आयकर अपीलीय अधिकरण 'ए" न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य एवं
माननीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

आयकरअपील सं./ ITA No.890/Chny/2023
(निर्धारणवर्ष / Assessment Year: 2015-2016)

The Deputy Commissioner of Income Tax, Corporate Circle 1 (1) Chennai 600 034.	**Vs.**	M/s. Aspire Systems India Private Limited, Old No.4, New No.7, IInd Trust Link Road, Raja Annamalaipuram, Chennai 600 028.
		[PAN AACCA 4543M]
(**अपीलार्थी**/Appellant)		(**प्रत्यर्थी**/Respondent)

अपीलार्थी की ओर से/ Appellant by	**:**	Shri Nilay Baran Som, IRS, CIT.
प्रत्यर्थी की ओर से /Respondent by	**:**	Shri Jharna B. Harilal, C.A.
सुनवाई की तारीख/Date of Hearing	**:**	29.08.2024
घोषणा की तारीख /Date of Pronouncement	**:**	04.09.2024

आदेश / O R D E R

PER MANU KUMAR GIRI (Judicial Member)

The appeal is arising out of the order dated 30.05.2023 of the Commissioner of Income Tax (Appeals), NFAC, Delhi (in short the ''ld. CIT(A)''). The assessment was framed by the DCIT, Corporate Circle 1(1), Chennai for the assessment year 2015-16 u/s.143(3) r.w.s.92CA of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 26.12.2018.

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

''1.The order of the CIT(A) is contrary to law, facts and circumstances of the case.

2. The ld.CIT(A) erred in deleting the disallowance made u/s 40(a)(i) of the IT Act without appreciating the fact that the services rendered by ASUS and ASFZE fall within the ambit of Section 9(1)(vii) of the Act and are also subject to explanation of Sec.9(2) of Act..

3. The ld.CIT(A) erred in deleting the disallowance made u/s 40(a)(i) of the IT Act of the IT Act without appreciating the fact that the outsourcing charges paid by the assessee company for availing those services falls under the definition of 'fees for included services' as per clause 4 of article 12 of India-USA DTAA.

4. The Ld. CIT(A) erred in deleting the disallowance made u/s 40a(i) of the IT Act without appreciating the fact that the fees for technical services received by the ASUS and ASFZE was deemed to accrue or arise in India and the assessee is liable for deduction of tax on the said payments u/s 195 of the Act.

5. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored''.

3. Brief facts of the case are as under:-

The assessee company filed its original return of income for AY 2015-16 on 30.03.2016 admitting a total income of Rs.46,14,48,511/-. The case was selected for scrutiny through CASS under limited category. Notice u/s 143(2) was 11.04.2016 and served on the appellant. The assessee during the previous year under consideration, has entered into international transaction with its Associate Enterprise to the tune of Rs.51,48,33,075/- and specific Domestic transaction to the tune of Rs.10,43,08,339/-. A reference was made to Transfer Pricing Officer-1(1) ('TPO' in short) Chennai to determine the Arm's Length price for the transactions after necessary approvals as prescribed. The TPO vide order dated 17.10.2018 held that no adjustment is required to be made to International transactions of the

assessee. During assessment proceedings ld.AO recorded the entire facts verbatim as stated by the assessee.

4. The ld.AO after considering the detailed submissions of the assessee dated 29.11.2018 has made the disallowance u/s.40(a)(i) in the assessment order dated 26.12.2018 as under:

> *'The facts of the case in the current year are identical to the facts of the discussion made in the above paras. Following* ***the stand taken by the department in the earlier years****, the sum of Rs.21,22,77,767/- is hereby disallowed and added back to the returned income".*

5. Being aggrieved by the assessment order, the assessee preferred an appeal before the ld. CIT(A). Before the ld. CIT(A), the assessee contended that payment made to non-resident service providers for rendering installation and testing service is not fees for technical service as defined u/s. 9(1)(vii) of the Act. The assessee further contended that assuming for a moment, said payment is in the nature of FTS, but it falls under the exception to section 9(1)(vii)(b) of the Act, because the services were utilized in the business or profession carried on by said person outside India or for the purpose of making or earning any income from any source outside India. Since, the appellant has paid consultancy charges to ASUS in USA for rendering services to appellant clients at USA, said payment is made outside India and for rendering services outside India. The assessee had also taken support from Article 12 of India USA DTAA and argued that unless make available technical knowledge, experience, skill, know-how or processes or consist of the development

and transfer of a technical plan or technical design, any payment made to service provider cannot be treated as fees for technical services.

6. The ld. CIT(A), after considering relevant submissions of the assessee and also taken note of various judicial precedents, held as under:

> *'"5.2.6 Having considered entire facts of the case and view take by Ld.CIT(A) in three preceding A.Ys. as mentioned in aforesaid paras, I see no reason to deviate from the stand taken by Ld. CIT(A)s as their decisions are based on proper appreciation of facts and position of law on this identical issue. Hence, addition so made in terms of section 40a(i) of I.T.Act deserves to be deleted. As a result, grounds Nos.2 to 7 are allowed".*

Aggrieved, the Revenue is in appeal before us.

7. The ld. Departmental Representative Mr.Nilay Baren Som, CIT also adopted the same line of argument as was taken in earlier years as under:

> *''9. that the ld. CIT(A) erred in deleting the disallowance made u/s. 40(a)(i) of the Act without appreciating the fact that the services rendered by non-residents fall within the ambit of provisions of section 9(1)(vii) of the Act and are also subject to explanation to section 9(2) of the Act. The ld.CIT-DR, further argued that outsourcing charges paid by the assessee company for availing services comes under the definition of fees for technical services as per clause 4 of Article 12 of India-USA DTAA and thus, as per the provisions of section 195 of the Act, the assessee ought to have deducted TDS while making payment to non-residents. Since, the assessee has failed to deduct TDS on payments made to non-residents, the Assessing Officer has rightly disallowed said payment u/s. 40(a)(i) of the Act, but the ld. CIT(A) without appreciating relevant facts simply deleted additions made by the Assessing Officer."*

8. Before us, the ld.AR of the assessee referred the order of the Co-ordinate Bench of Tribunal for Assessment Years 2010-11, 2017-18, 2016-17, 2012-13 & 2013-14 in ITA Nos. 1069, 1070 & 1071/Chny/2022, 159 & 315/Chny/2023 titled DCIT Vs. M/s. Aspire Systems India dated 13.12.2023 wherein the basic facts recorded by the Tribunal are as under:

''4. The brief facts of the case are that, the assessee M/s. Aspire Systems India Pvt. Ltd. (ASI) is engaged in the business of software development and provides complete lifecycle services, ranging from new product development and product advancement to product migration, re-engineering, sustenance and support. M/s. Aspire Systems Inc. (ASUS), incorporated in USA and Aspire Systems FZE, incorporated in UAE for the installation of software developed by the appellant at the client's site. The assessee company has paid outsourcing charges/consultancy charges to ASUS and Aspire Systems FZE for rendering installation and testing services to assessee's clients at USA and said payment has been made without deducting applicable TDS as per the provisions of section 195 of the Income-tax Act, 1961 (hereinafter referred to as "the Act").

5. The assessee has filed its return of income u/s. 139(1) of the Act. The cases were selected for scrutiny and during the course of assessment proceedings, the Assessing Officer noticed that outsourcing charges paid by the assessee to nonresident service providers is in the nature of 'fee for technical services' (FTS) as defined u/s. 9(1)(vii) of the Act and thus, called upon the assessee to explain as to why payment made to non-residents without deducting tax at source u/s. 195 of the Act cannot be disallowed u/s. 40(a)(i) of the Act. In response, the assessee submitted that outsourcing charges paid to non-residents for rendering installation and testing services are in the nature of support services without any technical knowledge and thus, cannot be considered as fees for technical services within the ambit of provisions of section 9(1)(vii) of the Act. Since, payment made to non-resident service providers is not a FTS, the assessee is not liable to deduct TDS as per section 195 and thus, said payment cannot be disallowed u/s. 40(a)(i) of the Act.

6. The Assessing Officer, however was not convinced with explanation furnished by the assessee and according to the Assessing Officer, payments made to non-residents are subject to TDS as per the provisions of section 195 of the Act, because said payments are in the nature of fees for technical services as per the provisions of section 9(1)(vii) of the Act. Since, the appellant has failed to deduct TDS on payment made to nonresidents, the Assessing Officer held that said payment needs to be disallowed u/s. 40(a)(i) of the Act. The Assessing Officer has discussed the issue at length in light of provisions of section 9(1)(vii) of the Act and Explanation to section 9(2) of the Act along with Article 12 of the India-USA DTAA and observed that payments made to non-residents for rendering services does not come under exception to section 9(1)(vii)(b) of the Act. The Assessing Officer, further observed that in absence of Permanent Establishment (PE) or branch office outside India, the business cannot be said to be carried on outside India in order to exclude said payments under the exception to section 9(1)(vii)(b) of the Act. The Assessing Officer, took support from the decision of DIT vs Rio Tinto Technical Services [2012] 340 ITR 507, and observed that, if the fees received from the third party satisfies and is covered by the Explanation 2 to section 9(vii) of the Act, then it is fee for technical services and it is immaterial whether the assessee is made available technical information or not. Therefore, rejected arguments of the assessee and disallowed payment

made to non-residents towards outsourcing/consultancy charges u/s. 40(a)(i) of the Act for non-deduction of tax at source u/s. 195 of the Act".

9. The Co-ordinate Bench of Tribunal, in assessee's own cases for Assessment Years 2010-11, 2017-18, 2016-17, 2012-13 & 2013-14 in ITA Nos. 1069, 1070 & 1071/Chny/2022, 159 & 315/Chny/2023 titled DCIT Vs. M/s. Aspire Systems India vide order dated 13.12.2023 held as under:

''12. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The assessee is in the business of software development service for offshore customers and for this purpose, had entered into a contract with ASUS for providing installation and testing services. As per the agreement between the assessee and ASUS, the service providers carried out testing, implementation, tutoring and demonstrating services. The work carried out by ASUS represents the services done on behalf of the assessee for a client located at USA. If you go by the nature of service provided by nonresidents, it appears that it is not purely technical services as defined, but a support service which may fall under the definition of fees for technical services. However, any payment made to non-resident are in the nature of fees for technical services has to be analysed in light of provisions of section 9(1)(vii) of the Act and exception provided therein. As per exception to section 9(1)(vii) of the Act, payment made by a person who is a non-resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India is outside the scope of section 9(1)(vii) of the Act. From a plain reading of Clause (b) of section 9(1)(vii) of the Act, it is evident that the services rendered by nonresident clearly falls under the exception whereby the same is not deemed to accrue or arise in India in case said services are utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India. In the present case, on perusal of contract between the assessee and the non-resident services providers, it is clear that payment made by the assessee to non-residents is directly related to services rendered to the customers outside India and income earned from such customers, in turn form part of the business of the assessee. Therefore, in our considered view it falls under the category of services utilized for a business or profession carried on by such person outside India. Further, the second aspect of exception as per Clause (b) to section 9(1)(vii) of the Act is that services utilized for the purpose of making income from any source outside India. In the instant case, services were carried on outside India by non-residents for offshore customers, because the customers of the appellant are situated outside India and services were utilized for earning income from source outside India. Therefore, in our considered view, the second part of exception as per section 9(1)(vii)(b) of the Act is also satisfied. Thus, from the

above it is undoubtedly clear that the services were not rendered in India, the person to whom the payment was made is a non-resident and finally an amount paid is a business income to the recipient who does not have any permanent establishment in India. Therefore, in our considered view payment made to non-residents towards services rendered in connection with installation and testing services was not chargeable to tax in India as it is covered under exception to section 9(1)(vii)(b) of the Act. Thus, provisions of section 195 of the Act are not attracting and question of disallowance u/s. 40(a)(i) of the Act would not arise.

13. Coming back to observations of the Assessing Officer. According to the Assessing Officer, when fees for services were utilized in India, then it does not come under the ambit of exception u/s. 9(1)(vii)(b) of the Act. In our considered view, the Assessing Officer is erred in contending that there should be a permanent establishment or branch office outside India to come under the purview of exception u/s. 9(1)(vii)(b) of the Act, because it is nowhere mentioned in the section that there should be a branch or permanent establishment outside India to come under the ambit of exception u/s. 9(1)(vii)(b) of the Act. Therefore, we are of the considered view that payment made to non-resident for rendering contract services outside India comes under the purview of section 9(1)(vii)(b) of the Act and thus, same is not chargeable to tax in India. Since, the income of non-resident is not chargeable to tax in India, the assessee need not to deduct TDS u/s. 195 of the Act on said payment. Since, the assessee is not required to deduct TDS u/s. 195 of the Act, payment made to non-residents cannot be disallowed u/s. 40(a)(i) of the Act.

14. Coming back to the arguments of the Assessing Officer that Clause (b) of Article 12 of India-USA DTAA is satisfied. Article 12 of India-USA DTAA deals with Royalties and fee for included services. As per Clause (b) of Article 12 in order to treat any payment under Article 12, make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design is required. Concept of make available has been explained by various Courts including the Hon'ble Supreme Court. The term make available means, the person acquiring the technical service is enabled to independently apply the technology. Therefore, where the recipient of technical services does not get equipped with the knowledge or expertise and the recipient would not be able to apply it in future independently without support from the service provider, it will not be a case of technical service having been made available. The fact that the provisions of services may require technical input by the person providing the service which does not mean that technical knowledge, skills etc are made available to the person purchasing the service, if it is performing a technical service does not amount to make available technical knowledge, skill etc. This fact has been explained by the Hon'ble High Court of Karnataka in the case of CIT & ITO vs De Beers India Minerals (P) Ltd [2012] 72 DTR 82 (Kar). Therefore, in our considered view payment made by the assessee to non-resident service providers cannot be brought under Article 12 of India-USA DTAA.

15. The Assessing Officer had also raised another contention in light of provisions of section 197 r.w.s. 195(2) of the Act in light of decision of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT (Supra). We have gone through the decision of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT (Supra) and find that said case law is not applicable for the simple reason that, it was a case of deduction of lower TDS on payment made to non-resident in light of composite contract entered into between non-resident and resident entities. The said composite contract was not only for supply of plant and machinery and equipment in India, but also comprised the installation and commissioning of the same in India. Erection and commission services gave raise to income taxable in India. There is no dispute on this aspect. The only issue raised in that case was whether TDS was applicable only to income payments or to composite payments which has no element of income embedded under those facts. The Hon'ble Supreme Court held that in view of provisions of section 195(2) of the Act, the appellant is required to file an application u/s. 197 of the Act, for determining the amount of tax needs to be deducted on payment made to non-resident. In the instant case, neither any services were rendered nor was any payment made to the non-residents in India. Further, non-resident does not have any permanent establishment in India. The payment made by the assessee is towards work carried out at USA and FZE. There is no question of any composite payment nor does it include any component of any income chargeable to tax in India as per the provisions contained in section 4, 5 & 9 of the Act. Therefore, we are of the considered view that the case laws relied upon by the Assessing Officer is not applicable to the facts of the present case.

