IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.231/Del/2016
Assessment Year: 2011-12

Rajesh Kumar Saroj, Cottage No.1, Oberoi Apartments,2, Sham Nath Marg, Delhi. PAN: ACOPS5597C Appellant	vs	Jt. Commissioner of Income-tax Range-20, New Delhi. Respondent

Assessee by: Ms. Lalita Krishna Murthi, CA
Department by: Shri N.K. Bansal, Sr. DR

Date of Hearing: 28.02.2019
Date of Pronouncement: 27.03.2019

ORDER

PER NARASIMHA K. CHARY, JM

Aggrieved by the order dated 12.11.2015 in Appeal Nos. 107/269/13-14 passed by the Learned Commissioner of Income-tax(Appeals)-32, New Delhi {"CIT(A)"} for Assessment Years 2011-12, assessee preferred this appeal.

2. Brief facts of the case are that the assessee is a proprietorship concern engaged in the business of manufacturing and sale of readymade garments in the name and style of 'Apollo Enterprises'. They have filed their return of income for the Asstt. Year 2011-12 on 28.9.2011 declaring income of Rs.4,08,75,250/-. During the scrutiny, learned AO

found, among other things, that the assessee had paid a sum of Rs.2,80,825/- by characterizing it as 'fees for technical services' to one M/s Association de Investigacion de la IndustriaTextil (Aitex), Plaza Emilio Sala, 1, 03801Alcoy, Alicante (Spain) and according to the assessee, the services were rendered outside India was also the payments, as such, the provisions u/s 195 of the Income-tax Act, 1961 ("the Act") are not attracted. It was further submitted that the respondent had shown this amount as a business receipt and would have paid taxes as per Spanish law.

3. Learned AO, however, brushed aside this contention of the assessee and while placing reliance on Section 9 of the Act and Article 13 of the Indo Spain DTAA, held that the assessee is not entitled to any benefit with regard to the payment under consideration and by virtue of Section 195 of the Act, there should have been TDS on the said payment of Rs.2,80,825/- and, therefore, because of the failure, the same invites rigors of Section 40(a)(ia) of the Act. On this premise, learned AO disallowed the expenditure and added it back to the income of the assessee.

4. Aggrieved by the said addition, assessee preferred an appeal before the learned CIT(A). Learned CIT(A) noticing Article 13 of the Indo Spain DTAA and in view of Section 3 thereof held that 'Fee for Technical Services' means payments of any kind to any person other than payments to an employee of the person making the payments and, therefore, this amounts to royalty attracting Section 195 of the Act Learned CIT(A), therefore, while placing reliance on the decision in the case of Steria (India) Ltd., (2014) 364 ITR 381 (AAR) held that the assessee cannot contend that in view of the protocol forming part of

India-Spain DTAA, the 'make available' clause in India-Singapore DTAA cannot be imported and it is incorrect to import such a clause. Learned CIT(A), therefore, upheld the findings of the learned AO and dismiss the appeal.

5. It is the argument of the learned AR that the receipts in the hands of Aitex are not chargeable to tax in India inasmuch as rendering of services and making of payments took place outside India. Laboratories and offices of the testing agents are in Spain; that the Aitex had no permanent establishment in India.

6. It is further argued that the Aitexis a Spanish company, non-resident in India and company's receipt in Spain is entitled to be governed by the provisions of Indo-Spain DTAA as per the provisions of Section 90(2) of the Act to the extent they are more beneficial as per the provisions of the Act. She further submitted that in view of the protocol to the Indian-Spain DTAA, the restricted meaning of the 'Fee for Technical Services' under Indo-UK Treaty has to be taken in the context of Indo-Spain Treaty also in which case the receipts in the hands of Aitex are not taxable in India and consequently, Section 195 of the Act is not attracted.

7. Per contra, learned DR placed reliance on the decision in the case of Steria (India) Ltd. (supra) and submitted that it was held therein that it would not correct or proper to import words, phrases or clause that were not available into Treaties between two sovereign nations on the basis of treaties with other countries. He justified the orders of the authorities below on the ground that the make available clause is not to be found in

the Indo-Spain Treaty and, therefore, the receipts in the hands of Aitex has to be charged in India and consequently, Section 195 is attracted.

8. We have gone through the record. In so far as the facts are concerned, absolutely, there is no dispute. The only question is whether in view of the Protocol to India-Spain DTAA, a restrictive meaning of the "Fee for Technical Services' has to be read in the context of Indo-Spain DTAA or not. Clause 7 of the Protocol to Indo-Spain DTAA reads as under:

> *"ARTICLE 7*
> *BUSINESS PROFITS*
> *1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities earned on in that other State of the same or similar kind as those effected through that permanent establishment.*
> *2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.*
> *3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses, research and development expenses, interest and other similar expenses so incurred, whether in the State in which*

the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the taxation laws of that State. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents, know-how or other rights, or by way of commission or other charges for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

5. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

9. Para 7 of the Protocol of the DTAA reads that, -

7. The competent authorities shall initiate the appropriate procedures to review the provisions of Article 13 (Royalties and fees for technical services) after a period of five years from the date of its entry into force. However, if under any Convention or Agreement between India and a third State which is a Member of the OECD, which enters into force after 1-1-1990, India limits its taxation at source on royalties or

fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of incomes, the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention with effect from the date on which the present Convention comes into force or the relevant Indian Convention or Agreement, whichever enters into force later.

10. The India-UK Treaty was entered into force on 26.10.1993 and because it is after 1.1.1990, the restricted scope provided in Indo-UK Treaty has to be read in the context of Indo-Spain DTAA. In so far as the reliance by the authorities on the decisions of AAR in the case of Steria (India) Ltd. (supra) is concerned, it is brought to our notice that in Steria (India) Ltd., vs. CIT (2016) 386 ITR 390 the Hon'ble Delhi High Court did not agree with the same. In this case, a similar protocol is there vide clause 7 in Indo-France DTAA pursuant to which the restricted meaning of 'fee for technical services' appearing in the Indo-UK DTAA was sought to be read as forming part of Indo-France DTAA as well. The Hon'ble Delhi High Court after considering the provisions of the DTAA of Indo –France, which are similarly worded as that of Indo-Spain held that less restrictive definition of expression 'Fee for Technical Services' appearing in Indo-UK DTAA, must be read as forming part of Indo-France DTAA as well.

11. We are, therefore, of the considered opinion that the decision of the Hon'ble Delhi High Court in Steria (India) Ltd., vs. CIT (2016) 386 ITR 390 and para 7 of the Protocol between India and Spain, the restrictive meaning of 'Fee for Technical Services' appearing in Article 13(4) (c) Indo-UK DTAA must be read as forming part of Indo-Spain DTAA as well and, therefore, the payment made by the assessee to the

Spanish company for fabric testing would not constitute fee for technical services and consequently, section 195 of the Act has no application to such a receipt. With this view of the matter, we find it difficult to sustain the addition and accordingly, direct the learned AO to delete the same.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the Open Court on 27th March, 2019.

Sd/-	**sd/-**
(PRASHANT MAHARISHI)	**(K.NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 27th **March, 2019.**
VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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