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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "F" BENCH: NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA Nos.911 & 912/Del/2023
[Assessment Years : 2017-18 & 2018-19]

ACIT, Circle-13(1), New Delhi	vs	Lx Pantos India Private Limited, K-27, Ground Floor, Gali No.06, Mahipalpur, South West, New Delhi-110037. ***PAN-AAACF8539L***
APPELLANT		**RESPONDENT**
Appellant by		Shri Dharambir Singh, CIT DR
Respondent by		Shri Salil Kapoor, Adv. & Ms. Ananya Kapoor, Adv.
Date of Hearing		08.04.2024
Date of Pronouncement		17.05.2024

ORDER

PER KUL BHARAT, JM :

Both the appeals filed by the Revenue are directed against the order passed by Ld.CIT(A), National Faceless Appeal Centre ("NFAC"), New Delhi dated 03.02.2023 for the assessment years 2017-18 & 2018-19. Since similar grounds have been raised, both appeals of the Revenue were taken up together for hearing and are being decided by way of this consolidated order for the sake of brevity.

ITA No.911/Del/2023 [Assessment Year : 2017-18]

2. First, we take up the appeal of the Revenue in the Assessment Year 2017-18 in ITA No. 911/Del/2023. The Revenue has raised following grounds of appeal:-

1. *"That whether on the facts and in law, the Ld.CIT(A) is erred in deleting the disallowance of Rs.33,49,56,683/- u/s 40(a)(i) of the Act for non-deduction of tax at source on shipment clearing and forwarding charges.*

2. *That the appellant craves leave to add, amend, alter or forego any ground/(s) of appeal either before or at the time of hearing of the appeal."*

3. Briefly stated facts of the case are that the assessee filed its return of income on 30.11.2017, declaring total income at INR 49,03,960/-. The case was selected for scrutiny assessment and the assessment u/s 143(3) of the Income Tax Act, 1961 ("the Act") was framed vide order dated 26.12.2019. The Assessing Officer ("AO") while framing the assessment, noticed that the assessee had claimed an amount of INR 89,42,83,355/- towards shipment clearing and forwarding expenses. It was noticed that out of these amount, an amount of INR 33,49,56,683/- was paid overseas on which no tax was deducted by the assessee. Therefore, the AO called upon the assessee to explain as to why it failed to deduct tax in terms of section 195 of the Act. In response to the show cause notice, the assessee filed its response, stating that the amount cannot be subjected to deduction of tax. However, the AO did not accept the explanation of the assessee and proceeded to make disallowance u/s 40(a)(i) of the Act and assessed income at INR 49,03,960/-. The AO was of the view that the services so rendered to the assessee by the persons hired by it fell under the category of consulting services and payments made to the parties, are liable for deducting tax at source since it was squarely covered by the provisions of section 195 of the Act which mandates deduction of tax at source on payments made to non-resident.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who after considering the submissions, allowed the appeal, observing that the payment received by the overseas parties neither falls u/s 9(1) nor u/s 9(1)(i) of the Act. Since the income could not be described as "deemed" to accrue or arising in India hence, taxability of such amount fails. Therefore, there is no justification for the action of the AO for invoking the provision of section 40(a)(i) of the Act, thereby making disallowance of the expenditure.

5. Aggrieved against the order of Ld.CIT(A), the Revenue preferred appeal before this Tribunal.

6. The only effective ground raised by the Revenue in this appeal is against the deletion of disallowance made by the Assessing Authority by invoking the provision of section 40(a)(i) of the Act.

7. Ld. CIT DR for the Revenue vehemently argued that Ld.CIT(A) was not justified in deleting the addition. Ld.CIT DR took us through the impugned order and the terms of contract executed between the assessee and non-residents. He submitted that the overseas client not only rendered services but also undertook to apprise and advise the assessee about any changes which may affect the freight tariffs and rules or other information applicable to and from China and to and from India. Ld. CIT DR drew our attention to clause 1.1 and 2.3 of the Agreement between the assessee and the overseas parties. He submitted that looking to the terms of the Agreement, the AO was justified in invoking the provision of section 40(a)(i) of the Act as the assessee ought to have deducted tax at source since the amount would be chargeable to

tax as Fee for Technical Services ("FTS"). He contended that fees for such services would fall within the ambit and scope of FTS. Therefore, he contended that Ld. CIT(A) grossly erred in holding that the amount is not chargeable to tax. Hence, the assessee is not liable for withholding tax.