16. At this stage, it is necessary to consider the decision of Hon'ble Supreme Court in the case of GE India Technology Centre Pvt Ltd Vs CIT [2010] 327 ITR 456, where the Hon'ble Supreme Court after considering its earlier decision in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT (Supra), held that in order to apply the provisions of section 195(2) r.w.s. 197 of the Act, income of non-resident should be chargeable to tax in India. In the present case, since income of non-resident is not chargeable in India, the assessee need not to make an application u/s. 195(2) r.w.s. 197 of the Act for determining the amount of TDS to be deducted on payment made to non-resident. Thus, we are of the considered view that the Assessing Officer is erred in relying upon the decision of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT (Supra).

17. At this stage, it is relevant to consider the decision of ITAT, Chennai Benches in assessee's own case for assessment years 2011-12 & 2014-15. The Tribunal after considering relevant facts has set aside the issue of disallowance u/s. 40(a)(i) of the Act for non-deduction of TDS u/s. 195 of the Act, to the file of the CIT(A) for fresh adjudication. The Tribunal while deciding to set aside the issue has followed its earlier decision in assessee's own case for assessment year 2009-10. We find that for assessment year 2009-10, the issue has been remitted back to the file of the ld. CIT(A), after considering certain new evidences filed by the assessee which were not before the Assessing Officer or the CIT(A). But, for the impugned assessment years, the CIT(A) has considered all evidences filed by the assessee while adjudicating

the issue of disallowance u/s. 40(a)(i) of the Act and thus, in our considered view, the issue need not to be set aside to the file of the CIT(A) for fresh adjudication.

18. In this view of the matter and considering facts and circumstances of this case, we are of the considered view that payments made by the assessee to non-residents for rendering installation and testing services fall under the provisions of section 9(1)(vii)(b) of the Act and thus, not liable to tax in India. Since, income of non-resident is not taxable in India, the assessee need not to deduct TDS u/s. 195 of the Act on payment made to non-resident service providers. Since, the assessee is not required to deduct TDS u/s. 195 of the Act, the question of disallowance of said payments u/s. 40(a)(i) of the Act does not arise. The ld. CIT(A) after considering relevant facts has rightly deleted additions made by the Assessing Officer and thus, we are inclined to uphold the findings of the ld. CIT(A) and reject grounds taken by the revenue for all assessment years".

10. The ld.AR of the assessee took the same line of argument as referred in co-ordinate bench order supra.

11. Having heard the rival submissions and perused the records of the lower authorities, paper book and order of the Co-ordinate bench (supra), we are of the considered view that the order of Co-ordinate Bench of Tribunal, in assessee's own cases for Assessment Years 2010-11, 2017-18, 2016-17, 2012-13 & 2013-14 in ITA Nos. 1069, 1070 & 1071/Chny/2022, 159 & 315/Chny/2023 titled DCIT Vs. M/s. Aspire Systems India vide order dated 13.12.2023 is candidly apply in this year also. The facts in this case are similar to above AYs as quoted by the Co-ordinate bench.

12. Therefore, in the light of entire conspectus of matter and respectfully following the order of co-ordinate bench of Tribunal in Assessee's own case

for Assessment Years 2010-11, 2017-18, 2016-17, 2012-13 & 2013-14 in ITA Nos. 1069, 1070 & 1071/Chny/2022, 159 & 315/Chny/2023 titled DCIT Vs. M/s. Aspire Systems India vide order dated 13.12.202316, we dismiss the appeal of the Department.

13. In the result, the appeal of the Department in ITA No.890/Chny/2023 for assessment year 2015-2016 stands dismissed.

Order pronounced in the court on 4th day of September, 2024 at Chennai.

Sd/-	**Sd/-**
(मनोज कुमार अग्रवाल)	**(मनु कुमार गिरि)**
(MANOJ KUMAR AGGARWAL)	**(MANU KUMAR GIRI)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

चेन्नई Chennai:
दिनांक Dated :04-09-2024
KV

आदेश की प्रतिलिपि अग्रेषित /Copy to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai/Coimbatore/Madurai/Salem.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF