IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'L' MUMBAI

BEFORE SHRI P M JAGTAP, AM & SHRI R S PADVKAR, JM

ITA No. 8432/Mum/04(Asst Year 1998-99)
ITA No. 8433/Mum/04(Asst Year 1999-00)
ITA No. 5286/Mum/04(Asst Year 2000-01)
ITA No. 1385/Mum/05(Asst Year 2001-02)

TIS Two Administration(Singapore) Pte Ltd (in Members" Voluntary Liquidation) (Formerly known as Telerate (Asia Pacific) Singapore Pte Ltd C/o Price water House Coopers P Ltd 252 Veer Savarkar Marg Next to Mayor's Bungalow, Shivaji Park, Dadar Mumbai 400 028	Vs	The Dy. Director of Income Tax (International taxation)2(1) Mumbai

PAN – AAACD2095F

ITA No. 8467/Mum/04(Asst Year 1998-99)
ITA No. 8468/Mum/04(Asst Year 1999-00)

The Dy. Director of Income Tax (International taxation)2(1) Mumbai	Vs	TIS Two Administration(Singapore) Pte Ltd (in Members" Voluntary Liquidation) (Formerly known as Telerate (Asia Pacific) Singapore Pte Ltd C/o Price water House Coopers P Ltd 252 Veer Savarkar Marg Next to Mayor's Bungalow, Shivaji Park, Dadar Mumbai 400 028
(Appellant)		(Respondent)

Assessee by: Shri P J Pardiwalla
Revenue by: Shri Narender Singh

O R D E R

PER R S PADVEKAR:

In this bunch of appeals, four appeals are filed by the assessee and two appeals are by the revenue. The assessment years involved in these

appeals are 1998-99, 1999-00, 2000-01 and 2001-02. As the facts as well as issues are common in all these appeals; hence, these appeals are disposed off by this common order for the sake of convenience.

2 The first issue arises for our consideration, which is common in assessee's appeals is whether the ld CIT(A) is justified in holding that the amount received by the appellant from the subscribers are in the nature of fees for technical services to the extent of subscription fees received for providing information/data on various products like inancial/ forex/ commodity market and 'royalty' for use of equipments such as shared printer, matrix etc., and accordingly, entire receipts are liable to tax @ 20% on gross basis u/s 44D r.w.s 115A.

3 The relevant facts which reveal from the records are as under:

3.1 The assessee is a branch of a company incorporated in Singapore and it is wholly owned subsidiary of Telerate Holdings Inc. The assessee company is a tax resident of Singapore. The activities of the assessee comprises of dissemination of information with respect to various markets including Equity Market, Fixed Income Market, Commodity Market, Future and Option Market, Forex Market, Derivates and Money Market. The assessee collects orders for various customers for subscription of various online real time products, created by the HO, related to financial/forex/commodity market. On the payment of subscription, the customer is provided with information, depending upon the products they are subscribed such as (i) TW (financial) i.e. products providing international financial information on foreign exchange market, money markets and market reports; (ii) TW (commodity) i.e. products providing commodity information such as wheat, lumber, metals and financial futures. (iii) Telerate energy i.e. products providing energy information relating to oil, natural gas and oil derived products such as motor gasoline, jet fuel, ship fuel and some petrochemicals and (iv)money market i.e.

products providing the information in respect of the international foreign exchange and money markets etc.

3.2 The information provided in respect of each market segments generally data comprises of prices and volume of products relating to the different markets as mentioned above and in some cases the historical data which may relate back as far as 25 years. The assessee has also offered other information in respect of each market segment. For this purpose, depending on the product that the customers have subscribed, the assessee installed the equipments which are necessary for accessing the products and are made available through V-SAT. The equipments that are installed include computers, modems, other special equipments required for enabling the subscriber to get access to the different products.

3.3 The AO asked the assessee as to why the income of the assessee from the above activities should not be taxed as royalty/fees for technical services and as the company has Permanent Establishment (PE) in India; why the same should not be computed in according with the provisions of Sec. 44D of the I T Act.

3.4 The contention of the assessee was that the income generated from the above activities i.e. for dissemination of market information, is business income and that cannot be treated as fees for technical services (FTS) as defined in sec 9(1)(vii) of the I T Act 1961. It was further pleaded by the assessee that providing the information to the customers is in nature of 'sale of products' and the same cannot be treated as 'services'. The assessee also contended that the activities of the assessee can be compared either to that of news agency or that of periodical information provided by the Centre of Monitoring Indian Economy (CMIE), except that the mode of communicating the information is different. The assessee has also contended that it is providing financial/forex/commodity related information on a continuous basis instead of in a form of printed newsletters/periodicals

and no special skill or knowledge is required to disseminate the market information. The assessee is also contended that the online real-time information disseminated to the subscriber cannot be classified as 'managerial services' as no services are provided by the assessee relating to the management of the subscriber's organisation. The assessee has also contended that the same cannot be put to the category for the clarification of consultancy.

3.5 In sum and substance, the contention of the assessee was that the income generated for the subscription fees for providing data or information to the customers is not fees for technical services as per Explanation 2 to sec. 9(1)(vii) of the Act. The assessee also contended that the information is transmitted by the assessee via V-SAT, which are not owned by them, but are taken on rentals from the V-Sat operators. Using V-SAT connection, the subscribers can also access the information stored by its client in their database apart from on line information.

4 The AO rejected the contentions of the assessee and he is of the opinion that the services provided by the assessee company are clearly consultancy and technical services. The assessee do provide the opportunity and advices in the form of the collection and collation of the information which is disseminated on the network. The AO also rejected the contention that professional advice was not given. The AO, therefore, held that the activities of the assessee do involved the application of technical and special skill or knowledge and the same are technical in nature as per Article 12 of the DTAA between India and Singapore.

5 In respect of the issue of royalty, the AO relied on the assessment order for the assessment year 1997-98 and accordingly, held that even though the information was transmitted through V-SAT, the subscriptions are accessing those information through highly sophisticated equipments provided by the assessee company. The AO, therefore, held that the income

of the assessee is taxable as per Sec. 44D of the Act and limitation provided in the said section are applicable; he therefore, brought to tax the entire receipts/revenue on gross basis u/sec. 44D of the Act r.w Article 12 and 7(3) of the Tax Treaty between India and Singapore at the tax rate of 20%. The assessee carried the issue before the ld CIT(A) but without success. Now, the assessee is in appeal here before us.

6 We have heard the parties.

6.1 The ld counsel of the assessee submitted that so far as the issue raised in appeal for A.Y. 1998-99 is concerned, the AO has relied on the assessment order for A.Y. 1997-98. He further submitted that in the A.Y. 1997-98, on identical set of facts, the issue has reached before the Tribunal in assessee's own case and now this issue has been decided in favour of the assessee by holding that the receipts/revenue by way of subscription fees by the assessee from its activities of providing information to its clients on subscription, cannot be treated as fees for providing technical services within the meaning of Explanation 2 to sec. 9(1)(vii) of the Act.

6.2 He further argued that so far as the issue of royalty is concerned, that will also not survive because in the assessment order for 1997-98, confirming the order of the ld CIT(A), the Tribunal held that the income has to be assessed as 'business income' as per Article 12 of the DTAA between India and Singapore. The ld counsel of the assessee relied on the decision of the Hon'ble Madras High Court in the case of Skycell Communications Ltd. v. Dy CIT (251 ITR 53) to explain the meaning of the 'fees for technical services'. He, therefore, pleaded that as the issue has already considered by the Tribunal and the facts are identical, the entire activity of the assessee may be treated as business activity and suitable direction may be given to the AO that the same should be assessed as business income provided under Article 12 and 7(3) of the Tax Treaty between India and Singapore and to compute the same in accordance with sec. 28 to 43C of the Act.

6.3 *Per contra;* the ld DR supported the order of the ld CIT(A). The ld DR fairly admitted that there is no difference in the facts relating to the activity of the assessee in the A.Y. 1997-98 to A.Y. 2001-02.

7 We have perused the copy of the order of the Tribunal filed by the ld counsel of the assessee in assessee's own case for the A.Y. 1997-98 being ITA No. 558/Mum/2001 dated 18.2.2010. The operative part of the order of the Tribunal reads as under:

> *"7. The Ld. CIT(A) held that the income of the assessee cannot be taxed on gross basis as FTS and it has to be assessed as business profits under Article 7(3) of the D.T.A. Agreement between India and Singapore. The Ld. CIT(A) further directed the AO to verify the allowability of the expenditure in terms of Article 7(3) in accordance with and subject to the limitations of India Income-Tax Act contained in the provisions of Sec. 30 to Sec. 43D. The Ld. CIT(A) further held that the interest u/s. 234B is not leviable since the assessee is a non-resident company and its entire income is tax deductible u/s. 195.*
>
> *8. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us. The Ld. Departmental Representative relied on the order of the AO.*
>
> *9. The Ld. Counsel for the assessee Shri Nitesh Joshi placed before us the copy of the judgement of the I.T.AT Mumbai 'C' Bench in the case of DCIT Vs Boston Consulting Group Pte. Ltd. 94 ITD 31 (Mum) wherein it has been held that "Assessee is a Singapore based company carrying out its business of strategy consulting services, such as strategy regarding business, marketing, sales, port folio etc. through its Permanent Establishment (PE) in India and received professional receipts from both Indian and foreign clients. It claimed deduction of certain expenditure to earn said professional receipts.*
>
> *10. The AO held that said receipts were fees for technical services and therefore limitation on deduction of expenses u/s. 44D would be applicable.*

11. On further appeal, the Hon'ble Tribunal held as follows:

(i) Once assessee chooses to be covered by provisions of an applicable tax treaty, it is not open to revenue to thrust provisions of Act on assessee.

