IN THE INCOME TAX APPELLATE TRIBUNAL
CHENNAI BENCH 'C' : CHENNAI

[BEFORE SHRI HARI OM MARATHA, JUDICIAL MEMBER
AND SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER]

I.T.A.No.1793/Mds/2006
Assessment year : 2005-06

M/s Wheels India Ltd Padi Chennia **[PAN – AAACW0315K]**	**vs**	The ITO International Taxation-II Chennai
(Appellant)		(Respondent)

Appellant by : Shri R.Vijayaraghavan
Respondent by : Shri K.E.B Rengarajan, Jr. Standing Counsel

O R D E R

PER HARI OM MARATHA, JUDICIAL MEMBER:

This appeal has been preferred by the assessee against the order of the ld. CIT(A)-XI, Chennai, dated 24.4.2006, pertaining to assessment year 2005-06.

2. In nut shell, the relevant facts of this case are that the appellant M/s Wheels India Ltd (in short 'WIL'), is engaged in the manufacture of steel wheels for commercial vehicles, passenger cars, utility vehicles, earthmoving and construction equipment, agricultural tractors and defense vehicles. The assessee entered into an

agreement dated 10.12.2003 with (i) Advanced Metal Technologies Inc. USA(in short 'AMT') for developing and proving the new process for manufacture of

(a) Integral flat based 5 degree steel truck wheel for tubeless application;

(b) Integral 15 degree drop center steel truck wheel for tubeless application; and

(c) 15 degree drop center steel truck rim for tubeless application

3. The traditional wheels covered under (a) & (b) above are manufactured by welding the disc and rim part of the wheel together to form an integral wheel. The assessee has developed a concept of manufacturing a wheel out of a single piece of steel material which will result in reduction of input material and improvement in the strength properties by elimination of welding. The assessee has designed the product and also has drawn a set of processes for the manufacture of wheels using the new concept. For rim falling in clause (c) as above, technology already exists but the assessee has modified the design of the rim to bring about considerable reduction in weight. The assessee has applied for patents in India with the Government Patent Authorities in respect of wheels covered under (a) and (b) above. The assessee did not have know-how for designing the machine capable of manufacturing the product as per the patented processes.

Therefore, WIL entered into an agreement with AMT for developing the machine tools manufacturing the products as per the patented processes. The assessee paid US $ 95,000 [equivalent to Indian ₹43,15,850/-] to AMT on 17.3.2004 by way of advance in accordance with the agreement. WIL did not deduct tax at source in respect of the above payment on the premise that the payee being a non-resident and the entire services under this agreement having been rendered outside India, so, no income would either accrue or arise or deemed to accrue or arise to the payee in India.

4. Likewise, WIL also entered into an agreement dated 7.4.2004 with Metal Forming Machines Inc. US (MFM in short) for developing and proving the new processes for manufacture of

(a) Flat based 5 degree steel truck rim of 20" diameter; and

(b) 5 degree semi drop center steel truck rim of 16" diameter

5. The assessee had modified the design of the rim using the concept developed for items in (a) mentioned above. Here also, the assessee did not have know-how for designing the machines capable of manufacturing products as per the patented processes. For that matter, WIL entered into an agreement with MFM for developing the machine tools to manufacture the products as per their patented

processes. For that, the assessee paid to MFM US $ 60,000 [equivalent to Indian ₹26,36,400/-] on 17.3.2004 in accordance with the agreement entered into with this party on 19.4.2004. Here again, for making the above payment, WIL did not deduct tax at source with similar reasons.

6. The Income-tax Officer(International Taxation)-II, Chennai, vide his letter dated 9.8.2004 had asked the assessee for furnishing the details for non-deduction of tax. In reply, vide letter dated 17.7.2004, the ITO rejected the explanation of the assessee and vide his letter dated 9.8.2004 considered the assessee as an assessee in default and proceeded to collect tax of ₹10,44,008 [₹6,47,378 + ₹3,96,630]; and interest u/s 201(1A) of ₹ 48,234/- [₹32,369 + ₹15,865] in respect of payments of ₹43,15,850/- and ₹26,44,200/- made to AMT and MFM respectively. Under section 201(1) of the Act, if any such assessee does not deduct or after deducting tax fails to pay the same, as directed by or under this Act, he shall be deemed to be the assessee in default in respect of the tax. In this case, non-deduction of tax comes to ₹10,44,008/-. Again under section 201(1A), if any person does not deduct or after deducting the tax fails to pay tax as required by or under this Act, he shall be liable to pay simple interest @ 12% per annum on this amount of such tax from the date

on which such tax was deductible to the date on which such taxes is actually paid. The Assessing Officer has worked out this interest at ₹48,234/-, hence, a total of ₹10,92,242/- has been demanded as tax by the ITO. Aggrieved, the assessee preferred appeal before the ld. CIT(A). He has confirmed the impugned additions. The assessee is further aggrieved and has raised the following grounds in its appeal:

> "1. The Incometax Officer erred in treating the appellant as 'assessee in default' for an amount of ₹10,44,008/- and levying interest of ₹ 48,234/- u/s 201(1A) of Income-tax Act. The learned Commissioner of Income-tax (Appeals) erred in confirming the above order.
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> 1.2. The learned Commissioner of Income-tax(Appeals) failed to note that the appellant is already in the possession of Technical know-how of manufacture of (i) integrated flat based 5-degree steel truck wheel for tube application;(ii) integrated 15-degree drop center steel truck wheel for tubeless application;(iii) 15-degree drop center steel truck rim for tubeless application, and hence no new know-how or information is being supplied by the above parties.
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> 1.3. The learned Commissioner of Income-tax (Appeals) Officer failed to appreciate that the above parties are engaged to prove the process developed by the appellant , by developing process with the required facilities in the form of machineries and technical manpower in its facility in USA, as evidenced by paras 3 of the Agreements.
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> 1.4. The learned Commissioner of Income-tax (Appeals) failed to appreciate that mere carrying out of testing activities outside India would not to "technical service" as per explanation 2 to proviso 9(1) of Income-tax Act.

1.5. The learned Commissioner of Income-tax (Appeals) failed to note that the term "developing and providing the new process" as appearing in para 3 of the agreements mean developing suitable testing facilities in the form of machineries and technical man power and does not mean any technical/consultancy services to be made available to the appellant but represent only validation charges for the process developed by the appellant.

1.6. The learned Commissioner of Income-tax (Appeals) failed to appreciate that carrying out testing works on various raw materials, supplied by the appellant to test the process developed by appellant outside India is not a technical consultancy. As the entire services were rendered outside India and the recipient of fees had no permanent establishments in India, the fees paid by the appellant is not taxable in India.

1.7. The learned Commissioner of Income-tax (Appeals) ought to have noted that the nature of work done amounted to "contract for work" in the form of carrying out work on the products manufactured by the appellant, and in which case, the services being rendered outside India, income accrued outside India to the recipient."

7. We have considered the rival submissions and have circumspected the entire evidence available on record in the light of the obtaining facts of this case. In short, the contention as put forth by the ld.AR Shri Vijayaraghavan, arguing on behalf of the assessee is that the assessee, WIL, has developed a new concept for manufacture of wheels and wheel rims. WIL worked on this concept and developed a design and prepared a product drawing in order to explore the feasibility of the process to manufacture complete CV rim through spin route. WIL did not have the necessary tooling and machinery for

validating the process. WIL came to know that MFM Inc. and AMT Inc. in USA, both non-resident companies, had the required machinery/tooling capability with them for validating the process conceptualized by WIL and that was the reason for entering into contract with the above companies for developing the necessary tooling and validating the process in the machines available with them. WIL released the product drawing to MFM and MFM agreed to undertake the work relating to developing the process feasible for manufacturing the rim for commercial vehicle through spin form route by cold working with the help of machineries and tooling available with AMT. It was stated that MFM had developed the rim profile, partially by cold working – flange and rim base portion of the rim and partially by hot spinning – gutter portion of the rim and send the cut section of the same to WIL. It was further stated that since WIL was not interested in hot working route which WIL was doing already, it was decided not to proceed with further development under the agreement with MFM. No further payments were made to them and the contracts were closed. WIL, however, felt the need to change the process from a pure spinning process – complete cold working to hot forming cum spinning process – hot and cold working so that the saving in input material can be achieved with additional equipments. Based on this,

WIL had identified the requirement of various machines and sourced spinning machines from Germany & USA and based preparation machines from locally for manufacturing the CV rims through spin route. The handling equipments including 4 Nos. Fanuc Robots of 210 kg capacity were procured and installed for loading and unloading of components in the spinning machines. Extensive process trials were conducted at WIL and rim could be established as per the product drawing with the optimized input material. The product was tested exhaustively and validated by WIL-R&D. WIL also obtained patent in India for the new process [Patent No.004804/15.7.2005]. As per the ld.AR, in the process, no technology made available to WIL by these two entities i.e MFM and AMT; and their services were essentially to develop the required tooling to validate the new process for manufacture of wheel-rim. It was stated that no technical know-how was passed on to WIL by these entities and the amount paid to them is only towards the cost of tooling they had to develop to validate the process and the time of their technical personnel. In the light of the above submissions, it was argued that the assessee cannot be treated as assessee in default and hence, no interest can also be levied. Per contra, the ld.DR has supported the orders of the authorities below. He has repeated the reasons given by the Assessing Officer and ld.

CIT(A) to treat the appellant company as a assessee in default and also for levying interest u/s 201(1A) of the Act.

8. The case of the assessee-company, as vehemently canvassed before us, is that WIL developed a new process for manufacturing steel wheel out of a single piece of steel material and for that matter WIL also applied for patent to the Government of India. Referring to the agreement, particularly its clauses (6) and (7), entered into between WIL and AMT Inc. USA and MFM Inc. USA on 12.12.2003, it was submitted that the technical data, drawings, specifications and other informtaions for testing and validation were provided to AMT and MFM and they would only test the process using their machines and tools to validate and prove the feasibility of the process that WIL has come up with. According to the ld.AR, the assessee had paid AMT on 17.3.2004 a sum of US $ 95,000 equivalent to Indian ₹43,15,850/- by way of advance in pursuance of the agreement. Similarly, it paid to MFM on 17.3.2004 a sum of US $ 60,000 equivalent to Indian ₹26,36,400 in pursuance of agreement dated 19.4.2004. Admittedly, on both these amounts, the assessee did not deduct tax at source on the reasoning that the payees were non-residents and that the entire services under the agreements were rendered outside India. So, when no income accrued or arose in India, there is no question of deducting

tax at source. Per contra, the ld.DR has argued that after affording opportunity to the assessee to present its case, the Assessing Officer has meticulously examined the agreements between the assessee and AMT/MFM and has culled out the following facts:

> "It is stated in the agreement between M/s Advanced Metal Forming Technologies, USA as under:
>
> WIL is interested in developing new process with the help of MFM for manufacture of the following products:
>
> i) Flat base 5-degree with rim of 20" diameter.
>
> ii) 5-degree semi-drop center steel light truck rim of 16" diameter.
>
> Whereas, MFM is interested in undertaking the work developing and providing the new process with the required facilities at its disposal in the form of machineries and technical manpower('facilities') in its facility situated in the United States.
>
> It is stated in the agreement with M/s Metal Forming machines Inc. USA as under:
>
> WIL is interested in developing new process for the manufacture of:
>
> i) Integral flat based 5-degree steel truck wheel for tube application.
>
> ii) Integral 15-degree drop center steel truck wheel for tubeless application.
>
> iii) 15-degree drop centre steel truck rim for tubeless application with the help of AMT (products).
>
> Whereas, AMT is interested in undertaking the work of developing and providing the new process with the required facilities as its disposal in the form of machineries and technical manpower('facilities') in its facility situated in the United States."

9. With reference to the above points, it was argued that both these foreign companies are interested in undertaking the work of developing and providing the new process with the required facilities at their disposal in the form of machineries and technical manpower (facilities) in its facilities situated in the United States. Therefore, as per Explanation to clause(vii) of sub-section (1) of section 9 of the Act "*fees for technical services" means any consideration (including lump sum consideration) for the rendering of any managerial, technical or consultancy services(including the provision of services of technical or other personnel) but does not include, consideration for any construction, assembly, mining or like project undertaken by the recipient under the head 'salaries'.* With reference to Article 12(4)(b) of the Double Taxation Avoidance Agreement (DTAA) with USA, the Assessing Officer has concluded that services provided by both the foreign companies would come under the purview of fees for technical services liable to be brought under tax in terms of section 9(1)(vii) and "fees for included services" under Article 12(4) of the DTAA with USA. The Assessing Officer has, thus, held the assessee as an assessee in default u/s 201 and to be liable for interest u/s 201(1A) of the Act.

10. The ld. CIT(A) has also dealt with the same issue and has come to the conclusion that the totality of the facts as obtaining from the

agreements and the substance of transactions, the services provided by both the non-resident companies would come under the purview of fees for technical services and taxable u/s 9(1)(vii) of the Act and fees for include services under Article 12(4) of DTAA with USA. Under Article 12(4)(b), two conditions are to be satisfied – (i) the payment should be a consideration for technical or consultancy services rendered; and (ii) the services so rendered should also be such that 'make available' technology, knowledge, experience, skill, know-how or processes or consists of the development or transfer of a technical plan or technical design. After considering various decisions, the ld. CIT(A) has come to the conclusion that both the above conditions were fulfilled in this case, hence, section 9(1)(vii) of the Act and Article 12(4) of the DTAA with USA become applicable.

11. Before us, the main thrust of ld.AR's argument was that although the services were rendered in foreign country but the same were not 'made available' to the assessee. In order to fall under the head "fees for included services", the ld.AR explained that the term 'make available' signifies transfer of the technical know-how to the service recipient or acquirer in order to equate it to perform the services independently thenceforth without the need for the service

provider. To substantiate the argument, the ld.AR has invited out attention towards various decisions.

12. After analyzing the subject under consideration, we have found that there are plethora of case laws which have defined the term "make available" to mean that the service rendered by a foreign company should have been transferred its technical know-how to the acquirer of the service. There are no two opinions about the definition of the term 'make available'. According to the ld.AR, no technical know-how was made available (transferred to) to the assessee as a result of the agreements in question but as per the Department, the fact finding done by the Assessing Officer and extracted above in para 8, it becomes crystal clear that the services provided by both the non-resident companies definitely fall under the purview of 'fees for technical services' and it was also 'made available' to the assessee company as per the expression given in Indo US Treaty document itself. The normal, plain and grammatical meaning of the language employed in DTAA, when the appellant is not able to utilize the services because it is unable to make use of the technical knowledge, etc. by itself, in its business without recourse to the borrowal of the service in future would amount to "make available". We are aware that time and again, it was submitted orally as well as through written

submission on behalf of the assessee that the foreign companies have validated the work after testing it in USA and thereafter WIL did not pursue this agreement because the validation reported by the foreign companies were not upto WIL's satisfaction. The Internal Technical Memo of WIL detailing the work done in USA and its output provided to WIL alongwith reasons for discontinuation of agreement with AMT/MFM were also referred and relied on before us. To our mind, this very submission of the ld.AR goes against the interest of the assessee company. The appellant company got the test for validation done in USA and after that they are manufacturing the same items/articles which raises a strong presumption that the assessee was 'made available' with the technical know-how involved in the process. It is not the case of the assessee that they are not manufacturing the same articles now and that they have made agreements with any other foreign company for getting the test and validation of the process done which was to their satisfaction. When both these facts are construed judiciously, it becomes a definite case, which cannot be denied, that the technical know-how must have been transferred to the assessee. The discontinuance of agreement or non-pursuance of the agreement thereafter, may be a personal understanding between the parties for the reasons best known to them. Therefore, in our

considered opinion, the payments made to these foreign companies definitely amount to 'fees for included services' and the amounts in question is taxable in India and hence, the assessee was liable to deduct tax at source. Having failed to do so, the assessee becomes assessee in default and therefore, the Assessing Officer has correctly passed order u/s 201(1) and also u/s 201(1A) of the Act. It has been further submitted that WIL felt the need to change the process from a pure spinning process, complete cold working to hot forming cum spinning process, hot and cold working so that the saving in input material can be achieved with additional equipments. It was argued that based on this, WIL had identified the requirement of various machines and sourced spinning machines from Germany & USA and band preparation machines from locally for manufacturing the CV rims through spin route. Necessary tooling was developed in house with the CAD and CAM facility available in WIL. Handling equipments including 4 Nos. Fanuc Robots of 210 kg capacity were procured and installed for loading and unloading of components in the spinning machines. As per the ld.AR, extensive process trials were conducted at WIL and rim could be established as per the product drawing with the optimized input material. The product was tested exhaustively and validated by WIL – R&D. WIL also obtained patent in India for the

new process. So, in the light of the above, it was tried to bring home that no technology was made available by these two entities and their services were essential to develop the required tooling to validate the new process for manufacture of steel rim. But again, we are not in agreement with the ld.AR's above submission, rather this fact also goes to show that technical know-how was passed on to WIL by these two entities and that is why they have done all these activities in-house using the technical know-how which was passed on to the company by he foreign companies.

