www.taxguru.in

आयकर अपीलीय अधिकरण "एल" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

आयकर अपील सं./I.T.A. Nos. 742 & 743/Mum/2016

(**निर्धारण वर्ष /** Assessment Years: 2006-07 & 2011-12)

Lloyd's Register Quality Assurance Ltd. (India Branch Office) 63-64, Kalpataru Square, 6th Floor, Kondivita Lane, Off. Andheri Kural Road, Andheri (E), Mumbai-400 059	**बनाम/** Vs.	Dy. DIT(IT)-4(1) Scindia House, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACL 9740 K		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Nitesh Joshi & Ms. Neha Vikram
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri M. V. Rajguru

सुनवाई की तारीख / **Date of Hearing**	:	10.04.2018
घोषणा की तारीख / **Date of Pronouncement**	:	10.04.2018

आदेश / O R D E R

Per Bench :

These are appeals by the assessee against the respective orders of the ld. Commissioner of Income Tax (Appeals). Since the issues are common and the appeals were heard together, these have been consolidated and disposed of by this common order.

www.taxguru.in

2. One common issue raised on merits reads as under:

> 1. The appellant wants to state that the learned assessing officer has taken a view in the assessment order that management charges paid are technical services and consequently by applying the provisions of Sec. 40(a)(i) of the Act, has disallowed the management charges. The learned CIT(A) restricted the disallowance to 50% of the management charges by considering the same as technical services. The appellant contends that the whole of management charges paid are not covered by the provisions of Sec. 40(a)(i) of the Act.
> Considering the above on the facts and in the circumstances of the case, the learned CIT(A) should have allowed management charges fully without applying the provisions of Sec. 40(a)(i) of the Act. She ought to have done so.

3. At the outset, in this case, the ld. Counsel of the assessee contended that this issue has been decided in favour of the assessee by this Tribunal in assessee's own case in ITA No. 389/Mum/2013 for assessment year 2008-09 vide order dated 07.06.2017.

4. The ld. Departmental Representative did not dispute this proposition and fairly accepted that the issue is covered in favour of the assessee.

5. The facts of the matter are that the assessee had made payment of management charges to Lloyds Register UK. The Assessing Officer was of the opinion that the assessee should have deducted tax at source and nonpayment thereof renders the same payment not allowable u/s. 40(a)(ia) of the Act. For the assessment year 2006-07, the ld. Commissioner of Income Tax (Appeals) held as under:

> In the present facts of the case, it is seen that the issue has already been a matter of adjudication as to whether the management charges received by Lloyds Register UK are to be treated as taxable in India. My predecessor in his order in the case of Uoyds Register for AY 2006-07 vide order CIT(A}~ ll/IT/Rg.4(l)/09-10/301-L dated 21.02.2011, for detailed reasons given therein, has held that 50% of the

www.taxguru.in

> management charges would be held as taxable in India, if this be the position then it flows from this that the appellant was mandated to deduct IDS on 50% of the Management charges paid to Llyods Register. Since that has not been done then the AO is right in making disallowance u/s 40{a)(i3, albeit restricted to 50% viz., Rs. 12,53,941/-, The appellant gets an equivalent quantum as relief. The ground is partly allowed.

6. For assessment year 2011-12, the ld. Commissioner of Income Tax (Appeals) has followed his order for assessment year 2006-07 and has held as under:

> In the present facts of the case, it is seen that the issue has already been a matter of adjudication as to whether the management charges received by Lloyds Register UK are to be treated as taxable in India. My predecessor in his order for Ay 2006-07 vide order CIT(A)-II/IT/Rg.4(l)/09-10/301-L dated 21.02.2011, for detailed reasons given therein, has held that 50% of the charges would be held as taxable in India, if this be the position then it flows from this that the appellant was mandated to deduct IDS on 50% of the Management charges. Since that has not been done then the AO is right in making disallowance u/s 40(a){i), albeit restricted to 50% viz., Rs.16,37,267/-The appellant gets an equivalent quantum as relief. The ground is partly allowed.

7. Against this order, the assessee is in appeal before the ITAT.

8. We have heard both the counsel and perused the records. Identical issue was considered in the assessee's own case by the ITAT for assessment year 2008-09 as referred above. The facts are undisputed and are identical. The tribunal had decided the issue in favour of the assessee by following the judgment of Hon'ble Delhi High Court in the case of Herbalifc International India P.Ltd. (384 ITR 276). We may gainfully refer to the order of the Tribunal on this issue as under:

> 6. Next effective ground of appeal(GOA -3&4) is about application of section 40(a)(ia) of the Act to management charges. During the assessment proceedings, the AO held that the assessee had to deduct tax at source on all the payments unless he had approached the AO and had obtained certificates for NIL TDS. The FAA dismissed the appeal filed by the assessee in that regard.

www.taxguru.in

6.1 Before us, the DR supported the order of the AO .The AR contended that the Hon'ble _Supreme Court in the case of GE India Technology Centre P.Ltd. (3271TR456) had held that obligation to deduct tax at source would arise only when an amount was chargeable to tax, that it was not necessary to obtain nil withholding tax certificate, that tax had not to be deducted $ source in each case, that the India Branch office had reimbursed the payments towards management charge to its HO in UK, that it in turn had made the payment to LR in UK. He further argued that the issue stands decided in favour of the assessee by the judgment of the Hon'ble Delhi High Court in the case of Herbalifc International India P.Ltd. (384 ITR 276).

6.2.We have heard the rival submissions and perused the available material. We find that in the case of Herbalife- International India P. Ltd. (supra)the Honble Delhi High Court has dealt the issue as under:

> "Section 40 of the Act is in the nature of a non obstante provision and there/fire, it overrides the provisions contained in sections 30 to 38 of the Act. This means that (he expenditure which is allowable under sections 30 to 38 of the Act in computing business income would be subject to the deducibility condition in section 40 of the Act. Section 40(a)(i) at first did not provide for deduction of tax at source where the payment was made in India. The requirement of deduction of lax at source on payments made in India to residents was inserted for the first time by way of section 40(a)(i) of the Act with effect from April 1, 2005. Section 40(a)(i) of the Act in providing for disallowance of a payment made to a non-resident if tax is not deducted at source, is no doubt meant to be a deterrent in order to compel the resident payer to deduct tax a! source while making the payment. However, that does not answer the requirement of article 26(3) of the DTAA that the payment to both residents and non-residents should be under the "same conditions" not only as regards deduction of tax at source but even as regards the allowability of such payment as deduction. It has to be seen that in those "same conditions[1]' whether tin- consequences are different for the failure to deduct tax at source. The expression "under the same conditions" in article 26(3) of the DTAA clarifies the nature of the receipt and conditions of its deducibility. It is relatable not merely to the compliance requirement of deduction of tax at source. The lack of parity in the allowing of the payment as deduction is what brings about the discrimination. The consequence of non-deduction of tax at source when die payment to a non-resident has an adverse consequence to the payer. Since it is mandatory in terms of section 4Q(a)(i) for the payer to deduct tax at source from the payment to the non-resident, the latter receives the payment net of tax deducted al source. The object of article 26(3) of the Double Taxation Avoidance Agreement was to ensure non-discrimination in the condition of deductibility of the payment in the hands of the payer

www.taxguru.in

> where the payee is either a resident or a non-resident. That object would gel defeated as a result of the discrimination brought about qua non-resident by requiring the tax to be deducted at source while making payment of fees for technical services in terms of section 40(a)(i) of the Act." Respectfully following the above judgment, we allow grounds no.3-4.

9. Since the facts are identical and on similar issue, the tribunal had decided the case in favour of the assessee, we follow the precedent and decide the issue in favour of the assessee.

10. The ld. Departmental Representative has fairly agreed to this proposition and no contrary decision has been produced before us.

11. In ITA No. 742/Mum/2016, the assessee has also raised an issue challenging the validity of reopening u/s. 147 by the Assessing Officer.

12. Since we have already decided the issue on merits in favour of the assessee, adjudication on the reopening is only of the academic interest and, hence, we are not engaging into the same.

13. In the result, the ITA No. 742/Mum/2016 for assessment year 2006-07 is partly allowed and ITA No. 743/Mum/2016 for assessment year 2011-12 is allowed.

Order pronounced in the open court on 10.04.2018

Sd/ (Ravish Sood) न्यायिक सदस्य / Judicial Member	- Sd/- (Shamim Yahya) लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 10.04.2018
व.नि.स./Roshani, Sr. PS

www.taxguru.in

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai