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

Before Shri Saktijit Dey, Vice President
&
Dr. B. R. R. Kumar, Accountant Member

ITA No. 6006/Del/2019: Asstt. Year: 2013-14

The ACIT, Circle 18(2), New Delhi	Vs	NTL Lemnis India Pvt Ltd., 305, Guru Amar Das Bhawan, 78, Nehru Place, Delhi 110019
(APPELLANT)		(RESPONDENT)
PAN No. AAHCA 9216 C		

Assessee by : None
Revenue by : Sh. Sanjay Kumar, Sr. DR

Date of Hearing: 17.01.2024		Date of Pronouncement: 22.01.2024

ORDER

Per Dr. B. R. R. Kumar:-

The present appeal has been filed by Revenue against the order of Ld.CIT(A)-6, New Delhi dated 09.04.2019.

2. The Revenue has raised the following grounds of appeal:-

> *1. Whether on the facts and circumstances of the case, the ld. CIT(A) has erred in deleting the disallowance of Rs. 6,74,32,200/- u/s. 40(a)(i) for non deduction of TDS on payment to non-resident which is in nature of FTS(Fee for Technical Service)?*

3. The facts of the case are that the assessee flied revised return on 28/03/2015 declaring income at NIL and current year loss was claimed at Rs. 10,77,13,660/-.

4. The assessee is engaged the business of import/export, trading, manufacturing, commission agency, consulting, advising in any way dealing with lighting products and lighting solutions in the field of home lighting, public lighting, greenhouse lighting and solar lighting. The company is also engaged in research and development in the area of lighting products and solutions.

5. The Assessing Officer noted that the assessee had claimed management fee amounting to Rs. 9,85,54,700/ - paid to NTL Lemnis Holding BV and Rs. 1,08,57,200/-. Before the AO the assessee filed management Agreement entered into by the assessee with NTL Lemnis Holding BV but not the Agreement in respect of management fee paid to NTL Electronics India Limited. The AO referred to the management Agreement with the assessee company and noted the following scope of services:

> *"Advise NL India's management on financial matters, which shall include review of operating results and budgets and assist NL India in evaluating the same for decision making purposes; Advise NL India's management on fund raising strategy with respect to funds to be raised from Bankers, Investors and other financial institutions to secure investment finance requirements; Assist in review of internal control procedures; Provide such assistance and advisory services as may be requested by NL India from time to time pertaining to management of operations and finance department of NL India;"*

6. From the scope of services the AO held that the nature of services contemplated under the Agreement was that of advisory and consultancy services which would be covered within the meaning of 'fee for technical services' ("FTS") both under the Income Tax Act as well as the treaty.

7. Referring to the provisions of section 9(1) and the Explanation to section 9 the Assessing Officer held that FTS is payable by a resident would become an income of the non-resident payee deemed to accrue or arise in India and would be chargeable to tax under the provisions of the Income Tax Act. The assessee submitted that the management fee paid to NTL Lemnis Holding BV is not liable to tax in India as the said payment is not income deemed to accrue or arise in India in view of Article 12 of India-Netherlands DTAA and the most favoured nation (MFN) clause in the India-Netherlands tax treaty. Further, it was submitted that management fee paid to NTL Lemnis Holding BV was not liable to tax in India as it was not making available to the Indian company (NTL Lemnis India Pvt. Ltd.).

8. The AO held that in accordance with the provisions of section 195, the assessee was required to deduct tax at source from payments of FTS amounting to Rs. 9,85,54,700/- but the assessee deducted tax only on payments aggregating to Rs. 3,11,22,500/-. Since the assessee had failed to deduct tax at source under section 195 on payments aggregating to Rs. 6,74,32,200/- in the nature of FTS made by it to a non-resident, the same was held to be not allowable as deduction

under section 40(a)i) and was disallowed and added back. It was also noted that out of the total payment of Rs. 9,85,54,700/-, payment of Rs. 69, 65,000/- had been booked by the assessee on 22/05/2013 and was not allowable as deduction for the year under consideration. In conclusion Assessment was completed at a loss of Rs. 4,02,81,460/-.

