IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA Nos.928 and 935/Bang/2023
Assessment Years : 2016-17 and 2017-18

DCIT, Circle – 1(1)(1), Bengaluru.	Vs.	M/s. AD2PRO Media Solutions Pvt. Ltd., No.163/B, 2nd and 3rd Floor, 6th Main, 3rd Cross, 3rd Phase, J P Nagar, Bengaluru – 560 078. **PAN : AAFCA 9418 A**
APPELLANT		RESPONDENT

Revenue by	:	Shri. G. Manoj Kumar, CIT(DR)(ITAT), Bengaluru.
Assessee by	:	None

Date of hearing	:	03.01.2024
Date of Pronouncement	:	03.01.2024

O R D E R

Per George George K, Vice President:

These appeals at the instance of the Revenue are directed against two orders of CIT(A) dated 16.08.2023 and 10.08.2023 for Assessment Years 2016-17 and 2017-18 respectively.

2. There is a delay of 37 days and 44 days in filing appeals for Assessment Years 2016-17 and 2017-18 respectively. The Revenue has filed a petition for condonation of delay. On perusal of the reasons stated in the petition for condonation of delay, we are of the view that there is reasonable cause and no latches can be attributed to the Revenue for late filing of these appeals. Hence, we

condone the delay of 37 days and 44 days in filing appeals for Assessment Years 2016-17 and 2017-18 and proceed to dispose off the same on merits.

3. Identical grounds are raised in both the appeals. The grounds raised read as follows:

> *"1. Whether in the facts and circumstances of the case, the Ld. CIT(A) was right in law in relying upon the decision of Hon'ble High Court in assessee's own case which has not yet reached finality?*
>
> *Whether in the facts and circumstances of the case, the Ld. CIT(A) was right in failing to appreciate that export activity had taken place/fulfilled in India utilising the services provided by the US entity, thereby the source of income was located in India as held by the AO following the principle laid down by the Hon'ble Supreme Court in the case of M/ s. GVK Industries Ltd. f(2015) 54 taxmann.com 347 (SC)1, which held that the source of payment being located in India, the payer being in India, India being following source rule, the exception to Section 9(1)(vii)(b) of the Act is not attracted?*
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> *Whether in the facts and circumstances of the case, the Lcl. CIT(A) was right in failing to appreciate that the services rendered by the US entity are in the nature of managerial / consultancy, for which 'make available' is not applicable, and proceeding* on *the basis that payment was towards technical knowledge, skill, know-how, process or transfer of technical plan or design, the same not being made available, the same would* not *fall within the ambit of FTS?"*

4. Brief facts of the case are as follows:

The AO had made an addition of Rs.11,84,47,825/- and Rs.23,03,47,626/- for Assessment Years 2016-17 and 2017-18 respectively by invoking the provisions of section 40(a)(ia) of the Income Tax Act, 1961 (hereinafter called 'the Act'). In paragraphs 5 and 6 of the Assessment Order for Assessment Year

2016-17, the AO has stated that the issue involved is recurring in nature and has been dealt by the Revenue in the earlier years. The relevant portion of the AO's order for Assessment Year 2016-17 reads as follows:

> *"5. It was also gathered that the said issue is the subject matter of order under section 201 and 201(1A) dated 16.02.2018. Accordingly, on 13.12.2018. the vide notice under section 142(1) assessee was asked to why disallowance should not be made under section 40(a)(i)for an amount of Rs.118447825/- in line with the order under section 201 and 201(1A) dated 16.02.2018. In response to the same, the assessee submitted an objection dated 17.12.2018.*
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> *6. The assessee submission has been analysed and it has been seen that order dated 10.04.2018 under section 201 has dealt with the objections raised in a comprehensive manner, for greater clarity the discussed order is reproduced here."*

5. The AO has reproduced the relevant portion of the order passed under section 201 of the Act to hold that agreement between M/s. AMSPL and M/s. AMSI for marketing services is in operation for the years together and these payments made by the assessee company viz., M/s. AMSPL for marketing services to M/s. AMSI is clearly taxable in India as Fees for Technical Services (FTS). Since the assessee had failed to deduct tax at source under section 195 of the Act on such FTS payments, the amount of Rs.11,84,47,825/- and Rs.23,03,47,626/- was disallowed by invoking the provisions of section 40(a)(ia) of the Act.

6. Aggrieved, assessee filed appeals before the CIT(A) for Assessment Years 2016-17 and 2017-18. The CIT(A), by following the Tribunal order which was confirmed by the Hon'ble High Court for the Assessment Years 2011-12 to 2017-18, decided the issue in favour of the assessee. The CIT(A) held that the payments cannot be termed as FTS and directed the AO to delete the additions.

7. Aggrieved by the Orders of the CIT(A) for Assessment Years 2016-17 and 2017-18, Revenue has filed the present appeals before the Tribunal. The learned DR has filed a brief submission which is reproduced below:

"Though the matter is covered in the respondent's own case and it is decided issue. It is submitted that this case has to be seen in different point of view and the following submission has to be taken into consideration.

1) *The concept of 'make available', if the view is applied as technical knowledge, experience, skill, know-how, etc. has to be given to the assessee, then any technical service provided for a technical issue, which is short term or temporary basis will not fall under FTS. The interpretation adopted by the several cases has flaw of reasoning, by the fact that it has not compared with the term services in a dynamic approach. The management / commercial / advisory services have to be taxed even if it does not have the effect of long-term or durable effect.*

2) *I submit that the Fees for technical services is to be determined on the basis of the term "make available", then the term 'make available' is to be interpreted in such a manner as the purpose is given. Now the sense of 'make available' is to be determined as per the heading of the Article, which directs the purpose of the term. The Article 12 falls under the heading of Royalty and Fees for Technical services.*

   The Royalty in general parlance is associated with IPR and the right to use is not available to another entity, the same is made available by the entity who owns it. The underlying thing is technical (IPR), and it is commonly not available to anyone but has to pay royalty and use it for years (as per agreement).

   Whereas, in the case of the term 'technical services' in the Article provides that those services which are not available to the entity, and it uses the technical/specialized skill of other entity, which is located outside the country. Suppose ***the entity(host),*** *which has the effective technical/specialized skill is making it available* ***to the entity(home),*** *which lacks such specialized skilled person. The underlying thing is technical service/consultancy services, and it is commonly not available to the entity(home), which is <u>made available</u> by rendering such services.*

I submit few things to substantiate my arguments for interpretation of the word 'make available',

A) The term 'make available' is to be used in a sense that, it is not commonly available to any entity, as per the Article. An Entity is holding the IPR or HR (human resources it is of in such nature that it can be performed by few skilled persons and that skilled person is held-up by particular entity). Now, the IPR can be made available through royalty agreements for a duration and whereas the technical service is to be performed by skilful/specialized persons (HR) as and when it is required. It has to be made available by that entity which is having it.
Otherwise, if the technical services, if available to an entity in its home country, then what it will attain from getting it outside the country. The term available means a thing which is not available in common (IPR and skilled persons), and it is made available through international transactions. The term 'make available' is being misinterpreted by comparing it with the term 'make use of. Actual sense has to be given by considering the concept of international transactions and not on just grammatical terms as earlier decision has followed.

B) Misconception is prevailing for 'Fees for Technical Service' from the term 'make available' is that it has to have a bearing effect in future, and it should be imparted in such a way that receiver can do it, without using the support of the provider. The technical service is required on the basis of issue/problem or on case to case it may differ. If each such technical service is imparted in such a way the receiver gets the skill/knowledge, then it may come under the purview of process or design, for which royalty will be applicable. Also imparting knowledge may amount to training, it will lead to 'Fees for Training Services' and not 'Fees for Technical Services'.

Example for simple understanding, 'A' entity gets legal issue and it takes the service of Mr. X person (CA), who is under the employment of 'ABC' (an entity). Now 'X' deals with it and solves the issue. 'ABC' has provided technical/specialized services to 'A'.

I put forth few questions below to substantiate my point,

1) Is it 'X' who has provided services? If so, what is the nature of the services?
2) If the nature of the services is technical/specialized one, is it necessary that he has to impart it to the other person?
3) If 'X' has imparted the service to 'Z', who is employee of 'A'. Will 'Z' have the ability to perform the service without the supervision of 'X'? Whether the `Z' has the necessary specialized qualifications to perform the service?
4) Whether the legal/technical issue will be same in the upcoming future years? Even if it is assumed that the issue remains the same for future years, will it be handled by some expert like 'X' or by 'Z' who doesn't have specialization but who got basic understanding from the previous issue?
5) What will be the value of the skilled persons who perform technical/specialized services; If it has to be imparted to the receiver and their education?
6) Can a same issue will be prevalent for upcoming future is very hypothetical ascertainment?
7) Whether imparting of knowledge/skill will not amount to training?
8) Whether same procedure of handling issue is used by every technical skilled person?

So, for these above reasons I submit that mere rendering of 'consultancy services will come under the FTS'. The requirement of imparting is to be construed as training the human resources of other entity, so that they can handle it in future."

8. The learned DR was however unable to distinguish the factual difference between Assessment Years 2011-12 to 2017-18 (the Assessment Years for which adjudication was made by the ITAT under section 201 of the Act, which was confirmed by the Hon'ble High Court).

9. None was present on behalf of the assessee. However, we proceed to dispose off the appeals on merits after hearing the learned DR.

10. We have heard the learned DR and perused the material on record. The issue involved is payment made by the assessee company for marketing services

to M/s. AMSI. The AO held that the payment is taxable in India as FTS and since TDS has not been deducted under section 195 of the Act, the said payments were disallowed by invoking the provisions of section 40(1)(ia) of the Act. The AO, by invoking the provisions of section 40(1)(ia) of the Act, had made reference to orders passed under sections 201(1) and 201(1A) of the Act for the Assessment Years 2011-12 to 2017-18. We notice that for the Assessment Years 2011-12 to 2017-18, the Tribunal, vide its consolidated order dated 20.03.2020 in ITA No.490 to 503/Bang/2019, had decided the issue in favour of the assessee. The Tribunal had examined in detail the agreement entered into by the assessee with its payee and the nature of services rendered, etc. Thereafter, it was concluded by ITAT that the payments cannot be attributed as FTS and assessee cannot be made liable under section 201 of the Act. The relevant conclusion of the Tribunal at paras 15.1 and 16 reads as follows:

> *"15.1 As per the above discussion, we have seen that in the facts of the present case, the services received by the assessee company cannot be considered as 'royalty' or fees for included services and the assessee was not under obligation to deduct TDS on this payment and as a consequence, the demand raised by the AO u/s 201(1) & 201(1A) of the Act cannot survive and the same is deleted .*
>
> *16. In the result, all the 14 appeals filed by the assessee are allowed."*

11. We notice that against the above order of the Tribunal, the Revenue had filed appeal under section 260A of the Act before the Hon'ble High Court. The Hon'ble High Court vide its judgment dated 24.02.2023 had dismissed the Revenue's appeal in ITA No.234, 235, 238, 241, 242 and 243 of 2020. In light of the above orders of the Tribunal which was confirmed by the Hon'ble High Court in assessee's own case for Assessment Years 2011-12 to 2017-18, we reject the contentions raised by the Department.

12. In the result, appeals filed by the Revenue are dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	**Sd/-**
(LAXMI PRASAD SAHU)	**(GEORGE GEORGE K)**
Accountant Member	**Vice President**

Bangalore.
Dated: 03.01.2024.
/NS/*

Copy to:

1. Appellants
2. Respondent
3. DRP
4. CIT
5. CIT(A)
6. DR, ITAT, Bangalore.
7. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.