IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER, AND SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 2332/DEL/2022 [A.Y. 2019-20]

ERNST & Young U.S. LLP 200, Plaza Drive, SECAUCUS New Jersey, USA	Vs.	The A.C.I.T., Circle International Taxation (12(2) New Delhi
PAN – AADFE 0355 M		
(Applicant)		(Respondent)

Assessee By : Shri S. Ganesh, Sr. Adv

Department By : Shri Vizay B. Vasanta, CIT-DR

Date of Hearing : 14.06.2023
Date of Pronouncement : 20.06.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 27.07.2022 framed u/s 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 [the Act, for short] pertaining to Assessment Year 2019-20.

2. The grievance of the assessee is two-fold – firstly, the assessee is aggrieved by the validity of notice u/s 143(2) of the Act and secondly, the assessee is aggrieved by the disallowance of Rs. 50,99,38,561/- being cost-to-cost reimbursements on account of secondment of employees.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the judicial decisions relied upon by both the sides.

4. Grievance relating to the validity of notice u/s 143(2) of the Act was not pressed by the ld. counsel for the assessee and hence the same is dismissed as not pressed.

5. The only issue that survives which needs adjudication is whether cost to cost reimbursement on account of secondment of employees was Fees for Technical Services [FTS] as defined under Article 12 of the India-USA Double Tax Avoidance Agreement [DTAA] and whether

arrangement between the assessee and Indian entities constitutes the 'provision of services' by the assessee through seconded personnel.

6. The assessee is a limited liability partnership firm, incorporated under the laws of United States of America and is engaged in the business of providing professional services in the field of assurance, tax, transaction and business advisory services etc to its clients across the globe including India. The assessee is eligible for availing treaty benefits as per the treaty between India and USA.

7. During the year under consideration, the assessee has offered its income to tax as per section 115A of the Act r.w. the provisions of Article of the India-USA Tax Treaty. Return so filed was selected for complete scrutiny and accordingly, statutory notices were issued and served upon the assessee.

8. During the course of scrutiny assessment proceedings, inter alia, the Assessing Officer issued a show cause notice to the assessee requiring the assessee to show cause as to why the payments received by the assessee on account seconded employees amounting to Rs.

50,99,38,561/- should not be taxed as FTS/Independent Personal Services [IPS] as per the treaty provisions.

9. The assessee filed detailed reply alongwith documentary evidences pursuant to which, the Assessing Officer framed draft assessment proceedings proposing to make the following valuations to the returned income of the assessee:

Total income as declared by the assessee	:	Rs. 32,73,620/-
Add: Secondment cost taxable as FTS Under the provision of DTAA	:	Rs. 50,99,38,561/-
Total proposed assessed income	:	Rs. 51,32,12,181/-

10. The assessee raised objections before the DRP but without any success.

11. Before us, the ld. counsel for the assessee vehemently stated that the personnel, after receiving approval from EY India member firms, were seconded by the assessee to EY India member firms and were released/discharged from all the obligations and rights of employment in their home country, USA and were subsequently

employed by EY India member firms for their business and as employees of such India member firms.

12. Referring to the deputation agreement between the assessee and the seconded personnel, the ld. counsel for the assessee pointed out that EY India member firms shall be solely responsible to pay salary and other costs of the personnel during the period of assignment and shall have the right to undertake performance appraisal of the personnel in accordance with the policies of EY India member firms.

13. The three EY India entities to whom employees were seconded were:

i) EYGBS [India] Pvt Ltd

ii) EY Global Delivery Services India LLP [EYGDS]

iii) Ernst & Young LLP

14. It is the say of the ld. counsel for the assessee that pursuant to the agreement, seconded personnel were employees of the Indian member firms and, accordingly, invoices raised by the assessee are pursuant to salary cost and other related costs paid by the assessee on behalf of India member firm for administrative convenience.

15. The ld. counsel for the assessee further explained that the invoices raised with respect to seconded personnel are not chargeable to tax in India as the said invoices are towards mere reimbursements of expenses incurred by the assessee on behalf of Indian entities having no profit element to it. The ld. counsel for the assessee further explained that the invoices so raised are with respect to reimbursement of salary costs and do not fall within the ambit of Article 12 FTS and Article 15 IPS under India – USA tax treaty.

16. The ld. counsel for the assessee emphatically stated that the invoices raised are for amounts which have already been subjected to tax as per provisions of Section 192 of the Act as the same is income in the hands of the seconded personnel.

17. Per contra, the ld. DR strongly supported the findings of the Assessing Officer and placed strong reliance on the decision of the Hon'ble Supreme Court in the case of M/s Northern Operating Systems Pvt Ltd Civil Appeal No. 2289 – 2293 of 2021. The ld. DR read the relevant part of the judgment to buttress his contention that there is no error in the findings of the Assessing Officer.

18. We have given thoughtful consideration to the rival contentions and have carefully perused the order of the authorities below. Since the ld. DR has placed strong reliance on the judgment of the Hon'ble Supreme Court [supra], we would like to address it first.

19. At the very outset, we have to state that the judgment has to be read in the context in which it is delivered and in the words of the Hon'ble Supreme Court, the judgment was delivered for :

> ***"48. The task of this court, therefore is to, upon an overall reading of the materials presented by the parties, discern the true nature of the relationship between the seconded employees and the assessee, and the nature of the service provided – in that context - by the overseas group company to the assessee."***

20. The Hon'ble Supreme Court, in the above context, observed as under:

> ***"33. The issue which this court has to decide is whether the overseas group company or companies, with whom the assessee has entered into agreements, 24 provide it manpower services, for the discharge of its functions through seconded employees.***
>
> ***34. The contemporary global economy has witnessed rapid cross-border arrangements for which dynamic mobile workforces are optimal. To leverage talent within a transnational group, employees are frequently seconded to affiliated or group companies based on***

business considerations. In a typical secondment arrangement, employees of overseas entities are deputed to the host entity (Indian associate) on the latter's request to meet its specific needs and requirements of the Indian associate. During the arrangement, the secondees work under the control and supervision of the Indian company and in relation to the work responsibilities of the Indian affiliate. Social security laws of the home country (of the secondees) and business considerations result in payroll retention and salary payment by the foreign entity, which is claimed as reimbursement from the host entity. The crux of the issue is the taxability of the cross charge, which is primarily based on who should be reckoned as an employer of the secondee. If the Indian company is treated as an employer, the payment would in effect be reimbursement and not chargeable to tax in the hands of the overseas entity. However, in the event the overseas entity is treated as the employer, the arrangement would be treated as service by the overseas entity and taxed."

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53. Facially, or to put it differently, for all appearances, the seconded employee, for the duration of her or his secondment, is under the control of the assessee, and works under its direction. Yet, the fact remains that they are on the pay rolls of their overseas employer. What is left unsaid- and perhaps crucial, is that this is a legal requirement, since they are entitled to social security benefits in the country of their origin. It is doubtful whether without the comfort of this assurance, they would agree to the secondment. Furthermore, the reality is that the secondment is a part of the global policy – of the overseas employer loaning their services, on temporary basis. On the cessation of the secondment period, they have to be repatriated in accordance with a global repatriation policy (of the overseas entity).

21. And finally, the Hon'ble Supreme Court concluded as under:

> ***"65. It is held, for the foregoing reasons, that the assessee was the service recipient for service (of manpower recruitment and supply services) by the overseas entity, in regard to the employees it seconded to the assessee, for the duration of their deputation or secondment. Furthermore, in view of the above discussion, the invocation of the extended period of limitation in both cases, by the revenue is not tenable. 66. In light of the above, the revenue's appeals succeed in part; the assessee is liable to pay service tax for the periods spelt out in the SCNs. However, the invocation of the extended period of limitation, in this court's opinion, was unjustified and unreasonable. Resultantly, the assessee is held liable to discharge its service tax liability for the normal period or periods, covered by the four SCNs issued to it. The consequential demands therefore, shall be recovered from the assessee. 67. The impugned common order of the CESTAT is accordingly set aside. The commissioner's orders in original are accordingly restored, except to the extent they seek to recover amounts for the extended period of limitation. The demand against the assessee, for the two separate periods, shall now be modified, excluding any liability for the extended period of limitation."***

22. A perusal of the judgment of the Hon'ble Supreme Court [supra] shows that it was in the context of manpower recruitment and supply of services for which the assessee was recipient of services and was liable to pay service tax. As mentioned elsewhere, this judgment was delivered to discern the true nature of relationship between the

seconded employees and the assessee and nature of services provided in that context by oversees group companies to the assessee.

23. The Hon'ble High Court of Karnataka in the case of Flipkart Internet [P] Ltd 448 ITR 268 had the occasion to consider the aforementioned judgment of the Hon'ble Supreme Court relied upon by the ld. DR and the Hon'ble High Court, inter alia, held as under:

> ***"viii) The Revenue has relied upon the judgment of the Apex Court in C.C., C.E. & S.T.-Bangalore (Adjudication) etc. v. M/s. Northern Operating Systems Pvt. Ltd.12 where the Apex Court has interpreted the concept of a secondment agreement taking note of the contemporary business practice and has indicated that the traditional control test to indicate who the employer is may not be the sole test to be applied. The Apex Court while construing a contract whereby employees were seconded to the assessee by foreign group of Companies, had upheld the demand for service tax holding that in a secondment arrangement, a secondee would continue to be employed by the original employer.***
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> ***(ix) The Apex Court in the particular facts of the case had held that the Overseas Co., had a pool of highly skilled employees and having regard to their expertise were seconded to the assessee and upon cessation of the term of secondment would return to their overseas employees, while returning Civil Appeal Nos.2289-2293/2021 such finding on facts, the assessee was held liable to pay service tax for the period as mentioned in the show cause notice.***

(x) It needs to be noted that the judgment rendered was in the context of service tax and the only question for determination was as to whether supply of man power was covered under the taxable service and was to be treated as a service provided by a Foreign Company to an Indian Company. But in the present case, the legal requirement requires a finding to be recorded to treat a service as 'FIS' which is "make available" to the Indian Company.

(xi) Accordingly, any conclusion on an interpretation of secondment as contained in the M.S.A. to determine who the employer is and determining the nature of payment by itself would have no conclusive bearing on whether the payment made is for 'FIS' in light of the further requirement of "make available."

24. The deputation agreement between the assessee and EY India member firms are exhibited at pages 19 to 43 of the Paper Book. It would be pertinent to refer to certain relevant clauses in the agreement as under:

"Assignment' shall mean release of personnel by EYUS to and who is to be in employment by EYGDS India for the period of employment under the terms and conditions agreed by EYGDS and employee.

25. Under the head "General Terms and Conditions of Secondment" :

> ***"3.1 During the Period of Assignment, the International Assignees shall function solely under the control, direction and supervision of EY LLP INDIA and in accordance with all rules, regulations, policies, guidelines and other practices, generally applicable to the employees of EY LLP INDIA. International Assignees shall work exclusively for EY LLP INDIA and shall be solely responsible to EY LLP INDIA for their work during the Period of Assignment. EY LLP INDIA shall decide the nature of work of the International Assignees and EY LLP INDIA shall be solely responsible for the work of International Assignees during the Period of Assignment.***
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> ***3.2 EYUS shall not be responsible for the work of the International Assignees or assume any risk for the results produced from the work performed by the International Assignees during the period. The International Assignees shall not be regarded as employees of EYUS and shall not in any way be subject to any kind of instructions or control of EYUS during the Period of Assignees.***
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> ***3.3 EYUS shall not have any obligation towards EY LLP INDIA regarding the performance of international Assignees. The privity and lien of EYUS would cease during the period of employment with EY LLP India on entering of employment contract by international assignee with EY LLP India."***

26. It can be seen from the above that EY LLP India is alone responsible for complying with the requirement of withholding of tax under the Indian Tax Laws and the same has been verified

from the Sample Form No. 16 Exhibited at pages 96 to 98 of the assessee paper book.

27. The co-ordinate bench in the case of Boeing India [P] Ltd 121 Taxmann.com 276 which has been affirmed by the Hon'ble High Court of Delhi, had the occasion to consider an identical issue and held as under:

> ***"30. We have given thoughtful consideration to the orders of the authorities below. We have also carefully perused the salary reimbursement agreement, which is placed at pages 296 onwards of the paper book, and as per clause1.1, it is provided that the secondees have expressed their willingness to be deputed to BIPICL [the 20 appellant] and TBC [AE] have agreed to release these employees to BIPICL. It is provided that TBC will facilitate payment of salaries in secondees home country on behalf of BICIPL. Under the head employment status, it is provided that the secondees shall be working for BICIPL and will be under supervision, control and management of BICIPL as an employee of BICIPL.***
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> ***31. It is clear from the afore-stated relevant clauses that the secondees were, in fact, in employment of the appellant and as per the terms, the 'A' was paying salaries at the home country of the secondees and, therefore, there was reimbursement by the appellant. These facts clearly show that the assessee has been paying to its own employees and this fact alone clearly distinguishes the facts of the decision in the case of Centrica India Offshore Ltd [supra].***

32. The co-ordinate bench in the case of AT & T Communication Services India Pvt Ltd. [supra], distinguishing the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore Pvt Ltd [supra], has held as under:

> *"30. The DRP has affirmed the decision of the Ld. AO by holding that the assessee has deducted withholding tax on 21 substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.*
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> *31. The DRP has affirmed the decision of the AO by holding that the assessee has deducted withholding tax on substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.*
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> *32. The Special Auditors in their Audit Report have worked out particulars of payments in respect of which no TDS was deducted u/s 40(a)(ia) of the Act. Consequently, an amount of Rs. 54,06,328/- was not to be allowed as expenditure."*
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> *33. We have also perused the TDS certificates, Forms 15CA and 15CB, tax deducted by the assessee and all these documents are part of the paper book. There is no dispute that the assessee has deducted tax at source u/s 192 of the Act. On the given facts of the case, we are of the considered opinion that the provisions of Section 195 of the Act do not apply. Considering the facts of the case in totality, in light of judicial decisions referred to hereinabove, we do not find any merit in 22 the disallowance made by the Assessing Officer/DRP. We, accordingly, direct for deletion of addition of Rs. 56.58 crores."*

28. Affirming the order of the co-ordinate bench in ITA No. 71/2022 dated 11.10.2022, the Hon'ble High Court held as under:

"11. As far as disallowance under Section 40(a)(ia) of the Act is concerned, this Court finds that there is no dispute that the assessee has deducted tax at source under Section 192 of the Act. This Court is in agreement with the opinion of the ITAT that Section 195 of the Act has no application once the nature of payment is determined as salary and deduction has been made under Section 192 of the Act.

12. This Court is further of the view that the judgment in Centrica India Offshore Pvt. Ltd (supra) has no application to the present case as the ITAT has returned a finding that the real employer of the seconded employees continues to be the Indian entity and not the overseas entity.

13. In Director of Income Tax (IT)-I vs. A.P. Moller Maersk A S, the Supreme Court in Civil Appeal No.8040/2015 decided on 17th February, 2017 has held as under:-

> ***"11. Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as free for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is reemphasized that neither the AO nor the CIT(A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India.***

Record shows that the assessee had given the calculations of the total costs and pro-rata division thereof among the agents for reimbursement. Not only that, the assessee have been submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax."

14. A Division Bench of this Court in Commissioner of Income Tax, Delhi II vs. Karl Storz Endoscopy India (P) Ltd., ITA No.13/2008 decided on 13th September, 2010 has held as under:-

1. This appeal pertains to the Assessment Year 2001-02. The issue relates to the treatment which is to be given to the amount of Rs.6,59,416 paid by the assessee to its parent foreign company, i.e., Karl Storz Vertriebs GMBH & Company. The assessee had claimed that he parent company had deputed one of the employees, viz., Mr. Peter Laser to the Indian Company/assessee and the aforesaid amount represented reimbursement of the salary, which was payable to Mr.Peter Laser. The Assessing Officer (AO), however, was of the opinion that since no agreement between the assessee and the parent company was produced and even the agreement between the parent company and its employees. Mr. Peter Lazer on the basis of which he was purportedly deputed to the Indian Company was produced, this amount should be treated as payment towards technical fee.

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3. Learned counsel for the respondent-assessee has pointed out that this was not the first year in which such a claim was made. He

stated that the Indian Company was incorporated during the Assessment year 1998-99 and for the establishment of this company which is subsidiary to the aforesaid foreign company. Mr. Peter Laser was deputed, the amount paid from the Assessment year 1998-99 onwards were always treated as salary and accepted as such. Learned counsel for the respondent has produced the copy of the orders dated 15.06.2005 passed by the ITAT, which relates to the Assessment year 1998-99, i.e. the first year of the incorporation of the respondent-company. Perusal of this orders shows that this very issue is decided and the following findings were arrived at by the Tribunal holding that the aforesaid payment would be treated as salary to Mr. Peter Laser.

> *"10. The foreign company had deputed one of its employees to look after the affairs of the Indian Company. The salary payable to this employee was to be borne by the foreign company. The Indian company was to reimburse this salary at cost, i.e. without any mark-up. Thus, it was merely the question of payment of salary to Mr. Peter Laser. There is no question of any technical fees being paid to the foreign company. Assuming for the sake of argument that it was in the nature of technical fees paid to the foreign company; then, as rightly pointed out by the learned ITA No.71/2022 Page 8 of 9 counsel, Article 12.4 was applicable and not Article 13.4 as contended by the learned DR. Even if Article 12.4 was applicable, the said Article specifically excludes payments mentioned in Article 15. Article 15 states that salaries, wages and other similar remuneration derived by a resident of a Contracting State (Germany) in respect of an employment shall be taxable in the other Contracting State (Indian) only if the employment is exercised there. In other words, salaries paid to such personnel like Mr. Laser are taxable in India and they cannot be considered to be fees*

for technical services. Further, even as per Section 9 of the Act, the payment cannot be treated as fees for technical service. Explanation 2 to Section 9(1)(vii) gives the meaning of the expression "fees for technical services" as per which, inter alia, any consideration which would be income of the recipient chargeable under the head "salaries", then such payment will not be considered as fees for technical services. Thus, even as per the provisions of the Act, the payment in question cannot be treated as fees for technical services. Moreover, since it is paid as salary to Mr. Laser, tax has been deducted under Section 192 of the Act."

4. Learned counsel also submitted that thereafter in the Assessment Year 1990-00 as well as 2000-01, the amounts reimbursed in identical manner were treated as "salary" to Mr. Laser. He further states that no appeal was filed against the aforesaid order of the Tribunal by the Revenue."

15. Consequently, this Court is of the view that the issues of 'receivables' as well as 'disallowance' under Section 40(a)(ia) of the Act are essentially questions of fact, which give rise to no substantial questions of law especially when the findings of the ITAT are not perverse."

29. Considering the facts of the case in totality, in light of the deputation agreement, we are of the considered view that cost to cost reimbursement on account of secondment of employees cannot be treated as FTS as defined under Article 12 of India USA-DTAA and seconded personnel are employees of EY India firms whose income has been taxed as salary in their respective hands. Therefore, the very

same amount could not, in law, be subjected twice – firstly in the hands of the seconded employees working in India and secondly again the hands of the assessee. The Assessing Officer is accordingly, directed to delete the impugned addition.

30. In the result, the appeal of the assessee in ITA No. 2332/DEL/2022 is partly allowed.

The order is pronounced in the open court on 20.06.2023.

Sd/-	**Sd/-**
[SAKTIJIT DEY**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 20th JUNE, 2023.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	