9. Aggrieved, the assessee file before the ld. CIT(A).

10. Submissions made by assessee before the ld. CIT(A) are as under:

> *M/s NTL Lemnis India Pot. Ltd (hereinafter referred to as the "Assessee" or the "Appellant") is in receipt of Assessment Order u/s 143(3) dated 18/03/2016 (Copy enclosed at Annexure 1) in which addition of Rs. 6,74,32,200/- has been made by the Assessing Officer ("AO"). It is in this matter that the Assessee has preferred an appeal before CIT (Appeal) against order of AO u/s 143(3).*
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> *1. FACTS OF THE CASE:*
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> *1.1. The assesseeis a private limited company engaged in the business of import, export, trading and manufacturing of lighting products.*
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> *1.2. The assesseefiled its ITR for A.Y 2013-14 declaring total loss of Rs. 10,77,13,660 and assessment under section 143(3) was completed on 18-03-2016.*
>
> *1.3. The Learned A.O has disallowed expenses for management and marketing support services of Rs.*
>
> *6,74,32,200 paid to foreign company under section 40(a) (i).*
>
> *1.4. During the relevant P.Y, assessee paid Rs. 9,85,54,700/- to NTL Lemnis holding BV, a tax resident of Netherlands*

towards management support services received pursuant to management agreement dated 02-04-2012(Copy enclosed at Annexure-2) and towards sales and marketing support services received pursuant to sales and marketing services agreement dated 02-04-
2012(Copy enclosed at Annexure-3).

1.5. Management support services provided to the assessee by NTL Lemnis Holding BV pertain to administration and management of assessee business. Specifically, services included reviewing and evaluating operating results, internal control procedures, management of fund raising strategy etc. All these services have been provided by personnel of NTL Lemnis Holding BV independently from outside India and no training or education has been transferred to the assessee or its personnel in the course of providing such services. All these services are non technical in nature as they are in the nature of administrative services and hence do not fall in the category of FTS. Even if some portion of scope included assistance, the same also does not become taxable as it was in the nature of managerial assistance and such services do not satisfy the make available test as no education or training was imparted to the assessee or its personnel which would enable them to perform such services independently in future.

1.6. Sales and marketing support services provided to the assessee by NTL Lemnis Holding BV mainly included facilitating interaction and support to overseas customer (IKEA) of the assessee which is clear from the perusal of scope of services of the sale and marketing services agreement dt: 02-04-2012. These services were also provided from outside India directly to the overseas customer (IKEA) which is also located outside India and there is no question of training or education that

could have been transferred to the assessee in the course of providing such services. By their very nature, these sales and marketing support services can not be said to be FTS and also do not fulfill the make available clause.

1.7. The learned AO has erred on facts and in law in assuming that rendering of such services automatically satisfy the make available clause as required by India-Netherland Tax treaty and accordingly erred in treating the same as liable for TDS under section 195 and disallowing Rs. 6,74,32,200 under section 40(a) (i).

1.8. Services rendered by the foreign co. to the assessee neither fall in the definition of FTS nor satisfy the make available clause as per the beneficial provisions of DTAA between India and Netherlands. Whereas to tax such income in India, above both conditions must be fulfilled.

2. Parawise reply to the AO's order u/s 143(3) dated 18st March, 2016

2.1. AO has stated in para 3.4 of his order that
"it can be observed that the nature of services contemplated under the above agreement is that of advisory and consultancy services, which is covered within the maning of 'Fee for Technical Services' ("FTS") both under the Act and under the Treaty."

In respect of above remarks of the learned AO, it is submitted that Management support services provided to the assessee by NTL Lemnis Holding BV pertain to administration and

management of assessee business. Management support services provided by personnel of NTL Lemnis Holding BV independently from outside India did not impart any training to the assessee or its personnel in the course of providing such services. All these services are administrative and non technical in nature and do not fall in FTS.

2.2. AO has stated in para 3.8 of his order that

"i have carefully considered the assessee's reply, but do not find the same as acceptable.....

In respect of above, it is submitted that The learned AO has erred on facts and in law in disregarding the provisions of Income Tax Act, 1961, rules made there under and beneficial provisions of DTAA between India and Netherlands, in as much as treating the management support services and sales and marketing support services provided by foreign company to the assessee as Fees for technical services according to the India-Netherland Tax Treaty

2.3. AO has stated in para 3.10 of his order that

"Regarding the issue of impugned services not being FTS as per the India USA Treaty, the assessee's contention is not correct. .....

In respect of above, it is submitted that foreign company has provided managerial services to the assessee and assisted the management on managerial matter such as review of operating results, fund raising strategy, review of internal control procedures etc. There can be no difference between providing managerial service and assisting on managerial matters.

Agreement has to be read and interpreted in a holistic manner and not with regard to some specific word only.

2.4. AO has stated in para 3.13 of his order that
"it can be observed from the Treaty that if technical knowledge, experience, skill, know-how, or processes are made available...... 〃

In respect of above, it is submitted that AO has assumed that Management support services made available technical knowledge, experience, skill, knowhow etc to the assessee without any rational logic.