13. In the case of Intertek Testing Services India P. Ltd In re, 307 ITR 418(AAR), it has been held as under:

> "It is well settled that the provisions of the Double Taxation Avoidance Agreement will prevail over the domestic law if they are more beneficial to the assessee
>
> Under article 13(4)(c) of the Agreement for the Avoidance of Double Taxation between India and the U.K., the first requirement is that the payment is made by way of consideration for rendering technical or consultancy services(including the provision of services of technical or other personnel). The second requirement is that those services should make available technical knowledge, skill, etc., to the recipient of the services. The third part speaks of "development and transfer of a technical plan or technical design.
>
> Unlike section 9(1)(vii) of the Income-tax Act, 1961, by using the expression "make available", article 13(4)(c) of the Agreement for the Avoidance of Double Taxation between India and the U. K. makes it clear that mere rendering of specific services is not sufficient to attract the definition of "fees for technical services". Article 13(4)(c)

requires that the services rendered should make available technical knowledge, experience, skill, know-how, etc.

The offer of a standard facility to a number of customers such as telephone/ cell phone users does not amount to rendering any "technical service" within the meaning of the definition.

SKYCELL COMMUNICATIONS LTD. v. DEPUTY CIT [2001] 251 ITR 53 (Mad) followed.

It is not any or every professional service that amounts to technical service. Professionalism and an element of expertise should be at the back of such services.

The expression "technical" ought not to be construed in a narrow sense or confined only to technology relating to engineering, manufacturing or other applied sciences.

Consultancy services can also be technical in nature. The two expressions, consultancy services and advisory services are not to be treated as water tight compartments. Advisory services, which merely involve discussion and advice of a routine nature or exchange of information, cannot appropriately be classified as "consultancy services" under article 14(3). An element of expertise or special knowledge on the part of the consultant is implicit in the consultancy services contemplated by article 14(3)(c).

Technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. To fit into the terminology "make available", the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and

experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider.

Though the memorandum of understanding relating to the Double Taxation Avoidance Agreement relating to India and the U.S.A., does not apply to the Double Taxation Avoidance Agreement between India and the U. K., if a similar expression, e.g., "make available", found in the former is interpreted and explained in a particular manner consistent with the one shade of meaning that can be attributed to it, there is no reason why that interpretation should be eschewed. It becomes a valuable aid in interpreting the phrase "make available" in the latter Agreement as well. The explanatory memorandum becomes a valuable aid in interpreting the phrase "make available". It reflects the Government of India's viewpoint on the true connotation of the expression. It stands on a higher pedestal than the principle of contemporanea expositio.

The Authority ruled, on the facts, (i) that, since the applicant had only given a general account of the relevant services that might be received in terms of the agreement and it was not clear whether all such services or some of them were rendered to the applicant, on a broad analysis the majority of the services catalogued were in the nature of technical or consultancy services, but most of them did not make available to the applicant technical knowledge, experience, skill, know-how, etc., possessed by the provider of the services, unless better particulars were available it was not proper to express a definite view.

(ii) That managerial service essentially involved controlling, directing or administering the business and support services were not necessarily equivalent to services of a managerial nature. The classification of the services received by the applicant as managerial might have to be undertaken in an appropriate proceeding.

(iii) That to what extent and at what rate the tax deduction at source under section 195 of the Income-tax Act, 1961, had to be made by the applicant had to be determined by the appropriate authority in the light of the principles laid down in this ruling. "

14. From the above, it becomes clear as to what does the term 'make available' to the recipient mean under different facts and circumstances. The above finding goes to strengthen our view taken in this case. We, therefore, cannot allow this appeal of the assessee and dismiss the same.

15. In the result, the appeal of the assessee stands dismissed.

The order pronounced in the open court on 19.4.2011.

Sd/-	Sd/-
(ABRAHAM P GEORGE)	**(HARI OM MARATHA)**
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 19th April, 2011
RD

Copy to: Appellant /Respondent/CIT(A)CIT/DR