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INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1. Whilst determining Arm's Length Price for payment of royalty, TPO cannot replace the assessee and question its business decision for such payment

PCIT vs. SI Group India Limited [(TS-525-HC-2019(BOM)] - Income Tax Appeal No. 447 of 2017

Facts

1. The assessee was engaged in the manufacture and sale of organic chemicals and phenolic resins having wide range of industrial applications. It had entered into a royalty agreement with its holding company for exclusive license for production and sale of the abovementioned products and supply of all know how related to new technology for the same and agreed to pay 2% of the net sale amount by way of royalty.

2. The TPO held that the assessee had not used any technology which was purchased and for which royalty was paid and made adjustment by adopting the ALP as Nil primarily on the ground that the assessee had not derived any specific benefits out of such technology, nor the assessee had received any incremental benefits on account of payment of such royalty amount.

3. The CIT(A) held that the TPO could not have judged the justification for purchase of the knowhow and further based on benchmarking analysis showing arithmetic mean of royalty rates as a percentage of turnover of broadly comparable companies to be 4.31% (which was submitted as additional evidence), the CIT(A) held that the assessee had established that such purchase was at Arm's Length Price. Thus, it deleted the adjustment.

4. The Tribunal confirmed the view of the CIT(A) relying upon the Co-ordinate bench decision in the assessee's own case for earlier AY wherein it was held that it was not open to the TPO to simply brush aside the benchmarking done by the assessee and adopt nil value.

5. Aggrieved, the Revenue filed an appeal before the Court against Tribunal's order.

Held

1. The Court held that TPO could have applied any of the specified methods for determining Arm's Length Price of the transaction, in case he was of the opinion that

the purchase of knowhow made by the assessee from the AE was not at arm's length. Instead of carrying out any such scientific exercise, the TPO went on to the justification of the purchase made in the context of the incremental benefit earned by the assessee out of such knowhow. This was clearly not within the purview of the TPO. The TPO could not replace the assessee and question its business decision.

2. In the context of the purchase being at arm's length, it was noted that based on the benchmarking analysis submitted as additional evidence, it was proved that the price paid by the assessee was at arm's length.

3. Accordingly, Revenue's appeal was dismissed.

2. TPO was not justified in making adjustment to the entire segment of manufacturing activity without restricting the same to the international transaction

PCIT vs. Bunge India Pvt. Ltd. [TS-526-HC-2019(Bombay)] - ITA 445 of 2017

Facts

1. The Assessee-company was engaged in the business of processing of oil seeds, manufacturing and trading in edible oils, de-oiled cake, crude oil, refined oil, hydrogenated oil and dealing in other agricultural commodities. The assessee had imported raw material from its AE.

2. The TPO made an adjustment of ₹ 48.65 crores to the entire segment of manufacturing activities instead of making the adjustment to only international transactions, thus having the effect of reducing the import price by 54.27%.

3. The Tribunal, relying on *CIT vs. Tara Jewels Exports P. Limited (2016) 381 ITR 404 (Bom),* held that the TPO was not justified in making adjustment to the entire segment of manufacturing activity without restricting the same to the international transaction.

4. Aggrieved, the Revenue filed an appeal before the Court against Tribunal's order.

Held

1. The Court upheld the Tribunal's finding noting that the decision in the case of Tara Jewels *Exports P. Limited (2016) 381 ITR 404 (Bom)* (followed by the Tribunal) had also been followed subsequently in the case of *CIT vs. Krupp Industries India P. Ltd. (2016) 381 ITR 413 (Bom)* and *CIT vs. Alstom Projects India Ltd. (2017) 394 ITR 141 (Bom).*

2. Accordingly, it dismissed Revenue's appeal.

3. SIP Technologies and Exports Ltd. is not a "persistent" loss making entity since it had suffered loss in only one out of three years. Genesys International Corporation Ltd., engaged in geospatial services, and Coral Hubs Ltd., having different operating model - not comparable to an entity providing design, engineering and testing services. Apitco Ltd., being functionally dissimilar - not comparable to an entity providing business support services

PCIT vs. John Deere India Pvt. Ltd. [TS-567-HC-2019(Bombay)] – ITA No. 63 of 2017

Facts

1. The assessee was engaged in providing software development services, ITES and sales support services to its group entities under three divisions viz. (i) Software Development; (ii) Design, Engineering & Testing, and

(iii) Business Support Services. The TPO made adjustment to all the three services rendered.

