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[2015] 56 taxmann.com 387 (Mumbai - Trib.)

IT/ILT-I: Where assessee, a joint venture between UPS WWF, USA, and 'J' Ltd., made reimbursement of debtor collection charges to US based company, in view of fact that had assessee made direct payment to payee, it would not have fallen within ambit of 'fee for technical services', assessee was not required to deduct tax at source while making payment in question

IT/ILT-II: Where assessee made reimbursement of legal expenses to UPS WWF in respect of services taken from Titus, i.e., an Indian company, without deducting tax at source, since payment was made to resident legal firm, matter was to be remanded back to Assessing Officer with a direction to verify as to whether Titus had paid tax on impugned payments by incorporating same in their respective income

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[2015] 56 taxmann.com 387 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'L'

Deputy Commissioner of Income-tax, 9 (3), Mumbai

v.

UPS Jetair Express (P.) Ltd.*

R.C. SHARMA, ACCOUNTANT MEMBER
AND VIVEK VARMA, JUDICIAL MEMBER
IT APPEAL NOS. 3311 & 3447 (MUM.) OF 2013
[ASSESSMENT YEAR 2008-09]
FEBRUARY 27, 2015

I. Section 9 of the Income-tax Act, 1961, read with article 12 of DTAA between India and USA - Income - Deemed to accrue or arise in India (Royalties and fee for technical services) - Assessment year 2008-09 - Assessee, an Indian company, was a joint venture between UPS WWF Inc., USA and 'J' Ltd. - It was engaged in business of international integrated transportation services - Based on a global arrangement 'RMS', USA provided debtor collection services to assessee rendered outside India - UPS WWF initially made payment to RMS, which was then reimbursed by assessee on cost-to-cost basis without any mark-up - During course of assessment proceedings, Assessing Officer opined that UPS WWF was only a conduit or a facilitator and assessee was not exonerated from its obligation to make TDS as per section 195 read with section 9(1)(vii) and Explanation to section 9(2) - Whether in view of fact that had assessee made direct payments to RMS for debtor collection services, it would not have fallen within ambit of Royalties or Fees for Technical Services under Act as well as under Article 12 of India-USA Tax Treaty, provisions of section 195 were not applicable - Held, yes [Para 12][In favour of assessee]

II. Section 9, read with section 40(a)(ia) of the Income-tax Act, 1961, read with article 7 of the DTAA between India & USA - Income - Deemed to accrue or arise in India

(Business income) - Assessment year 2008-09 - During relevant year, assessee made reimbursement of legal expenses to UPS WWF in respect of services taken from Titus, i.e., an Indian company, without deducting tax at source - Assessing Officer opined that UPS WWF was only facilitator and payment so made was subject to TDS as per section 195, read with section 9(1)(vii) and Explanation to section 9(2) - Assessing Officer thus made disallowance under section 40(a)(i) - Whether since payment was made to a resident legal firm, matter was to be remanded back to Assessing Officer with a direction to verify as to whether Titus had paid tax on impugned payments by incorporating same in their respective income and, if tax had already been paid, no disallowance could be made in assessee's hands under section 40(a)(ia) - Held, yes [Para 16][Matter remanded]

FACTS-I

- The assessee was Indian company, was a joint venture between UPS WWF Inc., USA and 'J' Ltd. It was engaged in the business of international integrated transportation services.
- Based on a global arrangement, 'RMS', USA provided debtor collection services to assessee outside India.
- UPS WWF initially made payment to RMS, which was then reimbursed by the assessee on cost-to-cost basis without any mark-up.
- During the course of assessment proceedings, the Assessing Officer opined that UPS WWF was only a conduit or a facilitator and assessee was not exonerated from its obligation to make TDS as per section 195 read with section 9(1)(vii) and *Explanation* to section 9(2). Since no tax was deducted the Assessing Officer disallowed the payment under section 40(a)(i).
- The Commissioner (Appeals) held that payment being a managerial services, was taxable under section 9(1)(vii). He thus confirmed the disallowance made by Assessing Officer.
- On second appeal:

HELD-I

- From the record, it was found that invoices issued by UPS WWF on assessee are matched back to back with the invoices raised by the RMS. It was a clear case of reimbursement without any profit element. There was mere provision of services which is not enough for bringing to same in the tax net. The services should also make available technical knowledge skill, experience, know or process.
- If the assessee would have made direct payments to RMS for debtors collection services, it would not fall within the ambit of Royalties or Fees for Technical Services under the Act as well as under Article 12 of the India-USA Tax Treaty. Thus, provisions of section 195 did not get attracted. Accordingly, there is no merit in the disallowance made by the Assessing Officer under section 40(a)(i). [Para 12]

FACTS-II

- During relevant year, assessee made reimbursement of legal expenses to UPS WWF in respect of services taken from Titus, i.e., an Indian company, without deducting tax at source.
- The Assessing Officer opined that UPS WWF was only facilitator and the payment so made was subject to TDS as per section 195 read with section 9(1)(vii) and *Explanation* to section 9(2).