2.5. AO has stated in para 3.17 of his order that
"Thus, in accordance with the provision of section 195 of the Act, the assessee was required to deduct...."
In respect of above it is submitted that Amount received by NTL Lemnis Holding BV is for providing management and sales and marketing support services is not taxable in India as per beneficial provisions of tax treaty between India and Netherlands and hence there is no question of deducting TDS under section 195 and disallowance under section 40(a) (i).

3. DETAILED SUBMISSION OF THE ASSESSEE ON GROUNDS OF APPEAL:

3.1. The order passed by learned AO is bad in law as proper Show Cause Notice giving reasons which formed the basis of disallowance as required by CBDT Instruction No. 20/2015 dt. 29-12-2015 was not issued by the AO. Mere quoting of

disallowance section doesn't amount to grong of reasons forming the basis of additions.

Moreover, a reasonable opportunity was not given to reply to SCN noted on 04-03-2016, which is against principles of natural justice, CBDT Instructions and assessee was prohibited from producing additional documentary evidences in support of his claim.

3.2. The learned AO had erred on facts and in law in disregarding the provisions of Income Tax Act, 1961 and rules made thereunder and beneficial provisions of DTAA between India and Netherlands

3.3. The assessee denies the additions of Rs. 6,74,32,200/- made in Assessment Order u/s 143(3) dated 18/03/2016 on the following grounds:

3.3.1. That the learned AO has erred on facts and in law in adding to income Rs. 6,74,32,200/- u/s 40(a) (i).

3.3.2. The learned AO has erred on facts and in law in disregarding the provisions of Income Tax Act, 1961, rules made there under and beneficial provisions of DTAA between India and Netherlands, in as much as treating the management support services and sales and marketing support services provided by foreign company to the assessee as Fees for technical services according to the India-Netherland Tax Treaty and also assuming that these services made available technical knowledge, experience, skill, knowhow etc to the assessee without any rational logic.

3.3.3. During the relevant P.Y., assessee incurred expenses ofRs. 9,85,54,700/- to NTL Lemnis holding BV, a tax resident of Netherlands towards management support services and sales & marketing support services. In the assessment proceedings of NTL Lemnis Holding BV, the amount received for management and sales marketing support services has been assessed to be non-taxable in view of the beneficial provisions of India-Netherland tax treaty read with MEN Clause and India-Netherland tax treaty. Copy of Computation, Relevant submissions made during the assessment proceedings of recipient and Assessment Order u/s 143(3) of NTL Lemnis Holding BV for A. Y. 2013-14 is enclosed at Annexure-4 for your kind perusal. Since the subject matter income has been assessed to be non-taxable in the hands of recipient, there is no question of deducting TDS u/s 195 by the remitter and disallowance u/s 40(a) (i).

3.3.4. Management support services provided by personnel of NTL Lemnis Holding BV independently from outside India did not impart any training to the assessee or its personnel in the course of providing such services. All these services are administrative and non technical in nature and do not fall in FTS. Even if some portion of scope included assistance, the same also does not become taxable as it was in the nature of managerial assistance and such services do not satisfy the Make available test as no training was imparted to the assessee or its personnel.

3.3.5. Sales and marketing support services were also provided from outside India directly to the overseas customer (IKEA) which is also located outside India and there is no question of

training or education that could have been transferred to the assessee in the course of providing such services. By their very nature, these sales and marketing support services can not be said to be FTS and also do not fulfill the make available clause. Copy of invoices of Management and Sales & Marketing Support Services are enclosed at Annexure 5.

3.3.6. NTL lemnis Holding BV is a tax resident of Netherlands and the assessee, being a domestic company is a tax resident of India. Hence India Netherlands tax treaty is applicable. The learned AO erred on facts and in law in disregarding the beneficial provisions of DTAA between India and Netherlands, particularly the Most Favoured Nation (MFN) clause.

It is an admitted position that by virtue of the MFN clause in India-Netherlands tax treaty, whatever benefit is extended under India-US tax treaty, stands incorporated in India-Netherlands tax treaty as well.

3.3.7. N/No. 11050, dt. 30-8-1999 categorically states that not only the provisions of article 12 stand amended accordingly, in the light of the Indo-US tax treaty and other similarly worded subsequent treaties, but also 'the Memorandum of Understanding and the Confirmation of Understanding, dated 12-9-1989, with reference to paragraph 4 of article 12 of the Indo-USA Double Taxation Avoidance Convention (DTAC), will apply mutatis mutandis for the purpose of paragraphs III, IV, V and VI above.

3.3.8. As held in case of Shell Global Solutions International BV vs. Income-tax Officer [2015] 64 taxmann.com 3 (Ahmedabad -

Trib.), connotations of 'make available' clause in the treaty is no longer res integra.

As stated in Moll to the Indo-US DTAA, which stands incorporated in the Indo-Dutch DAA as well by the virtue of MN clause, under para 4(b), consultancy services which are not of a technical nature cannot be treated as technical services. As services rendered by assessee are managerial or consultancy services in nature, which donot transmit the technology, the same cannot be brought to tax as FTS.

3.3.9. Even if the commercial or managerial services are linked with the technical services, it doesnot change the character of commercial or managerial services which is also stated in the Moll to Indo-US tax treaty

From the explanations and examples contained in the MOU, it is evident that administrative non-technical services rendered by NIL Lemnis Holding BV to NTL Lemnis India Private Limited for a specified fee do not "make available" technical knowledge, experience, skill, know how or processes, or consist of the development and transfer of a technical plan or technical design and hence not taxable in India.

3.3.10. The AO has wrongly interpreted and inferred the language of management agreement and its scope of services by treating "managerial service" different from "to assist the management" on managerial matters. In essence, foreign company has provided managerial services to the assessee and assisted the management on managerial matterssuch as review of operating results, fund raising strategy, review of internal

control procedures etc. There can be no difference between providing managerial service and assisting on managerial matters. Agreement has to be read and interpreted in a holistic manner and not with regard to some specific word only.

3.3.11. Amount received by NTL Lemnis Holding BV is for providing management and sales and marketing support services is not taxable in India as per beneficial provisions of tax treaty between India and Netherlands and hence there is no question of deducting TDS under section 195 and disallowance under section 40(a)(1).

From above submission, it is submitted that the learned AO has erred in facts as well as in law in adding to income Rs. 6,74,32,200/-.

Your honour is kindly requested to allow the appeal & delete the additions made by learned AO in the interest of equity & justice.

4. Since it was apparent that the assessment order passed by the DCIT, International Taxation Circle, Noida would not have been brought to the notice of the AO, a copy of the said assessment order was forwarded to the AO for perusal and comments. Comments received from the AO are reproduced below:

2. In this connection, I submit herewith my comment on admission of additional evidence and remand report as called hereunder:

2.1 Regarding matter relating to admission of additional evidence, it may kindly be submitted that the assesseeshould not be allowed to produce before your honors any additional evidence other than the evidence produced by him during the course of assessment proceedings before the Assessing Officer as the assesseeis not covered by any of the exceptions as given

in Rule 46A of the I T Rules 1962. The same are reproduced hereunder:

"(a) Where the Assessing Officer has refused to admit evidence which ought to have been admitted: or

(b) Where the assesseewas prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or

(c) Where the assesseewas prevented by sufficient cause from producing the evidence before the Assessing Officer; any evidence which is relevant to any ground of appeal; or

(d) Where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the assesseeto adduce evidence relevant to any ground of appeal."

2.2 Here in the case of the appellant, it may kindly be submitted that not a single exception as enumerated above exists which is evidenced by the fact that order by the DCIT (International Taxation, Noida) was passed on 11.03.2016 and order by the DCIT, Circle-18(2), Delhi was passed on 18.03.2016.

Assessee had ample time to bring the order before AO, however, it chose not to do so. Therefore, admission of additional/evidence at this stage should not be allowed.

2.3 In view of above, it is clear that the A.O. had made the assessment order appealed against after giving sufficient opportunity to the assesseeto adduce evidence relevant to the ground of appeal under report. Considering the above facts and circumstances of the case, in my humble opinion, the assesseemay not be allowed to produce before your good office any additional evidence as referred above.

3. Without prejudice what is submitted above, as directed, I submit herewith my remand report as under:

3.1 AO's order has provided detailed reasoning and explanation in para 3 of the order as to why disallowance of claim of management fee u/s 40(a)(i) is warranted. It is clear from the reading of the agreement, India US Treaty and India Netherlands Treaty that the impugned services from part of FTS and hence liable to deduction u/s 40(a) (i).

3.2 As far as the order of the DCIT (International Tax), Circle, Noida is concerned, it has not discussed the merits of the case and has not dwelled upon specific provisions/clauses of act. Agreement and treaties, In absence of any detailed rationale in DCIT (International Taxation, Noida) order, the order of assessing officer (DCIT, Circle-18(2), Delhi) is more reasoned and explanatory. Moreover, both assessment proceedings are independent proceedings and AO is only bound by the provisions of law.

3.3 Under the facts and circumstances of the case as mentioned above, it may kindly be submitted that the contention of assessee is found untenable and liable to be rejected.
Submitted for kind perusal and consideration.

5. A copy of the comments received from the AO was forwarded to the assesseefor filing comments/ rejoinder. Comments of the assesseeare reproduced below:

1. Justification on admissibility of additional evidence i.e. Order u/s 143(3) passed by DCIT International Taxation, Noida in the case of NTL Lemnis Holding BV)- Reply to Paras 2.1, 2.2 and 2.3 of remand report:

Although the above order was passed on 11/03/2016 but the same was received by NTL Lemnis Holding BV (recipient of income) after 18/03/2016 and hence assesseewas prevented by sufficient cause from producing this order which is relevant to ground no. 3 of above referenced appeal. Since the subject matter income has been assessed to be non-taxable in the hands of recipient, there is no question of deducting TDS u/s 195 by the remitter (appellant) and therefore it cannot be held liable for default u/s 40(a) (i).

2. Reply to Para 3.1 of remand report:

Assessing Officer has erred on facts and in law in interpreting the Agreements and beneficial provisions of DTAA between India and Netherlands, particularly the Most Favoured Nation (MFN) clause.

It is an admitted position that by virtue of the MFN clause in India-Netherlands tax treaty, whatever benefit is extended under India-US tax treaty, stands incorporated in India-Netherlands tax treaty as well.

N/No. 11050, dt. 30-8-1999 categorically states that not only the provisions of article 12 stana amended accordingly, in the light of the Indo-US tax treaty and other similarly worded subsequent treaties, but also 'the Memorandum of Understanding and the Confirmation of Understanding, dated 12-9-1989, with reference to paragraph 4 of article 12 of the Indo-USA Double Taxation Avoidance Convention (TAC), will

apply mutatis mutandis for the purpose of paragraphs III, IV, V and VI above.

As held in case of Shell Global Solutions International BV vs. Income-tax Officer [2015] 64 taxmann.com 3 (Ahmedabad - Trib.), connotations of 'make available' clause in the treaty is no longer res integra.

As stated in MoU to the Indo-US DTAA, which stands incorporated in the Indo-Dutch DTAA as well by the virtue of MEN clause, under para 4(b), consultancy services which are not of a technical nature cannot be treated as technical services. As services rendered by assessee are managerial or consultancy services in nature, which do not transmit the technology, the same cannot be brought to tax as FTS.
Detailed written submissions have already been furnished before your honor vide assessee's reply dt. 11-06-2018.

In view of above, it is clear that above services do not form part of FTS and hence same cannot be held liable for disallowance for non-deduction of tds u/s 40(a) (i).

3. Reply to Para 3.2 of remand report:

DCIT (International Tax), Circle, Noida had duly discussed the merits of the case and had even issued a show cause notice at. 01-03-16 requiring clarification from NTL Lemnis Holding B V as to how the impugned services do not satisfy the "make available" clause, which was duly complied vide letter dated 04/03/2016 (Copy of SCN and its reply are enclosed at Annexure A) and only after recording his satisfaction on order

sheet, order was passed. Hence, the contention of Assessing Officer that DCIT (International Tax), Noida passed the order without any rationale is factually incorrect. Since the subject matter income has been assessed to be non-taxable in the hands of recipient, there is no question of deducting TDS u/s 195 by the remitter (appellant) and therefore it cannot be held liable for default u/s 40(a) (i).

In view of above, it is kindly submitted that the contentions made by Assessing Officer in its remand report are baseless and not tenable in law and hence liable to be rejected.

Your honour is kindly requested to allow the appeal & delete the additions made by learned AO in the interest of equity & justice.

11. Based on the above submission the ld. CIT(A) held that the amount received by NTL Lemnis Holding BV for management and sales marketing support services as non-taxable in view of the beneficial provisions of India-Netherland tax treaty read with the MFN clause and the India Netherland treaty. It has also been submitted that since the subject matter income has been assessed to be non-taxable in the hands of the recipient, there is no question of deducting tax at source under section 195 by the remitter and disallowance under section 40(a)(i). Having heard the arguments of the ld. DR and the material on record, we hold that the MFN clause of India-Neitherland Tax Treaty has been rightly interpreted by the ld. CIT(A) and hence, we decline to interfere with order of the ld. CIT(A).

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

Order Pronounced in the Open Court on 22/01/2024.

Sd/-	Sd/-
(Saktijit Dey)	**(Dr. B. R. R. Kumar)**
Vice President	**Accountant Member**

Dated: 22/01/2024
NV, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, DELHI