ia) of the Act is concerned, this Court finds that there is no dispute that the Assessee has deducted tax at source under section 192 of the Act. This Court is in agreement with the opinion of the ITAT that Section 195 of the Act has no application, once the nature of payment is determined as salary and deduction has been made under section 192 of the Act."*

21.3 *The Hon'ble Courts in various cases including mentioned above, consciously held that even where tax has been deducted, under bona fide belief, under wrong provisions of TDS, the provisions of section 40(a)(i) cannot be invoked. Even if there is a difference of opinion as to the deductibility of TDS falling under different provisions, no disallowance can be made by invoking provisions of section 40(a)(i) of the Act. The Judgment passed by Calucutta High Court in the case of CIT vs. S. K. Tekriwal [2014] 46 taxmann.com 444 (Calcutta) (PB-688 to 689) is relevant on this issue, which has been subsequently followed by Hon'ble high Court of Delhi in the case of Pr. CIT vs. Future First Info. Services Private Limited [2022] 447 ITR 299 (Del.) [PB 815 to 819].*

21.4 *Coming to the arguments made by the Ld. DR by making emphasis on the decision of High Court of Kerala in the case of CIT1, Kochi v. P V S Memorial Hospital Ltd. [2015] 60 taxmann.com 69 (Kerala)to the effects that deduction under a wrong provision of law will not save an Assessee from the rigors of section 40(a)(ia) of the Act, we observe that admittedly there are contrary judgments on this issue and it is also admitted fact after the decision of the Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd. [1973] 88ITR 192 (SC)it is not res-intergra that when two views are possible in respect of an issue from different High Courts, then view which is in favour of the Assessee needs to be followed. Hence we are of the considered view that in this case on this count as well, no disallowance u/s 40(a)(i) is warranted."*

10. In light of the factual matrix and legal position set out above and respectfully following the decision of the Tribunal (supra) in the case of Serco India Pvt. Ltd., in our considered view, disallowance of salary cost reimbursement by Branch Office to the assessee by the Ld. AO under section 40(a)(i) is not justified as TDS has been duly deducted on entire salary payments to the expats and deposited into the Govt. Account within the prescribed time limit. Consequently addition of Rs. 1,83,71,951/- and

Rs. 2,53,00,714/- for AY 2020-21 and 2021-22 respectively to the returned income of the assessee is hereby deleted. Ground No. 8 & 9 in AY 2020-21 and ground No. 2 in AY 2021-22 are allowed.

11. The other grounds raised by the assessee have either become academic in view of our decision above or are argumentative in nature and not pressed before us and hence not adjudicated upon.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 8th April, 2024.

sd/-	**sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 08/04/2024
Veena

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
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	