- The Assessing Officer thus made disallowance under section 40(a)(i).
- The Commissioner (Appeals) confirmed said disallowance.
- On second appeal:

HELD-II

- As regards payments for legal services, invoices raised by UPS WWF on assessee can be matched back-to-back with the invoices raised by Titus, the payment so made was in the nature of reimbursement. However, since payment was made to resident legal firm, same was subject to TDS and liable for disallowance under section 40(a)(i). However, keeping in view the purpose behind insertion of second proviso by Finance Act, 2012 in section 40(a)(ia), it can be said to be declaratory and curative in nature and therefore, it should be given retrospective effect from 1-4-2005, being the date from which sub-clause (ia) of section 40(a) was inserted by Finance (No. 1) Act, 2004. [Para 15]
- In view of the above, the matter is restored back to the file of Assessing Officer to verify as to whether the Titus had paid tax on the impugned payments by incorporating the same in their respective income. If the Assessing Officer finds that the Titus has already paid tax by including such payments in its income, no further tax can be collected from assessee which amounts to double taxation and no disallowance can be made in the hands of the assessee under section 40(a)(ia). [Para 16]

CASES REFERRED TO

CIT v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320/177 Taxman 81 (Bom) (para 9), *DIT (IT)* v. *WNS Global Services (UK) Ltd.* [2013] 214 Taxman 317/32 taxmann.com 54 (Bom) (para 9), *CIT* v. *Angel Capital & Debt Market Ltd.* [IT Appeal (L) No. 475 of 2011] (Bom) (para 9), *Nathpa Jhakri Joint Venture* v. *Asstt. CIT* [2010] 37 SOT 160 (Mum) (para 9), *Dy. CIT* v. *Lazard India (P.) Ltd.* [2010] 41 SOT 72 (Mum) (para 9), *Asstt. CIT* v. *Modicon Network (P) Ltd.* [2007] 14 SOT 204 (Delhi) (para 9), *Dr. Adi R.Nazir* v. *ACIT* [IT Appeal No.10556/Mum/2011, dated 26-11-2014](para 15), *Dy. CIT* v. *Ananda Marakala* [2014] 48 taxmann.com 402/150 ITD 323 (Bang. - Trib.) (para 15) and *Rajeev Kumar Agarwal* v. *Addl. CIT* [2014] 45 taxmann.com 555/149 ITD 363(Agra - Trib.) (para 15).

Vivek A. Perampurna *for the Appellant.* **Sunil Moti Lala** and **Keerthiga R. Sharma** *for the Respondent.*

ORDER

R.C. Sharma, Accountant Member - These cross appeals filed by the Revenue and assessee against the order of CIT(A) dated 5-2-2013 for the assessment year 2008-09, in the matter of order passed u/s.143(3) of the IT. Act.

2. Rival contentions have been heard and record perused. The briefly stated facts and background of the case are that the assessee is an Indian Company and is a joint venture between UPS International Forwarding Inc., USA and Jetair Private Limited with shareholding of 60% and 40% respectively. It is engaged in the business of international express delivery services. The assessee filed its Return of Income for Assessment Year (AY) 2008-09 on 30 September 2008 declaring a total income of Rs.5,47,02,122 under Section 139(1) of the Act. In the assessment, the Assessing Officer ('AO') disallowed the following expenditure:

i. Reimbursements of Rs.34,45,995 at cost to UPS Worldwide Forwarding Inc. (UPSWWF') treated as taxable income and disallowed under Section 40(a)(i) of the Act.

ii. Reimbursements of Rs.36,69,834 at cost to UPSWWF treated as taxable income and disallowed under Section 40(a)(i) of the Act.

iii. Advertisement and public relation expenses of Rs.20,05,985 disallowed under Section 37(1) of the Act.

iv. Disallowance of depreciation of Rs.22,22,745 claimed under Section 32 of the Act' on the assets purchased from UPSWWF.

3. By the impugned order the CIT(A) deleted disallowance of advertisement expenditure of Rs.20,05,985/- but confirmed the addition with respect to reimbursement of Rs.34,45,995/- to UPS Worldwide Forwarding Inc. (UPS WWF) towards debtors collection services from RMS, USA as well as legal services of Rs.36,69,834/- from Titus, which was disallowed by the AO u/s.40(a)(i). The CIT(A) also confirmed the disallowance of depreciation of Rs.22,22,745/- u/s.32 on the assets imported from UPSWWF.

4. Against the above order of CIT(A), both assessee and revenue are in appeals before us.

5. The assessee in its appeal (i.e. ITA No.3447/M/2013) has taken following grounds :—

"Ground No.1-Reimbursements of Rs.34,45,995/- at cost to UPS Worldwide Forwarding, Inc. ('UPSWWF'), USA, towards debtors collection services from Receivable Management Services, USA ('RMS') disallowed under Section 40(a)(i) of the Act.

Ground No.2-Reimbursements of Rs.36,69,834/- at cost to UPSWWF, USA, towards legal services from Titus disallowed under Section 40(a)(i) of the Act.

Ground No.3-Disallwoance of depreciation of Rs.22,22,745/- under Section 32 of the Act on the assets imported from UPSWWF."

6. The revenue in its appeal (i.e. ITA No.3311/M/2013), has taken solitary ground, which reads as under :—

"1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance of advertisement expenses of Rs.20,05,985/- on the basis that the assessee had produced evidences in support of the said expenses, even though the assessee could not conclusively establish that the advertisement services for which payment was made, were actually received by it.

2. The appellant prays that the order of the CIT(A) on the grounds be set aside and that of the Assessing Officer be restored."

7. Rival contentions have been heard and record perused. The assessee is a joint venture, engaged in the business of international integrated transportation services. The assessee company has branches spread across several locations in India and all accounting entries relating to receivables/debtors is done in Mumbai head office, based on a global arrangement, Receivables Management Services Inc. ('RMS'), USA provided debtor collection services to assessee. These services were rendered by RMS outside India. RMS has their collection schedule according to which they make calls to customers of assessee, chase them for payments, make reminder calls, inform and update the assessee about the status of collections etc. UPS Worldwide Forwarding Inc. initially makes payment to RMS, which is then reimbursed by the assessee on cost-to-cost basis without any mark-up. During the year under consideration, assessee made payment of Rs.34,45,995/- to UPSWWF for services rendered by RMS. During the course of scrutiny assessment the AO observed that UPSWWF is only a conduit or a facilitator and assessee is not exonerated from its obligation to make TDS as per section 195 r.w.s9(1)(vii) and Explanation to section 9(2). Since no tax was deducted, the AO disallowed the payment u/s.40(a)(i).

8. By the impugned order, the CIT(A) held that payment being a managerial services, is taxable u/s.9(1)(vii) and that Article 12(4)(b) of India-USA DTAA is not applicable since there is no make

available of technical knowledge or experience.

9. It was argued by ld. AR that since the invoices raised by UPSWWF on assessee can be matched back-to-back with the invoices raised by RMS, the payment is reimbursement in nature, without any profit element and is hence not taxable. Reliance is placed on the following decisions for the proposition "Payment by way of reimbursement of expenses incurred on behalf of payer is not income chargeable to tax in the hands of payee and hence there is no disallowance . under Section 40(a)(i) :

i. *CIT* v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320/177 Taxman 81 (Bom)

ii. *DIT (IT)* v. WNS Global Services (UK) Ltd. [2013] 214 Taxman 317/32 taxmann.com 54 (Bom)

iii. *CIT* v. *Angel Capital & Debt Market Ltd.* [ITA (L) No. 475 of 2011]

iv. *Nathpa Jhakri Joint Venture* v. *Asstt. CIT* [2010] 37 SOT 160 (Mum)

v. *Dy. CIT* v. *Lazard India (P.) Ltd*. [2010] 41 SOT 72 (Mum)

vi. *Asstt. CIT* v. *Modicon Network (P) Ltd*. [2007] 14 SOT 204 (Delhi)

10. As per ld. AR, the payment so made is not taxable in India under Article 12 of India-USA Treaty, insofar as services provided should also make available technical knowledge, skill, experience, know-how or process.

11. Ld. DR contended that had the assessee felt that payment was not chargeable to tax then he would have recourse to section 195(2)/195(3) and 197. He further relied on the orders of the lower authorities for the disallowance so made.

12. We have considered rival contentions and gone through the orders of the lower authorities. From the record, we found that invoices issued by UPSWWF on assessee are matched back to back with the invoices raised by the RMS. It was a clear case of reimbursement without any profit element. We also found that there was mere provision of services which is not enough for bringing to same in the tax net. The services should also make available technical knowledge skill, experience, know or process. If the assessee would have made direct payments to RMS for debtors collection services it does not fall within the ambit of Royalties or Fees for Technical Services under the Act as well as under Article 13 of the India-USA Tax Treaty and hence provisions of Section 195 does not get attracted. Accordingly, we do not find any merit in the disallowance made by the AO u/s.40(a)(i) of the Act.

13. With regard to disallowance of Rs.36,69,834/- paid to the UPSWWF for services rendered by Titus, we found that assessee has obtained legal services, payment for which was initially made by UPSWWF and were later on reimbursed by assessee. The AO observed that UPSWWF is only facilitator. The payment so made is subject to TDS as per Section 195 r.w.s.9(1)(vii) and Explanation to section 9(2). Accordingly, disallowance was made u/s.40(a)(i). By the impugned order, the CIT(A) confirmed the disallowance.

14. It was also argued by ld. AR that Titus being a resident law firm, is liable to tax in India. In view of proviso to Section 40(a)(i), in case of tax has been paid by payee, no disallowance is warranted in the hands of the payer u/s.40(a)(i) of the Act.

15. We have considered rival contentions and found that invoices raised by UPSWWF on assessee can be matched back-to-back with the invoices raised by Titus, the payment so made was in the nature of reimbursement. However, since payment was made to resident legal firm, same was subject to TDS and liable for disallowance u/s.40(a)(i). However, keeping in view the purpose behind insertion of second proviso by Finance Act, 2012 in Section 40(a)(ia), it can be said to be declaratory and curative in nature and therefore, it should be given retrospective effect from 1-4-2005, being the date from which sub clause (ia) of section 40(a) was inserted by Finance (No.1)

Act, 2004. This view is propounded by various benches of the Tribunal which are as under :—

(*i*) *Dr. Adi R.Nazir* v. *ACIT* [IT Appeal No.10556 (Mum.) of 2011, dated 26-11-2014];

(*ii*) *Dy. CIT* v. *Ananda Marakala* [2014] 48 taxmann.com 402/150 ITD 323 (Bang), and

(*iii*) *Rajeev Kumar Agarwal* v. *Addl. CIT* [2014] 45 taxmann.com 555/149 ITD 363 (Agra)

16. In view of the above discussion, we restore the matter back to the file of AO to verify as to whether the Titus has paid tax on the impugned payments by incorporating the same in their respective income. If the AO finds that the Titus has already paid tax by including such payments in its income, no further tax can be collected from assessee which amounts to double taxation and no disallowance can be made in the hands of the assessee u/s.40(a)(ia). We direct accordingly.

17. With regard to disallowance of depreciation on assets imported by assessee in the form of computers, scanners, printers from UPSWWF of Rs.42,98,029/-, the AO disallowed assessee's claim of depreciation by observing that assessee has not furnished any evidence in the form of customs clearance certificate, bill of entry etc. As per AO it is not verifiable as to whether the goods have been actually imported by assessee and payment has been made to UPSWWF. By the impugned order, the CIT(A) confirmed the action of the AO, against which assessee is in further appeal before us.

18. Ld. AR drew our attention to the statement of facts evidencing furnishing of documents discussed by the AO. We found that payment has been made by assessee to the custom authority while importing the assets. The payment for purchase of computers so made has been accepted by TPO. We, therefore, do not find any merit in the action of the lower authorities for declining the claim of depreciation on the assets so imported.

19. The CIT(A) has deleted disallowance of advertisement expenses of Rs.20,05,985/- after having the following observations :—

> "6.3 I have considered the facts and circumstances of the case and also the rival submission of the appellant vis-a-vis finding of the Assessing Officer, carefully. I find that Ld. Assessing Officer has wrongly disallowed such genuine expenditure for want of some evidences whereas appellant has relevant evidences in support of its contention. I also find that Transfer Pricing Officer has considered such expenses and has not passed any adverse remarks. Appellant is able to demonstrate with the evidences the genuineness of the expenditure. The bills of Ogilvy Public Relation World Wide reveals the expenditure therefore I find force in the arguments of the appellant. Appellant also gets support from the decision of Hon'ble Delhi ITAT in the case of Cushman & Wakefield India Pvt. Ltd. vs. ACIT (2012) 135 ITO 242 (Del). Thus. considering the facts of the case and genuineness of expenditure addition so made of Rs.20,05,985/- is directed to be deleted from the assessment."

20. We have considered rival contentions and found that assessee has paid a sum of Rs.20,05,985/- to UPSWWF for advertisement services rendered by Ogilvy. Vide submission dated 25-11-2011 and 7-12-2011, the assessee has submitted all the relevant copies of invoices, articles, media release published in leading newspapers and news channels, demonstrating the advertising services rendered by Ogilvy during the year and the same was for the purpose of assessee's business. After recording detailed finding at para 6.3, as reproduced above, the CIT(A) has deleted the disallowance. The finding of the CIT(A) has not been controverted by ld. DR by brining any positive material on record. We also found that similar payments were made by the assessee in the A.Y.2007-08 and 2010-11, which was allowed by the AO. Accordingly, we do not find any infirmity in the order of CIT(A) for deleting the disallowance of advertisement expenses of Rs.20,05,985/-.

21. In the result, appeal of the assessee (ITA No.3447/M/2013) is allowed in part, whereas appeal of the Revenue (ITA No.3311/M/2013) is dismissed.

SUNIL

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*Partly in favour of assessee.