With respect to Software Development Services

2. The assessee had selected 23 comparables with average margin of 14.84%. The TPO retained 9 companies which were selected by the assessee and introduced 5 companies, resulting in operating margin of 24.63%. The DRP upheld the TPO's order. The Tribunal allowed assessee's appeal and excluded the following comparables –

— Bodhtree Consulting Ltd. as it was not engaged exclusively in Software development;

— eZest Solutions Ltd. as it was engaged more in ITES and that too in the nature of KPO services;

— Helios and Matheson Information Tech Ltd. and Kals Information Systems as the Co-ordinate Bench in assessee's own case for an earlier year had held them to be functionally different and there was no material change in the activities of the assessee and the functions of the comparables;

— FCS Software Solutions Ltd. as it was earning abnormally high profits in the assessment year under consideration as compared to the profits earned in earlier financial year

The Tribunal also included SIP Technologies and Exports Ltd. in the list of comparables, rejecting Revenue's contention that it was a persistent loss making entity. It held that 'persistent loss' means, continuous loss for more than 3 years and not loss in only one year.

With respect to Design, Engineering and Testing Services

3. The assessee had selected 11 comparables. The TPO accepted only 3 comparables and arrived at net operating margin of 31.62%. The DRP upheld TPO's order. The Tribunal allowed assessee's appeal and excluded the following comparables –

— Coral Hubs Ltd. noting that it had different business spheres and different operating models

— Genesys International Corporation Ltd. as it was engaged in geospatial services and thus, functionally different

With respect to Business Support Services

4. The assessee had selected 18 Companies as comparables. However, the TPO accepted only 7 comparables and included 2 more companies as comparables. The DRP upheld TPO's order. The Tribunal allowed assessee's appeal and excluded Apitco Ltd. as it was engaged in micro enterprises development, Skill development and Project Related Services, etc., including Infrastructure planning and development along with energy related service and cluster development, and thus, was functionally different.

5. Aggrieved, the Revenue filed an appeal before the Court against Tribunal's order

Held

With respect to Software Development Services

1. The Court upheld the Tribunal's order for exclusion of Bodhtree Consulting Ltd., E Zest Solutions Ltd., Kals Information System Ltd. and FCS Software Solutions Ltd., relying on its earlier decision in *PCIT vs Barclays Technology Centre India (P) Ltd* [ITA No. 1384 of 2015 decided on 26th June, 2018] wherein the said comparables were excluded under similar circumstance. It also upheld the Tribunal's order for exclusion of Helios and Matherson Information Technology Ltd. and Kals Information Solutions Ltd., relying on its earlier decision in *PCIT vs. John Deere India (P) Ltd* [ITA No. 902 of 2016 decided on 14th January, 2019]

2. It also rejected Revenue's plea for exclusion of SIP Technologies and Exports Ltd., noting that it had suffered loss only in one out of the last three years under consideration and thus was not constantly loss making company.

With respect to Design, Engineering and Testing Services

3. The Court noted that Coral Hubs Ltd was engaged in E-Publishing which was different from activities carried out by assessee, had abnormally high profit margin and had different operating models. Accordingly, it upheld Tribunal's finding that the said company was functionally different and thus was to be excluded.

4. The Court noted that Genesys International Corporation Ltd. was engaged in geospatial services and thus the Tribunal had held it to be functionally different from the assessee. Accordingly, it upheld the Tribunal's finding.

With respect to Business Support Services

5. It upheld Tribunal's finding that Apitco Ltd. being functionally different from the assessee was to be excluded.

6. Accordingly, the appeal filed by the Revenue was dismissed.

4. Motilal Oswal Investment Advisory, Sundaram Finance distribution Ltd., Integrated Capital Service Ltd., Brescon Advisors, Khandwala Securities Limited and Axis Private Equity Ltd. - not comparable to an entity providing investment advisory services

Pr. CIT vs. Goldman Sachs (India) Securities Pvt. Ltd. [TS-428-HC-2019 (Delhi)] - ITA No. 1130 of 2018

Facts

1. The assessee-company was engaged in securities broking, investment banking, underwriting and other financial services business in India. For benchmarking the international transaction of providing investment advisory services to its AE, the assessee had selected 10 comparables. The TPO rejected comparables selected by assessee and selected his own 8 comparables which resulted in arithmetic mean of 62.50%. The DRP upheld TPO's order.

2. The Tribunal allowed assessee's appeal and excluded the following comparables selected by TPO

— Motilal Oswal Investment Advisory as it was engaged in merchant banking.

— Sundaram Finance Distribution Ltd as it did not have any employees and had outsourced its activities

— Integrated Capital Service Ltd. as it was rendering advisory and consultancy services in the area of merger acquisition and reconstruction of business. It also rejected Revenue's plea that the same should not be excluded as the assessee itself had included it in its TP study.

— Brescon Advisors as it mostly used its own fund for making investments and the overall profile of the company was not functionally similar.

— Khandwala Securities Limited as it was also engaged in corporate advisory services and was very akin as security and stock brokers. Also, the annual report of the company showed that its performance was affected by global crises and resultant market melt-down.

— Axis Private Equity Ltd as it was engaged in asset management services and its related party transactions were more than 90%.

3. Aggrieved, Revenue filed an appeal against Tribunal's order.

Held

1. The Court upheld the Tribunal's order excluding Motilal Oswal Financial Services as comparable, relying on the case of *PCIT vs. NVP Venture Capital India (P.) Ltd. (2018) 100 taxmann.com 3 (Bombay)* wherein it was held that the said company was engaged in Merchant banking business.

2. Similarly, it upheld exclusion of Sundaram Finance Distribution Limited relying on the decision in case of *PCIT vs. Aptara Technology (P.) Ltd. (2018) 92 taxmann.com 240 (Bombay)* wherein also the said comparable was excluded under similar circumstance.

3. The Court rejected Revenue's plea for inclusion of Integrated Capital Service Ltd. solely on the ground that the same was included by the assessee in its TP study. It held that it had been consistently taking the view that it was open for the assessee to bring correct facts on record and claim the exclusion of the said comparable.

4. It also upheld the exclusion of Brescon Advisors, Khandwala Securities Ltd. and Axis Private Equity Limited based on Tribunal's findings.

5. Accordingly, the appeal filed by the Revenue was dismissed.

B. Tribunal Decisions

5. Whether fees for executive search are not taxable as FTS or royalty under the India-Netherlands tax treaty – Held: No, in favour of the assessee

Spencer Stuart International BV vs. DCIT [TS-333-ITAT-2019(Mum)] Assessment Year 2014-15

Facts

i) The assessee, a non-resident company, had a wholly owned subsidiary in India. The assessee is engaged in the business of executive search services as well as providing Spencer Stuart Technology software and related services to its group concerns worldwide and third party franchisees. The assessee had two streams of income from India, namely, licence fee and executive search fee.

ii) The assessee entered into a 'licence agreement' with its subsidiary in terms of which subsidiary had been granted licence to use trademark, trade name, logos and the right to use the software owned by the assessee and certain other support services. In terms of the agreement, the assessee was entitled to receive a licence fee which was offered as royalty under the Act as well as under the tax treaty.

iii) The assessee had also entered into a service agreement in terms of which the subsidiary agreed to provide, on principal to principal basis, support services to each other in relation to executive search assignments. In terms of the said arrangement, the assessee received consideration which was treated as business income. The assessee claimed that the said income was not taxable as FTS under Article 12(5) of the tax treaty since the said services neither 'made available' any technical knowledge, experience, skill, know-how or processor did it constitute development and transfer of a technical plan or technical design. The assessee contended that income by way of executive search services were not for services which were ancillary or subsidiary to the property rights for which licence fees was paid.

iv) There was no dispute about the taxability of licence fee received by the assessee. However, with respect to executive search fee, the Assessing Officer (AO) observed that it was to be treated as FTS in terms of *Explanation* 2 to Section 9(1)(vi) of the Income-tax Act (the Act). Further, such fee was for services which are ancillary and for the application or enjoyment of the right, property or information for which

the 'licence agreement' was entered into and, therefore, though it was in terms of a separate 'service agreement' yet it constituted FTS in terms of Article 12(5)(a) of the tax treaty.

v) The AO held that the amount of the executive search fee received by the assessee was in the nature of FTS under Article 12(5)(a) as well as under Article 12(5)(b) of the tax treaty. Alternatively, the AO held that it was to be treated as royalty under Article 12(4) of the tax treaty read with clause (iv) of Explanation 2 to Section 9(1)(vi) of the Act. The Dispute Resolution Panel (DRP) upheld the order of the AO.

Decision

On asseessee's appeal, the Tribunal relied on the assessee's own case of earlier year where it was held that:

i) The licence agreement which resulted in earning of royalty income (which has been offered to tax) and the service agreement (which resulted in earning executive search fee) were separate and distinct agreements constituting different sources of income.

ii) The principal business of the Indian subsidiary was to carry out or execute the mandate of executive searches and thus the executive search fee generating activities cannot be treated as ancillary or subsidiary to the licence agreement.

iii) The licence fee payable in terms of the licence agreement was a percentage of search fee, which was earned by the Indian subsidiary from the execution of executive search mandate during a particular year. Thus, the executive search fee was not taxable as FTS in terms of Article 12(5)(a) or (b) of the tax treaty.

iv) The Tribunal on reference to the Advance Pricing Agreement (APA) entered into by the subsidiary observed that the 'licence agreement' and the 'service agreement' between the assessee and the subsidiary are separate and distinct of each other. Further, in the context of the arm's length price (ALP) of the transactions, the APA makes a distinction between the payment of licence fee and executive search fee. There was a complete dichotomy between the nature and characterisation of transactions accepted in the APA in the context of Indian subsidiary *vis-à-vis* the tax authority in the present case. Ostensibly, it does not need any more emphasis that the nature and characterisation of the amount in the present case has correspond to what has been accepted by the tax authorities in the case of the payer of the same.

v) If the tax department was to contend that the executive search fee was nothing but licence fee, then even in the APA proceedings, the tax authority should have recharacterised such executive search fee as 'licence fee' to tax it as royalty under the APA. The Tribunal observed that considering the executive search fee as 'royalty' would make the APA redundant. Therefore, the executive search fee cannot be treated as FTS under Article 12(5)(a) as well as 12(5)(b) of the tax treaty. Further, it cannot be taxed as royalty under Article 12(4) of the tax treaty read with clause (iv) of *explanation* 2 to Section 9(1)(vi) of the Act.

6. Article 14- Fees for Independent Personnel Services- Foreign consultants' payment covered by article on 'Independent Personal Services', not taxable as FTS

DCIT vs. Hydrosult Inc [TS-43-ITAT-2019(Ahd)] Assessment Year 2011-12

Facts

i) Hydrosult Inc. (assessee) is a foreign company incorporated in Canada and is engaged in providing technical consultancy for development of irrigation and water resources in India in the State of Chhattisgarh and Orissa. The assessee was awarded contract by Chhattisgarh Government for providing consultancy services under the Chhattisgarh Irrigation Development Project. The assessee also had a PE in India.

ii) For AY 2011-12, AO noted that assessee had claimed consultancy expenses on which TDS was not been deducted. Assessee contended that the consultancy fees were paid to several independent professionals of foreign origin hired for technical services and the services are in the nature of independent personal services (IPS) governed by Article 14 of the respective Treaties.