(ii) Alternative paradigms contained in section 44D, r.w.s. 115A and in article 12 of DTAA offer alternative but similar modes of taxation of income from royalties and fees for technical services, and once it is clear that these are completing models of taxation of royalties and fees for technical services on gross basis, in Act and in DTAA, provisions of Act cannot come to play unless those are more beneficial to assessee.

(iii) Where a receipt is said to be not taxable as royalties and fees for technical services under provision of DTAA, same cannot also be subjected to tax u/s. 44D, r.w. s 115 either

(iv) Scope of 'fees for technical services' under article 12(4)(b) of DTAA does not cover 'consultancy service' unless those services are technical in nature.

(v) In case of non-technical consultancy services of instant nature, for computing profits attributable to permanent establishment in India, limitation on deduction of expenses u/s. 44D would not be applicable.

(vi) Limitations on deduction of expenses can only be under article 7(3) of DTAA, which can only be such as are applicable for business profits other than profits from royalties and fees for technical services."

12. We find that the facts and circumstances of the case before us are mutatis mutandis similar to those decided by the Tribunal in the case of Bostan Consulting (supra), therefore following the decision of the co-ordinate Bench, we dismiss the Revenue's appeal."

8 The judicial discipline desires that there should be consistency in the view, if the facts are identical and more particularly in the assessee's own

case. We, therefore, following the order of the Tribunal in assessee's own case for AY 1997-98 hold that 'subscription fees' received by the assessee has to be assessed as 'business income' as per the provisions of DTAA between India and Singapore and the same cannot be treated as the fees for technical services or royalty for the use of the equipments like V-SAT, Printer etc. We further hold that the provisions of sec. 44D are not applicable. With these directions, we set aside the issue to the file of the AO for re-computation of the total income of the assessee on net basis. The AO is also directed to give reasonable opportunity of being heard to the assessee. Accordingly, ground no.1 of the assessee is allowed.

9 So far as the ground nos 2 & 3 are concerned, they are in the nature of alternative plea taken by the assessee. As we have allowed the ground no.1, then the alternative plea does not survive.

10 Now, we will take up the appeals of the revenue.

11 The revenue has taken the following grounds which are common for A.Yrs. 1998-99 and 99-00:

> *i) On the facts and in the circumstances of case and in law, the ld CIT(A) erred in directing the AO to verify the issue of set off of losses brought forward, ignoring the fact that the assessment of income is on the gross basis which does not allow any set off of any losses brought forward.*
>
> *ii) On the facts and in the circumstances of case and in law, the ld CITA) erred in holding that no liability u/s 234B arise, ignoring the fact:*
>
> a) *That since the tax was deducted at source was not adequate to meet the entire tax liability, it was obligatory on the part of the assessee to make the deficit good by making the payment towards the advance tax;*
> b) *That since the assessee failed to pay the advance tax, the AO was right in charging interest u/s 234Bof the I. T. Act."*

12 The first issue is against the direction of the ld CIT(A) to set off of brought forward losses.

13 We have heard the parties. While deciding the assessee's appeal, we held that the income of the assessee in India is to be assessed as 'business income'; hence, the ground taken by the revenue in respect of the direction of the ld CIT(A) for setting off of brought losses does not survive as the assessee's income will be computed in the normal provisions of the Act. Moreover, there is no specific bar u/s 72 of the Act for not allowing the set off of brought forward business losses. On the perusal of the order of the ld CIT(A), it is seen that the ld CIT(A) has directed the AO to verify the position in respect of the claim of brought forward business losses of the earlier years and give the benefit of set off in accordance with the law. In our opinion, no interference is called for in the directions of the ld CIT(A) as the same are in accordance with law; accordingly ground no.1 is dismissed.

14 Ground no.2 is in respect of interest charged u/s 234B of the Act.

15 The ld counsel of the assessee submitted that due to the failure of the person to deduct TDS who makes the payment of tax, the assessee should not suffer by levy of interest u/s 234B. He further submitted that now the issue is covered in favour of the assessee by the decision of the jurisdictional High Court in the case of Director of income-tax (International Taxation) v. NGC Network Asia LLC (313 ITR 187) (Bom).

16 The ld DR is fair enough to submit that this issue stands covered in favour of the assessee as submitted by the ld counsel of the assessee. We, therefore, respectfully following the decision of the jurisdictional High Court in the case NGC Network Asia LLC (*supra*), dismiss the ground no.2 in appeal of the revenue.

17 In the result, all the appeals of the assessee are allowed whereas both the appeals of the revenue are dismissed.

Order pronounced on the 30thday of April, 2010.

Sd/-	**Sd/-**
(P M JAGTAP)	(**R S PADVEKAR**)
Accountant Member	Judicial Member

Place: Mumbai : Dated:30th. April 2010
Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

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BY ORDER

Dy /AR, ITAT, Mumbai