8. On the other hand, Ld. Counsel for the assessee, Shri Salil Kapoor, opposed these submissions and supported the decision of Ld.CIT(A). He submitted that the AO mis-directed himself and did not appreciate the facts in right perspective. He submitted that the entire services were rendered outside India. The payments for such services were made outside India. Therefore, the income did not arise or accrue in India, which has rightly been held by Ld.CIT(A). He submitted that if the payments were made for the services rendered outside India then how can the assessee be made liable for withholding tax. There is no provision under the Act that would mandate the assessee for deduction of tax under the facts and circumstances of the present case. Ld. Counsel for the assessee reiterated the contents of written submission and contended that even otherwise also, the issue regarding taxability of freight forwarding charges is covered in favour of the assessee by a series of decisions of Co-ordinate Benches of this Tribunal. For the sake of clarity, the relevant contents of the written submissions are reproduced as under:-

* *"LX Pantos India Private Limited ('Pantos India') is an Indian company engaged in the business of providing logistic services. For this purpose, Pantos India has entered into a 'Co-operation Agreement' with overseas logistics companies for providing*

transportation and customs clearing services in their respective countries.

* *For the AY 2017-18, Pantos India has filed its return of income declaring a total income of INR 49 Lacs and claiming refund of INR 1.26 crores. For AY 2018-19, total loss of INR 32.51 Lacs was declared, and refund of INR 3 crores (approx.) was claimed as under:*

Particulars	*Amount (INR) AY 2017-18*	*Amount (INR) AY 2018-19*
Total income	*49,03,960*	*(32,51,284)*
Tax payable under section 115JB	*38,01,114*	*(1,02,29,607)*
Less: Prepaid taxes	*(1,64,70,388)*	*(3,04,74,482)*
Tax payable/ (Refund)	*(1,26,69,270)*	*(3,04,74,482)*

* *Pantos India's case was selected for scruting under section 143(2) of the Income Tax Act, 1961 (the Act). During the course of said proceedings, Assessing Officer ('AO') held that Pantos India is availing advisory services from the overseas logistics company and the same is in the nature of consultancy services which would qualify as Fees for technical services ('FTS') under the Act and various Double Taxation Avoidance Agreements ('DTAA'). Thus, the Pantos India was required to deduct TDS on the shipment clearing and forwarding charges paid to overseas logistics companies under section 195 of the Act.*

* *Considering, Pantos India does not deduct any taxes on the payment made to overseas logistics companies, the aforesaid expenses amounting to INR 33.49 crores and INR 46.11 crores have been disallowed in AY 2017-18 and AY 2018-19 respectively under section 40(a) (i) of the Act.*

* *Aggrieved by the order of AO, Pantos India preferred an appeal before the CIT(A) on the ground that the shipment clearing and forwarding services rendered by the overseas logistics companies are not in the nature of advisory or consultancy services but are logistic expenses.*

* *CIT(A) has passed order in favour of Pantos India and held that the payment received by overseas parties neither falls u/s 9(1) nor u/s 9(1)(vii). Since the income cannot be deemed to accrue or arise in India and therefore the amount paid to overseas logistic cannot be charged to tax in India. Thus, the appeal was allowed in favour of Pantos India.*
* *Pursuant to the order of CIT(A) u/s 250 of the Act, income tax department has preferred an appeal before ITAT.*

<u>Our Submissions</u>

<u>Our stand and argument</u>

* *It is humbly submitted that the overseas entities' scope of work was limited to providing logistic services overseas. These services involve pick-up of goods from overseas consignor and delivery to overseas carrier and vice-versa, stuffing/ lashing/ packing of goods and clearance of goods at customs.*
* *These services are administrative in nature involving no professional skills or knowledge. Further, the overseas entities are responsible for mere execution of the deliveries and do not engage in any sort of planning or evaluation/testing of the goods and thus there was no requirement to deduct TDS.*
* *The section 195 of the Act provides that every person, responsible for paying any sum (which is chargeable to tax in India) to a non-resident, is required to withhold taxes at the applicable rates in force, at the time of credit or payment, whichever is earlier.*
* *In view of the above, only payments made to non-resident which are chargeable to tax in India are to be covered under this section for the purpose of withholding taxes.*
* *The income of overseas entity does not accrue or arise in India since the services have not been performed in India. Therefore, no amount of income from such service should be held taxable in India. Basis*

the same, it is clear that the payment made to overseas entities is not chargeable to tax in India and hence, not liable for withholding of taxes under section 195.

* *Considering that the sum paid by Appellant is not chargeable to tax in India, the Appellant is not liable to withhold taxes on such payments. Accordingly, the disallowance under 40(a)(i) will not apply in the present case.*

The stand of the AO

* *Pantos India has entered into a co-operation agreement with overseas logistics companies for providing transportation and custom clearing services in their respective countries. Relevant extract of the Article 2.3 of the co-operation agreement referred by AO is reproduced below:*

2.3 PLISZ and PLIIN respectively will advise each other of any changes, which may affect the freight tariffs and rules or other information applicable to and from China and to and from India.

* *AO contended that Pantos India is availing advisory services from its associated enterprises and overseas entities which are duly covered under the definition of consultancy under section 9(1)(vii) of the Act and under DTAA as well. Thus, Pantos India is liable to deduct TDS on its claim of Shipment Clearing and Forwarding Expenses of INR 33,49,56,683/- and INR 46,10,99,407 during AY 2017-18 and AY 2018-19 respectively. Since Pantos India did not deduct tax at source as per the provisions of Section 195 of the Act on payment of such expenses, the same should not be allowed as deduction to Pantos India in view of the provisions of section 40(a)(i) of the Act.*

Our Arguments

* *Our principal argument is that the services rendered were not in nature of consultancy and advisory basis which the liability for deduction of TDS does not arise on Pantos India.*

* *We wish to re-iterate that AO has grossly misinterpreted the facts in assuming that the word 'advice' has been used in its literal sense instead of its contextual sense; and has failed to understand that the usage of said word simply seeks to create a responsibility to relay the information 'as-it-is', without applying any professional or technical judgement or knowledge. The AO has erred in misconstruing the word 'advice' appearing in the contract has cherry picked the said word without looking at its meaning in the context of the agreement.*

* *AO, while alleging that the service provide are of 'consultancy nature', has selectively cherry- picked the following single clause mentioned in the 'Co-Operation Agreement'. AO has failed to read the same in context with the complete agreement, wherein scope of work has been defined separately. Further, AO has also wrongly interpreted the judicial precedents to conclude that the subject services of general business / administrative nature (involving no professional skills or knowledge) are of a 'consultancy nature'.*

* *After a detailed consideration of the factual and the legal aspects involved, the CIT(A) has allowed our appeals. The CIT(A) in para 5 (5.1 to 5.11), pg. 36-41 has given a detailed finding in this regard.*

* *We shall place reliance on below mentioned judicial precedents also referred before CIT(A):*

    ➢ ***<u>Circular No. 715 dated 08/08/1995 issued by CBDT-</u>*** *Question 6 of the said circular specifies that payment made to clearing and forwarding agent is covered for TDS under section 194C and accordingly cannot be considered as FTS.*

    > *"Question 6: Whether payment under a contract for carriage of goods or passengers by any mode of*

transport would include payment made to a travel agent for purchase of a ticket or payment made to a clearing and forwarding agent for carriage of goods? Answer: The payments made to a travel agent or an airline for purchase of a ticket for travel would not be subjected to tax deduction at source as the privity of the contract is between the individual passenger and the airline/travel agent, notwithstanding the fact that the payment is made by an entity mentioned in section 194C(1). The provision of section 194C shall, however, apply when a plane or a bus or any other mode of transport is chartered by one of the entities mentioned in section 194C of the Act. As regards payments made to clearing and forwarding agent for carriage of goods, the same shall be subjected to tax deduction at source under section 194C of the Act."

Thus, above circular clarifies that income is not FTS as per Section 194J but contractual service u/s 194C. It is pertinent to note that the purpose of section 194J and 195, read with section 115A, FTS is defined in section 9(i) (vii). Thus, when the payments are not covered by 194J, they cannot be covered by section 195 also, as the definition of FTS is same.

The above circular was referred by Delhi Tribunal in the case discussed below.

- ***ACIT Vs Indair Carriers Pvt. Ltd. [I.T.A. No. 1605 (Del) of 2010): (Jurisdictional Tribunal)***

"The payment made to freight forwarding agent as held by the Id. CIT (Appeals) is covered by Circular No. 715 dated 8/08/1995 and, therefore, the payment cannot be treated in respect of managerial services. The expenditure is in the

nature of business expenses. Moreover, the said payment is not chargeable to tax under section 195. When the amount is not chargeable to tax in India, provisions of section 40(a) (i) of the Act are not applicable."

Also refer Para 5.1-5.2.

- ***JAS Forwarding Worldwide Pvt. Ltd., New Delhi v. DCIT (ITAT No. 3296/Del/2011) (Jurisdictional Tribunal) (Para 18, 20, 21, 22)***
- *UPS SCS (Asia) Ltd [2012] 50 SOT 268 (Mum) (Para 4-10, 16-18)*
- *Expeditors International of Washington Inc. [TS-61-ITAT-2021 (DEL)] (Jurisdictional Tribunal)*
- *Asstt. CIT v. Leaap International (P.) Ltd. [201 1 1 15 taxmann.com 251 (Chennai)*
- *Spahi Projects (P.) Ltd., In re |2009| 183 Taxman 92 (AAR - New Delhi)*
- *Linde A.G. v. ITO [1997] 62 ITD 330 (Mum.)*
- *Dy. DIT v. Samsung Engg. Co. Ltd. [2011] 43 SOT 38 (Mum.) (URO)."*

9. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. The Revenue by way of the present appeal has challenged the correctness of the order of Ld.CIT(A) who had deleted the impugned addition by holding that the assessee was not liable to deduct tax u/s 195 of the Act in respect of shipment clearing and forwarding expenses paid by it to overseas parties at different countries. It is pertinent to mention here that the case of AO in sum and substance is that as per one of the terms of contract, the assessee was provided information regarding tariff etc. prevalent in that country. The assessee was also informed about any change into tariff rates. Such information would have influenced the decision making process. Thus,

such services fall under the category of fee for technical services. And under such facts, the assessee was required to deduct tax at source. On the other hand, case of the assessee is that section 195(1)of the Act states that the income will be subject to deduction of tax at source if it is chargeable under the provision of the Income Tax Act. It is stated by the assessee that the income earned by the overseas logistics company is neither received or deemed to receive in India nor accrues or arises or is deemed to accrue or arise in India as all activities are carried out overseas and culminated when the goods are handed over the transporter overseas. It is not the case that overseas parties have their Permanent Establishment ("PE") in India. And derive income from the business set up and controlled in India. Hence, such amount is not chargeable to tax in India and no tax needs to be deducted at source. Ld.CIT(A) decided the issue by observing as under:-

5. Decision:-

5.1. "I have considered the submission of the assessee and given a careful thought. Every person is liable to pay income tax in respect of his total income in accordance with the provisions of the Act. For determination of taxability, the Act in general follows a combination of the source and residence Rules. In this case, the entire dispute centre around the taxability of the amount received by the Pantos Logistics (S) Co.Ltd. and other non resident parties from the assessee in respect of services performed outside India on the export consignment. There is no quarrel over the nature of services for which the above referred amount has been paid to the non resident parties being freight and logistic services such as transport, procurement, custom clearance, sorting delivery. Now the question arises for my consideration as to whether the payment in respect of

these services can be held as fees for technical services within the meaning of section 9(1)(vi) of L.T. Act. The expression fees for technical services has been defined in Explanation 2 to section 9(1)(vii) as under:

> *"For the purpose of this clause fees for technical services means any consideration (including any lumpsum 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 of any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under head salaries."*

5.2. A bare perusal of the above quoted provision indicates that the fees for technical services means any consideration for rendering of any managerial, technical and consultancy services but does not include the consideration for any construction, assembly etc. The AO has held the services rendered by the non resident payee parties as fee for technical services coming within the sweep of consultancy services. On the contrary, the contention of the assessee is that such services do not fall within the ambit of any of the categories as envisages u/s.9 (1)(vii) of I.T.Act.