iii) Assessee contended that IPS are different from fees for technical services' (FTS) and therefore income of the aforesaid consultants being IPS were not susceptible to tax in India in view of exceptions provided in the treaties in this regard.

iv) Moreover, assessee also submitted that the professionals rendering services have neither fixed base in India (source country) nor have any of the professionals stayed in India more than the threshold limit in terms of number of days (aggregate 90/183 days) of stay provided in the respective DTAA.

v) AO however observed that services rendered were admittedly technical/consultancy services by the professionals who are stated to be specialists in their respective domains and therefore, the services were in the nature of technical and consultancy services and would thus fall in the Article related to FTS. AO also contended that the professionals rendering consultancy services were not independent *per se* and their scope of work and activities were regulated by contractual obligations or other form of employment. AO thus concluded that in the absence of independence of such services, the assessee was under obligation to deduct TDS.

vi) On appeal, CIT(A) re-examined the agreements and found that independence of the non-resident consultants towards rendition of services remained intact and the employer-employee relationship was absent.

Decision

On Revenue's appeal, the Tribunal held in favour of the assessee as under:

i) The assessee referred to the contractual agreement entered into with one of the consultants of Netherlands as specimen contract. Assessee contended that as per one of the clauses in contract, the contract cannot be assigned nor the services of the consultant can be assigned by him unlike employment in ordinary course. Assessee contended that the consultants were also made liable for certain losses or damage which was ordinarily not there in contract of employment .

ii) The Tribunal found merit in assessee's contention that the none of the non-resident individuals providing IPS have a fixed base available to them in India and none of them have stayed in India for a period exceeding aggregate 183 days in the AY concerned. Thus the Tribunal affirmed assessee's contention that services rendered by the non residents are covered by Article 14 of DTAA with the respective country where the respective non-residents are residents of. The Tribunal thus upheld the eligibility of DTAA benefit under Article relating to IPS in view of the undisputed facts towards absence of fixed base and period of stay below threshold.

iii) The Tribunal rejected Revenue's contention that the services rendered are not independent in character. In this regard, the Tribunal stated

that a bare look at the specimen agreement entered into between the assessee and one of the consultants gives an unmistakable impression that as per the agreement, the non-resident has been contracted as an 'Advisor' for providing consulting services related to the project to the assessee. The Tribunal noted that the responsibility or the risk for the results with non-resident was to a greater degree, moreover the obligations arising from the contract cannot be assigned to some other persons unlike in the case of an employer.

iv) The Tribunal stated that it was difficult to read that the contracts entered into by the non-residents for their services lack independence. The Tribunal remarked that, "In view of risk fastened with the non-residents for their services, it is clear that the services are of independent nature. We do not see any trappings of alleged dependence in the contract."

7. India-UK DTAA - Taxation of FTS - Article 13 – Whether 'Make available' condition relevant for supply of design/drawing; Applies *'ejusdem generis'*- Held: Yes, in favour of the assessee

Buro Happold Limited vs. DCIT [TS-76-ITAT-2019(Mum)] Assessment Year: 2012-13

Facts

i) Buro Happold Limited (assessee), a company, registered in UK is a tax resident of UK for AY 2012-13. The assessee is involved in the business of providing engineering design and consultancy services. During the assessment proceedings, AO observed that, the assessee had earned an amount of ₹ 1,09,03,039, from the provision of consulting engineering services to Buro Happold Engineers India Pvt. Ltd. (BHEI).

ii) Moreover, the assessee had also received an amount of ₹ 1,01,44,808 from BHEI as a cost recharge towards Head Office expenses.

iii) The Assessing Officer observed that, as per Article 13(4)(c) of subject Treaty, payment received for development and transfer of a technical plan or technical design would be in the nature of FTS, irrespective of the fact, whether it also 'makes available' technical knowledge, experience, skill, knowhow, etc.

iv) Interpreting the provisions of Article 13(4)(c), the Assessing Officer observed that the words "*make available*" go with technical knowledge, experience, skill, knowhow, etc., but do not go with "*the development and transfer of a technical plan or a technical design*".

