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

BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.2645/Bang/2017
Assessment Year: 2013-14

M/s. Trelleborg India Pvt. Ltd. (Previously known as Trelleborg Industrial Products India Pvt. Ltd.) (Successor in interest to Trelleborg Sealing Solutions India Pvt. Ltd.) #22/9, Beretana Agrahara Hosur Main Road Bengaluru 560 100 **PAN NO : AAECT1088L**	**Vs.**	Deputy Commissioner of Income-tax Circle-7(1)(1) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Tata Krishna, A.R.
Respondent by	:	Shri Priyadarshi Mishra, D.R.

Date of Hearing	:	30.08.2021
Date of Pronouncement	:	01.09.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the decision of Ld. CIT(A) in confirming the addition made by the A.O. u/s 40(a)(i) of the Income-tax Act,1961 ['the Act' for short] and it relates to assessment year 2013-14.

2. The assessee is engaged in the business of manufacture and sale of seals and bearings. The assessee has entered into an international transaction of payment of communication charges to its Associated Enterprise (A.E.) The TPO held that the payment to be at arm's length and accordingly, did not make any transfer pricing adjustment. The A.O., however, noticed that the assessee has not deducted tax at source on the amount of Rs.54 lakhs paid to it's A.E. Accordingly, the A.O. issued show cause notice to the assessee to explain why disallowance u/s 40(a)(i) of the Act should not be made. In the reply, the assessee submitted that it is covered by DTAA entered between India and Sweden. Further, as per DTAA, the impugned payment is not royalty or Fee for technical services. Accordingly, the assessee contended that it is not liable to deduct tax at source from the payment of Rs.54 lakhs made to it's A.E.

3. The A.O. simply observed that the submissions made by the assessee is not satisfactory and accordingly disallowed the amount of Rs.54 lakhs as per provisions of section 40(a)(i)/40(a)(ia) of the Act.

4. The Ld. CIT(A), in the initial part of his order, took the view that the payment is in the nature of Fee for technical services. The Ld. CIT(A) further noticed that the assessee has paid a sum of Rs.1,57,99,276/- to its A.E. as communication expenses. Out of the above amount, a sum of Rs.52,67,660/- was related to management fee and the assessee has claimed to have deducted tax at source. Accordingly, the remaining amount of Rs.1,03,17,271/- relating to communication expenses should have been subjected to disallowance u/s 40(a)(i) for non-deduction of tax at source. instead of Rs.54 lakhs.

5. The Ld. CIT(A) also referred to the decision rendered by Hon'ble Karnataka High Court in the case of CIT Vs. Samsung Electronics Ltd. 203 Taxman 477, wherein it was held that the payment made for purchase of software is in the nature of royalty. Accordingly, the Ld. CIT(A) directed the A.O. to disallow payment of Rs.1,03,17,271/- for non-compliance of TDS provision as the payment is nothing but fees for technical services liable for TDS or payment for purchase of software. He also observed that the A.O. should verify the details of TDS deducted from the payment of management fee of Rs.52,67,660/-. It can be noticed that the Ld CIT(A) has held that the impugned payment is Fee for technical services or Royalty. Aggrieved by the order passed by Ld. CIT(A), the assessee is in appeal before us.

6. The Ld. A.R. submitted that the parent company (AE) is providing "common infrastructure facilities" and the impugned payment has been made by the assessee for use of those infrastructure facilities. He submitted that the details of services provided by the AE are given in a document titled as "Group I.T. Services Catalogue". The above said document is placed at page nos.100 to 112 of the paper book. The Ld. A.R. submitted that the group company is offering various services to all the entities in the group in the following fields in order to maintain uniformity in the operations of the group:

1. Service Desk (AMER/APAC/EMEA)
2. Workplace
3. Email & Instant Messaging
4. Audio & Web Conferencing
5. Trelleborg Network Services
6. Wide Area Network
7. Central Hosting Services

8. Licenses
9. Appendices & Definitions

The Ld. A.R. submitted that the assessee has neither purchased any software or got the license to use any of the software belonging to the AE. All the facilities are owned by the AE and the payment has been made for use of those facilities. He further submitted that the use of infrastructure facilities cannot be termed as provision of technical services by AE to the assessee. Accordingly, he submitted that the impugned payments would not fall under the category of either royalty or fee for technical services within the meaning of "India Sweden DTAA". It would constitute business income in the hands of AE and since the AE does not have permanent establishment, no income is chargeable to tax in India in the hands of AE. Accordingly, he submitted that the assessee is not liable to deduct tax at source from the above said payments u/s 195 of the Act.

7. The Ld. A.R. further submitted that the Ld. CIT(A) has enhanced the disallowance without giving statutory notice as per provisions of section 251(2) OF THE Act. Further, he submitted that the decision rendered by Hon'ble Karnataka High Court in the case of Samsung Electronics Ltd. (supra) has since been reversed by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd.

8. On the contrary, the Ld. D.R. submitted that the Ld. CIT(A) has incorporated the submissions made by the assessee before the A.O. and based upon the same has come to the conclusion that the services provided by the A.E. to the assessee are in the nature of fee for technical services. Further, by placing reliance on the decision rendered by Hon'ble Karnataka High Court in the case of Samsung

Electronics Ltd. (supra), the Ld. CIT(A) has come to the conclusion that the assessee is liable to deduct tax at source from the impugned payment made by the assessee to it's A.E. either as FTS or as Royalty. He further submitted that the assessee has not explained before both the tax authorities about the nature of services provided by the AE to it.

9. We heard the rival contentions and perused the record. Admittedly, the agreement entered by the assessee with its A.E. and also the nature of services provided by the A.E. to the assessee have not been examined by the tax authorities. We notice that the A.O. has simply stated that the assessee is liable to deduct tax at source from the impugned payment made to the AE, i.e., he has not addressed the submissions made by the assessee before him that the impugned payment would not fall under the category of royalty or fee for technical services. Further, the AO has also not given any independent finding on it. The AO has also not discussed about the nature of services provided by the AE to the assessee. Unless the type and nature of services are analysed vis-à-vis relevant DTAA provisions, it would not be possible to come to a conclusion on this issue.

10. We have noticed that the Ld. CIT(A) has taken the view that the impugned payment may fall under both categories, i.e., it may be FTS or Royalty. There should not be any dispute that the payment can either fall under any one of the categories i.e. either it can be "royalty" or "fee for technical services" and it cannot be the both. We notice that the Ld CIT(A) has also not examined the type and nature of services.

11. The above said discussions would show that the tax authorities have not examined the factual aspects properly taking into consideration the definition of the terms namely “Royalty” and “Fee for technical services” as given in DTAA. Since the impugned payment is covered by DTAA, the A.O. is required to be examined the taxability of these payments and liability to deduct tax at source in accordance with the provisions of DTAA unless it is shown by the assessee that the provisions of Indian Income Tax Act is more beneficial to it. It has been held so by Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd (supra). Under these set of facts, we are of the view that this issue requires fresh examination at the end of the A.O. Accordingly, we set aside the order passed by Ld CIT(A) and restore this issue to the file of A.O. for examining it afresh. The assessee is also directed to furnish required information and explanations with regard to the type and nature of services provided by the AE to the assessee.

12. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 1st Sept, 2021

Sd/-	**Sd/-**
(Beena Pillai)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 1st Sept, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.