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

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &
DR.B.R.R.KUMAR, ACCOUNTANT MEMBER

ITA No.2252/Del/2016
Assessment Year : 2008-09

McCANN Erickson (India) Pvt.Ltd., 204-2016, Tolstoy Marg, New Delhi-110001. PAN-AAACT0835D	vs	ACIT, Range-6(1), New Delhi-110002.
APPELLANT		**RESPONDENT**

Appellant by	Sh. Sanjesh Kumar Jawarani, CA
Respondent by	Sh. Farhat Khan, Sr. DR
Date of Hearing	03.06.2021
Date of Pronouncement	02.07.2021

ORDER

PER KUL BHARAT, JM :

This appeal filed by the assessee for the assessment year 2008-09 is directed against the order of Ld. CIT(A)-20, New Delhi dated 31.03.2016. The assessee has raised following grounds of appeal:-

1.1. "On the facts and circumstances of the case and in law the Ld.CIT Appeal has erred in disallowance u/s 40(a)(i) of the Act.

1.2. On the facts and circumstances of the case and in law the Ld.CIT Appeal has erred in treating the Global Account Coordination Cost as Fees for Technical Services.

1.3. On the facts and circumstances of the case and in law the Ld.CIT Appeal has erred in not appreciating that retrospective amendment in law

cannot charge the tax withholding liability with retrospective effect unless such services were rendered in India."

2. The facts giving rise to the present case of the assessee are that the case of the assessee was re-opened for assessment and the assessment was framed u/s 147 of the Income Tax Act, 1961 ("the Act") vide order dated 26.03.2014. While framing the assessment, the Assessing Officer did not accept the explanation offered by the assessee regarding non-applicability of provision for deduction of tax, therefore, he proceeded to make addition of Rs.57,38,948/- on account of non-deduction of tax in respect of Global Account Coordination cost.

3. Aggrieved against this, the assessee preferred appeal before Ld. CIT(A) who after considering the submissions and perused material available on record, dismissed the appeal of the assessee.

4. Aggrieved against this, the assessee is in appeal before this Tribunal.

5. Ld. Counsel for the assessee reiterated the submissions made in the appellate proceedings. He contended the appeal as against the order of Assessing Officer who made disallowance by invoking the provision of 40(a)(i) of the Act on account of treatment of Global Account Coordination Cost of Rs.57,38,948/- as per provisions of section 195 read with explanation 2 of section 9(1)(vii)(b) of the Act. He contended that so far as the provision of section 9(1)(viii) and relevant Articles of DTAA is concerned, no tax should be deducted under section 195 of the Act hence, no disallowance can be made

under section 40(a)(i) of the Act. He further submitted that Ld.CIT(A) failed to consider that retrospective amendment in law cannot charge the tax withholding liability with retrospective effect unless such services were rendered in India. He placed reliance on the decision of Tribunal rendered in the case of *M/s. Euro RSCG Worldwide Inc. vide ITA No.7094/Mum/2010 for Assessment Year 2010-11* wherein it was held that Coordination fee was not taxable on the ground that the assessee company did not have permanent establishment in India. He further placed reliance on the decision of the Tribunal rendered in the case of *M/s. Virola International vide ITA No.256/Agr/2013 for Assessment Year 2008-09*. He further placed reliance on the judgement of High Court of Karnataka rendered in the case of *M/s. Jindal Thermal Power Company ltd. vide ITA No.3022/2005 to 3025/2005.*

6. On the contrary, Ld. DR opposed these submissions and supported the order of authorities below.

7. We have heard the rival contentions and perused the material available on record. We find that Ld.CIT(A) has decided the issue in question by observing as under:-

> *{4.3.1}. "I have considered the appellant's submission and the assessment order. Following facts have emerged;*
>
> *1. That the appellant company is engaged in the business in the advertising industry*
>
> *2. That the appellant company is a sister company of M/s The McCann-Erickson Marketing, Inc. New York with whom the Assessee*

Company entered into a Multinational Client Coordination Service Agreement is Provider of the following services to the Assessee :

i) Fostering and Developing Creativity

ii) New Business Targeting Assistance

iii) Public Relation Services and Strategic Planning Assistance

iv) Media Support Services

v) Financial Administration Services. HR Management

vi) Information Technology and Business Services.

3. That during the year under consideration the appellant company had paid an amount of Rs.57,38,948/ on account of Global Account Coordination Cost like earlier assessment year without deduction of TDS .

4. That the A.O is of the opinion that the TDS is required to be deducted under the Act. And non-deduction attracts provision of section 40(a) of the Act.

{4.3.2]. I have considered the abovementioned facts. The appellant had cited various judgment in its favour. The crux of the appellant's argument is that the nature of payment does not attract provisions of section 195 of the Act and that the nature of payment does not come under' technical services' under section 9 of the Act. Therefore. the provision of section 195 is not attracted.

However, the A.O has also given a number of judgments and also analysed the nature of services rendered which entails the payment on account of Global Account Co-ordination Cost.

I have also taken into account the rationale of Hon'ble ITAT judgment in the appellant's own case on similar issue for A. Y:2007-08. I have also considered the fact that the services rendered by the parent

company does come under the purview of technical services if we look at the multilateral agreement. The relevant part about the scope the arrangements as per agreement is reproduced in the earlier para. Therefore, the payment comes under the purview of section 195 of the Act particularly after insertion of the following provision which is applicable from the retrospective date 01/04/1976.

The Finance Act 2010 has inserted an explanation to the section w.e.f 01/04/1976 which is given below:

Explanation.-For the removal of doubts, it is hereby declared that for the

purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the nonresident, whether or not,-

(iii) the business or business connection in India; or

(iv) the non-resident has rendered services in India.

I have further considered the following points;

Fee for technical services(FTS) is defined in explanation 2 to section 9(1) (vii) of the Act to mean "any consideration (including any lump sum 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 for any construction, assembly/mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under head "Salaries" .

As per Article 12(a) of the DTAA, the term FTS means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

a) Are ancillary and subsidiary .... ; or

b) Make available technical knowledge, experience, skill, know-how or processes or consists of the development and transfer of a technical plan or technical design.

Therefore, taking into account factual matrix of the case, it is my considered view that the A.O is justified in disallowing the payment as it had attracted provision of section 195 of the Act which the appellant company had failed to deduct tax at source. Accordingly, the disallowance of Rs.57,38,948/- on account of Global Account Coordination Cost under section 4O(a)(i) of the Act is upheld. Appellant's ground of appeal is dismissed."

8. From the above, we find that the Ld.CIT(A) has relied upon the amendment in the statute. However, the Co-ordinate Bench of this Tribunal after having considered the amendment held in the case of *Ashapura Minichem Ltd. vs ADIT 131 TTJ 291* that till 08.05.2010, *"the prevailing legal position was that unless the technical services were rendered in India, the fees for such services could not be brought to tax under section 9(1)(vii). The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax-deductor cannot be expected to have clairvoyance of knowing how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in Section 195, require that the*

person making the payment "at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income -tax thereon at the rates in force". When these obligations are to be discharged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands that point of time."

9. We are in agreement with the view expressed by the Co-ordinate Bench. Therefore, we hold that the Assessing Officer was not justified in fastening the liability of tax deduction by relying on the amendment which was inserted in the year 2010 with retrospective effect from 01.04.1976. The Assessment Year in question is 2008-09, therefore, provision of section 40(a)(i) of the Act ought not to have been invoked in the case of the assessee. Therefore, we direct the Assessing Officer to delete the addition. Thus, grounds raised by the assessee in this appeal are allowed.

10. In the result, the appeal of the assessee is allowed.

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 02nd July, 2021.

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

(DR.B.R.R.KUMAR) **(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