v) He observed that, the second limb of clause-(c) of Article 13(4) of subject treaty can be invoked when the amount is paid in consideration for rendering of any technical and consultancy services consisting of development and transfer of a technical plan or technical design. Thus the AO levied tax @ 15% on the gross amount as per Article 13(2)(a)(ii) of the India-UK tax treaty.

vi) Upon appeal, CIT observed that the amount received towards consulting engineering services are in the nature of fees for technical services not only u/s 9(1) but also under Article-13(4)(c) of the India-UK tax treaty. Further he observed that technical services in the form of designing and planning could not have been rendered by the assessee without locating technical personnel, wherein they needed thorough application of mind in India for execution of the designs and drawing. Thereby CIT (A) upheld the order of AO and held that amount received towards consulting engineering services is in the nature of fees for technical services and taxable in India.

Decision

On Asseessee's appeal, the Tribunal held in its favour, as under:

i) The assessee argued that consultancy services provided, are project based and

the consultancy services for one project cannot be used for any subsequent project. Further, it was contended that the words "*consists of the development and transfer of technical plan or technical design*" in the second limb of Article 13(4)(c) could not be read disjunctively but had to be read along with the first limb, and thus could not be treated as FTS.

ii) On the other hand, Revenue contended that the employees of the assessee worked closely with the employees of the Indian company and supported/advised them and provided assistance to them on various technical and engineering matters. Therefore, technical knowledge, experience, etc., were made available to the Indian companies, and thus they are of such nature that they are capable of being used in future.

iii) Upon perusal of rival submissions, the Tribunal noted that the main issue under consideration was whether the amount received by the assessee towards supply of technical designs, drawings, plans, etc., under the consulting engineering services was to be treated as fees for technical services under the India-UK tax treaty. The Tribunal held that once the above issue was decided, the issue of whether cost recharge was in the nature of FTS, would automatically get resolved.

iv) Upon careful examination of facts, the Tribunal observed that the assessee was entrusted the work of providing consulting services for a twin city project by the Pune Municipality as well as other building projects in Mumbai. Further, on perusal of the sample copies of the agreement, it was seen that the work of the assessee was to provide consultancy services relating to the projects. Thus, it was a fact on record that the technical designs/drawings/plans supplied by the assessee under contract were project specific and could not be used in the future.

v) The Tribunal remarked, *"On a careful reading of Article 13(4)(c) of the India-UK tax treaty it becomes clear that the words "or consists of the development and transfer of a technical plan or technical design", appearing in the second limb has to be read in conjunction with "make available technical knowledge, experience, skill, knowhow or processes". The reasoning of the Assessing Officer that the second limb of Article-13(4)(c) of the India- UK tax treaty has to be read independently, in our view, cannot be the correct interpretation of the said Article. As per the rule of ejusdem generis, the words "or consists of the development and transfer of a technical plan or technical design" will take colour from "make available technical knowledge, experience, skill, knowhow or processes"*.

vi) Having held so, the Tribunal further went on to adjudicate whether by supply of technical, designs, drawing, plans, the assessee has made available technical knowledge, experience, skill, know-how or processes. The Tribunal stated, *"..... the technical knowledge, experience, skill, knowhow or processes, must remain with the service recipient even after rendering of the services has come to an end. The service recipient must be at liberty to use the technical knowledge, experience, skill, knowhow or processes in his own right. Undisputedly, in the present case, as revealed from the material on record, the technical design/drawings/plans supplied by the assessee to the Indian entity are project specific, hence, cannot be used by the Indian entity in any other project in future."* Therefore, the Tribunal accepted the claim of the assessee that it had not made available any technical knowledge,

experience, skill, knowhow or processes while developing and supplying the technical drawings/designs/plans.

vii) The Tribunal placed reliance on Pune Tribunal decision in case of Gera Developments Pvt. Ltd. [TS-462-ITAT-2016 (PUN)], wherein a dispute of identical nature under which definition of FTS as per Article 12(4)(b) which is identically worded like Article 13(4)(c) of the India-UK tax treaty was adjudicated, wherein the Pune Tribunal had held that unless there is transfer of technical expertise skill or knowledge along with drawings and designs and if the assessee cannot independently use the drawings and designs in any manner whatsoever for commercial purpose, the payment received cannot be treated as FTS. Thus the Tribunal concluded by ruling that, *"Therefore, in our considered opinion, the amount received by the assessee has to be treated as business profit and in the absence of a PE in India, it cannot be brought to tax in India."*

viii) With regards to the second issue of cost recharge, the Tribunal applied the stated that, *"the very same reason on the basis of which we have held the amount received towards consulting engineering services to be not in the nature of fees for technical services as discussed above, we hold that the amount received towards cost recharge cannot be brought to tax in India in the absence of PE."*

8. Taxability of certain payments as FTS – payments made to foreign agent in Ecquador for services rendered outside India, which assessee was contractually required to perform, were not taxable as FTS u/s. 9(1)(vii) and hence, payments were not subject to TDS u/s. 195; however payment for market survey, being for managerial, technical or consultancy services, was subject to TDS u/s. 195.

Shri Jogendra L. Bhati [TS-183-ITAT-2019 (Ahd)] Assessment Year 2013-14

Facts

i) Assessee, proprietor at "Bion Healthcare" was engaged in trading/exporting medicines through his proprietorship concern. Assessee had made a payment of ₹ 1.79 crore to CACMILSA/ Carlos Avila Guilermo Celi. Additionally assessee also paid ₹ 77.99 lakh to Carlos Avila Guilermo Celi for "Market Survey Charges for three months" and "Registration fees, evaluation & analysis charges, transaction and notarisation of dossiers, market analysis & tender survey" respectively. Thus, total payment of ₹ 2.57 crore was made to CACMILSA/ Carlos Avila Guilermo Celli.

ii) The assessee contended that Ecquadorian Institute of Social Security ("IESS") had entered into a contract with assessee for supply of 62 drugs. As per the contract, assessee was to carry out geographical, logistical support for the delivery of imported drugs in the warehouse of different health units of "IESS". Similarly, the assessee was under the obligation that it would pay notarizing fees, contract registration fees, cost of the copies of the contract, the cost of storage, transportation etc. Further assessee undertook to deliver the drugs acquired through this contract in all the medical units of "IESS". The assessee was also required to provide space for storage, repackaging and all other necessary logistics. Assessee required physical presence in Ecuador to carry out all these activities/ works and thus he entered into a contract with non-resident agent, viz. CACMILSA through its director, Carlos Avila Guilermo Celi.

iii) The AO opined that since the assessee failed to deduct TDS on managerial and

consultancy services, provided by CACMILSA, the expenditure was to be disallowed. Aggrieved, assessee was in appeal before CIT (A) who concurred with AO. Thus assessee filed an appeal before ITAT.

iv) The assessee contended that both the Revenue authorities failed to construe the meaning of expression "managerial, technical and consultancy services" employed in *Explanation* to section 9 while harping that such payment involved such services. Assessee argued that had any consultancy/opinion given by CACMILSA being used by the assessee within India for enhancing its business, then payment *qua* that could be at most in the field of managerial and consultancy services. But here the payments have been made to CACMILSA for fulfilment of obligations of different services required to be rendered outside India by assessee. Assessee bifurcated the payments made to such CACMILSA under four different categories out of which expenditure for (a) local logistic cost at Ecuador, (b) supply of goods to various hospitals across Ecuador, and (c) custom clearance at Ecuador were in nature of reimbursement. Fourth category was liaisoning and commissioning. Assessee submitted that foreign agent had no permanent establishment in India and had not provided any services in India. Therefore, any commission paid by the assessee to the foreign agent for the purpose of duty outside India would not be taxable in India and no TDS was required to be deducted.

v) For fulfilment of the contractual obligation with Government of Ecuador the assessee had hired services of CACMILSA. Assessee argued that the payment made to CACMILSA could not be considered as an income or deemed income as defined under section 9 of the Income-tax Act and was not chargeable to income-tax in India. On the other hand, stand of the AO which concurred by the CIT(A) was that a perusal of this agreement would indicate that CACMILSA provide services of specialized nature in the field of pharmaceutical sector, hence it fell within the ambit of expression "management, technical and consultancy services" used in *Explanation* 2 to section 9.