5.3 In order to appreciate the nature of services more elaborately, it is relevant to consider the terms of the agreement entered into between the assessee and Pantos Logistics (S) Co.Ltd. The scope of services has been given in clause 1.1, wherein it is provided that the non-resident party has to perform logistic services viz. handling of air and sea freight shipments in China. In the present appeal, I am concerned with the international services provided to the assessee company. These services comprise of transport, procurement etc. on behalf of the assessee.

5.4 First I will consider the ambit of 'managerial services' to test whether the instant services can qualify to be so called. Ordinarily the managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. It would mean that the directions of the latter are executed simplicity without there being any planning part involved in the execution and also the evaluation of the performance. In the absence of any specific definition of the phrase "managerial services" as used in section 9(1)(vii) defining the "fees for technical services", it needs to be considered in a commercial sense. It cannot be interpreted in a narrow sense to mean simply executing the directions of the other for doing a specific task. For instance, if goods are to be loaded and some worker is instructed to place the goods on a carrier in a particular manner, the act of the worker in placing the goods in the prescribed manner, cannot be described as managing the goods. It is a simple direction given to the worker who has to execute it in the way prescribed. It is quite natural that some sort of application of mind is required in each and every aspect of the work done. As in the above example when the worker will lift the goods, he is expected to be vigilant in picking up the goods moving towards the carrier and then placing them. This act of the worker cannot be described as managing the goods because he simply followed the direction given to him. On the other hand, managing' encompasses not only the simple execution of a work, but also certain other aspects, such as planning for the way in which the execution is to be done coupled with the overall responsibility in a larger sense. Thus it is manifest that the word

'managing' is wider in scope than the word executing'. Rather the later is embedded in the former and not vice versa.

5.5 *Adverting to the facts of the instant case it is observed that the assessee performed freight and logistics services outside India in respect of consignments originating from India undertaken to be delivered by the assessee. The role of the parties in the entire transaction was to perform only the destination services outside India by unloading and loading of consignment, custom clearance and transportation to the ultimate customer. In my considered opinion, it is too much to categorize such restricted services as managerial services.*

5.6 *Now I take up the next component of the definition of "fees for technical services", being consultancy services', which has been pressed into service by the AO to fortify his view that the amount paid by the assessee is covered within section 9(1)(vii). The word "consultancy" means giving some sort of consultation de hors the performance or the execution of any work. It is only when some consideration is given for rendering some advice or opinion etc., that the same falls within the scope of "consultancy services". The word 'consultancy' excludes actual execution'. The nature of services, being freight and logistics services provided by the parties to the assessee has not been disputed by the A.O. There is nothing like giving any consultation worth the name. Rather such payment is wholly and exclusively for the execution in the shape of transport, procurement, customs clearance, delivery, warehousing and picking up services. That being the position, I opine that the payment in lieu of freight and logistics services cannot be ranked as consultancy services.*

5.7 *The only left over component of the definition of "fees for technical services" taken note of by the AO is "technical services". He observed that the assessee's business structure is time bound service coupled*

with continuous real time transmission of information by using and also making available its technology in the form of sophisticated equipments and software etc. The AO has held that: "in order to ensure efficient and timely delivery and to provide continuous real time information, the parties are required to use sophisticated technology for which the overseas parties are also equally involved and to whom the overseas parties are committed to providing the requisite software and equipment".

5.8 The principle of noscitur a sociis mandates that the meaning of a word is to be judged by the company of other words which it keeps. This rule is wider in scope than the rule of ejusdem geners. In order to discover the meaning of a word which has not been defined in the Act, the Hon'ble Supreme Court has applied the principle of noscitur a sociis in several cases including Aravinda Paramila Works Vs. CIT [(1999) 237 ITR 284 (SC) As noted above the word 'technical' has been sandwiched between the words 'managerial' and consultancy' in Explanation sec. 9(1)(vii) and rno definition has 2 to been assigned to the technical services in the relevant provision, we need to ascertain 1 the meaning of the technical services' from the overall meaning of the words 'managerial and the principle of nosticur asools has be consultancy services by applying the managerial services' and consultancy services pre-suppose some sort of direct human involvement. These services cannot be conceived without the direct involvement of man. These services can be rendered with or without any equipment, but the human involvement is inevitable. Moving in the light of this rule, there remains no doubt whatsoever that the technical services cannot be contemplated without the direct involvement of human endeavor. Where simply an equipment or a standard facility albeit developed or manufactured with the use of technology is used, such a user cannot be characterized as using 'technical services'.