Decision

i) The Tribunal held that as per section 9 "fee for technical services" means any consideration for rendering of any "managerial, technical or consultancy services", but does not include consideration for any construction, assembly etc. CIT(A) construed the agreement between assessee and the CACMILSA for harping a belief that services rendered by the foreign agent was in the nature of "managerial, technical or consultancy services". For this purpose, the CIT(A) has observed that first clause of the agreement itself mention that commercial advisory i.e., CACMILSA has agreed to provide services which consisted of support, management, general advice and other actions require during the process of supply of drugs to the Government of Ecuador.

ii) The Tribunal observed that in order to fulfil all the activities as per agreement, liaison with the local authorities according to the requirement of drugs, had to be kept.

iii) The Tribunal further noted that ordinarily, "managerial services" means managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done, and if overall planning aspect is missing, and one has to follow a direction from the other for executing particular job in a particular manner, then, it could not be said that the former is managing that affair. The Tribunal stated that consultancy services would fall within the expression "fees for technical services" if some consideration was given for rendering some advice, opinion etc. for the execution of any work. Now consideration was equivalent to 45% of the value of the order from Ecuador out of which 15% was allocated for liaison

and commission for the purpose of fulfilment of these activities. According to the assessee, these are simplicitor reimbursement of actual expenditure as well as commission to foreign agents for performing these activities on behalf the assessee. The assessee had not debited any other expenditure separately in his account, more so, the AO himself did not raise any doubt about incurrence of expenditure. The Tribunal observed that all these services were rendered in Ecuador out of Indian territory. No information supplied by the commercial agent was used except to some extent the market research of pharma products in Vietnam given by said advisor.

iv) The Tribunal relied on a plethora of rulings where it was unanimously held that if services rendered by foreign agent are simplicitor for procurement of some contract, and fulfilment of certain export obligations like logistic, warehousing etc. then these will not be termed as service in the nature of technical services or managerial and consultancy services. The Tribunal found that these activities will not generate or invent any information which could be used in India for augmentation of manufacturing of drugs and held that no element of managerial consultancy or technical services were being rendered by the commercial agent and thus the assessee was not required to deduct TDS on receipt of ₹1.79 crores, as per break up given below:

Nature of expenditure	Head of Expenditure in P&L	FCN $	INR
Local Logistic cost at Ecuador	Logistic cost @8%	60,765	3,372,438
Supply of goods to various Hospitals across Ecuador	Distribution & Admin cost @10%	75,956	4,215,547
Custom clearance at Ecuador	Importation & Custom clearing	75,956	4,215,547
Liaisoning and Commission	Commission @15%	113,9	6,170,229
		326,6	**17,973,760**

v) The Tribunal relied on Gujarat HC ruling in case of *CIT vs. Torrent Pharmaceuticals Ltd., (2013) 29 taxmann.com 405 (Guj)*; where it was held that expenses incurred by the assessee in foreign country for registration of its products for marketing and promoting sales was to be allowed as revenue expenditure. The Tribunal thus allowed expenses incurred by the assessee towards registration fees, evaluation and analysis charges, translation & notarization of dossiers.

vi) The Tribunal found that market research of new pharma products and market survey would provide the assessee with information used for exploring new business venture and enhancing its capacity to conduct new business. Certainly, such information would fall within the managerial, technical consultancy services, therefore, the tribunal held that the assessee was required to deduct TDS on a sum of ₹ 11.92 lakh and ₹ 7.63 lakh paid to Allegens Co. Ltd. and ₹ 5.56 lakh paid to Mr. Carlos Avila Guilermo Celi. ITAT held that since the assessee failed to deduct TDS on these payments, they deserved to be disallowed.

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