5.9. Thus it can be noticed that the payment made to overseas parties in question is not a consideration for managerial or technical or consultancy services. That being the position, it cannot fall within the ambit of section 9(1)(vii) of I.T. Act.

5.10 Section 4 provides that the income tax shall be charged on the total income of any assessee of the previous year for any assessment year at the rates in accordance with and subject to the provisions of this Act. Scope of total income of any person has been enshrined in section 5. Section 5(2) mandates that the total income of a non-resident includes the income from whatever source derived which is received or is deemed to be received in India; or accrues or arises or is deemed to accrue or arise in India. The only possibility of the receipt by the overseas parties in the present facts and circumstances qualifying for inclusion in the total income, can be under section 9. I have observed that section 9(1)(vii) is not applicable. Now let me examine the prescription of section 9(1)(i) which deals with the income accruing or arising from any business connection in India. It provides that where an income accrues or arises whether directly or indirectly through or from any business connection in India etc., it shall be deemed to accrue or arise in India. Explanation 1(a) states that in the case of a business of which all operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. This Explanation makes it prominent that only that part of the income from business operations can be said to be accruing or arising in India, as is relatable to the carrying on of operations in India. In other words, if a non- resident earns any income from India by means of operations carried on outside India, that will not fall within the scope of section 9(1)(i). Even Explanation below section 9(2), requiring inclusion of income in the total income of the non-resident whether or not the non-resident has

a residence or place of business or business- connection in India or the non-resident has rendered services in India, is applicable only in respect of clauses (v) to (vil). Clause (i) of section 9 has not been included by the legislature within the ambit of this. It shows that unless a non- resident earns income from business operations carried out in India, such income cannot be deemed as accruing or arising in India. Reverting to the facts of the instant case, it is crystal clear that the overseas parties rendered "International services" outside India which required the payment in question. If this is the position, which has not even been disputed by the A.O, then there can be no question of roping such income within the ken of section 9(1)(i) of the Act.

5.11. It is, therefore, patent that the payment received by overseas parties neither falls u/s 9(1)() nor u/s 9(1)(vii) of the Act. Since the income cannot be described as deemed to accrue or arise in India and there is no doubt about such income having not been received or deemed to be received or accruing or arising in India, the taxability of such income fails. I, therefore, hold that the amount in question cannot be charged to tax."

10. Ld.CIT(A) has elaborately discussed and dealt with the objection of AO by giving finding on facts. The sole basis of the AO for rejecting the submissions of the assessee is that it was also advised by the overseas parties on change into tariff ratio etc. The AO tried to find support from one of terms of the Contract executed between the assessee and non-resident. We find merit into the contention of the assessee, such advise would not partake character of rendering consultancy service. Merely, providing information of such nature in our considered view would not be sufficient for treating the entire services as managerial or consultancy services. If the view of the AO is accepted then any information received by the assessee from non-residents during the coruse of

business would be treated as rendition of consultancy services by the non-resident. Looking to the context of providing information, it cannot be deduced such information was provided for consultancy. Under the identical facts, Co-ordinate Bench of this Tribunal in the case of ***ACIT vs M/s. Indiar Carriers Pvt.Ltd.*** in ***ITA No.1605/Del/2010 [Assessment Year 2006-07]*** vide order dated ***13.05.2011*** held as under:-

> *5.1. "We have heard both the parties. There is no dispute about the fact that the assessee had made payment to UTI Network, Inc, outside India against freight forwarding functions. The income by way of freight forwarding charges is not taxable in India. Under section 40 (a) (i) of the Act, any payment by way of interest, royalty, fee for technical services or other sum chargeable under this Act which is payable outside India or in India to a non-resident, not being a company or to a foreign company on which tax is deductible at source under Chapter XVII-B and such tax had not been deducted or after deduction has not been paid during the previous year or in the subsequent year before expiry of time prescribed under sub section (1) of section 200 shall not be deducted in computing the income chargeable under the head 'profits or gains of business or profession'. The payment made to freight forwarding agent as held by the ld. CIT (Appeals) is covered by Circular No. 715 dated 8/08/1995 and, therefore, the payment cannot be treated in respect of managerial services. The expenditure is in the nature of business expenses. Moreover, the said payment is not chargeable to tax under section 195. When the amount is not chargeable to tax in India, provisions of section 40(a)(i) of the Act are not applicable.*
>
> *5.2 Hon'ble Delhi High Court in the case of Van Oord ACZ India P. Ltd. (323 ITR 130) has held that liability to deduct tax at source arises only when the sum paid to the non-resident was chargeable to tax in*

India. Once that was chargeable to tax, it was not for the assessee to find out how much amount of receipt was chargeable to tax, but it was the obligation of the assessee to deduct the tax at source on the entire sum paid by him to the recipient. Under section 195 of the Act, the obligation to deduct tax at source was attracted only when the payment was chargeable to tax in India. Hon'ble Supreme Court in the case of Elly Lilly Co. P. Ltd. 312 ITR 225 (SC) has held that the purpose of provisions for deduction of tax at source in Chapter XVII-B of the Income-tax Act, 1961 is to see that from the sum which is chargeable under section 4 for levy and collection of Indian tax, the payer should deduct tax at the rates if the amount is to be paid to non-resident. They are meant for tentative deduction of Income-tax subject to regular assessment. Special Bench of the ITAT in the case of Prasad Production [3 ITR Trib. 58] has held that it is only when the Revenue establishes that the sum payable to the non-resident is taxable under the provisions of the Act, the provisions of section 40(a)(i) can be invoked. This proposition of law has been approved by the Hon'ble Supreme Court in the case of GE India Technology Centre (P) Vs. CIT dated 09.09.2010. Since the payment of Rs.3,22,042/- is not chargeable to tax in India under section 9(1)(vii) read with section 195 of the Act, provisions of section 40 (a) (i) will not be applicable. Accordingly, we do not find any infirmity in the order of the ld. CIT (A) deleting the addition."

11. In the light of binding precedent (supra), we do not see any infirmity into the decision of Ld.CIT(A) holding *"Since the income cannot be described as deemed to accrue or arise in India and there is no doubt about such income having not been received as deemed to be received as accruing or arising in India, the taxability of such income fails."* The Revenue has not rebutted this finding of Ld.CIT(A) by bringing any contrary material on record. The Revenue has also not brought to our notice any other contrary binding precedent

applicable on the facts of the present case. We therefore, do not see any error in the finding of Ld.CIT(A), same is hereby affirmed. The grounds raised by the Revenue are devoid of any merit.

12. In the result, the appeal of the Revenue is dismissed.

ITA No.912/Del/2023 [Assessment Year : 2018-19]

13. Now, we take up the appeal of the Revenue in the Assessment Year 2018-19 in ITA No. 912/Del/2023. The Revenue has raised following grounds of appeal:-

> 1. *"That whether on the facts and in law, the Ld.CIT(A) is erred in deleting the disallowance of Rs.46,10,99,507/- u/s 40(a)(i) of the Act for non-deduction of tax at source on shipment clearing and forwarding charges.*
> 2. *That the appellant craves leave to add, amend, alter or forego any ground/(s) of appeal either before or at the time of hearing of the appeal."*

14. Facts in this case are also identical and similar as in ITA No.911/Del/2023 [AY 2018-19] except figures. Ld. Representatives of the parties have adopted the same arguments in respect of grounds of appeal.

15. We have heard Ld. Authorized representatives of the parties and perused the material available on record. We find that the facts and issues are similar and identical to the Revenue's appeal in **ITA No.911/Del/2023 [AY 2017-18]** except figures. Ld. Representatives of the parties have adopted the same arguments in respect of grounds of appeal. Since the facts are identical and similar, our decision in **ITA No.911/Del/2023 [AY 2017-18]** would apply

Mutatis Mutandi in this appeal filed by the Revenue as well. Grounds raised by the Revenue are accordingly, dismissed.

16. In the result, the appeal of the Revenue is dismissed.

17. In the final result, both appeals of the Revenue in **ITA No.911 & 912/Del/2023** for the **Assessment Years 2017-18 & 2018-19** are dismissed.

Order pronounced in the open Court on 17th May, 2024.

Sd/- ***Sd/-***

(M.BALAGANESH) **(KUL BHARAT)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI